Documentation

WORKSHOP ON THE INTERACTION BETWEEN THE EIA AND THE NATURE DIRECTIVES



413DV142 Trier, 13-15 November 2013

Background Documentation

A. European Nature Protection Law

	EU Documents:	
01	DIRECTIVE 2009/147/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 November 2009 on the conservation of wild birds (Birds Directive)	
02	COUNCIL REGULATION (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001	
03	COUNCIL REGULATION (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein	
04	COUNCIL DIRECTIVE 92/43/EEC of May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitats Directive)	
05	COUNCIL DECISION 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (Bern Convention)	
06	Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive"	
07	MANAGING NATURA 2000 SITES: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC	
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21	C-258/11 Judgment of the Court (Third Chamber) of 11 April 2013. Peter Sweetman and Others v An Bord Pleanála. Reference for a preliminary ruling: Supreme Court - Ireland.	
22	C-43/10 Judgment of the Court (Grand Chamber) of 11 September 2012. Nomarchiaki Aftodioikisi Aitoloakarnanias and Others v Ypourgos Perivallontos, Chorotaxias kai Dimosion ergon and Others.	
23	C-340/10 Judgment of the Court (Fourth Chamber) of 15 March 2012, European Commission v Republic of Cyprus.	
24	C-182/10 Judgment of the Court (Fourth Chamber) of 16 February 2012, Marie-Noëlle Solvay and Others v Région wallonne.	
25	C-404/09 Judgment of the Court (Fourth Chamber) of 24 November 2011, European Commission v Kingdom of Spain.	
26	C-383/09 Judgment of the Court (Fourth Chamber) of 9 June 2011, European Commission v French Republic.	
27	C-308/08 Judgment of the Court (Fourth Chamber) of 20 May 2010, European Commission v Kingdom of Spain.	
28	C-241/08 Judgment of the Court (Second Chamber) of 4 March 2010, European Commission v French Republic.	
29	C-226/08 Judgment of the Court (Second Chamber) of 14 January 2010, Stadt Papenburg v Bundesrepublik Deutschland.	
30	C-418/04 Judgment of the Court (Second Chamber) of 13 December	

	2007, Commission of the European Communities v Ireland.	
31	C-179/06 Judgment of the Court (Fourth Chamber) of 4 October 2007, Commission of the European Communities v Italian Republic.	
32	C-304/05 Judgment of the Court (Fourth Chamber) of 20 September 2007, Commission of the European Communities v Italian Republic.	
33	C-235/04 Judgment of the Court (Second Chamber) of 28 June 2007, Commission of the European Communities v Kingdom of Spain.	
34	C-342/05 Judgment of the Court (Second Chamber) of 14 June 2007, Commission of the European Communities v Republic of Finland.	
35	C-508/04 Judgment of the Court (Fourth Chamber) of 10 May 2007, Commission of the European Communities v Republic of Austria.	
36	C-183/05 Judgment of the Court (Second Chamber) of 11 January 2007, Commission of the European Communities v Ireland.	
37	C-418/05 P Order of the Court (Sixth Chamber) of 7 November 2006, Centro Provincial de Jóvenes Agricultores de Jaén (ASAJA) and Others v Council of the European Union.	
38	C-239/04 Judgment of the Court (Second Chamber) of 26 October 2006, Commission of the European Communities v Portuguese Republic.	
39	C-244/05 Judgment of the Court (Second Chamber) of 14 September 2006, Bund Naturschutz in Bayern eV and Others v Freistaat Bayern.	
40	C-191/05 Judgment of the Court (Second Chamber) of 13 July 2006, Commission of the European Communities v Portuguese Republic.	
41	C-221/04 Judgment of the Court (Second Chamber) of 18 May 2006, Commission of the European Communities v Kingdom of Spain.	
42	C-209/04 Judgment of the Court (Second Chamber) of 23 March 2006, Commission of the European Communities v Republic of Austria.	
43	C-518/04 Judgment of the Court (Fifth Chamber) of 16 March 2006, Commission of the European Communities v Hellenic Republic.	

44	C-98/03 Judgment of the Court (Second Chamber) of 10 January 2006, Commission of the European Communities v Federal Republic of Germany.	
45	C-6/04 Judgment of the Court (Second Chamber) of 20 October 2005, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.	
46	C-441/03 Judgment of the Court (Second Chamber) of 14 April 2005, Commission of the European Communities v Kingdom of the Netherlands.	
47	C-117/03 Judgment of the Court (Second Chamber) of 13 January 2005, Società Italiana Dragaggi SpA and Others v Ministero delle Infrastrutture e dei Trasporti and Regione Autonoma Friuli Venezia Giulia.	
48	C-127/02 Judgment of the Court (Grand Chamber) of 7 September 2004, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij.	
49	C-407/03 Judgment of 15 July 2004, Commission v Finland.	
50	C-143/02 Judgment of the Court (Third Chamber) of 20 March 2003, Commission of the European Communities v Italian Republic.	
51	C-75/01 Judgment of the Court (Sixth Chamber) of 13 February 2003, Commission of the European Communities v Grand Duchy of Luxemburg.	
52	C-103/00 Judgment of the Court (Sixth Chamber) of 30 January 2002, Commission of the European Communities v Hellenic Republic.	
53	C-374/98 Judgment of the Court (Sixth Chamber) of 7 December 2000, Commission of the European Communities v French Republic.	
54	C-371/98 Judgment of the Court of 7 November 2000, The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, interveners: World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust.	
55	C-256/98 Judgment of the Court (Fifth Chamber) of 6 April 2000, Commission of the European Communities v French Republic.	
56	C-3/96 Judgment of the Court of 19 May 1998, Commission of the European Communities v Kingdom of the Netherlands.	
57	C-44/95 Judgment of the Court of 11 July 1996, Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds.	

58	C-57/89 Judgment of the Court of 28 February 1991. Commission of the European Communities v Federal Republic of Germany.	
59	C-396/92 Judgment of the Court of 9 August 1994. Bund Naturschutz in Bayern e.V. and Richard Stahnsdorf and others v Freistaat Bayern, Stadt Vilsbiburg and Landkreis Landshut.	

B. Environmental Impact Assessment

	EU Documents:	
60	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 October 2012 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment	
61	DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment	
62	DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice	
63	DIRECTIVE 2001/42/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive)	
	Selected CJEU Case Law	
64	C-128/09 Judgment of the Court (Grand Chamber) of 18 October 2011, Antoine Boxus and Willy Roua (C-128/09), Guido Durlet and Others (C-129/09), Paul Fastrez and Henriette Fastrez (C-130/09), Philippe Daras (C-131/09), Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh) (C-134/09 and C-135/09), Bernard Page (C-134/09) and Léon L'Hoir and Nadine Dartois (C-135/09) v Région wallonne.	
65	C-75/08 Judgment of the Court (Second Chamber) of 30 April 2009, The Queen, on the application of Christopher Mellor v Secretary of State for Communities and Local Government.	
66	C-142/07 Judgment of the Court (Third Chamber) of 25 July 2008, Ecologistas en Acción-CODA v Ayuntamiento de Madrid.	
67	C-156/07 Order of the Court (Sixth Chamber) of 10 July 2008, Salvatore Aiello and Others v Regione Lombardia and Others.	
68	C-215/06 Judgment of the Court (Second Chamber) of 3 July 2008,	

	Commission of the European Communities v Ireland.	
69	C-508/03 Judgment of the Court (First Chamber) of 4 May 2006, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.	
70	C-290/03 Judgment of the Court (First Chamber) of 4 May 2006, The Queen, on the application of: Diane Barker v London Borough of Bromley.	
71	C-227/01 Judgment of the Court (Second Chamber) of 16 September 2004, Commission of the European Communities v Kingdom of Spain.	
72	C-87/02 Judgment of the Court (First Chamber) of 10 June 2004, Commission of the European Communities v Italian Republic.	
73	C-201/02 Judgment of the Court (Fifth Chamber) of 7 January 2004, The Queen, on the application of Delena Wells v Secretary of State for Transport, Local Government and the Regions.	
74	C-230/00 Judgment of the Court (Third Chamber) of 14 June 2001, Commission of the European Communities v Kingdom of Belgium.	
75	C-392/96 Judgment of the Court (Fifth Chamber) of 21 September 1999, Commission of the European Communities v Ireland.	
76	C-435/97 Judgment of the Court (Sixth Chamber) of 16 September 1999, World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others.	
77	C-301/95 Judgment of the Court (Sixth Chamber) of 22 October 1998, Commission of the European Communities v Federal Republic of Germany.	
78	C-72/95 Judgment of the Court of 24 October 1996, Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland.	
79	C-133/94 Judgment of the Court (Sixth Chamber) of 2 May 1996, Commission of the European Communities v Kingdom of Belgium.	
80	C-431/92 Judgment of the Court of 11 August 1995, Commission of the European Communities v Federal Republic of Germany.	
81	C-186/91 Judgment of the Court of 10 March 1993, Commission of the European Communities v Kingdom of Belgium.	
82	C-360/87 Judgment of the Court of 28 February 1991, Commission of the European Communities v Italian Republic.	
83	C-96/81 Judgment of the Court of 25 May 1982, Commission of the European Communities v Kingdom of the Netherlands.	
84	C-103/88 Judgment of the Court of 22 June 1989, Fratelli Costanzo SpA v	

	Comune di Milano.	
85	C-427/07 Judgment of the Court (Second Chamber) of 16 July 2009. Commission of the European Communities v Ireland.	
86	C-205/08 Judgment of the Court (Second Chamber) of 10 December 2009. Umweltanwalt von Kärnten v Kärntner Landesregierung.	
87	C-263/08 Judgment of the Court (Second Chamber) of 15 October 2009. Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd.	
88	C-115/09 Judgment of the Court (Fourth Chamber) of 12 May 2011. Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg.	
89	C-420/11 Judgment of the Court (Fourth Chamber) of 14 March 2013. Jutta Leth v Republik Österreich and Land Niederösterreich.	
90	C-244/12 Judgment of the Court (Fifth Chamber) of 21 March 2013. Salzburger Flughafen GmbH v Umweltsenat.	
	International Case law	
91	INTERNATIONAL COURT OF JUSTICE JUDGMENT OF 20 APRIL 2010, PULP MILLS ON THE RIVER URUGUAY (ARGENTINA v. URUGUAY)	
92	INTERNATIONAL COURT OF JUSTICE JUDGMENT OF 25 SEPTEMBER 1997 CASE CONCERNING THE GABCIKOVO-NAGYMAROS PROJECT (HUNGARYISLOVAKIA)	
93	REPORTS OF INTERNATIONAL ARBITRAL AWARDS of 16 April 1938 and 11 March 1941, Trail smelter case (United States, Canada)	

C. The Role of the National Judge in the European Judicial System and the Procedures of the CJEU

	EU Documents	
94	Selected articles from the consolidated versions of the Treaty on European Union and the Treaty on the functioning of the European Union, including Statute of the Court of Justice of the European Union (OJ C 83 of 30 March 2010, p.1)	
95	Rules of Procedure of the Court of Justice (consolidated version of 25 September 2012)	
96	Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling procedure (OJ C 338 of 6 November 2012, p. 1)	

	Selected CJEU Case Law	
97	Case 26/62 *Van Gend & Loos* [1963] ECR 1.	
98	Case 6/64 *Costa v Enel* [1964] ECR 585.	
99	Case 41/74 *van Duyn* [1974] ECR 1337.	
100	Case 283/81 *Cilfit and Others* [1982] ECR 3415	
101	Case 314/85 *Foto-Frost* [1987] ECR 4199	
102	Case 222/86 *Heylens and others* [1987] ECR 4097	
103	Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291	
104	Case C-415/93 *Bosman* [1995] ECR I-4921	
105	Case C-99/00 *Lyckeskog* [2002] ECR I-4839	
106	Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835	
107	Case C-350/02 *Commission* v *Netherlands* [2004] ECR I-6213	
108	Case C-461/03 *Gaston Schul Douane-expediteur* [2005] ECR I-10513	
109	Case C-53/03 *Syfait* [2005] ECR I-4609	
110	Case C-304/02 *Commission* v *France* (small fish) [2005] ECR I-6263	
111	Case C-466/04 *Acereda Herrera* [2006] ECR I-5341	
112	Case C-344/04 *IATA and ELFAA* [2006] ECR I-403	
113	Case C-221/04 *Commission* v *Spain* [2006] ECR I-4515	
114	Case C-380/05 *Centro Europa 7* [2008] ECR I-349	
115	Case C-210/06 *Cartesio* [2008] ECR I-9641	
116	Joined Cases C-261/08 and C-348/08 *Zurita García and Choque Cabrera* [2009] ECR I-10143	
117	Case C-445/06 *Danske Slagterier* [2009] I-2119	
118	Joined Cases C-188/10 and C-189/10 *Melki and Abdeli* [2010] ECR I-5667	
119	Case C-240/09 *Lesoochranárske zoskupenie* [2011] ECR I-1255	
120	Case C-282/10 *Dominguez* [2012] ECR I-0000	
121	Case C-374/11 *Commission* v *Ireland* of 19 December 2012	

122	Case C-394/11, *Belov* [2013] ECR I-0000	
123	C-45/76 Judgment of the Court of 16 December 1976. Comet BV v Produktschap voor Siergewassen.	
124	C-33/76 Judgment of the Court of 16 December 1976. Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland.	
125	C-106/89 Judgment of the Court (Sixth Chamber) of 13 November 1990. Marleasing SA v La Comercial Internacional de Alimentacion SA.	
126	C-6/90 Judgment of the Court of 19 November 1991. Andrea Francovich and Danila Bonifaci and others v Italian Republic. Joined cases C-6/90 and C-9/90.	
127	C-46/93 Judgment of the Court of 5 March 1996. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others. Joined cases C-46/93 and C-48/93.	
128	C-168/95 Judgment of the Court (Fourth Chamber) of 26 September 1996. Criminal proceedings against Luciano Arcaro.	
129	C-129/96 Judgment of the Court of 18 December 1997. Inter-Environnement Wallonie ASBL v Région wallonne.	
130	C-240/09 Judgment of the Court (Grand Chamber) of 8 March 2011. Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky.	
	Selected Articles	
131	Ludwig Krämer, Environmental judgments by the Court of Justice and their duration, Journal for European Environmental and Planning Law 2008, 263.	

IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

DIRECTIVE 2009/147/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 30 November 2009

on the conservation of wild birds

(codified version)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [3] has been substantially amended several times [4]. In the interests of clarity and rationality the said Directive should be codified.

(2) Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme [5] calls for specific action for biodiversity, including to protect birds and their habitats.

(3) A large number of species of wild birds naturally occurring in the European territory of the Member States are declining in number, very rapidly in some cases. This decline represents a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby.

(4) The species of wild birds naturally occurring in the European territory of the Member States are mainly migratory species. Such species constitute a common heritage and effective bird protection is typically a trans-frontier environment problem entailing common responsibilities.

(5) The conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the Community's objectives regarding the improvement of living conditions and sustainable development.

(6) The measures to be taken must apply to the various factors which may affect the numbers of birds, namely the repercussions of man's activities and in particular the destruction and pollution of their habitats, capture and killing by man and the trade resulting from such practices; the stringency of such measures should be adapted to the particular situation of the various species within the framework of a conservation policy.

(7) Conservation is aimed at the long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe. It makes it possible to control natural resources and governs their use on the basis of the measures necessary for the maintenance and adjustment of the natural balances between species as far as is reasonably possible.

(8) The preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. Certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution. Such measures must also take account of migratory species and be coordinated with a view to setting up a coherent whole.

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[1] Opinion of 10 June 2009 (not yet published in the Official Journal).
[2] Opinion of the European Parliament of 20 October 2009 (not yet published in the Official Journal) and Council Decision of 26 November 2009.
[3] OJ L 103, 25.4.1979, p. 1.
[4] See Annex VI, Part A.
[5] OJ L 242, 10.9.2002, p. 1.

(9) In order to prevent commercial interests from exerting a possible harmful pressure on exploitation levels, it is necessary to impose a general ban on marketing and to restrict all derogation to those species whose biological status so permits, account being taken of the specific conditions obtaining in the different regions.

(10) Because of their high population level, geographical distribution and reproductive rate in the Community as a whole, certain species may be hunted, which constitutes acceptable exploitation where certain limits are established and respected, as such hunting must be compatible with maintenance of the population of these species at a satisfactory level.

(11) The various means, devices or methods of large-scale or non-selective capture or killing and hunting with certain forms of transport must be banned because of the excessive pressure which they exert or may exert on the numbers of the species concerned.

(12) Because of the importance which may be attached to certain specific situations, provision should be made for the possibility of derogations on certain conditions and subject to monitoring by the Commission.

(13) The conservation of birds and, in particular, migratory birds still presents problems which call for scientific research. Such research will also make it possible to assess the effectiveness of the measures taken.

(14) Care should be taken in consultation with the Commission to see that the introduction of any species of wild bird not naturally occurring in the European territory of the Member States does not cause harm to local flora and fauna.

(15) The Commission will every three years prepare and transmit to the Member States a composite report based on information submitted by the Member States on the application of national provisions introduced pursuant to this Directive.

(16) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ([1]).

(17) In particular, the Commission should be empowered to amend certain Annexes in the light of scientific and technical progress. Since those measures are of general scope and are designed to amend non-essential elements of this Directive, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

(18) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the directives set out in Annex VI, Part B,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

1. This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.

2. It shall apply to birds, their eggs, nests and habitats.

Article 2

Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.

Article 3

1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

(a) creation of protected areas;

(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;

(c) re-establishment of destroyed biotopes;

(d) creation of biotopes.

([1]) OJ L 184, 17.7.1999, p. 23.

Article 4

1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

3. Member States shall send the Commission all relevant information so that it may take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 form a coherent whole which meets the protection requirements of these species in the geographical sea and land area where this Directive applies.

4. In respect of the protection areas referred to in paragraphs 1 and 2, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.

Article 5

Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:

(a) deliberate killing or capture by any method;

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

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

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

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

Article 6

1. Without prejudice to paragraphs 2 and 3, Member States shall prohibit, for all the bird species referred to in Article 1, the sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognisable parts or derivatives of such birds.

2. The activities referred to in paragraph 1 shall not be prohibited in respect of the species referred to in Annex III, Part A, provided that the birds have been legally killed or captured or otherwise legally acquired.

3. Member States may, for the species listed in Annex III, Part B, allow within their territory the activities referred to in paragraph 1, making provision for certain restrictions, provided that the birds have been legally killed or captured or otherwise legally acquired.

Member States wishing to grant such authorisation shall first of all consult the Commission with a view to examining jointly with the latter whether the marketing of specimens of such species would result or could reasonably be expected to result in the population levels, geographical distribution or reproductive rate of the species being endangered throughout the Community. Should this examination prove that the intended authorisation will, in the view of the Commission, result in any one of the aforementioned species being thus endangered or in the possibility of their being thus endangered, the Commission shall forward a reasoned recommendation to the Member State concerned stating its opposition to the marketing of the species in question. Should the Commission consider that no such risk exists, it shall inform the Member State concerned accordingly.

The Commission's recommendation shall be published in the *Official Journal of the European Union*.

Member States granting authorisation pursuant to this paragraph shall verify at regular intervals that the conditions governing the granting of such authorisation continue to be fulfilled.

Article 7

1. Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation. Member States shall ensure that the hunting of these species does not jeopardise conservation efforts in their distribution area.

2. The species referred to in Annex II, Part A may be hunted in the geographical sea and land area where this Directive applies.

3. The species referred to in Annex II, Part B may be hunted only in the Member States in respect of which they are indicated.

4. Member States shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2.

They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season or during the various stages of reproduction.

In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds.

Member States shall send the Commission all relevant information on the practical application of their hunting regulations.

Article 8

1. In respect of the hunting, capture or killing of birds under this Directive, Member States shall prohibit the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV, point (a).

2. Moreover, Member States shall prohibit any hunting from the modes of transport and under the conditions mentioned in Annex IV, point (b).

Article 9

1. Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution, for the following reasons:

(a) — in the interests of public health and safety,

— in the interests of air safety,

— to prevent serious damage to crops, livestock, forests, fisheries and water,

— for the protection of flora and fauna;

(b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogations referred to in paragraph 1 must specify:

(a) the species which are subject to the derogations;

(b) the means, arrangements or methods authorised for capture or killing;

(c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;

(d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;

(e) the controls which will be carried out.

3. Each year the Member States shall send a report to the Commission on the implementation of paragraphs 1 and 2.

4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of the derogations referred to in paragraph 1 are not incompatible with this Directive. It shall take appropriate steps to this end.

Article 10

1. Member States shall encourage research and any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1. Particular attention shall be paid to research and work on the subjects listed in Annex V.

2. Member States shall send the Commission any information required to enable it to take appropriate measures for the coordination of the research and work referred to in paragraph 1.

Article 11

Member States shall see that any introduction of species of bird which do not occur naturally in the wild state in the European territory of the Member States does not prejudice the local flora and fauna. In this connection they shall consult the Commission.

Article 12

1. Member States shall forward to the Commission every three years, starting from 7 April 1981, a report on the implementation of national provisions taken under this Directive.

2. The Commission shall prepare every three years a composite report based on the information referred to in paragraph 1. That part of the draft report covering the information supplied by a Member State shall be forwarded to the authorities of the Member State in question for verification. The final version of the report shall be forwarded to the Member States.

Article 13

Application of the measures taken pursuant to this Directive may not lead to deterioration in the present situation as regards the conservation of the species of birds referred to in Article 1.

Article 14

Member States may introduce stricter protective measures than those provided for under this Directive.

Article 15

Such amendments as are necessary for adapting Annexes I and V to technical and scientific progress shall be adopted. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 16(2).

Article 16

1. The Commission shall be assisted by the Committee for Adaptation to Technical and Scientific Progress.

2. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

Article 17

Member States shall communicate to the Commission the texts of the main provisions of national law which they adopt in the field governed by this Directive.

Article 18

Directive 79/409/EEC, as amended by the acts listed in Annex VI, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex VI, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex VII.

Article 19

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 20

This Directive is addressed to the Member States.

Done at Brussels, 30 November 2009.

For the European Parliament	*For the Council*
The President	*The President*
J. BUZEK	B. ASK

ANNEX I

GAVIIFORMES

Gaviidae

- *Gavia stellata*
- *Gavia arctica*
- *Gavia immer*

PODICIPEDIFORMES

Podicipedidae

- *Podiceps auritus*

PROCELLARIIFORMES

Procellariidae

- *Pterodroma madeira*
- *Pterodroma feae*
- *Bulweria bulwerii*
- *Calonectris diomedea*
- *Puffinus puffinus mauretanicus (Puffinus mauretanicus)*
- *Puffinus yelkouan*
- *Puffinus assimilis*

Hydrobatidae

- *Pelagodroma marina*
- *Hydrobates pelagicus*
- *Oceanodroma leucorhoa*
- *Oceanodroma castro*

PELECANIFORMES

Pelecanidae

- *Pelecanus onocrotalus*
- *Pelecanus crispus*

Phalacrocoracidae

- *Phalacrocorax aristotelis desmarestii*
- *Phalacrocorax pygmeus*

CICONIIFORMES

Ardeidae

- *Botaurus stellaris*
- *Ixobrychus minutus*
- *Nycticorax nycticorax*
- *Ardeola ralloides*
- *Egretta garzetta*
- *Egretta alba (Ardea alba)*
- *Ardea purpurea*

Ciconiidae

- *Ciconia nigra*
- *Ciconia ciconia*

Threskiornithidae

- *Plegadis falcinellus*
- *Platalea leucorodia*

PHOENICOPTERIFORMES

Phoenicopteridae

- *Phoenicopterus ruber*

ANSERIFORMES

Anatidae

- *Cygnus bewickii (Cygnus columbianus bewickii)*
- *Cygnus cygnus*
- *Anser albifrons flavirostris*
- *Anser erythropus*
- *Branta leucopsis*
- *Branta ruficollis*
- *Tadorna ferruginea*
- *Marmaronetta angustirostris*
- *Aythya nyroca*
- *Polysticta stelleri*
- *Mergus albellus (Mergellus albellus)*
- *Oxyura leucocephala*

FALCONIFORMES

Pandionidae

- *Pandion haliaetus*

Accipitridae

- *Pernis apivorus*
- *Elanus caeruleus*
- *Milvus migrans*
- *Milvus milvus*
- *Haliaeetus albicilla*
- *Gypaetus barbatus*
- *Neophron percnopterus*
- *Gyps fulvus*
- *Aegypius monachus*
- *Circaetus gallicus*
- *Circus aeruginosus*
- *Circus cyaneus*
- *Circus macrourus*
- *Circus pygargus*
- *Accipiter gentilis arrigonii*
- *Accipiter nisus granti*
- *Accipiter brevipes*
- *Buteo rufinus*
- *Aquila pomarina*
- *Aquila clanga*
- *Aquila heliaca*
- *Aquila adalberti*

Aquila chrysaetos
Hieraaetus pennatus
Hieraaetus fasciatus

Falconidae

Falco naumanni
Falco vespertinus
Falco columbarius
Falco eleonorae
Falco biarmicus
Falco cherrug
Falco rusticolus
Falco peregrinus

GALLIFORMES

Tetraonidae

Bonasa bonasia
Lagopus mutus pyrenaicus
Lagopus mutus helveticus
Tetrao tetrix tetrix
Tetrao urogallus

Phasianidae

Alectoris graeca
Alectoris barbara
Perdix perdix italica
Perdix perdix hispaniensis

GRUIFORMES

Turnicidae

Turnix sylvatica

Gruidae

Grus grus

Rallidae

Porzana porzana
Porzana parva
Porzana pusilla
Crex crex
Porphyrio porphyrio
Fulica cristata

Otididae

Tetrax tetrax
Chlamydotis undulata
Otis tarda

CHARADRIIFORMES

Recurvirostridae

Himantopus himantopus
Recurvirostra avosetta

Burhinidae

Burhinus oedicnemus

Glareolidae

Cursorius cursor
Glareola pratincola

Charadriidae

Charadrius alexandrinus
Charadrius morinellus (Eudromias morinellus)
Pluvialis apricaria
Hoplopterus spinosus

Scolopacidae

Calidris alpina schinzii
Philomachus pugnax
Gallinago media
Limosa lapponica
Numenius tenuirostris
Tringa glareola
Xenus cinereus (Tringa cinerea)
Phalaropus lobatus

Laridae

Larus melanocephalus
Larus genei
Larus audouinii
Larus minutus

Sternidae

Gelochelidon nilotica (Sterna nilotica)
Sterna caspia
Sterna sandvicensis
Sterna dougallii
Sterna hirundo
Sterna paradisaea
Sterna albifrons
Chlidonias hybridus
Chlidonias niger

Alcidae

Uria aalge ibericus

PTEROCLIFORMES

Pteroclididae

Pterocles orientalis
Pterocles alchata

COLUMBIFORMES

Columbidae

Columba palumbus azorica
Columba trocaz
Columba bollii
Columba junoniae

STRIGIFORMES

Strigidae

- *Bubo bubo*
- *Nyctea scandiaca*
- *Surnia ulula*
- *Glaucidium passerinum*
- *Strix nebulosa*
- *Strix uralensis*
- *Asio flammeus*
- *Aegolius funereus*

CAPRIMULGIFORMES

Caprimulgidae

- *Caprimulgus europaeus*

APODIFORMES

Apodidae

- *Apus caffer*

CORACIIFORMES

Alcedinidae

- *Alcedo atthis*

Coraciidae

- *Coracias garrulus*

PICIFORMES

Picidae

- *Picus canus*
- *Dryocopus martius*
- *Dendrocopos major canariensis*
- *Dendrocopos major thanneri*
- *Dendrocopos syriacus*
- *Dendrocopos medius*
- *Dendrocopos leucotos*
- *Picoides tridactylus*

PASSERIFORMES

Alaudidae

- *Chersophilus duponti*
- *Melanocorypha calandra*
- *Calandrella brachydactyla*
- *Galerida theklae*
- *Lullula arborea*

Motacillidae

- *Anthus campestris*

Troglodytidae

- *Troglodytes troglodytes fridariensis*

Muscicapidae (Turdinae)

- *Luscinia svecica*
- *Saxicola dacotiae*
- *Oenanthe leucura*
- *Oenanthe cypriaca*
- *Oenanthe pleschanka*

Muscicapidae (Sylviinae)

- *Acrocephalus melanopogon*
- *Acrocephalus paludicola*
- *Hippolais olivetorum*
- *Sylvia sarda*
- *Sylvia undata*
- *Sylvia melanothorax*
- *Sylvia rueppelli*
- *Sylvia nisoria*

Muscicapidae (Muscicapinae)

- *Ficedula parva*
- *Ficedula semitorquata*
- *Ficedula albicollis*

Paridae

- *Parus ater cypriotes*

Sittidae

- *Sitta krueperi*
- *Sitta whiteheadi*

Certhiidae

- *Certhia brachydactyla dorotheae*

Laniidae

- *Lanius collurio*
- *Lanius minor*
- *Lanius nubicus*

Corvidae

- *Pyrrhocorax pyrrhocorax*

Fringillidae (Fringillinae)

- *Fringilla coelebs ombriosa*
- *Fringilla teydea*

Fringillidae (Carduelinae)

- *Loxia scotica*
- *Bucanetes githagineus*
- *Pyrrhula murina (Pyrrhula pyrrhula murina)*

Emberizidae (Emberizinae)

- *Emberiza cineracea*
- *Emberiza hortulana*
- *Emberiza caesia*

ANNEX II

PART A

ANSERIFORMES

Anatidae

- *Anser fabalis*
- *Anser anser*
- *Branta canadensis*
- *Anas penelope*
- *Anas strepera*
- *Anas crecca*
- *Anas platyrhynchos*
- *Anas acuta*
- *Anas querquedula*
- *Anas clypeata*
- *Aythya ferina*
- *Aythya fuligula*

GALLIFORMES

Tetraonidae

- *Lagopus lagopus scoticus et hibernicus*
- *Lagopus mutus*

Phasianidae

- *Alectoris graeca*
- *Alectoris rufa*
- *Perdix perdix*
- *Phasianus colchicus*

GRUIFORMES

Rallidae

- *Fulica atra*

CHARADRIIFORMES

Scolopacidae

- *Lymnocryptes minimus*
- *Gallinago gallinago*
- *Scolopax rusticola*

COLUMBIFORMES

Columbidae

- *Columba livia*
- *Columba palumbus*

PART B

ANSERIFORMES

Anatidae

- *Cygnus olor*
- *Anser brachyrhynchus*
- *Anser albifrons*
- *Branta bernicla*
- *Netta rufina*
- *Aythya marila*
- *Somateria mollissima*
- *Clangula hyemalis*
- *Melanitta nigra*
- *Melanita fusca*
- *Bucephala clangula*
- *Mergus serrator*
- *Mergus merganser*

GALLIFORMES

Meleagridae

- *Meleagris gallopavo*

Tetraonidae

- *Bonasa bonasia*
- *Lagopus lagopus lagopus*
- *Tetrao tetrix*
- *Tetrao urogallus*

Phasianidae

- *Francolinus francolinus*
- *Alectoris barbara*
- *Alectoris chukar*
- *Coturnix coturnix*

GRUIFORMES

Rallidae

- *Rallus aquaticus*
- *Gallinula chloropus*

CHARADRIIFORMES

Haematopodidae

- *Haematopus ostralegus*

Charadriidae

Pluvialis apricaria

Pluvialis squatarola

Vanellus vanellus

Scolopacidae

Calidris canutus

Philomachus pugnax

Limosa limosa

Limosa lapponica

Numenius phaeopus

Numenius arquata

Tringa erythropus

Tringa totanus

Tringa nebularia

Laridae

Larus ridibundus

Larus canus

Larus fuscus

Larus argentatus

Larus cachinnans

Larus marinus

COLUMBIFORMES

Columbidae

Columba oenas

Streptopelia decaocto

Streptopelia turtur

PASSERIFORMES

Alaudidae

Alauda arvensis

Muscicapidae

Turdus merula

Turdus pilaris

Turdus philomelos

Turdus iliacus

Turdus viscivorus

Sturnidae

Sturnus vulgaris

Corvidae

Garrulus glandarius

Pica pica

Corvus monedula

Corvus frugilegus

Corvus corone

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
Cygnus olor					+														+								
Anser brachyrhynchus	+			+						+																	+
Anser albifrons	+	+	+	+	+	+	+		+	+		+	+	+		+		+		+		+		+		+	+
Branta bernicla				+	+																						
Netta rufina								+	+																		
Aythya marila	+			+	+		+		+	+			+					+				+					+
Somateria mollissima				+		+			+	+															+	+	
Clangula hyemalis				+		+			+	+			+												+	+	+
Melanitta nigra				+	+	+			+	+			+												+	+	+
Melanitta fusca				+	+				+	+			+												+	+	+
Bucephala clangula				+		+	+		+	+			+	+		+			+			+			+	+	+
Mergus serrator				+						+							+								+	+	
Mergus merganser				+						+															+	+	
Bonasa bonasia						+			+				+						+	+		+		+	+	+	
Lagopus lagopus lagopus																									+	+	
Tetrao tetrix	+				+				+		+		+						+						+	+	+
Tetrao urogallus		+			+				+		+		+						+			+			+	+	+
Francolinus francolinus												+															
Alectoris barbara								+			+																
Alectoris chukar		+					+					+															
Coturnix coturnix		+					+	+	+		+	+					+		+		+	+					
Meleagris gallopavo			+		+														+					+			
Rallus aquaticus									+		+						+										
Gallinula chloropus	+						+		+		+						+				+	+					+
Haematopus ostralegus				+					+																		
Pluvialis apricaria	+			+			+		+	+							+	+			+						+
Pluvialis squatarola				+					+								+										+
Vanellus vanellus	+			+			+	+	+	+	+						+										

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
Calidris canutus				+					+																		
Philomachus pugnax									+		+						+										
Limosa limosa				+					+																		
Limosa lapponica				+					+																		+
Numenius phaeopus				+					+																		+
Numenius arquata				+					+	+																	+
Tringa erythropus				+					+																		
Tringa totanus				+					+		+																+
Tringa nebularia				+					+																		
Larus ridibundus	+			+	+	+		+								+			+					+		+	
Larus canus				+	+	+																			+	+	
Larus fuscus				+	+																						
Larus argentatus	+			+	+	+							+												+	+	
Larus cachinnans								+								+											
Larus marinus				+	+	+																			+	+	
Columba oenas							+	+	+			+									+	+					
Streptopelia decaocto		+	+	+	+				+			+				+			+			+		+			
Streptopelia turtur		+					+	+	+		+	+					+		+		+	+					
Alauda arvensis							+		+		+	+					+					+					
Turdus merula							+		+		+	+					+				+					+	
Turdus pilaris						+	+	+	+		+	+					+		+		+	+			+	+	
Turdus philomelos							+	+	+		+	+					+				+	+					
Turdus iliacus							+	+	+		+	+					+				+	+					
Turdus viscivorus							+	+	+			+					+				+	+					
Sturnus vulgaris		+					+	+	+			+				+	+				+	+					
Garrulus glandarius	+			+	+				+		+				+	+		+			+	+	+	+		+	+
Pica pica	+	+	+	+	+		+	+	+		+	+	+		+	+		+			+	+	+	+	+	+	+
Corvus monedula		+					+	+				+						+				+			+	+	+

	BE	BG	CZ	DK	DE	EE	EL	ES	FR	IE	IT	CY	LV	LT	LU	HU	MT	NL	AT	PL	PT	RO	SI	SK	FI	SE	UK
Corvus frugilegus		+				+			+					+		+						+		+		+	+
Corvus corone	+	+	+	+	+	+	+	+	+		+	+	+	+	+	+		+			+	+	+	+	+	+	+

AT = Österreich, BE = Belgique/België, BG = България, CY = Κύπρος, CZ = Česká republika, DE = Deutschland, DK = Danmark, EE = Eesti, ES = España, FI = Suomi/Finland, FR = France, EL = Ελλάδα, HU = Magyarország, IE = Ireland, IT = Italia, LT = Lietuva, LU = Luxembourg, LV = Latvija, MT = Malta, NL = Nederland, PL = Polska, PT = Portugal, RO = România, SE = Sverige, SI = Slovenija, SK = Slovensko, UK = United Kingdom.
+ = Member States which under Article 7(3) may authorise hunting of the species listed.

ANNEX III

PART A

ANSERIFORMES

Anatidae

Anas platyrhynchos

GALLIFORMES

Tetraonidae

Lagopus lagopus lagopus, scoticus et hibernicus

Phasianidae

Alectoris rufa

Alectoris barbara

Perdix perdix

Phasianus colchicus

COLUMBIFORMES

Columbidae

Columba palumbus

PART B

ANSERIFORMES

Anatidae

Anser albifrons albifrons

Anser anser

Anas penelope

Anas crecca

Anas acuta

Anas clypeata

Aythya ferina

Aythya fuligula

Aythya marila

Somateria mollissima

Melanitta nigra

GALLIFORMES

Tetraonidae

Lagopus mutus

Tetrao tetrix britannicus

Tetrao urogallus

GRUIFORMES

Rallidae

Fulica atra

CHARADRIIFORMES

Charadriidae

Pluvialis apricaria

Scolopacidae

Lymnocryptes minimus

Gallinago gallinago

Scolopax rusticola

ANNEX IV

(a) — Snares (with the exception of Finland and Sweden for the capture of *Lagopus lagopus lagopus* and *Lagopus mutus* north of latitude 58° N), limes, hooks, live birds which are blind or mutilated used as decoys, tape recorders, electrocuting devices,

— artificial light sources, mirrors, devices for illuminating targets, sighting devices for night shooting comprising an electronic image magnifier or image converter,

— explosives,

— nets, traps, poisoned or anaesthetic bait,

— semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition;

(b) — aircraft, motor vehicles,

— boats driven at a speed exceeding five kilometres per hour. On the open sea, Member States may, for safety reasons, authorise the use of motor-boats with a maximum speed of 18 kilometres per hour. Member States shall inform the Commission of any authorisations granted.

ANNEX V

(a) National lists of species in danger of extinction or particularly endangered species, taking into account their geographical distribution.

(b) Listing and ecological description of areas particularly important to migratory species on their migratory routes and as wintering and nesting grounds.

(c) Listing of data on the population levels of migratory species as shown by ringing.

(d) Assessing the influence of methods of taking wild birds on population levels.

(e) Developing or refining ecological methods for preventing the type of damage caused by birds.

(f) Determining the role of certain species as indicators of pollution.

(g) Studying the adverse effect of chemical pollution on population levels of bird species.

ANNEX VI

PART A

REPEALED DIRECTIVE WITH LIST OF ITS SUCCESSIVE AMENDMENTS

(referred to in Article 18)

Council Directive 79/409/EEC (OJ L 103, 25.4.1979, p. 1)	
1979 Act of Accession, Annex I, point XIII.1.F (OJ L 291, 19.11.1979, p. 111)	
Council Directive 81/854/EEC (OJ L 319, 7.11.1981, p. 3)	
Commission Directive 85/411/EEC (OJ L 233, 30.8.1985, p. 33)	
1985 Act of Accession, Annex I, points X.1.(h) and X.6 (OJ L 302, 15.11.1985, p. 218)	
Council Directive 86/122/EEC (OJ L 100, 16.4.1986, p. 22)	
Commission Directive 91/244/EEC (OJ L 115, 8.5.1991, p. 41)	
Council Directive 94/24/EC (OJ L 164, 30.6.1994, p. 9)	
1994 Act of Accession, Annex I, point VIII.E.1 (OJ C 241, 29.8.1994, p. 175)	
Commission Directive 97/49/EC (OJ L 223, 13.8.1997, p. 9)	
Council Regulation (EC) No 807/2003 (OJ L 122, 16.5.2003, p. 36)	only Annex III, point 29
2003 Act of Accession, Annex II, point 16.C.1 (OJ L 236, 23.9.2003, p. 667)	
Council Directive 2006/105/EC (OJ L 363, 20.12.2006, p. 368)	only as regards the reference, in Article 1, to Directive 79/409/EEC and point A.1 of the Annex
Directive 2008/102/EC of the European Parliament and of the Council (OJ L 323, 3.12.2008, p. 31)	

PART B

LIST OF TIME LIMITS FOR TRANSPOSITION INTO NATIONAL LAW

(referred to in Article 18)

Directives	Time limit for transposition
79/409/EEC	7 April 1981
81/854/EEC	—
85/411/EEC	31 July 1986
86/122/EEC	—
91/244/EEC	31 July 1992
94/24/EC	29 September 1995
97/49/EC	30 September 1998
2006/105/EC	1 January 2007
2008/102/EC	—

ANNEX VII

CORRELATION TABLE

Directive 79/409/EEC	This Directive
Article 1(1) and (2)	Article 1(1) and (2)
Article 1(3)	—
Articles 2 to 5	Articles 2 to 5
Article 6(1), (2) and (3)	Article 6(1), (2) and (3)
Article 6(4)	—
Article 7(1), (2) and (3)	Article 7(1), (2) and (3)
Article 7(4), first sentence	Article 7(4), first subparagraph
Article 7(4), second sentence	Article 7(4), second subparagraph
Article 7(4), third sentence	Article 7(4), third subparagraph
Article 7(4), fourth sentence	Article 7(4), fourth subparagraph
Article 8	Article 8
Article 9(1)	Article 9(1)
Article 9(2), introductory wording	Article 9(2), introductory wording
Article 9(2), first indent	Article 9(2), point (a)
Article 9(2), second indent	Article 9(2), point (b)
Article 9(2), third indent	Article 9(2), point (c)
Article 9(2), fourth indent	Article 9(2), point (d)
Article 9(2), fifth indent	Article 9(2), point (e)
Article 9(3)	Article 9(3)
Article 9(4)	Article 9(4)
Article 10(1)	Article 10(1), first sentence
Article 10(2), first sentence	Article 10(1), second sentence
Article 10(2), second sentence	Article 10(2)
Articles 11 to 15	Articles 11 to 15
Article 16(1)	—
Article 17	Article 16
Article 18(1)	—
Article 18(2)	Article 17

Directive 79/409/EEC	This Directive
—	Article 18
—	Article 19
Article 19	Article 20
Annex I	Annex I
Annex II/1	Annex II, Part A
Annex II/2	Annex II, Part B
Annex III/1	Annex III, Part A
Annex III/2	Annex III, Part B
Annex IV	Annex IV
Annex V	Annex V
—	Annex VI
—	Annex VII

Corrigendum to Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001

(Official Journal of the European Union L 270 of 21 October 2003)

On page 7, in Article 1, first indent:

for: '— common rules on direct payments … (EAGGF), except those provided for under Regulation (EC) No 1257/1999',

read: '— common rules on direct payments … (EAGGF) listed in Annex I, except those provided for under Regulation (EC) No 1257/1999'.

On page 16, in Article 43(1), third subparagraph:

for: '… and Article 42(6) shall apply to these payment entitlements.',

read: '… and Article 42(8) shall apply to these payment entitlements.'

On pages 17 and 18, in Article 46(3):

for: '…, acting in compliance with the general principle of Community law, …',

read: '…, acting in compliance with the general principles of Community law, …'.

On page 22, in Article 62, first subparagraph:

for: '…, shall be included, in part or in full, in the single payment scheme …',

read: '…, shall be included at national or regional level, in part or in full, in the single payment scheme …'.

On page 23, in Article 63(3):

for: '… acting in compliance with the general principle of Community law, …',

read: '… acting in compliance with the general principles of Community law, …'.

On page 32, in Article 102(1):

for: '… for all the payments granted under this Regulation in the region …',

read: '… for all the payments granted under this Chapter in the region …'.

On page 52, in Article 155:

for: '… and those related to the improvement plans referred to in Article 86 of this Regulation, …',

read: '… and from the provisions related to the improvement plans provided for in Regulation (EEC) No 1035/72 to those referred to in Articles 83 to 87 of this Regulation, …'.

On page 53, in Annex I, title:

for: 'List of support schemes fulfilling the criteria set out in Article 1',

read: 'List of direct payments referred to in Article 1'.

This document is meant purely as a documentation tool and the institutions do not assume any liability for its contents

►**B**

COUNCIL REGULATION (EC) No 338/97

of 9 December 1996

on the protection of species of wild fauna and flora by regulating trade therein

(OJ L 61, 3.3.1997, p. 1)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Commission Regulation (EC) No 938/97 of 26 May 1997	L 140	1	30.5.1997
►**M2**	Commission Regulation (EC) No 2307/97 of 18 November 1997	L 325	1	27.11.1997
►**M3**	Commission Regulation (EC) No 2214/98 of 15 October 1998	L 279	3	16.10.1998
►**M4**	Commission Regulation (EC) No 1476/1999 of 6 July 1999	L 171	5	7.7.1999
►**M5**	Commission Regulation (EC) No 2724/2000 of 30 November 2000	L 320	1	18.12.2000
►**M6**	Commission Regulation (EC) No 1579/2001 of 1 August 2001	L 209	14	2.8.2001
►**M7**	Commission Regulation (EC) No 2476/2001 of 17 December 2001	L 334	3	18.12.2001
►**M8**	Commission Regulation (EC) No 1497/2003 of 18 August 2003	L 215	3	27.8.2003
►**M9**	Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003	L 284	1	31.10.2003
►**M10**	Commission Regulation (EC) No 834/2004 of 28 April 2004	L 127	40	29.4.2004
►**M11**	Commission Regulation (EC) No 1332/2005 of 9 August 2005	L 215	1	19.8.2005
►**M12**	Commission Regulation (EC) No 318/2008 of 31 March 2008	L 95	3	8.4.2008
►**M13**	Commission Regulation (EC) No 407/2009 of 14 May 2009	L 123	3	19.5.2009
►**M14**	Regulation (EC) No 398/2009 of the European Parliament and of the Council of 23 April 2009	L 126	5	21.5.2009
►**M15**	Commission Regulation (EU) No 709/2010 of 22 July 2010	L 212	1	12.8.2010
►**M16**	Commission Regulation (EU) No 101/2012 of 6 February 2012	L 39	133	11.2.2012
►**M17**	Commission Regulation (EU) No 1158/2012 of 27 November 2012	L 339	1	12.12.2012

Corrected by:

►**C1** Corrigendum, OJ L 298, 1.11.1997, p. 70 (338/97)

►**C2** Corrigendum, OJ L 139, 5.6.2009, p. 35 (407/2009)

▼B

COUNCIL REGULATION (EC) No 338/97

of 9 December 1996

on the protection of species of wild fauna and flora by regulating trade therein

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 130s (1) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 189c of the Treaty [3],

(1) Whereas Regulation (EEC) No 3626/82 [4] applies the Convention on International Trade in Endangered Species of Wild Fauna and Flora in the Community with effect from 1 January 1984; whereas the purpose of the Convention is to protect endangered species of fauna and flora through controls on international trade in specimens of those species;

(2) Whereas, in order to improve the protection of species of wild fauna and flora which are threatened by trade or likely to be so threatened, Regulation (EEC) No 3626/82 must be replaced by a Regulation taking account of the scientific knowledge acquired since its adoption and the current structure of trade; whereas, moreover, the abolition of controls at internal borders resulting from the Single Market necessitates the adoption of stricter trade control measures at the Community's external borders, with documents and goods being checked at the customs office at the border where they are introduced;

(3) Whereas the provisions of this Regulation do not prejudice any stricter measures which may be taken or maintained by Member States, in compliance with the Treaty, in particular with regard to the holding of specimens of species covered by this Regulation;

(4) Whereas it is necessary to lay down objective criteria for the inclusion of species of wild fauna and flora in the Annexes to this Regulation;

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(1) OJ No C 26, 3.2.1992, p. 1, and OJ No C 131, 12.5.1994, p. 1.
(2) OJ No C 223, 31.8.1992, p. 19.
(3) Opinion of the European Parliament of 15 December 1995 (OJ No C 17, 22.1.1996, p. 430). Common position of the Council of 26 February 1996 (OJ No C 196, 6.7.1996, p. 58) and Decision of the European Parliament of 18 September 1996 (OJ No C 320, 28. 10. 1996).
(4) OJ No L 384, 31.12.1982, p. 1. Regulation as last amended by Commission Regulation (EC) No 558/95 (OJ No L 57, 15.3.1995, p. 1).

▼B

(5) Whereas the implementation of this Regulation necessitates the application of common conditions for the issue, use and presentation of documents relating to authorization of the introduction into the Community and the export or re-export from the Community of specimens of the species covered by this Regulation; whereas it is necessary to lay down specific provisions relating to the transit of specimens through the Community;

(6) Whereas it is for a management authority of the Member State of destination, assisted by the scientific authority of that Member State and, where appropriate, taking into account any opinion of the Scientific Review Group, to decide on the requests for introduction of specimens into the Community;

(7) Whereas it is necessary to supplement the provisions on re-export with a consultation procedure, in order to limit the risk of infringement;

(8) Whereas, in order to guarantee effective protection of species of wild fauna and flora, additional restrictions may be imposed on the introduction of specimens into, and the export thereof from, the Community; whereas, with regard to live specimens, these restrictions may be supplemented by restrictions at Community level on the holding or movement of such specimens within the Community;

(9) Whereas it is necessary to lay down specific provisions applicable to captive-born and bred, or artificially propagated specimens, to specimens which are personal or household effects, and to non-commercial loans, donations or exchanges between registered scientists and scientific institutions;

(10) Whereas there is a need, in order to ensure the broadest possible protection for species covered by this Regulation, to lay down provisions for controlling trade and movement of specimens within the Community, and the conditions for housing specimens; whereas the certificates issued under this Regulation, which contribute to controlling these activities, must be governed by common rules on their issue, validity and use;

(11) Whereas measures should be taken to minimize the adverse effects on live specimens of transport to their destination, from or within the Community;

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(12) Whereas, to ensure effective controls and to facilitate customs procedures, customs offices should be designated, with trained personnel responsible for carrying out the necessary formalities and corresponding checks where specimens are introduced into the Community, in order to assign them a customs-approved treatment or use within the meaning of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code ([1]), or where they are exported or re-exported from the Community; whereas there should also be facilities guaranteeing that live specimens are adequately housed and cared for;

(13) Whereas the implementation of this Regulation also calls for the designation of management and scientific authorities by the Member States;

(14) Whereas informing the public and making them aware of the provisions of this Regulation, particularly at border crossing points, is likely to encourage compliance with these provisions;

(15) Whereas, in order to ensure effective enforcement of this Regulation, Member States should closely monitor compliance with its provisions and, to that end, cooperate closely between themselves and with the Commission; whereas this requires the communication of information relating to the implementation of this Regulation;

(16) Whereas the monitoring of levels of trade in the species of wild fauna and flora covered by this Regulation is of crucial importance for assessing the effects of trade on the conservation status of species; whereas detailed annual reports should be drawn up in a common format;

(17) Whereas, in order to guarantee compliance with this Regulation, it is important that Member States impose sanctions for infringements in a manner which is both sufficient and appropriate to the nature and gravity of the infringement;

(18) Whereas it is essential to lay down a Community procedure enabling the implementing provisions and amendments to the Annexes of this Regulation to be adopted within a suitable period; whereas a Committee must be set up to permit close and effective cooperation between the Member States and the Commission in this field;

(19) Whereas the multitude of biological and ecological aspects to be considered in the implementation of this Regulation requires the setting up of a Scientific Review Group, whose opinions will be forwarded by the Commission to the Committee and the management bodies of the Member States, to assist them in making their decisions,

([1]) OJ No L 302, 19.10.1992, p. 1. Regulation as last amended by the 1994 Act of Accession.

▼B

HAS ADOPTED THIS REGULATION:

Article 1

Object

The object of this Regulation is to protect species of wild fauna and flora and to guarantee their conservation by regulating trade therein in accordance with the following Articles.

This Regulation shall apply in compliance with the objectives, principles and provisions of the Convention defined in Article 2.

Article 2

Definitions

For the purposes of this Regulation:

(a) 'Committee' shall mean the Committee on Trade in Wild Fauna and Flora, established under Article 18;

(b) 'Convention' shall mean the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Cites);

(c) 'country of origin' shall mean the country in which a specimen was taken from the wild, captive-bred or artificially propagated;

(d) 'import notification' shall mean the notification given by the importer or his agent or representative, at the time of the introduction into the Community of a specimen of a species included in Annexes C or D, on a form prescribed by the Commission in accordance with the procedure laid down in Article 18;

(e) 'introduction from the sea' shall mean the introduction into the Community of any specimen which was taken in, and is being introduced directly from, the marine environment not under the jurisdiction of any State, including the air-space above the sea and the sea-bed and subsoil beneath the sea;

(f) 'issuance' shall mean the completion of all procedures involved in preparing and validating a permit or certificate and its delivery to the applicant;

(g) 'management authority' shall mean a national administrative authority designated, in the case of a Member State, in accordance with Article 13(1)(a) or, in the case of a third country party to the Convention, in accordance with Article IX of the Convention;

(h) 'Member State of destination' shall mean the Member State of destination mentioned in the document used to export or re-export a specimen; in the event of introduction from the sea, it shall mean the Member State within whose jurisdiction the place of destination of a specimen lies;

(i) 'offering for sale' shall mean offering for sale and any action that may reasonably be construed as such, including advertising or causing to be advertised for sale and invitation to treat;

(j) 'personal or household effects' shall mean dead specimens, parts and derivatives thereof, that are the belongings of a private individual and that form, or are intended to form, part of his normal goods and chattels;

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(k) ‘place of destination’ shall mean the place at which at the time of introduction into the Community, it is intended that specimens will normally be kept; in the case of live specimens, this shall be the first place where specimens are intended to be kept following any period of quarantine or other confinement for the purposes of sanitary checks and controls;

(l) ‘population’ shall mean a biologically or geographically distinct total number of individuals;

(m) ‘primarily commercial purposes’ shall mean all purposes the non-commercial aspects of which do not clearly predominate;

(n) ‘re-export from the Community’ shall mean export from the Community of any specimen that has previously been introduced;

(o) ‘reintroduction into the Community’ shall mean introduction into the Community of any specimen that has previously been exported or re-exported;

(p) ‘sale’ shall mean any form of sale. For the purposes of this Regulation, hire, barter or exchange shall be regarded as sale; cognate expressions shall be similarly construed;

(q) ‘scientific authority’ shall mean a scientific authority designated, in the case of a Member State, in accordance with Article 13(1)(b) or, in the case of a third country party to the Convention, in accordance with Article IX of the Convention;

(r) ‘Scientific Review Group’ shall mean the consultative body established under Article 17;

(s) ‘species’ shall mean a species, subspecies or population thereof;

(t) ‘specimen’ shall mean any animal or plant, whether alive or dead, of the species listed in Annexes A to D, any part or derivative thereof, whether or not contained in other goods, as well as any other goods which appear from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be or to contain parts or derivatives of animals or plants of those species, unless such parts or derivatives are specifically exempted from the provisions of this Regulation or from the provisions relating to the Annex in which the species concerned is listed by means of an indication to that effect in the Annexes concerned.

A specimen will be considered to be a specimen of a species listed in Annexes A to D if it is, or is part of or derived from, an animal or plant at least one of whose ‘parents’ is of a species so listed. In cases where the ‘parents’ of such an animal or plant are of species listed in different Annexes, or of species only one of which is listed, the provisions of the more restrictive Annex shall apply. However, in the case of specimens of hybrid plants, if one of the ‘parents’ is of a species listed in Annex A, the provisions of the more restrictive Annex shall apply only if that species is annotated to that effect in the Annex;

(u) ‘trade’ shall mean the introduction into the Community, including introduction from the sea, and the export and re-export therefrom, as well as the use, movement and transfer of possession within the Community, including within a Member State, of specimens subject to the provisions of this Regulation;

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(v) ‘transit’ shall mean the transport of specimens between two points outside the Community through the territory of the Community which are shipped to a named consignee and during which any interruption in the movement arises only from the arrangements necessitated by this form of traffic;

(w) ‘worked specimens that were acquired more than 50 years previously’ shall mean specimens that were significantly altered from their natural raw state for jewellery, adornment, art, utility, or musical instruments, more than 50 years before the entry into force of this Regulation and that have been, to the satisfaction of the management authority of the Member State concerned, acquired in such conditions. Such specimens shall be considered as worked only if they are clearly in one of the aforementioned categories and require no further carving, crafting or manufacture to effect their purpose;

(x) ‘checks at the time of introduction, export, re-export and transit’ shall mean documentary checks on the certificates, permits and notifications provided for in this Regulation and — in cases where Community provisions so provide or in other cases by representative sampling of the consignments — examination of the specimens, where appropriate accompanied by the taking of samples with a view to analysis or more detailed checks.

Article 3

Scope

1. Annex A shall contain:

(a) the species listed in Appendix I to the Convention for which the Member States have not entered a reservation;

(b) any species:

(i) which is, or may be, in demand for utilization in the Community or for international trade and which is either threatened with extinction or so rare that any level of trade would imperil the survival of the species;

or

(ii) which is in a genus of which most of the species or which is a species of which most of the subspecies are listed in Annex A in accordance with the criteria in subparagraphs (a) or (b)(i) and whose listing in the Annex is essential for the effective protection of those taxa.

2. Annex B shall contain:

(a) the species listed in Appendix II to the Convention, other than those listed in Annex A, for which the Member States have not entered a reservation;

(b) the species listed in Appendix I to the Convention for which a reservation has been entered;

▼B

(c) any other species not listed in Appendices I or II to the Convention:

(i) which is subject to levels of international trade that might not be compatible:

— with its survival or with the survival of populations in certain countries, or

— with the maintenance of the total population at a level consistent with the role of the species in the ecosystems in which it occurs:

or

(ii) whose listing in the Annex for reasons of similarity in appearance to other species listed in Annex A or Annex B, is essential in order to ensure the effectiveness of controls on trade in specimens of such species;

(d) species in relation to which it has been established that the introduction of live specimens into the natural habitat of the Community would constitute an ecological threat to wild species of fauna and flora indigenous to the Community.

3. Annex C shall contain:

(a) the species listed in Appendix III to the Convention, other than those listed in Annexes A or B, for which the Member States have not entered a reservation;

(b) the species listed in Appendix II to the Convention for which a reservation has been entered.

4. Annex D shall contain:

(a) species not listed in Annexes A to C which are imported into the Community in such numbers as to warrant monitoring;

(b) the species listed in Appendix III to the Convention for which a reservation has been entered.

5. Where the conservation status of species covered by this Regulation warrants their inclusion in one of the Appendices to the Convention, the Member States shall contribute to the necessary amendments.

Article 4

Introduction into the Community

1. The introduction into the Community of specimens of the species listed in Annex A shall be subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import permit issued by a management authority of the Member State of destination.

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The import permit may be issued only in accordance with the restrictions established pursuant to paragraph 6 and when the following conditions have been met:

(a) the competent scientific authority, after considering any opinion by the Scientific Review Group, has advised that the introduction into the Community:

(i) would not have a harmful effect on the conservation status of the species or on the extent of the territory occupied by the relevant population of the species;

(ii) is taking place:

— for one of the purposes referred to in Article 8(3)(e), (f) and (g), or

— for other purposes which are not detrimental to the survival of the species concerned;

(b) (i) the applicant provides documentary evidence that the specimens have been obtained in accordance with the legislation on the protection of the species concerned which, in the case of import from a third country of specimens of a species listed in the Appendices to the Convention, shall be an export permit or re-export certificate, or copy thereof, issued in accordance with the Convention by a competent authority of the country of export or re-export;

(ii) however, the issuance of import permits for species listed in Annex A in accordance with Article 3(1)(a) shall not require such documentary evidence, but the original of any such import permit shall be withheld from the applicant pending presentation of the export permit or re-export certificate;

(c) the competent scientific authority is satisfied that the intended accommodation for a live specimen at the place of destination is adequately equipped to conserve and care for it properly;

(d) the management authority is satisfied that the specimen is not to be used for primarily commercial purposes;

(e) the management authority is satisfied, following consultation with the competent scientific authority, that there are no other factors relating to the conservation of the species which militate against issuance of the import permit; and

(f) in the case of introduction from the sea, the management authority is satisfied that any live specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

2. The introduction into the Community of specimens of the species listed in Annex B shall be subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import permit issued by a management authority of the Member State of destination.

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The import permit may be issued only in accordance with the restrictions established pursuant to paragraph 6 and when:

(a) the competent scientific authority, after examining available data and considering any opinion from the Scientific Review Group, is of the opinion that the introduction into the Community would not have a harmful effect on the conservation status of the species or on the extent of the territory occupied by the relevant population of the species, taking account of the current or anticipated level of trade. This opinion shall be valid for subsequent imports as long as the abovementioned aspects have not changed significantly;

(b) the applicant provides documentary evidence that the intended accommodation for a live specimen at the place of destination is adequately equipped to conserve and care for it properly;

(c) the conditions referred to in paragraph 1(b)(i), (e) and (f) have been met.

3. The introduction into the Community of specimens of the species listed in Annex C shall be subject to completion of the necessary checks and the prior presentation, at the border customs office at the point of introduction, of an import notification and:

(a) in the case of export from a country mentioned in relation to the species concerned in Annex C, the applicant shall provide documentary evidence, by means of an export permit issued in accordance with the Convention by an authority of that country competent for the purpose, that the specimens have been obtained in accordance with the national legislation on the conservation of the species concerned; or

(b) in the case of export from a country not mentioned in relation to the species concerned in Annex C or re-export from any country, the applicant shall present an export permit, a re-export certificate or a certificate of origin issued in accordance with the Convention by an authority of the exporting or re-exporting country competent for the purpose.

4. The introduction into the Community of specimens of the species listed in Annex D shall be subject to completion of the necessary checks and the prior presentation of an import notification at the border customs office at the point of introduction.

5. The conditions for the issuance of an import permit as referred to in paragraph 1(a) and (d) and in paragraph 2(a), (b) and (c) shall not apply to specimens for which the applicant provides documentary evidence:

(a) that they had previously been legally introduced into or acquired in the Community and that they are, modified or not, being reintroduced into the Community; or

(b) that they are worked specimens that were acquired more than 50 years previously.

▼M14

6. In consultation with the countries of origin concerned, in accordance with the regulatory procedure referred to in Article 18(2) and taking account of any opinion from the Scientific Review Group, the Commission may establish general restrictions, or restrictions relating to certain countries of origin, on the introduction into the Community:

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(a) on the basis of the conditions referred to in paragraph 1(a)(i) or (e), of specimens of species listed in Annex A;

(b) on the basis of the conditions referred to in paragraph 1(e) or paragraph 2(a), of specimens of species listed in Annex B; and

(c) of live specimens of species listed in Annex B which have a high mortality rate during shipment or for which it has been established that they are unlikely to survive in captivity for a considerable proportion of their potential life span; or

(d) of live specimens of species for which it has been established that their introduction into the natural environment of the Community presents an ecological threat to wild species of fauna and flora indigenous to the Community.

The Commission shall on a quarterly basis publish a list of such restrictions, if any, in the *Official Journal of the European Communities*.

▼M14

7. Where special cases of transhipment, air transfer or rail transport occur following introduction into the Community, derogations from completion of the checks and presentations of import documents at the border customs office at the point of introduction which are referred to in paragraphs 1 to 4 shall be granted by the Commission in order to permit such checks and presentations to be made at another customs office designated in accordance with Article 12(1).

Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

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Article 5

Export or re-export from the Community

1. The export or re-export from the Community of specimens of the species listed in Annex A shall be subject to completion of the necessary checks and the prior presentation, at the customs office at which the export formalities are completed, of an export permit or re-export certificate issued by a management authority of the Member State in which the specimens are located.

2. An export permit for specimens of the species listed in Annex A may be issued only when the following conditions have been met:

(a) the competent scientific authority has advised in writing that the capture or collection of the specimens in the wild or their export will not have a harmful effect on the conservation status of the species or on the extent of the territory occupied by the relevant population of the species;

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(b) the applicant provides documentary evidence that the specimens have been obtained in accordance with the legislation in force on the protection of the species in question; where the application is made to a Member State other than the Member State of origin, such documentary evidence shall be furnished by means of a certificate stating that the specimen was taken from the wild in accordance with the legislation in force on its territory;

(c) the management authority is satisfied that:

(i) any live specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and

(ii) — the specimens of species not listed in Annex I to the Convention will not be used for primarily commercial purposes, or

— in the case of export to a State party to the Convention of specimens of the species referred to in Article 3(1)(a) of this Regulation, an import permit has been issued;

and

(d) the management authority of the Member State is satisfied, following consultation with the competent scientific authority, that there are no other factors relating to the conservation of the species which militate against issuance of the export permit.

3. A re-export certificate may be issued only when the conditions referred to in paragraph 2 (c) and (d) have been met and when the applicant provides documentary evidence that the specimens:

(a) were introduced into the Community in accordance with the provisions of this Regulation;

(b) if introduced into the Community before the entry into force of this Regulation, were introduced in accordance with the provisions of Regulation (EEC) No 3626/82; or

(c) if introduced into the Community before 1984, entered international trade in accordance with the provisions of the Convention; or

(d) were legally introduced into the territory of a Member State before the provisions of the Regulations referred to in (a) and (b) or of the Convention became applicable to them, or became applicable in that Member State.

4. The export or re-export from the Community of specimens of the species listed in Annexes B and C shall be subject to completion of the necessary checks and the prior presentation, at the customs office at which the export formalities are completed, of an export permit or re-export certificate issued by a management authority of the Member State in whose territory the specimens are located.

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An export permit may be issued only when the conditions referred to in paragraph 2 (a), (b), (c) (i) and (d) have been met.

A re-export certificate may be issued only when the conditions referred to in paragraph 2 (c) (i) and (d) and in paragraph 3 (a) to (d) have been met.

▼M14

5. Where an application for a re-export certificate concerns specimens introduced into the Community under an import permit issued by another Member State, the management authority must first consult the management authority which issued the permit. The consultation procedures and the cases in which consultation is necessary shall be established by the Commission. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

▼B

6. The conditions for the issuance of an export permit or re-export certificate as referred to in paragraph 2 (a) and (c) (ii) shall not apply to:

(i) worked specimens that were acquired more than 50 years previously; or

(ii) dead specimens and parts and derivatives thereof for which the applicant provides documentary evidence that they were legally acquired before the provisions of this Regulation, or of Regulation (EEC) No 3626/82 or of the Convention became applicable to them.

7. (a) The competent scientific authority in each Member State shall monitor the issuance of export permits by that Member State for specimens of species listed in Annex B and actual exports of such specimens. Whenever such scientific authority determines that the export of specimens of any such species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystem in which it occurs, and well above the level at which that species might become eligible for inclusion in Annex A in accordance with Article 3 (1) (a) or (b) (i), the scientific authority shall advise the competent management authority, in writing, of suitable measures to be taken to limit the issuance of export permits for specimens of that species

▼M14

(b) Whenever a management authority is advised of the measures referred to in (a), it shall inform and send comments to the Commission which shall, if appropriate, recommend restrictions on exports of the species concerned in accordance with the regulatory procedure referred to in Article 18(2).

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Article 6

Rejection of applications for permits and certificates referred to in Articles 4, 5 and 10

1. When a Member State rejects an application for a permit or certificate in a case of significance in respect of the objectives of this Regulation, it shall immediately inform the Commission of the rejection and of the reasons for rejection.

2. The Commission shall communicate information received in accordance with paragraph 1 to the other Member States in order to ensure uniform application of this Regulation.

3. When an application is made for a permit or certificate relating to specimens for which such an application has previously been rejected, the applicant must inform the competent authority to which the application is submitted of the previous rejection.

4. (a) Member States shall recognize the rejection of applications by the competent authorities of the other Member States, where such rejection is based on the provisions of this Regulation.

(b) However, this need not apply where the circumstances have significantly changed or where new evidence to support an application has become available. In such cases, if a management authority issues a permit or certificate, it shall inform the Commission thereof, stating the reasons for issuance.

Article 7

Derogations

1. *Specimens born and bred in captivity or artificially propagated*

(a) Save where Article 8 applies, specimens of species listed in Annex A that have been born and bred in captivity or artificially propagated shall be treated in accordance with the provisions applicable to specimens of species listed in Annex B.

(b) In the case of artificially propagated plants, the provisions of Articles 4 and 5 may be waived under special conditions laid down by the Commission, relating to:

(i) the use of phytosanitary certificates;

(ii) trade by registered commercial traders and by the scientific institutions referred to in paragraph 4 of this Article; and

(iii) trade in hybrids.

▼M14

(c) The criteria for determining whether a specimen has been born and bred in captivity or artificially propagated and whether for commercial purposes, as well as the special conditions referred to in (b), shall be specified by the Commission. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

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2. *Transit*

(a) By way of derogation from Article 4, where a specimen is in transit through the Community, checks and presentation at the border customs office at the point of introduction of the prescribed permits, certificates and notifications shall not be required.

(b) In the case of species listed in the Annexes in accordance with Article 3 (1) and Article 3 (2) (a) and (b), the derogation referred to in (a) shall apply only where a valid export or re-export document provided for by the Convention, relating to the specimens that it accompanies and specifying the destination of the specimens, has been issued by the competent authorities of the exporting or re-exporting third country.

▼M14

(c) If the document referred to in (b) has not been issued before export or re-export, the specimen must be seized and may, where applicable, be confiscated unless the document is submitted retrospectively in compliance with the conditions specified by the Commission. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

3. *Personal and household effects*

By way of derogation from Articles 4 and 5, the provisions therein shall not apply to dead specimens, parts and derivatives of species listed in Annexes A to D which are personal or household effects being introduced into the Community, or exported or re-exported therefrom, in compliance with provisions that shall be specified by the Commission. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

4. *Scientific institutions*

The documents referred to in Articles 4, 5, 8 and 9 shall not be required in the case of non-commercial loans, donations and exchanges between scientists and scientific institutions, registered by the management authorities of the States in which they are located, of herbarium specimens and other preserved, dried or embedded museum specimens, and of live plant material, bearing a label, the model for which has been determined in accordance with the regulatory procedure referred to in Article 18(2) or a similar label issued or approved by a management authority of a third country.

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Article 8

Provisions relating to the control of commercial activities

1. The purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A shall be prohibited.

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2. Member States may prohibit the holding of specimens, in particular live animals of the species listed in Annex A.

3. In accordance with the requirements of other Community legislation on the conservation of wild fauna and flora, exemption from the prohibitions referred to in paragraph 1 may be granted by issuance of a certificate to that effect by a management authority of the Member State in which the specimens are located, on a case-by-case basis where the specimens:

(a) were acquired in, or were introduced into, the Community before the provisions relating to species listed in Appendix I to the Convention or in Annex C1 to Regulation (EEC) No 3626/82 or in Annex A became applicable to the specimens; or

(b) are worked specimens that were acquired more than 50 years previously; or

(c) were introduced into the Community in compliance with the provisions of this Regulation and are to be used for purposes which are not detrimental to the survival of the species concerned; or

(d) are captive-born and bred specimens of an animal species or artificially propagated specimens of a plant species or are parts or derivatives of such specimens; or

(e) are required under exceptional circumstances for the advancement of science or for essential biomedical purposes pursuant to Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes ([1]) where the species in question proves to be the only one suitable for those purposes and where there are no specimens of the species which have been born and bred in captivity; or

(f) are intended for breeding or propagation purposes from which conservation benefits will accrue to the species concerned; or

(g) are intended for research or education aimed at the preservation or conservation of the species; or

(h) originate in a Member State and were taken from the wild in accordance with the legislation in force in that Member State.

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4. General derogations from the prohibitions referred to in paragraph 1 based on the conditions referred to in paragraph 3, as well as general derogations with regard to species listed in Annex A in accordance with point (ii) of Article 3(1)(b) may be defined by the Commission. Any such derogations must be in accordance with the requirements of other Community legislation on the conservation of wild fauna and flora. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

([1]) OJ No L 358, 18.12.1986, p. 1.

▼B

5. The prohibitions referred to in paragraph 1 shall also apply to specimens of the species listed in Annex B except where it can be proved to the satisfaction of the competent authority of the Member State concerned that such specimens were acquired and, if they originated outside the Community, were introduced into it, in accordance with the legislation in force for the conservation of wild fauna and flora.

6. The competent authorities of the Member States shall have discretion to sell any specimen of the species listed in Annexes B to D they have confiscated under this Regulation, provided that it is not thus returned directly to the person or entity from whom it was confiscated or who was party to the offence. Such specimens may then be treated for all purposes as if they had been legally acquired.

Article 9

Movement of live specimens

1. Any movement within the Community of a live specimen of a species listed in Annex A from the location indicated in the import permit or in any certificate issued in compliance with this Regulation shall require prior authorization from a management authority of the Member State in which the specimen is located. In other cases of movement, the person responsible for moving the specimen must be able, where applicable, to provide proof of the legal origin of the specimen.

2. Such authorization shall:

(a) be granted only when the competent scientific authority of such Member State or, where the movement is to another Member State, the competent scientific authority of the latter, is satisfied that the intended accommodation for a live specimen at the place of destination is adequately equipped to conserve and care for it properly;

(b) be confirmed by issuance of a certificate; and

(c) where applicable, be immediately communicated to a management authority of the Member State in which the specimen is to be located.

3. However, no such authorization shall be required if a live animal must be moved for the purpose of urgent veterinary treatment and is returned directly to its authorized location.

4. Where a live specimen of a species listed in Annex B is moved within the Community, the holder of the specimen may relinquish it only after ensuring that the intended recipient is adequately informed of the accommodation, equipment and practices required to ensure the specimen will be properly cared for.

5. When any live specimens are transported into, from or within the Community or are held during any period of transit or transhipment, they shall be prepared, moved and cared for in a manner such as to minimize the risk of injury, damage to health or cruel treatment and, in the case of animals, in conformity with Community legislation on the protection of animals during transport.

▼M14

6. The Commission may establish restrictions on the holding or movement of live specimens of such species in relation to which restrictions on introduction into the Community have been established in accordance with Article 4(6). Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

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Article 10

Certificates to be issued

On receiving an application, together with all the requisite supporting documents, from the person concerned and provided that all the conditions governing their issuance have been fulfilled, a management authority of a Member State may issue a certificate for the purposes referred to in Article 5 (2) (b), 5 (3) and (4), Article 8 (3) and Article 9 (2) (b).

Article 11

Validity of and special conditions for permits and certificates

1. Without prejudice to stricter measures which the Member States may adopt or maintain, permits and certificates issued by the competent authorities of the Member States in accordance with this Regulation shall be valid throughout the Community.

2. (a) However, any such permit or certificate, as well as any permit or certificate issued on the basis of it, shall be deemed void if a competent authority or the Commission, in consultation with the competent authority which issued the permit or certificate, establishes that it was issued on the false premise that the conditions for its issuance were met.

(b) Specimens situated in the territory of a Member State and covered by such documents shall be seized by the competent authorities of that Member State and may be confiscated.

3. Any permit or certificate issued in accordance with this Regulation may stipulate conditions and requirements imposed by the issuing authority to ensure compliance with the provisions thereof. Where such conditions or requirements need to be incorporated in the design of permits or certificates, Member States shall inform the Commission thereof.

4. Any import permit issued on the basis of a copy of the corresponding export permit or re-export certificate shall be valid for the introduction of specimens into the Community only when accompanied by the original of the valid export permit or re-export certificate.

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5. The Commission shall establish time limits for the issuance of permits and certificates. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

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Article 12

Places of introduction and export

1. Member States shall designate customs offices for carrying out the checks and formalities for the introduction into and export from the Community, in order to assign to them a customs-approved treatment or use, within the meaning of Regulation (EEC) No 2913/92, of specimens of species covered by this Regulation and shall state which offices are specifically intended to deal with live specimens.

2. All offices designated in accordance with paragraph 1 shall be provided with sufficient and adequately trained staff. Member States shall ensure that accommodation is provided in accordance with relevant Community legislation as regards the transport and accommodation of live animals and that, where necessary, adequate steps are taken for live plants.

3. All offices designated in accordance with paragraph 1 shall be notified to the Commission which shall publish a list of them in the *Official Journal of the European Communities*.

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4. In exceptional cases and in accordance with the criteria defined by the Commission, a management authority may authorise the introduction into the Community or the export or re-export therefrom at a customs office other than one designated in accordance with paragraph 1. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

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5. Member States shall ensure that at border crossing-points the public are informed of the implementing provisions of this Regulation.

Article 13

Management and scientific authorities and other competent authorities

1. (a) Each Member State shall designate a management authority with primary responsibility for implementation of this Regulation and for communication with the Commission:

(b) Each Member State may also designate additional management authorities and other competent authorities to assist in implementation, in which case the primary management authority shall be responsible for providing the additional authorities with all the information required for correct application of this Regulation.

2. Each Member State shall designate one or more scientific authorities with appropriate qualifications whose duties shall be separate from those of any designated management authority.

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3. (a) Not later than three months before the date of application of this Regulation, Member States shall forward the names and addresses of the designated management authorities, other authorities competent to issue permits or certificates and scientific authorities to the Commission, which shall publish this information in the *Official Journal of the European Communities* within a month.

(b) Each management authority referred to in paragraph 1 (a) shall, if so requested by the Commission, communicate to it within two months the names and specimen signatures of people authorized to sign permits or certificates, and impressions of the stamps, seals or other devices used to authenticate permits or certificates.

(c) Member States shall communicate to the Commission any changes in the information already provided, not later than two months after the implementation of such change.

Article 14

Monitoring of compliance and investigation of infringements

1. (a) The competent authorities of the Member States shall monitor compliance with the provisions of this Regulation.

(b) If, at any time, the competent authorities have reason to believe that these provisions are being infringed, they shall take the appropriate steps to ensure compliance or to instigate legal action.

(c) Member States shall inform the Commission and, in the case of species listed in the Appendices to the Convention, the Convention Secretariat of any steps taken by the competent authorities in relation to significant infringements of this Regulation, including seizures and confiscations.

2. The Commission shall draw the attention of the competent authorities of the Member States to matters whose investigation it considers necessary under this Regulation. Member States shall inform the Commission and, in the case of species listed in the Appendices to the Convention, the Convention Secretariat of the outcome of any subsequent investigation.

3. (a) An enforcement group shall be established consisting of the representatives of each Member State's authorities with responsibility for ensuring the implementation of the provisions of this Regulation. The group shall be chaired by the representative of the Commission.

(b) The enforcement group shall examine any technical question relating to the enforcement of this Regulation raised by the chairman, either on his own initiative or at the request of the members of the group or the committee.

(c) The Commission shall convey the opinions expressed in the enforcement group to the committee.

▼B

Article 15

Communication of information

1. The Member States and the Commission shall communicate to one another the information necessary for implementing this Regulation.

The Member States and the Commission shall ensure that the necessary steps are taken to make the public aware and inform it of the provisions regarding implementation of the Convention and of this Regulation and of the latter's implementing measures.

2. The Commission shall communicate with the Convention Secretariat so as to ensure that the Convention is effectively implemented throughout the territory to which this Regulation applies.

3. The Commission shall immediately communicate any advice from the Scientific Review Group to the management authorities of the Member States concerned.

4. (a) The management authorities of the Member States shall communicate to the Commission before 15 June each year all the information relating to the preceding year required for drawing up the reports referred to in Article VIII.7 (a) of the Convention and equivalent information on international trade in all specimens of species listed in Annexes A, B and C and on introduction into the Community of specimens of species listed in Annex D. ►M14 The information to be communicated and the format for its presentation shall be specified by the Commission in accordance with the regulatory procedure referred to in Article 18(2). ◄

(b) On the basis of the information referred to in (a), the Commission shall publish before 31 October each year a statistical report on the introduction into, and the export and re-export from, the Community of specimens of the species to which this Regulation applies and shall forward to the Convention Secretariat information on the species to which the Convention applies.

(c) Without prejudice to Article 20, the management authorities of the Member States shall, before 15 June of each second year, and for the first time in 1999, communicate to the Commission all the information relating to the preceding two years required for drawing up the reports referred to in Article VIII.7 (b) of the Convention and equivalent information on the provisions of this Regulation that fall outside the scope of the Convention. ►M14 The information to be communicated and the format for its presentation shall be specified by the Commission in accordance with the regulatory procedure referred to in Article 18(2). ◄

(d) On the basis of the information referred to in (c), the Commission shall, before 31 October of each second year, and for the first time in 1999, draw up a report on the implementation and enforcement of this Regulation.

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5. With a view to the preparation of amendments to the Annexes, the competent authorities of the Member States shall forward all relevant information to the Commission. The Commission shall specify the information required, in accordance with the regulatory procedure referred to in Article 18(2).

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►C1 6. Without prejudice to Council Directive 90/313/EEC ◄ of 7 June 1990 on the freedom of access to information on the environment [1], the Commission shall take appropriate measures to protect the confidentiality of information obtained in implementation of this Regulation.

Article 16

Sanctions

1. Member States shall take appropriate measures to ensure the imposition of sanctions for at least the following infringements of this Regulation:

(a) introduction into, or export or re-export from, the Community of specimens without the appropriate permit or certificate or with a false, falsified or invalid permit or certificate or one altered without authorization by the issuing authority;

(b) failure to comply with the stipulations specified on a permit or certificate issued in accordance with this Regulation;

(c) making a false declaration or knowingly providing false information in order to obtain a permit or certificate;

(d) using a false, falsified or invalid permit or certificate or one altered without authorization as a basis for obtaining a Community permit or certificate or for any other official purpose in connection with this Regulation;

(e) making no import notification or a false import notification;

(f) shipment of live specimens not properly prepared so as to minimize the risk of injury, damage to health or cruel treatment;

(g) use of specimens of species listed in Annex A other than in accordance with the authorization given at the time of issuance of the import permit or subsequently;

(h) trade in artificially propagated plants contrary to the provisions laid down in accordance with Article 7(1)(b);

(i) shipment of specimens into or out of or in transit through the territory of the Community without the appropriate permit or certificate issued in accordance with this Regulation and, in the case of export or re-export from a third country party to the Convention, in accordance therewith, or without satisfactory proof of the existence of such permit or certificate;

(j) purchase, offer to purchase, acquisition for commercial purposes, use for commercial gain, display to the public for commercial purposes, sale, keeping for sale, offering for sale or transporting for sale of specimens in contravention of Article 8;

(k) use of a permit or certificate for any specimen other than one for which it was issued;

[1] OJ No L 158, 23.6.1990, p. 56.

▼B

(l) falsification or alteration of any permit or certificate issued in accordance with this Regualation;

(m) failure to disclose rejection of an application for a Community import, export or re-export permit or certificate, in accordance with Article 6 (3).

2. The measures referred to in paragraph 1 shall be appropriate to the nature and gravity of the infringement and shall include provisions relating to the seizure and, where appropriate, confiscation of specimens.

3. Where a specimen is confiscated, it shall be entrusted to a competent authority of the Member State of confiscation which:

(a) following consultation with a scientific authority of that Member State, shall place or otherwise dispose of the specimen under conditions which it deems to be appropriate and consistent with the purposes and provisions of the Convention and this Regulation; and

(b) in the case of a live specimen which has been introduced into the Community, may, after consultation with the State of export, return the specimen to that State at the expense of the convicted person.

4. Where a live specimen of a species listed in Annex B or C arrives at a point of introduction into the Community without the appropriate valid permit or certificate, the specimen must be seized and may be confiscated or, if the consignee refuses to acknowledge the specimen, the competent authorities of the Member State responsible for the point of introduction may, if appropriate, refuse to accept the shipment and require the carrier to return the specimen to its place of departure.

Article 17

The Scientific Review Group

1. A Scientific Review Group is hereby established, consisting of the representatives of each Member State's scientific authority or authorities and chaired by the representative of the Commission.

2. (a) The Scientific Review Group shall examine any scientific question relating to the application of this Regulation — in particular concerning Article 4 (1) (a), (2) (a) and (6) — raised by the chairman, either on his own initiative or at the request of the members of the Group or the Committee.

(b) The Commission shall convey the opinions of the Scientific Review Group to the Committee.

▼M9

Article 18

1. The Commission shall be assisted by a committee.

2. Where reference is made to this Article, Articles 5 and 7 of Decision 1999/468/EC ([1]) shall apply, having regard to the provisions of Article 8 thereof.

([1]) Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23).

▼**M9**

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months. As regards the Committee's tasks referred to in points 1 and 2 of Article 19, if, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

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3. Where reference is made to this paragraph, Article 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

4. Where reference is made to this paragraph, Article 5a(1) to (4) and (5)(b) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.

The time limits laid down in Article 5a(3)(c) and (4)(b) and (e) of Decision 1999/468/EC shall be set at one month, one month and two months respectively.

Article 19

1. In accordance with the regulatory procedure referred to in Article 18(2), the Commission shall adopt the measures referred to in Article 4(6), Article 5(7)(b), Article 7(4), Article 15(4)(a) and (c), Article 15(5) and Article 21(3).

The Commission shall determine the design of the documents referred to in Articles 4, 5, 7(4) and 10 in accordance with the regulatory procedure referred to in Article 18(2).

2. The Commission shall adopt the measures referred to in Article 4(7), Article 5(5), Article 7(1)(c), (2)(c) and (3), Article 8(4), Article 9(6), Article 11(5) and Article 12(4). Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

3. The Commission shall lay down uniform conditions and criteria for:

(a) the issue, validity and use of the documents referred to in Articles 4, 5, 7(4) and 10;

(b) the use of phytosanitary certificates referred to in Article 7(1)(b)(i);

(c) the establishment of procedures, where necessary, for marking specimens in order to facilitate identification and ensure enforcement of the provisions.

Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

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4. The Commission shall adopt, where necessary, additional measures to implement resolutions of the Conference of the Parties to the Convention, decisions or recommendations of the Standing Committee of the Convention and recommendations of the Convention Secretariat. Those measures, designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(3).

5. The Commission shall amend Annexes A to D except in the case of amendments to Annex A which do not result from decisions of the Conference of the Parties to the Convention. Those measures, designed to amend non-essential elements of this Regulation, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 18(4).

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Article 20

Final provisions

Each Member State shall notify the Commission and the Convention Secretariat of the provisions which it adopts specifically for the implementation of this Regulation and of all legal instruments used and measures taken for its implementation and enforcement.

The Commission shall communicate this information to the other Member States.

Article 21

1. Regulation (EEC) No 3626/82 is hereby repealed.

2. Until the measures provided for in points 1 and 2 of Article 19 have been adopted, Member States may maintain or continue to apply the measures adopted in accordance with Regulation (EEC) No 3626/82 and Commission Regulation (EEC) No 3418/83 of 28 November 1983 laying down provisions for the uniform issue and use of the documents required for the implementation in the Community of the Convention on International Trade in Endangered Species of Wild Fauna and Flora ([1]).

▼M14

3. Two months before this Regulation is implemented the Commission, in accordance with the regulatory procedure referred to in Article 18(2) and in consultation with the Scientific Review Group:

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(a) must check that there is no justification for restrictions on the introduction into the Community of the species listed in Annex C1 to Regulation (EEC) No 3626/82 which are not included in Annex A to this Regulation;

(b) shall adopt a Regulation amending Annex D into a representative list of species meeting the criteria laid down in Article 3 (4) (a).

([1]) OJ No L 344, 7.12.1983, p. 1.

▼B

Article 22

This Regulation shall enter into force on the date of its publication in the *Official Journal of the European Communities*.

It shall apply from 1 June 1997.

Articles 12, 13, 14 (3), 16, 17, 18, 19 and 21(3) shall apply from the date of entry into force of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

▼**M17**

ANNEX

Notes on interpretation of Annexes A, B, C and D

1. Species included in these Annexes A, B, C and D are referred to:

   (a) by the name of the species; or

   (b) as being all of the species included in a higher taxon or designated part thereof.

2. The abbreviation 'spp.' is used to denote all species of a higher taxon.

3. Other references to taxa higher than species are for the purposes of information or classification only.

4. Species printed in bold in Annex A are listed there in consistency with their protection as provided for by Council Directive 2009/147/EC ([1]) or Council Directive 92/43/EEC ([2]).

5. The following abbreviations are used for plant taxa below the level of species:

   (a) 'ssp.' is used to denote subspecies;

   (b) 'var(s).' is used to denote variety (varieties); and

   (c) 'fa.' is used to denote forma.

6. The symbols '(I)', '(II)' and '(III)' placed against the name of a species or higher taxon refer to the Appendices to the Convention in which the species concerned are listed as indicated in notes 7 to 9. Where none of these annotations appears, the species concerned are not listed in the Appendices to the Convention.

7. (I) against the name of a species or higher taxon indicates that the species or higher taxon concerned is included in Appendix I to the Convention.

8. (II) against the name of a species or higher taxon indicates that the species or higher taxon concerned is included in Appendix II to the Convention.

9. (III) against the name of a species or higher taxon indicates that it is included in Appendix III to the Convention. In this case the country with respect to which the species or higher taxon is included in Appendix III is also indicated.

10. 'Cultivar' means, following the definition of the 8th edition of the *International Code of Nomenclature for Cultivated Plants*, an assemblage of plants that (a) has been selected for a particular character or combination of characters, (b) is distinct, uniform, and stable in these characters, and (c) when propagated by appropriate means, retains those characters. No new taxon of a cultivar can be regarded as such until its category name and circumscription has been formally published in the latest edition of the International Code of Nomenclature for Cultivated Plants.

11. Hybrids may be specifically included in the Appendices but only if they form distinct and stable populations in the wild. Hybrid animals that have in their previous four generations of the lineage one or more specimens of species included in Annex A or B shall be subject to the provisions of this Regulation just as if they were full species, even if the hybrid concerned is not specifically included in the Annexes.

([1]) OJ L 20, 26.1.2010, p. 7.
([2]) OJ L 206, 22.7.1992, p. 7.

▼**M17**

12. When a species is included in Annex A, B or C, all parts and derivatives of the species are also included in the same Annex unless the species is annotated to indicate that only specific parts and derivatives are included. In accordance with Article 2(t) of this Regulation, the symbol '#' followed by a number placed against the name of a species or higher taxon included in Annex B or C designates parts or derivatives which are specified in relation thereto for the purposes of the Regulation as follows:

#1 Designates all parts and derivatives, except:

(a) seeds, spores and pollen (including pollinia);

(b) seedling or tissue cultures obtained *in vitro*, in solid or liquid media, transported in sterile containers;

(c) cut flowers of artificially propagated plants; and

(d) fruits and parts and derivatives thereof of artificially propagated plants of the genus *Vanilla*.

#2 Designates all parts and derivatives, except:

(a) seeds and pollen; and

(b) finished products packaged and ready for retail trade.

#3 Designates whole and sliced roots and parts of roots.

#4 Designates all parts and derivatives, except:

(a) seeds (including seedpods of Orchidaceae), spores and pollen (including pollinia). The exemption does not apply to seeds from Cactaceae spp. exported from Mexico, and to seeds from *Beccariophoenix madagascariensis* and *Neodypsis decaryi* exported from Madagascar;

(b) seedling or tissue cultures obtained *in vitro*, in solid or liquid media, transported in sterile containers;

(c) cut flowers of artificially propagated plants;

(d) fruits and parts and derivatives thereof of naturalised or artificially propagated plants of the genus *Vanilla* (Orchidaceae) and of the family Cactaceae;

(e) stems, flowers, and parts and derivatives thereof of naturalised or artificially propagated plants of the genera *Opuntia* subgenus *Opuntia* and *Selenicereus* (Cactaceae); and

(f) finished products of *Euphorbia antisyphilitica* packaged and ready for retail trade.

#5 Designates logs, sawn wood and veneer sheets.

#6 Designates logs, sawn wood, veneer sheets and plywood.

▼**M17**

#7 Designates logs, wood-chips, powder and extracts.

#8 Designates underground parts (i.e. roots, rhizomes): whole, parts and powdered.

#9 Designates all parts and derivatives, except those bearing a label 'Produced from *Hoodia* spp. material obtained through controlled harvesting and production in collaboration with the CITES Management Authorities of Botswana/Namibia/South Africa under agreement No BW/NA/ZA xxxxxx'.

#10 Designates logs, sawn wood, veneer sheets, including unfinished wood articles used for the fabrication of bows for stringed musical instruments.

#11 Designates logs, sawn wood, veneer sheets, plywood, powder and extracts.

#12 Designates logs, sawn wood, veneer sheets, plywood and essential oil, excluding finished products packaged and ready for retail trade.

#13 Designates the kernel (also known as 'endosperm', 'pulp' or 'copra') and any derivative thereof.

13. As none of the species or higher taxa of FLORA included in Annex A is annotated to the effect that its hybrids shall be treated in accordance with the provisions of Article 4(1) of the Regulation, this means that artificially propagated hybrids produced from one or more of these species or taxa may be traded with a certificate of artificial propagation, and that seeds and pollen (including pollinia), cut flowers, seedling or tissue cultures obtained *in vitro*, in solid or liquid media, transported in sterile containers of these hybrids are not subject to the provisions of the Regulation.

14. Urine, faeces and ambergris which are waste products and gained without the manipulation of the animal concerned are not subject to the provisions of the Regulation.

15. In respect of fauna species listed in Annex D, the provisions shall apply only to live specimens and whole, or substantially whole, dead specimens except for taxa which are annotated as follows to show that other parts and derivatives are also covered:

§ 1 Any whole, or substantially whole, skins, raw or tanned.

§ 2 Any feathers or any skin or other part with feathers on it.

16. In respect of flora species listed in Annex D, the provisions shall apply only to live specimens except for taxa which are annotated as follows to show that other parts and derivatives are also covered:

§ 3 Dried and fresh plants, including, where appropriate; leaves, roots/rootstock, stems, seeds/spores, bark and fruits.

§ 4 Logs, sawn wood and veneer sheets.

▼M17

	Annex A	Annex B	Annex C	Common name
		FAUNA		
		CHORDATA (CHORDATES)		
MAMMALIA				**Mammals**
ARTIODACTYLA				
Antilocapridae				**Pronghorn**
	Antilocapra americana (I) (Only the population of Mexico; no other population is included in the Annexes to this Regulation)			Mexican pronghorn
Bovidae				**Antelopes, cattle, duikers, gazelles, goats, sheep etc.**
	Addax nasomaculatus (I)			Addax
		Ammotragus lervia (II)		Barbary sheep
			Antilope cervicapra (III Nepal)	Blackbuck
		Bison bison athabascae (II)		Wood bison
	Bos gaurus (I) (Excludes the domesticated form referenced as *Bos frontalis* which is not subject to the provisions of this Regulation)			Gaur
	Bos mutus (I) (Excludes the domesticated form referenced as *Bos grunniens* which is not subject to the provisions of this Regulation)			Wild yak
	Bos sauveli (I)			Kouprey
			Bubalus arnee (III Nepal) (Excludes the domesticated form referenced as *Bubalus bubalis*, which is not subject to the provisions of this Regulation)	Wild Asiatic buffalo
	Bubalus depressicornis (I)			Lowland anoa

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	Annex A	Annex B	Annex C	Common name
	Bubalus mindorensis (I)			Tamarau
	Bubalus quarlesi (I)			Mountain anoa
		Budorcas taxicolor (II)		Takin
	Capra falconeri (I)			Markhor
	Capricornis milneedwardsii (I)			Chinese serow
	Capricornis rubidus (I)			Red serow
	Capricornis sumatraensis (I)			Sumatran serow
	Capricornis thar (I)			Himalayan serow
		Cephalophus brookei (II)		Brooke's duiker
		Cephalophus dorsalis (II)		Bay duiker
	Cephalophus jentinki (I)			Jentink's duiker
		Cephalophus ogilbyi (II)		Ogilby's duiker
		Cephalophus silvicultor (II)		Yellow-backed duiker
		Cephalophus zebra (II)		Zebra duiker
		Damaliscus pygargus pygargus (II)		Bontebok
	Gazella cuvieri (I)			Cuvier's gazelle
			Gazella dorcas (III Algeria/ Tunisia)	Dorcas gazelle
	Gazella leptoceros (I)			Slender-horned gazelle
	Hippotragus niger variani (I)			Giant sable antelope
		Kobus leche (II)		Lechwe
	Naemorhedus baileyi (I)			Red goral
	Naemorhedus caudatus (I)			Long-tailed goral
	Naemorhedus goral (I)			Himalayan goral
	Naemorhedus griseus (I)			Chinese goral

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Nanger dama (I)			Dama gazelle
	Oryx dammah (I)			Scimitar-horned oryx
	Oryx leucoryx (I)			Arabian oryx
		Ovis ammon (II) (Except for the subspecies included in Annex A)		Argali
	Ovis ammon hodgsonii (I)			Tibetan argali
	Ovis ammon nigrimontana (I)			Kara Tau argali
		Ovis canadensis (II) (Only the population of Mexico; no other population is included in the Annexes to this Regulation)		Mexican bighorn sheep
	Ovis orientalis ophion (I)			Cyprus mouflon
		Ovis vignei (II) (Except for the subspecies included in Annex A)		Urial
	Ovis vignei vignei (I)			Ladakh urial
	Pantholops hodgsonii (I)			Chiru
		Philantomba monticola (II)		Blue duiker
	Pseudoryx nghetinhensis (I)			Siola
	Rupicapra pyrenaica ornata (I)			Abruzzo chamois
		Saiga borealis (II)		Mongolian saiga
		Saiga tatarica (II)		Steppe saiga
			Tetracerus quadricornis (III Nepal)	Four-horned antelope
Camelidae				**Camels, guanaco, vicuña**
		Lama guanicoe (II)		Guanaco

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	Annex A	Annex B	Annex C	Common name
	Vicugna vicugna (I) (Except for the populations of: Argentina [the populations of the Provinces of Jujuy and Catamarca and the semi-captive populations of the Provinces of Jujuy, Salta, Catamarca, La Rioja and San Juan]; Bolivia [the whole population]; Chile [population of the Primera Región]; and Peru [the whole population]; which are included in Annex B)	*Vicugna vicugna* (II) (Only the populations of **Argentina** ([1]) [the populations of the Provinces of Jujuy and Catamarca and the semi-captive populations of the Provinces of Jujuy, Salta, Catamarca, La Rioja and San Juan]; **Bolivia** ([2]) [the whole population]; **Chile** ([3]) [population of the Primera Región]; **Peru** ([4]) [the whole population]; all other populations are included in Annex A)		Vicuña
Cervidae				**Deer, huemuls, muntjacs, pudus**
	Axis calamianensis (I)			Calamian deer
	Axis kuhlii (I)			Bawean deer
	Axis porcinus annamiticus (I)			Indochina hog deer
	Blastocerus dichotomus (I)			Marsh deer
		Cervus elaphus bactrianus (II)		Bactrian deer
			Cervus elaphus barbarus (III Algeria/Tunisia)	Barbary deer
	Cervus elaphus hanglu (I)			Hangul
	Dama dama mesopotamica (I)			Persian fallow deer
	Hippocamelus spp. (I)			Huemuls
			Mazama temama cerasina (III Guatemala)	Central American red brocket
	Muntiacus crinifrons (I)			Black muntjac
	Muntiacus vuquangensis (I)			Giant muntjac
			Odocoileus virginianus mayensis (III Guatemala)	Guatemalan white-tailed deer
	Ozotoceros bezoarticus (I)			Pampas deer

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Pudu mephistophiles (II)		Northern pudu
	Pudu puda (I)			Southern pudu
	Rucervus duvaucelii (I)			Barasingha
	Rucervus eldii (I)			Eld's deer
Hippopotamidae				**Hippopotamuses**
		Hexaprotodon liberiensis (II)		Pygmy hippopotamus
		Hippopotamus amphibius (II)		Common hippopotamus
Moschidae				**Musk deer**
	Moschus spp. (I) (Only the populations of Afghanistan, Bhutan, India, Myanmar, Nepal and Pakistan; all other populations are included in Annex B)	*Moschus* spp. (II) (Except for the populations of Afghanistan, Bhutan, India, Myanmar, Nepal and Pakistan, which are included in Annex A)		Musk deer
Suidae				**Babirusa, hogs, pigs**
	Babyrousa babyrussa (I)			Buru babirusa
	Babyrousa bolabatuensis (I)			Bola Batu babirusa
	Babyrousa celebensis (I)			North Sulawesi babirusa
	Babyrousa togeanensis (I)			Malenge babirusa
	Sus salvanius (I)			Pygmy hog
Tayassuidae				**Peccaries**
		Tayassuidae spp. (II) (Except for the species included in Annex A and excluding the populations of *Pecari tajacu* of Mexico and the United States, which are not included in the Annexes to this Regulation)		Peccaries
	Catagonus wagneri (I)			Chacoan peccary

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	Annex A	*Annex B*	*Annex C*	*Common name*
CARNIVORA				
Ailuridae				
	Ailurus fulgens (I)			Red panda
Canidae				**Dogs, foxes, wolves**
			Canis aureus (III India)	Golden jackal
	***Canis lupus* (I/II)** (All populations except those of Spain north of the Duero and Greece north of the 39th parallel. Populations of Bhutan, India, Nepal and Pakistan are listed in Appendix I; all other populations are listed in Appendix II. Excludes the domesticated form and the dingo which are referenced as *Canis lupus familiaris* and *Canis lupus dingo*)	*Canis lupus* (II) (Populations of Spain north of the Duero and Greece north of the 39th parallel. Excludes the domesticated form and the dingo which are referenced as *Canis lupus familiaris* and *Canis lupus dingo*)		Grey wolf
	Canis simensis			Ethiopian wolf
		Cerdocyon thous (II)		Crab-eating fox
		Chrysocyon brachyurus (II)		Maned wolf
		Cuon alpinus (II)		Dhole
		Lycalopex culpaeus (II)		Culpeo
		Lycalopex fulvipes (II)		Darwin's fox
		Lycalopex griseus (II)		South American grey fox
		Lycalopex gymnocercus (II)		Pampas fox
	Speothos venaticus (I)			Bush dog
			Vulpes bengalensis (III India)	Bengal fox
		Vulpes cana (II)		Blanford's fox

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Vulpes zerda (II)		Fennec fox
Eupleridae				
		Cryptoprocta ferox (II)		Fossa
		Eupleres goudotii (II)		Falanouc
		Fossa fossana (II)		Malagasy civet
Felidae				**Cats, cheetahs, leopards, lions, tigers etc.**
		Felidae spp. (II) (Except for the species included in Annex A. Specimens of the domesticated form are not subject to the provisions of this Regulation)		Cats
	Acinonyx jubatus (I) (Annual export quotas for live specimens and hunting trophies are granted as follows: Botswana: 5; Namibia: 150; Zimbabwe: 50. The trade in such specimens is subject to the provisions of Article 4(1) of this Regulation)			Cheetah
	Caracal caracal (I) (Only the population of Asia; all other populations are included in Annex B)			Asian Caracal
	Catopuma temminckii (I)			Asian golden cat
	Felis nigripes (I)			Black-footed cat
	***Felis silvestris* (II)**			Wild cat
	Leopardus geoffroyi (I)			Geoffroy's cat
	Leopardus jacobitus (I)			Andean mountain cat
	Leopardus pardalis (I)			Ocelot

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Annex A	Annex B	Annex C	Common name
Leopardus tigrinus (I)			Oncilla
Leopardus wiedii (I)			Margay
***Lynx lynx* (II)**			Eurasian lynx
Lynx pardinus (I)			Iberian lynx
Neofelis nebulosa (I)			Clouded leopard
Panthera leo persica (I)			Asiatic lion
Panthera onca (I)			Jaguar
Panthera pardus (I)			Leopard
Panthera tigris (I)			Tiger
Pardofelis marmorata (I)			Marbled cat
Prionailurus bengalensis bengalensis (I) (Only the populations of Bangladesh, India and Thailand; all other populations are included in Annex B)			Bengal leopard cat
Prionailurus iriomotensis (II)			Iriomote cat
Prionailurus planiceps (I)			Flat-headed cat
Prionailurus rubiginosus (I) (Only the population of India; all other populations are included in Annex B)			Rusty-spotted cat
Puma concolor coryi (I)			Florida cougar
Puma concolor costaricensis (I)			Costa Rican cougar
Puma concolor couguar (I)			Eastern cougar
Puma yagouaroundi (I) (Only the populations of Central and North America; all other populations are included in Annex B)			Jaguarundi
Uncia uncia (I)			Snow leopard

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	Annex A	*Annex B*	*Annex C*	*Common name*
Herpestidae				**Mongooses**
			Herpestes fuscus (III India)	Indian brown mongoose
			Herpestes edwardsi (III India)	Indian grey mongoose
			Herpestes javanicus auropunctatus (III India)	Small Indian mongoose
			Herpestes smithii (III India)	Ruddy mongoose
			Herpestes urva (III India)	Crab-eating mongoose
			Herpestes vitticollis (III India)	Stripe-necked mongoose
Hyaenidae				**Aardwolf, hyenas**
			Proteles cristata (III Botswana)	Aardwolf
Mephitidae				**Skunks**
		Conepatus humboldtii (II)		Humboldt's hog-nosed skunk
Mustelidae				**Badgers, martens, weasels etc.**
Lutrinae				**Otters**
		Lutrinae spp. (II) (Except for the species included in Annex A)		Otters
	Aonyx capensis microdon (I) (Only the populations of Cameroon and Nigeria; all other populations are included in Annex B)			Cameroon clawless otter
	Enhydra lutris nereis (I)			Southern sea otter
	Lontra felina (I)			Marine otter
	Lontra longicaudis (I)			Neotropical otter
	Lontra provocax (I)			Southern river otter
	Lutra lutra (I)			European otter
	Lutra nippon (I)			Japanese otter

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Pteronura brasiliensis (I)			Giant otter
Mustelinae				**Grisons, martens, tayra, weasels**
			Eira barbara (III Honduras)	Tayra
			Galictis vittata (III Costa Rica)	Greater grison
			Martes flavigula (III India)	Yellow-throated marten
			Martes foina intermedia (III India)	Stone marten
			Martes gwatkinsii (III India)	Nilgiri marten
			Mellivora capensis (III Botswana)	Honey badger
	Mustela nigripes (I)			Black-footed ferret
Odobenidae				**Walrus**
		Odobenus rosmarus (III Canada)		Walrus
Otariidae				**Fur seals, sealions**
		Arctocephalus spp. (II) (Except for the species included in Annex A)		Fur seals
	Arctocephalus philippii (II)			Juan Fernández fur seal
	Arctocephalus townsendi (I)			Guadalupe fur seal
Phocidae				**Seals**
		Mirounga leonina (II)		Southern elephant seal
	Monachus spp. (I)			Monk seals
Procyonidae				**Coatis, olingos**
			Bassaricyon gabbii (III Costa Rica)	Olingo
			Bassariscus sumichrasti (III Costa Rica)	Cacomistle
			Nasua narica (III Honduras)	White-nosed coati

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	Annex A	Annex B	Annex C	Common name
			Nasua nasua solitaria (III Uruguay)	South Brazilian coati
			Potos flavus (III Honduras)	Kinkajou
Ursidae				**Bears**
		Ursidae spp. (II) (Except for the species included in Annex A)		Bears
	Ailuropoda melanoleuca (I)			Giant panda
	Helarctos malayanus (I)			Sun bear
	Melursus ursinus (I)			Sloth bear
	Tremarctos ornatus (I)			Spectacled bear
	***Ursus arctos* (I/II)** (Only the populations of Bhutan, China, Mexico and Mongolia and the subspecies *Ursus arctos isabellinus* are listed in Appendix I; all other populations and subspecies are listed in Appendix II)			Brown bear
	Ursus thibetanus (I)			Asian black bear
Viverridae				**Binturong, civets, linsangs, otter-civet, palm civet**
			Arctictis binturong (III India)	Binturong
			Civettictis civetta (III Botswana)	African civet
		Cynogale bennettii (II)		Otter civet
		Hemigalus derbyanus (II)		Banded palm civet
			Paguma larvata (III India)	Masked palm civet
			Paradoxurus hermaphroditus (III India)	Asian palm civet
			Paradoxurus jerdoni (III India)	Jerdon’s palm civet

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Prionodon linsang (II)		Banded linsang
	Prionodon pardicolor (I)			Spotted linsang
			Viverra civettina (III India)	Malabar large-spotted civet
			Viverra zibetha (III India)	Large Indian civet
			Viverricula indica (III India)	Small Indian civet
CETACEA				**Cetaceans (dolphins, porpoises, whales)**
	CETACEA spp. (I/II) [5]			Cetaceans
CHIROPTERA				
Phyllostomidae				**Broad-nosed bats**
			Platyrrhinus lineatus (III Uruguay)	White-lined bat
Pteropodidae				**Fruit bats, flying foxes**
		Acerodon spp. (II) (Except for the species included in Annex A)		Flying foxes
	Acerodon jubatus (I)			Golden-capped fruit bat
		Pteropus spp. (II) (Except for the species included in Annex A)		Flying foxes
	Pteropus insularis (I)			Ruck flying fox
	Pteropus livingstonii (II)			Comoro flying fox
	Pteropus loochoensis (I)			Japanese flying fox
	Pteropus mariannus (I)			Marianas flying fox
	Pteropus molossinus (I)			Caroline flying fox
	Pteropus pelewensis (I)			Pelew flying fox
	Pteropus pilosus (I)			Large Pelew flying fox
	Pteropus rodricensis (II)			Rodrigues flying fox

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	Annex A	Annex B	Annex C	Common name
	Pteropus samoensis (I)			Samoan flying fox
	Pteropus tonganus (I)			Pacific flying fox
	Pteropus ualanus (I)			Kosrae flying fox
	Pteropus voeltzkowi (II)			Pemba flying fox
	Pteropus yapensis (I)			Yap flying fox
CINGULATA				
Dasypodidae				**Armadillos**
			Cabassous centralis (III Costa Rica)	Northern naked-tailed armadillo
			Cabassous tatouay (III Uruguay)	Greater naked-tailed armadillo
		Chaetophractus nationi (II) (A zero annual export quota has been established. All specimens shall be deemed to be specimens of species included in Annex A and the trade in them shall be regulated accordingly)		Andean hairy armadillo
	Priodontes maximus (I)			Giant armadillo
DASYUROMORPHIA				
Dasyuridae				**Dunnarts, marsupial mice, planigales**
	Sminthopsis longicaudata (I)			Long-tailed dunnart
	Sminthopsis psammophila (I)			Sandhill dunnart
Thylacinidae				**Tasmanian wolf, thylacine**
	Thylacinus cynocephalus (possibly extinct) (I)			Thylacine
DIPROTODONTIA				
Macropodidae				**Kangaroos, wallabies**
		Dendrolagus inustus (II)		Grizzled tree-kangaroo

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Dendrolagus ursinus (II)		Ursine tree-kangaroo
	Lagorchestes hirsutus (I)			Rufous hare-wallaby
	Lagostrophus fasciatus (I)			Banded hare-wallaby
	Onychogalea fraenata (I)			Bridled nail-tail wallaby
	Onychogalea lunata (I)			Crescent nail-tail wallaby
Phalangeridae				**Cuscus**
		Phalanger intercastellanus (II)		Eastern common cuscus
		Phalanger mimicus (II)		Southern common cuscus
		Phalanger orientalis (II)		Northern common cuscus
		Spilocuscus kraemeri (II)		Admiralty Island cuscus
		Spilocuscus maculatus (II)		Common spotted cuscus
		Spilocuscus papuensis (II)		Waigeou cuscus
Potoroidae				**Rat-kangaroos**
	Bettongia spp. (I)			Bettongs
	Caloprymnus campestris (possibly extinct) (I)			Desert rat-kangaroo
Vombatidae				**Wombats**
	Lasiorhinus krefftii (I)			Northern hairy-nosed wombat
LAGOMORPHA				
Leporidae				**Hares, rabbits**
	Caprolagus hispidus (I)			Hispid hare
	Romerolagus diazi (I)			Volcano rabbit
MONOTREMATA				
Tachyglossidae				**Echidnas, spiny anteaters**
		Zaglossus spp. (II)		Long-beaked echidnas

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	Annex A	*Annex B*	*Annex C*	*Common name*
PERAMELEMORPHIA				
Chaeropodidae				**Bandicoots**
	Chaeropus ecaudatus (possibly extinct) (I)			Pig-footed bandicoot
Peramelidae				
	Perameles bougainville (I)			Western barred bandicoot
Thylacomyidae				
	Macrotis lagotis (I)			Greater bilby
	Macrotis leucura (I)			Lesser bilby
PERISSODACTYLA				
Equidae				**Horses, wild asses, zebras**
	Equus africanus (I) (Excludes the domesticated form referenced as *Equus asinus*, which is not subject to the provisions of this Regulation)			African ass
	Equus grevyi (I)			Grévy's zebra
	Equus hemionus (I/II) (The species is listed in Appendix II but subspecies *Equus hemionus hemionus* and *Equus hemionus khur* are listed in Appendix I)			Asiatic wild ass
	Equus kiang (II)			Kiang
	Equus przewalskii (I)			Przewalski's horse
		Equus zebra hartmannae (II)		Hartmann's mountain zebra
	Equus zebra zebra (I)			Cape mountain zebra
Rhinocerotidae				**Rhinoceroses**

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Rhinocerotidae spp. (I) (Except for the subspecies included in Annex B)			Rhinoceroses
		Ceratotherium simum simum (II) (Only the populations of South Africa and Swaziland; all other populations are included in Annex A. For the exclusive purpose of allowing international trade in live animals to appropriate and acceptable destinations and trade in hunting trophies. All other specimens shall be deemed to be specimens of species included in Annex A and trade in them shall be regulated accordingly)		Southern white rhinoceros
Tapiridae				**Tapirs**
	Tapiridae spp. (I) (Except for the species included in Annex B)			Tapirs
		Tapirus terrestris (II)		South American tapir
PHOLIDOTA				
Manidae				**Pangolins**
		Manis spp. (II) (A zero annual export quota has been established for *Manis crassicaudata*, *Manis culionensis*, *Manis javanica* and *Manis pentadactyla* for specimens removed from the wild and traded for primarily commercial purposes)		Pangolins
PILOSA				
Bradypodidae				**Three-toed sloths**

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Bradypus variegatus (II)		Brown-throated sloth
Megalonychidae				**Two-toed sloth**
			Choloepus hoffmanni (III Costa Rica)	Hoffmann's two-toed sloth
Myrmecophagidae				**American anteaters**
		Myrmecophaga tridactyla (II)		Giant anteater
			Tamandua mexicana (III Guatemala)	Northern tamandua
PRIMATES				**Primates (apes and monkeys)**
		PRIMATES spp. (II) (Except for the species included in Annex A)		Primates
Atelidae				**Howlers, spider monkeys**
	Alouatta coibensis (I)			Coiba Island howler
	Alouatta palliata (I)			Mantled howler
	Alouatta pigra (I)			Guatemalan black howler
	Ateles geoffroyi frontatus (I)			Black-browed spider monkey
	Ateles geoffroyi panamensis (I)			Red spider monkey
	Brachyteles arachnoides (I)			Southern muriqui
	Brachyteles hypoxanthus (I)			Northern muriqui
	Oreonax flavicauda (I)			Yellow-tailed woolly monkey
Cebidae				**Marmosets, tamarins, New-world monkeys**
	Callimico goeldii (I)			Goeldi's marmoset
	Callithrix aurita (I)			Buffy-tufted marmoset
	Callithrix flaviceps (I)			Buffy-headed marmoset
	Leontopithecus spp. (I)			Lion tamarins

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Saguinus bicolor (I)			Pied tamarin
	Saguinus geoffroyi (I)			Geoffroy's tamarin
	Saguinus leucopus (I)			White-footed tamarin
	Saguinus martinsi (I)			Martins' bare-face tamarin
	Saguinus oedipus (I)			Cottontop tamarin
	Saimiri oerstedii (I)			Central American squirrel monkey
Cercopithecidae				**Old-world monkeys**
	Cercocebus galeritus (I)			Tana River mangabey
	Cercopithecus diana (I)			Diana monkey
	Cercopithecus roloway (I)			Roloway monkey
	Cercopithecus solatus (II)			Sun-tailed monkey
	Colobus satanas (II)			Black colobus
	Macaca silenus (I)			Lion-tailed macaque
	Mandrillus leucophaeus (I)			Drill
	Mandrillus sphinx (I)			Mandrill
	Nasalis larvatus (I)			Proboscis monkey
	Piliocolobus foai (II)			Central African red colobus
	Piliocolobus gordonorum (II)			Uzungwa red colobus
	Piliocolobus kirkii (I)			Zanzibar red colobus
	Piliocolobus pennantii (II)			Pennant's red colobus
	Piliocolobus preussi (II)			Preuss's red colobus
	Piliocolobus rufomitratus (I)			Tana River red colobus
	Piliocolobus tephrosceles (II)			Ugandan red colobus
	Piliocolobus tholloni (II)			Thollon's red colobus
	Presbytis potenziani (I)			Mentawai langur

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Pygathrix spp. (I)			Douc langurs
	Rhinopithecus spp. (I)			Snub-nosed monkeys
	Semnopithecus ajax (I)			Kashmir grey langur
	Semnopithecus dussumieri (I)			Southern Plains grey langur
	Semnopithecus entellus (I)			Northern Plains grey langur
	Semnopithecus hector (I)			Tarai grey langur
	Semnopithecus hypoleucos (I)			Black-footed grey langur
	Semnopithecus priam (I)			Tufted grey langur
	Semnopithecus schistaceus (I)			Nepal grey langur
	Simias concolor (I)			Simakobou
	Trachypithecus delacouri (II)			Delacour's langur
	Trachypithecus francoisi (II)			François's langur
	Trachypithecus geei (I)			Gee's golden langur
	Trachypithecus hatinhensis (II)			Hatinh langur
	Trachypithecus johnii (II)			Nilgiri langur
	Trachypithecus laotum (II)			Laotian langur
	Trachypithecus pileatus (I)			Capped langur
	Trachypithecus poliocephalus (II)			White-headed langur
	Trachypithecus shortridgei (I)			Shortridge's langur
Cheirogaleidae				**Dwarf lemurs and mouse-lemurs**
	Cheirogaleidae spp. (I)			Dwarf lemurs and mouse lemurs
Daubentoniidae				**Aye-aye**
	Daubentonia madagascariensis (I)			Aye-aye
Hominidae				**Chimpanzees, gorillas, orang-utan**
	Gorilla beringei (I)			Eastern gorilla

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Gorilla gorilla (I)			Western gorilla
	Pan spp. (I)			Chimpanzee and bonobo
	Pongo abelii (I)			Sumatran orangutan
	Pongo pygmaeus (I)			Bornean orangutan
Hylobatidae				**Gibbons**
	Hylobatidae spp. (I)			Gibbons
Indriidae				**Indri, sifakas and woolly lemurs**
	Indriidae spp. (I)			Indri, sifakas and woolly lemurs
Lemuridae				**Large lemurs**
	Lemuridae spp. (I)			Large lemurs
Lepilemuridae				**Sportive lemurs**
	Lepilemuridae spp. (I)			Sportive lemurs
Lorisidae				**Lorises**
	Nycticebus spp. (I)			Slow lorises
Pitheciidae				**Uacaris, titis, sakis**
	Cacajao spp. (I)			Uacaris
	Callicebus barbarabrownae (II)			Barbara Brown's Titi
	Callicebus melanochir (II)			Coastal Black-handed Titi
	Callicebus nigrifrons (II)			Black-fronted Titi
	Callicebus personatus (II)			Atlantic titi
	Chiropotes albinasus (I)			White-nosed saki
Tarsiidae				**Tarsiers**
	Tarsius spp. (II)			Tarsiers
PROBOSCIDEA				
Elephantidae				**Elephants**

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Elephas maximus (I)			Asian elephant
	Loxodonta africana (I) (Except for the populations of Botswana, Namibia, South Africa and Zimbabwe, which are included in Annex B)	*Loxodonta africana* (II) (Only the populations of Botswana, Namibia, South Africa and Zimbabwe ([6]); all other populations are included in Annex A)		African elephant
RODENTIA				
Chinchillidae				**Chinchillas**
	Chinchilla spp. (I) (Specimens of the domesticated form are not subject to the provisions of this Regulation)			Chinchillas
Cuniculidae				**Pacas**
			Cuniculus paca (III Honduras)	Lowland paca
Dasyproctidae				**Agoutis**
			Dasyprocta punctata (III Honduras)	Central American agouti
Erethizontidae				**New-world porcupines**
			Sphiggurus mexicanus (III Honduras)	Mexican hairy dwarf porcupine
			Sphiggurus spinosus (III Uruguay)	Paraguaian hairy dwarf porcupine
Hystricidae				**Old-world porcupines**
	Hystrix cristata			Crested porcupine
Muridae				**Mice, rats**
	Leporillus conditor (I)			Greater stick-nest rat
	Pseudomys fieldi praeconis (I)			Shark Bay mouse
	Xeromys myoides (I)			False water rat

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Zyzomys pedunculatus (I)			Central Australian rock rat
Sciuridae				**Ground squirrels, tree squirrels**
	Cynomys mexicanus (I)			Mexican prairie dog
			Marmota caudata (III India)	Long-tailed marmot
			Marmota himalayana (III India)	Himalayan marmot
		Ratufa spp. (II)		Giant squirrels
		Callosciurus erythraeus		Pallas's Squirrel
		Sciurus carolinensis		Grey squirrel
			Sciurus deppei (III Costa Rica)	Deppe's squirrel
		Sciurus niger		Eastern Fox Squirrel
SCANDENTIA				
		SCANDENTIA spp. (II)		**Treeshrews**
SIRENIA				
Dugongidae				**Dugong**
	Dugong dugon (I)			Dugong
Trichechidae				**Manatees**
	Trichechidae spp. (I/II) (*Trichechus inunguis* and *Trichechus manatus* are listed in Appendix I. *Trichechus senegalensis* is listed in Appendix II)			Manatees
AVES				**Birds**
ANSERIFORMES				
Anatidae				**Ducks, geese, swans etc.**
	Anas aucklandica (I)			Auckland Islands teal
		Anas bernieri (II)		Madagascar teal

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	Annex A	Annex B	Annex C	Common name
	Anas chlorotis (I)			Brown teal
		Anas formosa (II)		Baikal teal
	Anas laysanensis (I)			Laysan duck
	Anas nesiotis (I)			Campbell Island teal
	Anas querquedula			Garganey
	Asarcornis scutulata (I)			White-winged duck
	Aythya innotata			Madagascar pochard
	Aythya nyroca			Ferruginous duck
	Branta canadensis leucopareia (I)			Aleutian goose
	Branta ruficollis (II)			Red-breasted goose
	Branta sandvicensis (I)			Nene
			Cairina moschata (III Honduras)	Muscovy duck
		Coscoroba coscoroba (II)		Coscoroba swan
		Cygnus melancoryphus (II)		Black-necked swan
		Dendrocygna arborea (II)		West Indian whistling-duck
			Dendrocygna autumnalis (III Honduras)	Black-bellied whistling-duck
			Dendrocygna bicolor (III Honduras)	Fulvous whistling-duck
	Mergus octosetaceus			Brazilian merganser
		Oxyura jamaicensis		Ruddy duck
	Oxyura leucocephala **(II)**			White-headed duck
	Rhodonessa caryophyllacea (possibly extinct) (I)			Pink-headed duck
		Sarkidiornis melanotos (II)		Comb duck
	Tadorna cristata			Crested shelduck

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	Annex A	*Annex B*	*Annex C*	*Common name*
APODIFORMES				
Trochilidae				**Hummingbirds**
		Trochilidae spp. (II) (Except for the species included in Annex A)		Hummingbirds
	Glaucis dohrnii (I)			Hook-billed hermit
CHARADRIIFORMES				
Burhinidae				**Thick-knees**
			Burhinus bistriatus (III Guatemala)	Double-striped thick-knee
Laridae				**Gulls, terns**
	Larus relictus (I)			Relict gull
Scolopacidae				**Curlews, greenshanks**
	Numenius borealis (I)			Eskimo curlew
	Numenius tenuirostris (I)			Slender-billed curlew
	Tringa guttifer (I)			Nordmann's greenshank
CICONIIFORMES				
Ardeidae				**Egrets, herons**
	Ardea alba			Great egret
	Bubulcus ibis			Cattle egret
	Egretta garzetta			Little egret
Balaenicipitidae				**Shoebill, whale-headed stork**
		Balaeniceps rex (II)		Shoebill
Ciconiidae				**Storks**
	Ciconia boyciana (I)			Oriental stork
	***Ciconia nigra* (II)**			Black stork
	Ciconia stormi			Storm's stork

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Jabiru mycteria (I)			Jabiru
	Leptoptilos dubius			Greater adjutant stork
	Mycteria cinerea (I)			Milky stork
Phoenicopteridae				**Flamingos**
		Phoenicopteridae spp. (II) (Except for the species included in Annex A)		Flamingos
	***Phoenicopterus ruber* (II)**			Greater flamingo
Threskiornithidae				**Ibises, spoonbills**
		Eudocimus ruber (II)		Scarlet ibis
	Geronticus calvus (II)			Bald ibis
	Geronticus eremita (I)			Waldrapp
	Nipponia nippon (I)			Crested ibis
	***Platalea leucorodia* (II)**			Eurasian spoonbill
	Pseudibis gigantea			Giant ibis
COLUMBIFORMES				
Columbidae				**Doves, pigeons**
	Caloenas nicobarica (I)			Nicobar pigeon
	Claravis godefrida			Purple-winged ground-dove
	Columba livia			Rock pigeon
	Ducula mindorensis (I)			Mindoro zone-tailed pigeon
		Gallicolumba luzonica (II)		Luzon bleeding-heart
		Goura spp. (II)		Crowned-pigeons
	Leptotila wellsi			Grenada dove
			Nesoenas mayeri (III Mauritius)	Pink pigeon
	Streptopelia turtur			European turtle-dove

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	Annex A	*Annex B*	*Annex C*	*Common name*
CORACIIFORMES				
Bucerotidae				**Hornbills**
		Aceros spp. (II) (Except for the species included in Annex A)		Hornbills
	Aceros nipalensis (I)			Rufous-necked hornbill
		Anorrhinus spp. (II)		Hornbills
		Anthracoceros spp. (II)		Hornbills
		Berenicornis spp. (II)		Hornbills
		Buceros spp. (II) (Except for the species included in Annex A)		Hornbills
	Buceros bicornis (I)			Great hornbill
		Penelopides spp. (II)		Hornbills
	Rhinoplax vigil (I)			Helmeted hornbill
		Rhyticeros spp. (II) (Except for the species included in Annex A)		Hornbills
	Rhyticeros subruficollis (I)			Plain-pouched hornbill
CUCULIFORMES				
Musophagidae				**Turacos**
		Tauraco spp. (II) (Except for the species included in Annex A)		Turacos
	Tauraco bannermani (II)			Bannerman's turaco
FALCONIFORMES				**Diurnal birds of prey (eagles, falcons, hawks, vultures)**
		FALCONIFORMES spp. (II) (Except for the species included in Annex A and for one species of the family Cathartidae included in Annex C; the other species of that family are not included in the Annexes to this Regulation)		Diurnal birds of prey

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	Annex A	Annex B	Annex C	Common name
Accipitridae				**Hawks, eagles**
	***Accipiter brevipes* (II)**			Levant sparrowhawk
	***Accipiter gentilis* (II)**			Northern goshawk
	***Accipiter nisus* (II)**			Eurasian sparrowhawk
	***Aegypius monachus* (II)**			Cinereous vulture
	Aquila adalberti (I)			Adalbert's eagle
	***Aquila chrysaetos* (II)**			Golden eagle
	***Aquila clanga* (II)**			Greater spotted eagle
	Aquila heliaca (I)			Imperial eagle
	***Aquila pomarina* (II)**			Lesser spotted eagle
	***Buteo buteo* (II)**			Common buzzard
	***Buteo lagopus* (II)**			Rough-legged buzzard
	***Buteo rufinus* (II)**			Long-legged buzzard
	Chondrohierax uncinatus wilsonii (I)			Cuban hook-billed kite
	***Circaetus gallicus* (II)**			Short-toed snake-eagle
	***Circus aeruginosus* (II)**			Western marsh-harrier
	***Circus cyaneus* (II)**			Northern harrier
	***Circus macrourus* (II)**			Pallid harrier
	***Circus pygargus* (II)**			Montagu's harrier
	***Elanus caeruleus* (II)**			Black-winged kite
	Eutriorchis astur (II)			Madagascar serpent-eagle

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	Annex A	Annex B	Annex C	Common name
	***Gypaetus barbatus* (II)**			Lammergeier
	***Gyps fulvus* (II)**			Eurasian griffon
	Haliaeetus spp. (I/II) (*Haliaeetus albicilla* is listed in Appendix I; the other species are listed in Appendix II)			Sea-eagles
	Harpia harpyja (I)			Harpy eagle
	***Hieraaetus fasciatus* (II)**			Bonelli's eagle
	***Hieraaetus pennatus* (II)**			Booted eagle
	Leucopternis occidentalis (II)			Grey-backed hawk
	***Milvus migrans* (II)** (Except *for Milvus migrans lineatus* which is included in Annex B)			Black kite
	***Milvus milvus* (II)**			Red kite
	***Neophron percnopterus* (II)**			Egyptian vulture
	***Pernis apivorus* (II)**			European honey-buzzard
	Pithecophaga jefferyi (I)			Great Philippine eagle
Cathartidae				**New world vultures**
	Gymnogyps californianus (I)			California condor
			Sarcoramphus papa (III Honduras)	King vulture
	Vultur gryphus (I)			Andean condor
Falconidae				**Falcons**
	Falco araeus (I)			Seychelles kestrel
	***Falco biarmicus* (II)**			Lanner falcon
	***Falco cherrug* (II)**			Saker falcon
	***Falco columbarius* (II)**			Merlin

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	Annex A	*Annex B*	*Annex C*	*Common name*
	***Falco eleonorae* (II)**			Eleonora's falcon
	Falco jugger (I)			Laggar falcon
	***Falco naumanni* (II)**			Lesser kestrel
	Falco newtoni (I) (Only the population of the Seychelles)			Newton's kestrel
	Falco pelegrinoides (I)			Barbary falcon
	Falco peregrinus (I)			Peregrine falcon
	Falco punctatus (I)			Mauritius kestrel
	Falco rusticolus (I)			Gyrfalcon
	***Falco subbuteo* (II)**			Eurasian hobby
	***Falco tinnunculus* (II)**			Common kestrel
	***Falco vespertinus* (II)**			Red-footed falcon
Pandionidae				**Ospreys**
	***Pandion haliaetus* (II)**			Osprey
GALLIFORMES				
Cracidae				
	Crax alberti (III Colombia)			Blue-knobbed curassow
	Crax blumenbachii (I)			Red-billed curassow
			Crax daubentoni (III Colombia)	Yellow-knobbed curassow
		Crax fasciolata		Bare-faced Curassow
			Crax globulosa (III Colombia)	Wattled curassow
			Crax rubra (III Colombia, Costa Rica, Guatemala and Honduras)	Great currasow
	Mitu mitu (I)			Alagoas curassow
	Oreophasis derbianus (I)			Horned guan

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	Annex A	*Annex B*	*Annex C*	*Common name*
			Ortalis vetula (III Guatemala/ Honduras)	Plain chachalaca
			Pauxi pauxi (III Colombia)	Helmeted curassow
	Penelope albipennis (I)			White-winged guan
			Penelope purpurascens (III Honduras)	Crested guan
			Penelopina nigra (III Guatemala)	Highland guan
	Pipile jacutinga (I)			Black-fronted piping guan
	Pipile pipile (I)			Trinidad piping guan
Megapodiidae				**Megapodes, scrubfowl**
	Macrocephalon maleo (I)			Maleo
Phasianidae				**Grouse, guineafowl, partridges, pheasants, tragopans**
		Argusianus argus (II)		Great argus
	Catreus wallichii (I)			Cheer pheasant
	Colinus virginianus ridgwayi (I)			Masked bobwhite
	Crossoptilon crossoptilon (I)			White eared-pheasant
	Crossoptilon mantchuricum (I)			Brown eared-pheasant
		Gallus sonneratii (II)		Grey junglefowl
		Ithaginis cruentus (II)		Blood pheasant
	Lophophorus impejanus (I)			Himalayan monal
	Lophophorus lhuysii (I)			Chinese monal
	Lophophorus sclateri (I)			Sclater's monal
	Lophura edwardsi (I)			Edwards' pheasant
		Lophura hatinhensis		Vietnamese fireback
	Lophura imperialis (I)			Imperial pheasant
	Lophura swinhoii (I)			Swinhoe's pheasant

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	Annex A	*Annex B*	*Annex C*	*Common name*
			Meleagris ocellata (III Guatemala)	Ocellated turkey
	Odontophorus strophium			Gorgeted wood-quail
	Ophrysia superciliosa			Himalayan quail
		Pavo muticus (II)		Green peafowl
		Polyplectron bicalcaratum (II)		Grey peacock-pheasant
		Polyplectron germaini (II)		Germain's peacock-pheasant
		Polyplectron malacense (II)		Malayan peacock-pheasant
	Polyplectron napoleonis (I)			Palawan peacock-pheasant
		Polyplectron schleiermacheri (II)		Bornean peacock-pheasant
	Rheinardia ocellata (I)			Crested argus
	Syrmaticus ellioti (I)			Elliot's pheasant
	Syrmaticus humiae (I)			Hume's pheasant
	Syrmaticus mikado (I)			Mikado pheasant
	Tetraogallus caspius (I)			Caspian snowcock
	Tetraogallus tibetanus (I)			Tibetan snowcock
	Tragopan blythii (I)			Blyth's tragopan
	Tragopan caboti (I)			Cabot's tragopan
	Tragopan melanocephalus (I)			Western tragopan
			Tragopan satyra (III Nepal)	Satyr tragopan
	Tympanuchus cupido attwateri (I)			Attwater's prairie-chicken
GRUIFORMES				
Gruidae				**Cranes**
		Gruidae spp. (II) (Except for the species included in Annex A)		Cranes
	Grus americana (I)			Whooping crane

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Grus canadensis (I/II) (The species is listed in Appendix II but subspecies *Grus canadensis nesiotes* and *Grus canadensis pulla* are listed in Appendix I)			Sandhill crane
	***Grus grus* (II)**			Common crane
	Grus japonensis (I)			Red-crowned crane
	Grus leucogeranus (I)			Siberian crane
	Grus monacha (I)			Hooded crane
	Grus nigricollis (I)			Black-necked crane
	Grus vipio (I)			White-necked crane
Otididae				**Bustards**
		Otididae spp. (II) (Except for the species included in Annex A)		Bustards
	Ardeotis nigriceps (I)			Indian bustard
	Chlamydotis macqueenii (I)			Macqueen's bustard
	Chlamydotis undulata (I)			Houbara bustard
	Houbaropsis bengalensis (I)			Bengal florican
	***Otis tarda* (II)**			Great bustard
	Sypheotides indicus (II)			Lesser florican
	***Tetrax tetrax* (II)**			Little bustard
Rallidae				**Coots, rails**
	Gallirallus sylvestris (I)			Lord Howe rail
Rhynochetidae				**Kagu**
	Rhynochetos jubatus (I)			Kagu
PASSERIFORMES				
Atrichornithidae				**Scrub-birds**

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Atrichornis clamosus (I)			Noisy scrub-bird
Cotingidae				**Cotingas**
			Cephalopterus ornatus (III Colombia)	Amazonian umbrella bird
			Cephalopterus penduliger (III Colombia)	Long-wattled umbrella bird
	Cotinga maculata (I)			Banded cotinga
		Rupicola spp. (II)		Cocks-of-the-rock
	Xipholena atropurpurea (I)			White-winged cotinga
Emberizidae				**Cardinals, tanagers**
		Gubernatrix cristata (II)		Yellow cardinal
		Paroaria capitata (II)		Yellow-billed cardinal
		Paroaria coronata (II)		Red-crested cardinal
		Tangara fastuosa (II)		Seven-coloured tanager
Estrildidae				**Mannikins, waxbills**
		Amandava formosa (II)		Green avadavat
		Lonchura fuscata		Timor sparrow
		Lonchura oryzivora (II)		Java sparrow
		Poephila cincta cincta (II)		Southern black-throated finch
Fringillidae				**Finches**
	Carduelis cucullata (I)			Red siskin
		Carduelis yarrellii (II)		Yellow-faced siskin
Hirundinidae				**Martins**
	Pseudochelidon sirintarae (I)			White-eyed river-martin
Icteridae				**New-world blackbirds**
	Xanthopsar flavus (I)			Saffron-cowled blackbird

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	Annex A	*Annex B*	*Annex C*	*Common name*
Meliphagidae				**Honey-eaters**
	Lichenostomus melanops cassidix (I)			Helmeted honeyeater
Muscicapidae				**Old-world flycatchers, babblers, etc.**
	Acrocephalus rodericanus (III Mauritius)			Rodrigues brush-warbler
		Cyornis ruckii (II)		Rueck's blue-flycatcher
	Dasyornis broadbenti litoralis (possibly extinct) (I)			Western rufous bristlebird
	Dasyornis longirostris (I)			Western bristlebird
		Garrulax canorus (II)		Chinese Hwamei
		Garrulax taewanus (II)		Taiwan Hwamei
		Leiothrix argentauris (II)		Silver-eared mesia
		Leiothrix lutea (II)		Red-billed leiothrix
		Liocichla omeiensis (II)		Omei Shan liocichla
	Picathartes gymnocephalus (I)			White-necked rockfowl
	Picathartes oreas (I)			Grey-necked rockfowl
			Terpsiphone bourbonnensis (III Mauritius)	Mascarene paradise-flycatcher
Paradisaeidae				**Birds of paradise**
		Paradisaeidae spp. (II)		Birds of paradise
Pittidae				**Pittas**
		Pitta guajana (II)		Banded pitta
	Pitta gurneyi (I)			Gurney's pitta
	Pitta kochi (I)			Whiskered pitta
		Pitta nympha (II)		Fairy pitta
Pycnonotidae				**Bulbuls**

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	Annex A	Annex B	Annex C	Common name
		Pycnonotus zeylanicus (II)		Straw-headed bulbul
Sturnidae				**Mynas**
		Gracula religiosa (II)		Hill myna
	Leucopsar rothschildi (I)			Bali myna
Zosteropidae				**White-eyes**
	Zosterops albogularis (I)			White-chested white-eye
PELECANIFORMES				
Fregatidae				**Frigatebirds**
	Fregata andrewsi (I)			Christmas frigatebird
Pelecanidae				**Pelicans**
	Pelecanus crispus (I)			Dalmatian pelican
Sulidae				**Boobies**
	Papasula abbotti (I)			Abbott's booby
PICIFORMES				
Capitonidae				**Barbets**
			Semnornis ramphastinus (III Colombia)	Toucan barbet
Picidae				**Woodpeckers**
	Campephilus imperialis (I)			Imperial woodpecker
	Dryocopus javensis richardsi (I)			Tristram's woodpecker
Ramphastidae				**Toucans**
			Baillonius bailloni (III Argentina)	Saffron toucanet
		Pteroglossus aracari (II)		Black-necked aracari
			Pteroglossus castanotis (III Argentina)	Chestnut-eared aracari

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Pteroglossus viridis (II)		Green aracari
			Ramphastos dicolorus (III Argentina)	Red-breasted toucan
		Ramphastos sulfuratus (II)		Keel-billed toucan
		Ramphastos toco (II)		Toco toucan
		Ramphastos tucanus (II)		Red-billed toucan
		Ramphastos vitellinus (II)		Channel-billed toucan
			Selenidera maculirostris (III Argentina)	Spot-billed toucanet
PODICIPEDIFORMES				
Podicipedidae				**Grebes**
	Podilymbus gigas (I)			Atitlan Grebe
PROCELLARIIFORMES				
Diomedeidae				**Albatrosses**
	Phoebastria albatrus (I)			Short-tailed albatross
PSITTACIFORMES				**Cockatoos, lories, macaws, parakeets, parrots etc.**
		PSITTACIFORMES spp. (II) (Except for the species included in Annex A and excluding *Agapornis roseicollis*, *Melopsittacus undulatus*, *Nymphicus hollandicus* and *Psittacula krameri*, which are not included in the Annexes to this Regulation)		**Parrots, etc.**
Cacatuidae				**Cockatoos**
	Cacatua goffiniana (I)			Tanimbar cockatoo
	Cacatua haematuropygia (I)			Philippine cockatoo
	Cacatua moluccensis (I)			Salmon-crested cockatoo

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	Annex A	Annex B	Annex C	Common name
	Cacatua sulphurea (I)			Yellow-crested cockatoo
	Probosciger aterrimus (I)			Palm cockatoo
Loriidae				**Lories, lorikeets**
	Eos histrio (I)			Red and blue lory
	Vini spp. (I/II) (*Vini ultramarina* is listed in Appendix I, the other species are listed in Appendix II)			Blue lorikeets
Psittacidae				**Amazons, macaws, parakeets, parrots**
	Amazona arausiaca (I)			Red-necked parrot
	Amazona auropalliata (I)			Yellow-naped parrot
	Amazona barbadensis (I)			Yellow-shouldered parrot
	Amazona brasiliensis (I)			Red-tailed parrot
	Amazona finschi (I)			Lilac-crowned parrot
	Amazona guildingii (I)			St Vincent parrot
	Amazona imperialis (I)			Imperial parrot
	Amazona leucocephala (I)			Cuban parrot
	Amazona oratrix (I)			Yellow-headed parrot
	Amazona pretrei (I)			Red-spectacled parrot
	Amazona rhodocorytha (I)			Red-browed parrot
	Amazona tucumana (I)			Tucuman parrot
	Amazona versicolor (I)			Saint Lucia parrot
	Amazona vinacea (I)			Vinaceous parrot
	Amazona viridigenalis (I)			Green-cheeked parrot
	Amazona vittata (I)			Puerto Rican parrot
	Anodorhynchus spp. (I)			Blue macaws

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	Annex A	Annex B	Annex C	Common name
	Ara ambiguus (I)			Great green macaw
	Ara glaucogularis (I)			Blue-throated macaw
	Ara macao (I)			Scarlet macaw
	Ara militaris (I)			Military macaw
	Ara rubrogenys (I)			Red-fronted macaw
	Cyanopsitta spixii (I)			Spix's macaw
	Cyanoramphus cookii (I)			Norfolk Island parakeet
	Cyanoramphus forbesi (I)			Chatham Island yellow-fronted parakeet
	Cyanoramphus novaezelandiae (I)			Red-fronted parakeet
	Cyanoramphus saisseti (I)			Red-crowned parakeet
	Cyclopsitta diophthalma coxeni (I)			Coxen's double-eyed fig parrot
	Eunymphicus cornutus (I)			Horned parakeet
	Guarouba guarouba (I)			Golden parakeet
	Neophema chrysogaster (I)			Orange-bellied parrot
	Ognorhynchus icterotis (I)			Yellow-eared parrot
	Pezoporus occidentalis (possibly extinct) (I)			Night parrot
	Pezoporus wallicus (I)			Ground parrot
	Pionopsitta pileata (I)			Pileated parrot
	Primolius couloni (I)			Blue-headed macaw
	Primolius maracana (I)			Blue-winged macaw
	Psephotus chrysopterygius (I)			Golden-shouldered parrot
	Psephotus dissimilis (I)			Hooded parrot
	Psephotus pulcherrimus (possibly extinct) (I)			Paradise parrot

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Psittacula echo (I)			Mauritius parakeet
	Pyrrhura cruentata (I)			Blue-throated parakeet
	Rhynchopsitta spp. (I)			Thick-billed parrots
	Strigops habroptilus (I)			Kakapo
RHEIFORMES				
Rheidae				**Rheas**
	Pterocnemia pennata (I) (Except *Pterocnemia pennata pennata* which is included in Annex B)			Lesser rhea
		Pterocnemia pennata pennata (II)		Lesser rhea
		Rhea americana (II)		Greater rhea
SPHENISCIFORMES				
Spheniscidae				**Penguins**
		Spheniscus demersus (II)		Jackass penguin
	Spheniscus humboldti (I)			Humboldt penguin
STRIGIFORMES				**Owls**
		STRIGIFORMES spp. (II) (Except for the species included in Annex A)		Owls
Strigidae				**Owls**
	***Aegolius funereus* (II)**			Boreal owl
	***Asio flammeus* (II)**			Short-eared owl
	***Asio otus* (II)**			Long-eared owl
	***Athene noctua* (II)**			Little owl
	***Bubo bubo* (II)** (Except for *Bubo bubo bengalensis* which is included in Annex B)			Eurasian eagle-owl

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	Annex A	Annex B	Annex C	Common name
	***Glaucidium passerinum* (II)**			Eurasian pygmy-owl
	Heteroglaux blewitti (I)			Forest owlet
	Mimizuku gurneyi (I)			Lesser eagle-owl
	Ninox natalis (I)			Christmas hawk-owl
	Ninox novaeseelandiae undulata (I)			Norfolk boobook
	***Nyctea scandiaca* (II)**			Snowy owl
	Otus ireneae (II)			Sokoke scops-owl
	***Otus scops* (II)**			Eurasian scops-owl
	***Strix aluco* (II)**			Tawny owl
	***Strix nebulosa* (II)**			Great grey owl
	***Strix uralensis* (II)** (Except for *Strix uralensis davidi* which is included in Annex B)			Ural owl
	***Surnia ulula* (II)**			Northern hawk owl
Tytonidae				**Barn owls**
	***Tyto alba* (II)**			Barn owl
	Tyto soumagnei (I)			Soumagne's owl
STRUTHIONIFORMES				
Struthionidae				**Ostrich**
	Struthio camelus (I) (Only the populations of Algeria, Burkina Faso, Cameroon, the Central African Republic, Chad, Mali, Mauritania, Morocco, the Niger, Nigeria, Senegal and the Sudan; all other populations are not included in the Annexes to this Regulation)			Ostrich

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	Annex A	*Annex B*	*Annex C*	*Common name*
TINAMIFORMES				
Tinamidae				**Tinamous**
	Tinamus solitarius (I)			Solitary tinamou
TROGONIFORMES				
Trogonidae				**Quetzals**
	Pharomachrus mocinno (I)			Resplendent quetzal
REPTILIA				**Reptiles**
CROCODYLIA				**Alligators, caimans, crocodiles**
		CROCODYLIA spp. (II) (Except for the species included in Annex A)		Alligators, caimans, crocodiles
Alligatoridae				**Alligators, caimans**
	Alligator sinensis (I)			Chinese alligator
	Caiman crocodilus apaporiensis (I)			Rio Apaporis spectacled caiman
	Caiman latirostris (I) (Except for the population of Argentina, which is included in Annex B)			Broad-nosed caiman
	Melanosuchus niger (I) (Except for the population of Brazil, which is included in Annex B, and population of Ecuador, which is included in Annex B and is subject to a zero annual export quota until an annual export quota has been approved by the CITES Secretariat and the IUCN/SSC Crocodile Specialist Group)			Black caiman
Crocodylidae				**Crocodiles**

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	Annex A	Annex B	Annex C	Common name
	Crocodylus acutus (I) (Except for the population of Cuba, which is included in Annex B)			American crocodile
	Crocodylus cataphractus (I)			African slender-snouted crocodile
	Crocodylus intermedius (I)			Orinoco crocodile
	Crocodylus mindorensis (I)			Philippine crocodile
	Crocodylus moreletii (I) (Except for the populations of Belize and Mexico, which are included in Annex B, with a zero quota for wild specimens traded for commercial purposes)			Morelet's crocodile
	Crocodylus niloticus (I) (Except for the populations of Botswana, Egypt [subject to a zero quota for wild specimens traded for commercial purposes], Ethiopia, Kenya, Madagascar, Malawi, Mozambique, Namibia, South Africa, Uganda, the United Republic of Tanzania [subject to an annual export quota of no more than 1 600 wild specimens including hunting trophies, in addition to ranched specimens], Zambia and Zimbabwe; these populations are included in Annex B)			Nile crocodile
	Crocodylus palustris (I)			Mugger crocodile

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Crocodylus porosus (I) (Except for the populations of Australia, Indonesia and Papua New Guinea, which are included in Annex B)			Estuarine crocodile
	Crocodylus rhombifer (I)			Cuban crocodile
	Crocodylus siamensis (I)			Siamese crocodile
	Osteolaemus tetraspis (I)			West African dwarf crocodile
	Tomistoma schlegelii (I)			False gharial
Gavialidae				**Gavial or gharial**
	Gavialis gangeticus (I)			Gharial
RHYNCHOCEPHALIA				
Sphenodontidae				**Tuataras**
	Sphenodon spp. (I)			Tuataras
SAURIA				
Agamidae				**Spiny-tailed lizards (Agamas, mastigures)**
		Uromastyx spp. (II)		Spiny-tailed lizards
Chamaeleonidae				**Chameleons**
		Bradypodion spp. (II)		Dwarf chameleons
		Brookesia spp. (II) (Except for the species included in Annex A)		Dwarf chameleons
	Brookesia perarmata (I)			Dwarf spiny chameleon
		Calumma spp. (II)		Madagascar chameleons

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Chamaeleo spp. (II) (Except for the species included in Annex A)		Chameleons
	***Chamaeleo chamaeleon* (II)**			European chameleon
		Furcifer spp. (II)		Madagascar chameleons
		Kinyongia spp. (II)		Dwarf chameleons
		Nadzikambia spp. (II)		Dwarf chameleons
Cordylidae				**Spiny-tailed lizards**
		Cordylus spp. (II)		Girdled lizards
Gekkonidae				**Geckos**
		Cyrtodactylus serpensinsula (II)		Serpent Island gecko
			Hoplodactylus spp. (III New Zealand)	Sticky-toed geckos
			Naultinus spp. (III New Zealand)	New Zealand tree geckos
		Phelsuma spp. (II) (Except for the species included in Annex A)		Day geckos
	Phelsuma guentheri (II)			Round Island day gecko
		Uroplatus spp. (II)		Flat-tailed geckos
Helodermatidae				**Gila monster and beaded lizard**
		Heloderma spp. (II) (Except for the subspecies included in Annex A)		Gila monster and beaded lizard
	Heloderma horridum charles-bogerti (I)			Guatemalan beaded lizard
Iguanidae				**Iguanas**

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Amblyrhynchus cristatus (II)		Galapagos marine iguana
	Brachylophus spp. (I)			Fiji iguanas
		Conolophus spp. (II)		Galapagos land iguanas
		Ctenosaura bakeri (II)		Utila Island spiny-tailed iguana
		Ctenosaura oedirhina (II)		Roatan spiny-tailed iguana
		Ctenosaura melanosterna (II)		Rio Aguan Valley spiny-tailed iguana
		Ctenosaura palearis (II)		Guatemalan Spiny-tailed iguana
	Cyclura spp. (I)			Ground iguanas
		Iguana spp. (II)		Iguanas
		Phrynosoma blainvillii (II)		Blaineville's horned lizard
		Phrynosoma cerroense (II)		Cedros Island horned lizard
		Phrynosoma coronatum (II)		Coast horned lizard
		Phrynosoma wigginsi (II)		Gulf coast horned lizard
	Sauromalus varius (I)			San Esteban Island chuckwalla
Lacertidae				**Lizards**
	Gallotia simonyi (I)			Hierro giant lizard
	***Podarcis lilfordi* (II)**			Lilford's wall lizard
	***Podarcis pityusensis* (II)**			Ibiza wall lizard
Scincidae				**Skinks**
		Corucia zebrata (II)		Prehensile-tailed skink

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	Annex A	Annex B	Annex C	Common name
Teiidae				**Caiman lizards, tegu lizards**
		Crocodilurus amazonicus (II)		Dragon lizard
		Dracaena spp. (II)		Caiman lizards
		Tupinambis spp.(II)		Tegus
Varanidae				**Monitor lizards**
		Varanus spp. (II) (Except for the species included in Annex A)		Monitor lizards
	Varanus bengalensis (I)			Indian monitor
	Varanus flavescens (I)			Yellow monitor
	Varanus griseus (I)			Desert monitor
	Varanus komodoensis (I)			Komodo dragon
	Varanus nebulosus (I)			Clouded monitor
	Varanus olivaceus (II)			Gray's monitor
Xenosauridae				**Chinese crocodile lizard**
		Shinisaurus crocodilurus (II)		Chinese crocodile lizard
SERPENTES				**Snakes**
Boidae				**Boas**
		Boidae spp. (II) (Except for the species included in Annex A)		Boas
	Acrantophis spp. (I)			Madagascar ground boas

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	Annex A	Annex B	Annex C	Common name
	Boa constrictor occidentalis (I)			Argentine boa constrictor
	Epicrates inornatus (I)			Puerto Rican boa
	Epicrates monensis (I)			Virgin Island tree boa
	Epicrates subflavus (I)			Jamaican boa
	***Eryx jaculus* (II)**			Spotted sand boa
	Sanzinia madagascariensis (I)			Madagascar tree boa
Bolyeriidae				**Round Island boas**
		Bolyeriidae spp. (II) (Except for the species included in Annex A)		Round Island boas
	Bolyeria multocarinata (I)			Round Island boa
	Casarea dussumieri (I)			Round Island keel-scaled boa
Colubridae				**Typical snakes, water snakes, whip snakes**
			Atretium schistosum (III India)	Olive keel-back
			Cerberus rynchops (III India)	Dog-faced water snake
		Clelia clelia (II)		Mussurana
		Cyclagras gigas (II)		False cobra
		Elachistodon westermanni (II)		Indian egg-eating snake
		Ptyas mucosus (II)		Common rat snake

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	Annex A	Annex B	Annex C	Common name
			Xenochrophis piscator (III India)	Checkered keel-back
Elapidae				**Cobras, coral snakes**
		Hoplocephalus bungaroides (II)		Broad-headed snake
			Micrurus diastema (III Honduras)	Atlantic coral snake
			Micrurus nigrocinctus (III Honduras)	Central American coral snake
		Naja atra (II)		Chinese spitting cobra
		Naja kaouthia (II)		Monocellate cobra
		Naja mandalayensis (II)		Burmese spitting cobra
		Naja naja (II)		Indian cobra
		Naja oxiana (II)		Central Asian cobra
		Naja philippinensis (II)		North Philippine spitting cobra
		Naja sagittifera (II)		Andaman cobra
		Naja samarensis (II)		South-east Philippine spitting cobra
		Naja siamensis (II)		Indochinese spitting cobra
		Naja sputatrix (II)		South Indonesian spitting cobra
		Naja sumatrana (II)		Golden spitting cobra
		Ophiophagus hannah (II)		King cobra
Loxocemidae				**Mexican dwarf boa**
		Loxocemidae spp. (II)		Mexican dwarf boa
Pythonidae				**Pythons**

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Pythonidae spp. (II) (Except for the subspecies included in Annex A)		Pythons
	Python molurus molurus (I)			Indian python
Tropidophiidae				**Wood boas**
		Tropidophiidae spp. (II)		Wood boas
Viperidae				**Vipers**
			Crotalus durissus (III Honduras)	Neotropical rattlesnake
		Crotalus durissus unicolor		Aruba rattlesnake
			Daboia russelii (III India)	Russell's viper
	Vipera latifii			Latifi's viper
	Vipera ursinii (I) (Only the population of Europe, except the area which formerly constituted the USSR; these latter populations are not included in the Annexes to this Regulation)			Orsini's viper
		Vipera wagneri (II)		Wagner's viper
TESTUDINES				
Carettochelyidae				**Pig-nosed turtles**
		Carettochelys insculpta (II)		Pig-nosed turtle
Chelidae				**Austro-American sideneck turtles**
		Chelodina mccordi (II)		Roti snake-necked turtle
	Pseudemydura umbrina (I)			Western swamp turtle
Cheloniidae				**Sea turtles**

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Cheloniidae spp. (I)			Sea turtles
Chelydridae				**Snapping turtles**
			Macrochelys temminckii (III United States of America)	Alligator snapping turtle
Dermatemydidae				**Central American river turtle**
		Dermatemys mawii (II)		Central American river turtle
Dermochelyidae				**Leatherback turtle**
	Dermochelys coriacea (I)			Leatherback turtle
Emydidae				**Box turtles, freshwater turtles**
		Chrysemys picta		Painted turtle
		Glyptemys insculpta (II)		Wood turtle
	Glyptemys muhlenbergii (I)			Bog turtle
			Graptemys spp. (III United States of America)	Map turtles
		Terrapene spp. (II) (Except for the species included in Annex A)		Box turtles
	Terrapene coahuila (I)			Aquatic box turtle
		Trachemys scripta elegans		Red-eared terrapin
Geoemydidae				
	Batagur affinis (I)			Southern river terrapin
	Batagur baska (I)			Batagur
		Batagur spp. (Except for the species included in Annex A)		
		Cuora spp. (II)		Asian box turtles
	Geoclemys hamiltonii (I)			Black pond turtle
			Geoemyda spengleri (III China)	Black-breasted leaf turtle

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	Annex A	Annex B	Annex C	Common name
		Heosemys annandalii (II)		Yellow-headed temple turtle
		Heosemys depressa (II)		Arakan forest turtle
		Heosemys grandis (II)		Giant Asian turtle
		Heosemys spinosa (II)		Spiny turtle
		Leucocephalon yuwonoi (II)		Sulawesi forest turtle
		Malayemys macrocephala (II)		Snail-eating turtle
		Malayemys subtrijuga (II)		Ricefield turtle
		Mauremys annamensis (II)		Annam pond turtle
			Mauremys iversoni (III China)	Fujian pond turtle
			Mauremys megalocephala (III China)	Big-headed pond turtle
		Mauremys mutica (II)		Yellow pond turtle
			Mauremys nigricans (III China)	Red-necked turtle
			Mauremys pritchardi (III China)	Pritchard's pond turtle
			Mauremys reevesii (III China)	Reeves's turtle
			Mauremys sinensis (III China)	Chinese stripe-necked turtle
	Melanochelys tricarinata (I)			Three-keeled land tortoise
	Morenia ocellata (I)			Burmese swamp turtle
		Notochelys platynota (II)		Malayan flat-shelled turtle
			Ocadia glyphistoma (III China)	Notch-mouthed stripe-necked turtle
			Ocadia philippeni (III China)	Philippen's stripe-necked turtle
		Orlitia borneensis (II)		Malayan giant turtle
		Pangshura spp. (II) (Except for the species included in Annex A)		Roofed turtles
	Pangshura tecta (I)			Indian roofed turtle

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	Annex A	*Annex B*	*Annex C*	*Common name*
			Sacalia bealei (III China)	Beal's eyed turtle
			Sacalia pseudocellata (III China)	Chinese false-eyed turtle
			Sacalia quadriocellata (III China)	Four-eyed turtle
		Siebenrockiella crassicollis (II)		Black marsh turtle
		Siebenrockiella leytensis (II)		Philippine pond turtle
Platysternidae				**Big-headed turtle**
		Platysternon megacephalum (II)		Big-headed turtle
Podocnemididae				**Afro-American sideneck turtles**
		Erymnochelys madagascariensis (II)		Madagascar sideneck turtle
		Peltocephalus dumerilianus (II)		Big-headed sideneck turtle
		Podocnemis spp. (II)		Sideneck turtles
Testudinidae				**Tortoises**
		Testudinidae spp. (II) (Except for the species included in Annex A; a zero annual export quota has been established for *Geochelone sulcata* for specimens removed from the wild and traded for primarily commercial purposes)		Tortoises
	Astrochelys radiata (I)			Radiated tortoise
	Astrochelys yniphora (I)			Angonoka
	Chelonoidis nigra (I)			Galapagos giant tortoise
	Gopherus flavomarginatus (I)			Bolson tortoise
	Malacochersus tornieri (II)			Pancake tortoise
	Psammobates geometricus (I)			Geometric tortoise

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Pyxis arachnoides (I)			Madagascar spider tortoise
	Pyxis planicauda (I)			Madagascar flat-shelled tortoise
	***Testudo graeca* (II)**			Spur-thighed tortoise
	***Testudo hermanni* (II)**			Hermann's tortoise
	Testudo kleinmanni (I)			Egyptian tortoise
	***Testudo marginata* (II)**			Marginated tortoise
Trionychidae				**Softshell turtles, terrapins**
		Amyda cartilaginea (II)		Southeast Asian soft-shelled turtle
	Apalone spinifera atra (I)			Cuatro Cienagas soft-shell turtle
	Aspideretes gangeticus (I)			Indian soft-shell turtle
	Aspideretes hurum (I)			Peacock soft-shell turtle
	Aspideretes nigricans (I)			Black soft-shell turtle
		Chitra spp. (II)		Narrow-headed softshell turtles
		Lissemys punctata (II)		Indo-Gangetic flapshell turtle
		Lissemys scutata (II)		Burmese flapshell turtle
			Palea steindachneri (III China)	Wattle-necked softshell turtle
		Pelochelys spp. (II)		Giant softshell turtles
			Pelodiscus axenaria (III China)	Hunan softshell turtle
			Pelodiscus maackii (III China)	Amur softshell turtle
			Pelodiscus parviformis (III China)	Chinese softshell turtle
			Rafetus swinhoei (III China)	Yangtze softshell turtle
AMPHIBIA				**Amphibians**
ANURA				Frogs and toads
Bufonidae				**Toads**

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	Annex A	Annex B	Annex C	Common name
	Altiphrynoides spp. (I)			Malcolm's Ethiopian toad
	Atelopus zeteki (I)			Golden frog
	Bufo periglenes (I)			Golden toad
	Bufo superciliaris (I)			Cameroon toad
	Nectophrynoides spp. (I)			African viviparous toads
	Nimbaphrynoides spp. (I)			Nimba toads
	Spinophrynoides spp. (I)			Osgood's Ethiopian toad
Calyptocephalellidae				
			Calyptocephalella gayi (III Chile)	Chilean helmeted water toad
Dendrobatidae				**Poison frogs**
		Allobates femoralis (II)		Brilliant-thighed poison frog
		Allobates zaparo (II)		Sanguine poison frog
		Cryptophyllobates azureiventris (II)		Sky-blue poison frog
		Dendrobates spp. (II)		Poison-arrow frogs
		Epipedobates spp. (II)		Poison-arrow frogs
		Phyllobates spp. (II)		Poison-arrow frogs
Hylidae				**Tree frogs**
		Agalychnis spp. (II) (7)		
Mantellidae				**Mantella frogs**
		Mantella spp. (II)		Mantella frogs
Microhylidae				**Tomato frogs**
	Dyscophus antongilii (I)			Tomato frog
		Scaphiophryne gottlebei (II)		Red rain frog
Ranidae				**Frogs**
		Conraua goliath		Goliath frog

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Euphlyctis hexadactylus (II)		Six-fingered frog
		Hoplobatrachus tigerinus (II)		Tiger frog
		Rana catesbeiana		American bullfrog
Rheobatrachidae				**Gastric brooding frogs**
		Rheobatrachus spp. (II) (Except for the species included in Annex A)		Gastric brooding frog
	Rheobatrachus silus (II)			Platypus frog
CAUDATA				
Ambystomatidae				**Axolotls**
		Ambystoma dumerilii (II)		Lake Patzcuaro salamander
		Ambystoma mexicanum (II)		Axolotl
Cryptobranchidae				**Giant salamanders**
	Andrias spp. (I)			Giant salamanders
			Cryptobranchus alleganiensis (III United States of America)	Hellbender
Salamandridae				**Salamanders and newts**
	Neurergus kaiseri (I)			Kaiser's spotted newt
ELASMOBRANCHII				**Sharks and rays**
CARCHARHINIFORMES				
Sphyrnidae				**Hammerhead sharks**
			Sphyrna lewini (III Costa Rica)	Scalloped hammerhead shark
LAMNIFORMES				
Cetorhinidae				**Basking sharks**
		Cetorhinus maximus (II)		Basking shark
Lamnidae				**Great white shark**
		Carcharodon carcharias (II)		Great white shark
			Lamna nasus (III 27 Member States)	Porbeagle
ORECTOLOBIFORMES				
Rhincodontidae				**Whale sharks**
		Rhincodon typus (II)		Whale shark

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	Annex A	*Annex B*	*Annex C*	*Common name*
PRISTIFORMES				
Pristidae				**Sawfishes**
	Pristidae spp. (I) (Except for the species included in Annex B)			Sawfishes
		Pristis microdon (II) (For the exclusive purpose of allowing international trade in live animals to appropriate and acceptable aquaria for primarily conservation purposes. All other specimens shall be deemed to be specimens of species included in Annex A and the trade in them shall be regulated accordingly)		Freshwater sawfish
ACTINOPTERYGII				**Fish**
ACIPENSERIFORMES				
		ACIPENSERIFORMES spp. (II) (Except for the species included in Annex A)		Sturgeons and paddlefish
Acipenseridae				**Sturgeons**
	Acipenser brevirostrum (I)			Shortnose sturgeon
	Acipenser sturio (I)			Common sturgeon
ANGUILLIFORMES				
Anguillidae				**Freshwater eels**
		Anguilla anguilla (II)		European eel
CYPRINIFORMES				
Catostomidae				**Cui-ui**
	Chasmistes cujus (I)			Cui-ui

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	Annex A	*Annex B*	*Annex C*	*Common name*
Cyprinidae				**Blind carps, plaeesok**
		Caecobarbus geertsi (II)		African blind barb fish
	Probarbus jullieni (I)			Ikan temoleh
OSTEOGLOSSIFORMES				
Osteoglossidae				**Arapaimas, bonytongues**
		Arapaima gigas (II)		Arapaima
	Scleropages formosus (I) [8]			Asian arowana
PERCIFORMES				
Labridae				**Wrasses**
		Cheilinus undulatus (II)		Humphead wrasse
Sciaenidae				**Totoabas**
	Totoaba macdonaldi (I)			Totoaba
SILURIFORMES				
Pangasiidae				**Pangasid catfish**
	Pangasianodon gigas (I)			Giant catfish
SYNGNATHIFORMES				
Syngnathidae				**Pipefishes, seahorses**
		Hippocampus spp. (II)		Seahorses
SARCOPTERYGII				**Lungfishes**
CERATODONTIFORMES				
Ceratodontidae				**Australian lungfishes**
		Neoceratodus forsteri (II)		Australian lungfish
COELACANTHIFORMES				
Latimeriidae				**Coelacanths**
	Latimeria spp. (I)			Coelacanths

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	Annex A	*Annex B*	*Annex C*	*Common name*
ECHINODERMATA (STARFISH, BRITTLE STARS, SEA URCHINS AND SEA CUCUMBERS)				
HOLOTHUROIDEA				**Sea cucumbers**
ASPIDOCHIROTIDA				
Stichopodidae				**Sea cucumbers**
			Isostichopus fuscus (III Ecuador)	**Brown sea cucumber**
ARTHROPODA (ARTHROPODS)				
ARACHNIDA				**Spiders and scorpions**
ARANEAE				
Theraphosidae				**Red-kneed tarantulas, tarantulas**
		Aphonopelma albiceps (II)		
		Aphonopelma pallidum (II)		Chihuahua rose-grey tarantula
		Brachypelma spp. (II)		Central American tarantulas
SCORPIONES				
Scorpionidae				**Scorpions**
		Pandinus dictator (II)		
		Pandinus gambiensis (II)		Giant Senegalese scorpion
		Pandinus imperator (II)		Emperor scorpion
INSECTA				**Insects**
COLEOPTERA				Beetles
Lucanidae				**Stag beetles**
			Colophon spp. (III South Africa)	Cape stag beetles
Scarabaeidae				**Scarab beetles**
		Dynastes satanas (II)		Satanas beetle
LEPIDOPTERA				Butterflies

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	Annex A	*Annex B*	*Annex C*	*Common name*
Nymphalidae				
			Agrias amydon boliviensis (III Bolivia)	
			Morpho godartii lachaumei (III Bolivia)	
			Prepona praeneste buckleyana (III Bolivia)	
Papilionidae				**Birdwing and swallowtail butterflies**
		Atrophaneura jophon (II)		Sri Lankan rose
		Atrophaneura palu		Palu swallowtail butterfly
		Atrophaneura pandiyana (II)		Malabar rose
		Bhutanitis spp. (II)		Swallowtail butterflies
		Graphium sandawanum		Apo swallowtail butterfly
		Graphium stresemanni		Seram swallowtail
		Ornithoptera spp. (II) (except for the species included in Annex A)		Birdwing butterflies
	Ornithoptera alexandrae (I)			Queen Alexandra's birdwing
		Papilio benguetanus		
	Papilio chikae (I)			Luzon peacock swallowtail
		Papilio esperanza		
	Papilio homerus (I)			Homerus swallowtail
	Papilio hospiton (I)			Corsican swallowtail
		Papilio morondavana		Madagascan emperor swallowtail
		Papilio neumoegeni		

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Parides ascanius		Fluminense swallowtail butterfly
		Parides hahneli		Hahnel's amazonian swallowtail butterfly
	***Parnassius apollo* (II)**			Mountain apollo
		Teinopalpus spp. (II)		Kaiser-I-Hind butterflies
		Trogonoptera spp. (II)		Birdwing butterflies
		Troides spp. (II)		Birdwing butterflies
		ANNELIDA (SEGMENTED WORMS AND LEECHES)		
HIRUDINOIDEA				**Leeches**
ARHYNCHOBDELLIDA				
Hirudinidae				**Leeches**
		Hirudo medicinalis (II)		Northern medicinal leech
		Hirudo verbana (II)		Southern medicinal leech
		MOLLUSCA (MOLLUSCS)		
BIVALVIA				**Bivalve molluscs (clams, mussels etc.)**
MYTILOIDA				
Mytilidae				**Marine mussels**
		Lithophaga lithophaga (II)		European date mussel
UNIONOIDA				
Unionidae				**Freshwater mussels, pearly mussels**
	Conradilla caelata (I)			Birdwing pearly mussel
		Cyprogenia aberti (II)		Western fanshell mussel
	Dromus dromas (I)			Dromedary pearly mussel
	Epioblasma curtisii (I)			Curtis' pearly mussel
	Epioblasma florentina (I)			Yellow-blossom pearly mussel
	Epioblasma sampsonii (I)			Wabash riffleshell

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Epioblasma sulcata perobliqua (I)			White catspaw mussel
	Epioblasma torulosa gubernaculum (I)			Green-blossom pearly mussel
		Epioblasma torulosa rangiana (II)		Northern riffleshell
	Epioblasma torulosa torulosa (I)			Turbercled-blossom pearly mussel
	Epioblasma turgidula (I)			Turgid-blossom pearly mussel
	Epioblasma walkeri (I)			Tan riffleshell
	Fusconaia cuneolus (I)			Fine-rayed pigtoe pearly mussel
	Fusconaia edgariana (I)			Shiny pigtoe pearly mussel
	Lampsilis higginsii (I)			Higgins' eye pearly mussel
	Lampsilis orbiculata orbiculata (I)			Pink mucket pearly mussel
	Lampsilis satur (I)			Sandback pocketbook mussel
	Lampsilis virescens (I)			Alabama lamp pearly mussel
	Plethobasus cicatricosus (I)			White warty-back pearly mussel
	Plethobasus cooperianus (I)			Orange-footed pimpleback mussel
		Pleurobema clava (II)		Clubshell pearly mussel
	Pleurobema plenum (I)			Rough pigtoe pearly mussel
	Potamilus capax (I)			Fat pocketbook pearly mussel
	Quadrula intermedia (I)			Cumberland monkey-face pearly mussel
	Quadrula sparsa (I)			Appalachian monkey-face pearly mussel
	Toxolasma cylindrella (I)			Pale lilliput pearly mussel
	Unio nickliniana (I)			Nicklin's pearly mussel
	Unio tampicoensis tecomatensis (I)			Tampico pearly mussel
	Villosa trabalis (I)			Cumberland bean pearly mussel
VENEROIDA				
Tridacnidae				**Giant clams**

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Tridacnidae spp. (II)		Giant clams
GASTROPODA				**Slugs, snails and conches**
MESOGASTROPODA				
Strombidae				**Conches**
		Strombus gigas (II)		Queen conch
STYLOMMATOPHORA				
Achatinellidae				**Agate snails, oahu tree snails**
	Achatinella spp. (I)			Little agate shells
Camaenidae				**Green tree snail**
		Papustyla pulcherrima (II)		Manus green tree snail
CNIDARIA (CORALS, FIRE CORALS, SEA ANEMONES)				
ANTHOZOA				**Corals, sea anemones**
ANTIPATHARIA				
		ANTIPATHARIA spp. (II)		Black corals
GORGONACEAE				
Coralliidae				**Red and pink corals**
			Corallium elatius (III China)	
			Corallium japonicum (III China)	
			Corallium konjoi (III China)	
			Corallium secundum (III China)	
HELIOPORACEA				
Helioporidae				**Blue coral**
		Helioporidae spp. (II) (Includes only the species *Heliopora coerulea*) (9)		Blue coral

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	Annex A	*Annex B*	*Annex C*	*Common name*
SCLERACTINIA				
		SCLERACTINIA spp. (II) (9)		Stony corals
STOLONIFERA				
Tubiporidae				**Organpipe corals**
		Tubiporidae spp. (II) (9)		Organpipe corals
HYDROZOA				**Sea ferns, fire corals, stinging medusas**
MILLEPORINA				
Milleporidae				**Wello fire corals**
		Milleporidae spp. (II) (9)		Wello fire corals
STYLASTERINA				
Stylasteridae				**Lace corals**
		Stylasteridae spp. (II) (9)		Lace corals
		FLORA		
AGAVACEAE				**Agaves**
	Agave parviflora (I)			Santa Cruz striped agave
		Agave victoriae-reginae (II) #4		Queen Victoria agave
		Nolina interrata (II)		Dehesa bear-grass
AMARYLLIDACEAE				**Amaryllids**
		Galanthus spp. (II) #4		Snowdrops
		Sternbergia spp. (II) #4		Sternbergias
ANACARDIACEAE				
		Operculicarya hyphaenoides (II)		Jabihy
		Operculicarya pachypus (II)		Tabily
APOCYNACEAE				
		Hoodia spp. (II) #9		Hoodia

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Pachypodium spp. (II) (Except for the species included in Annex A) #4		Elephant trunks
	Pachypodium ambongense (I)			
	Pachypodium baronii (I)			
	Pachypodium decaryi (I)			
		Rauvolfia serpentina (II) #2		Snake-root devil-pepper
ARALIACEAE				**Aralias**
		Panax ginseng (II) (Only the population of the Russian Federation; no other population is included in the Annexes to this Regulation) #3		Asian ginseng
		Panax quinquefolius (II) #3		American ginseng
ARAUCARIACEAE				**Araucarias**
	Araucaria araucana (I)			Monkey-puzzle tree
BERBERIDACEAE				**Barberries**
		Podophyllum hexandrum (II) #2		Himalayan may-apple
BROMELIACEAE				**Air plants, bromelias**
		Tillandsia harrisii (II) #4		Harris' tillandsia
		Tillandsia kammii (II) #4		Kamm's tillandsia
		Tillandsia kautskyi (II) #4		Kautsky's tillandsia
		Tillandsia mauryana (II) #4		Maury's tillandsia
		Tillandsia sprengeliana (II) #4		Sprengel's tillandsia
		Tillandsia sucrei (II) #4		Sucre tillandsia
		Tillandsia xerographica (II) ([10]) #4		Xerographic tillandsia
CACTACEAE				**Cacti**

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	Annex A	Annex B	Annex C	Common name
		CACTACEAE spp. (II) (Except for the species included in Annex A and *Pereskia* spp., *Pereskiopsis* spp. and *Quiabentia* spp.) ([11]) #4		Cacti
	Ariocarpus spp. (I)			Living rock cacti
	Astrophytum asterias (I)			Star cactus
	Aztekium ritteri (I)			Aztec cactus
	Coryphantha werdermannii (I)			Jobali pincushion cactus
	Discocactus spp. (I)			Discocacti
	Echinocereus ferreirianus ssp. *lindsayi* (I)			Lindsay's hedgehog cacti
	Echinocereus schmollii (I)			Lamb's-tail cactus
	Escobaria minima (I)			Nelle's cactus
	Escobaria sneedii (I)			Sneed's pincushion cactus
	Mammillaria pectinifera (I)			Conchilinque
	Mammillaria solisioides (I)			Pitayita
	Melocactus conoideus (I)			Conelike Turk's-cap cactus
	Melocactus deinacanthus (I)			Wonderfully-bristled Turk's cap cactus
	Melocactus glaucescens (I)			Woolly waxy-stemmed Turk's-cap cactus
	Melocactus paucispinus (I)			Few-spined Turk's-cap cactus
	Obregonia denegrii (I)			Artichoke cactus
	Pachycereus militaris (I)			Grenadier's cap
	Pediocactus bradyi (I)			Brady's pincushion cactus
	Pediocactus knowltonii (I)			Knowlton's cactus
	Pediocactus paradinei (I)			Houserock valley cactus
	Pediocactus peeblesianus (I)			Peebles's Navajo cactus

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	Annex A	*Annex B*	*Annex C*	*Common name*
	Pediocactus sileri (I)			Siler's pincushion cactus
	Pelecyphora spp. (I)			Pine cane cactus
	Sclerocactus brevihamatus ssp. *tobuschii* (I)			Tobusch fishhook cactus
	Sclerocactus erectocentrus (I)			Needle-spined pineapple cactus
	Sclerocactus glaucus (I)			Uinta Basin hookless cactus
	Sclerocactus mariposensis (I)			Mariposa cactus
	Sclerocactus mesae-verdae (I)			Mesa Verde cactus
	Sclerocactus nyensis (I)			Tonopah fishook cactus
	Sclerocactus papyracanthus (I)			Grama-grass cactus
	Sclerocactus pubispinus (I)			Great-Basin fishhook cactus
	Sclerocactus wrightiae (I)			Wright's fishhook cactus
	Strombocactus spp. (I)			Peyote
	Turbinicarpus spp. (I)			Turbinicarps
	Uebelmannia spp. (I)			Uebelmann cacti
CARYOCARACEAE				**Ajos**
		Caryocar costaricense (II) #4		Ajillo
COMPOSITAE (ASTERACEAE)				**Asters, daisies, costus**
	Saussurea costus (I) (also known as *S. lappa, Aucklandia lappa or A. costus*)			Costus
CRASSULACEAE				**Dudleyas, crassulas**
		Dudleya stolonifera (II)		Laguna beach dudleya
		Dudleya traskiae (II)		Santa Barbara Island dudleya
CUCURBITACEAE				
		Zygosicyos pubescens (II) (also known as *Xerosicyos pubescens*)		Tobory

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	Annex A	*Annex B*	*Annex C*	*Common name*
		Zygosicyos tripartitus (II)		Betoboky
CUPRESSACEAE				**Cypresses**
	Fitzroya cupressoides (I)			Alerce
	Pilgerodendron uviferum (I)			Pilgerodendron
CYATHEACEAE				**Tree ferns**
		Cyathea spp. (II) #4		Tree ferns
CYCADACEAE				**Cycads**
		CYCADACEAE spp. (II) (Except for the species included in Annex A) #4		Cycads
	Cycas beddomei (I)			Beddome's cycad
DICKSONIACEAE				**Tree ferns**
		Cibotium barometz (II) #4		
		Dicksonia spp. (II) (Only the populations of the Americas; no other populations are included in the Annexes to this Regulation. This includes the synonyms *Dicksonia berteriana, D. externa*, *D. sellowiana* and *D. stuebelii*) #4		Tree ferns
DIDIEREACEAE				**Didiereas**
		DIDIEREACEAE spp. (II) #4		Alluaudias, didiereas
DIOSCOREACEAE				**Yams**
		Dioscorea deltoidea (II) #4		Elephant's foot
DROSERACEAE				**Sundews**
		Dionaea muscipula (II) #4		Venus fly-trap
EBENACEAE			Ebonies	

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	Annex A	Annex B	Annex C	Common name
			Diospyros aculeata (III Madagascar) (includes var. *meridionalis*) #5	
			Diospyros analamerensis (III Madagascar) #5	
			Diospyros anosivolensis (III Madagascar) #5	
			Diospyros baroniana (III Madagascar) #5	
			Diospyros bemarivensis (III Madagascar) #5	
			Diospyros bernieri (III Madagascar) #5	
			Diospyros bernieriana (III Madagascar) #5	
			Diospyros bezofensis (III Madagascar) #5	
			Diospyros boinensis (III Madagascar) #5	
			Diospyros boivini (III Madagascar) (includes var. *manongarivensis*) #5	
			Diospyros calophylla (III Madagascar) #5	
			Diospyros caucheana (III Madagascar) #5	
			Diospyros cinnamomoides (III Madagascar) #5	
			Diospyros clusiifolia (III Madagascar) #5	

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	Annex A	Annex B	Annex C	Common name
			Diospyros conifera (III Madagascar) #5	
			Diospyros coursiana (III Madagascar) #5	
			Diospyros cupulifera (III Madagascar) #5	
			Diospyros danguyana (III Madagascar) #5	
			Diospyros decaryana (III Madagascar) #5	
			Diospyros dycorypheoides (III Madagascar) (includes var. *meridionalis*) #5	
			Diospyros ebenifera (III Madagascar) #5	
			Diospyros enervis (III Madagascar) #5	
			Diospyros erinacea (III Madagascar) #5	
			Diospyros erythrosperma (III Madagascar) #5	
			Diospyros filipes (III Madagascar) #5	
			Diospyros fuscovelutina (III Madagascar) #5	
			Diospyros geayana (III Madagascar) #5	
			Diospyros gneissicola (III Madagascar) #5	

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	Annex A	Annex B	Annex C	Common name
			Diospyros gracilipes (III Madagascar) (includes vars *lecomtei, parvifolia*, *velutipes* and *subenervis*) #5	
			Diospyros greveana (III Madagascar) (includes var. *boinensis*) #5	
			Diospyros haplostylis (III Madagascar) (includes var. *hildebrandtii*) #5	
			Diospyros hazomainty (III Madagascar) #5	
			Diospyros hemiteles (III Madagascar) #5	
			Diospyros heterosepala (III Madagascar) #5	
			Diospyros humbertiana (III Madagascar) #5	
			Diospyros humbertii (III Madagascar) #5	
			Diospyros implexicalyx (III Madagascar) #5	
			Diospyros ketsensis (III Madagascar) #5	
			Diospyros laevis (III Madagascar) #5	
			Diospyros lamiana (III Madagascar) #5	
			Diospyros lanceolata (III Madagascar) #5	
			Diospyros latispathulata (III Madagascar) #5	

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	Annex A	Annex B	Annex C	Common name
			Diospyros lenticellata (III Madagascar) #5	
			Diospyros leucomelas (III Madagascar) #5	
			Diospyros leucocalyx (III Madagascar) #5	
			Diospyros lokohensis (III Madagascar) #5	
			Diospyros louveli (III Madagascar) #5	
			Diospyros madagascariensis (III Madagascar) #5	
			Diospyros madecassa (III Madagascar) #5	
			Diospyros magnifolia (III Madagascar) #5	
			Diospyros manampetsae (III Madagascar) #5	
			Diospyros mangabensis (III Madagascar) #5	
			Diospyros mangorensis (III Madagascar) #5	
			Diospyros mapingo (III Madagascar) #5	
			Diospyros masoalensis (III Madagascar) #5	
			Diospyros mcphersonii (*Diospyros crassiflora*) (III Madagascar) #5	
			Diospyros meeusiana (III Madagascar) #5	

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	Annex A	Annex B	Annex C	Common name
			Diospyros microrhombus (III Madagascar) #5	
			Diospyros montigena (III Madagascar) #5	
			Diospyros myriophylla (III Madagascar) #5	
			Diospyros myrtifolia (III Madagascar) #5	
			Diospyros myrtilloides (III Madagascar) #5	
			Diospyros natalensis (III Madagascar) #5	
			Diospyros neraudii (III Madagascar) #5	
			Diospyros nigricans (III Madagascar) #5	
			Diospyros nodosa (III Madagascar) #5	
			Diospyros obducta (III Madagascar) #5	
			Diospyros occlusa (III Madagascar) #5	
			Diospyros olacinoides (III Madagascar) #5	
			Diospyros onivensis (III Madagascar) #5	
			Diospyros parifolia (III Madagascar) #5	
			Diospyros parvifolia (III Madagascar) #5	

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	Annex A	Annex B	Annex C	Common name
			Diospyros perreticulata (III Madagascar) #5	
			Diospyros perrieri (III Madagascar) #5	
			Diospyros pervillei (III Madagascar) #5	
			Diospyros platycalyx (III Madagascar) #5	
			Diospyros pruinosa (III Madagascar) #5	
			Diospyros quartzitarium (III Madagascar) #5	
			Diospyros quercina (III Madagascar) #5	
			Diospyros revaughanii (III Madagascar) #5	
			Diospyros rubrolanata (III Madagascar) #5	
			Diospyros sakalavarum (III Madagascar) (includes var. *mollifolia*) #5	
			Diospyros sclerophylla (III Madagascar) #5	
			Diospyros seychellarum (III Madagascar) #5	
			Diospyros sphaerosepala (III Madagascar) (includes var. *calyculata*) #5	
			Diospyros stenocarpa (III Madagascar) #5	

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	Annex A	Annex B	Annex C	Common name
			Diospyros striicalyx (III Madagascar) #5	
			Diospyros subacuta (III Madagascar) #5	
			Diospyros subenervis (III Madagascar) #5	
			Diospyros subfalciformis (III Madagascar) #5	
			Diospyros subsessilifolia (III Madagascar) #5	
			Diospyros subtrinervis (III Madagascar) #5	
			Diospyros tampinensis (III Madagascar) #5	
			Diospyros tetraceros (III Madagascar) #5	
			Diospyros tetrapoda (III Madagascar) #5	
			Diospyros torquata (III Madagascar) (includes var. *mabaoides*) #5	
			Diospyros toxicaria (III Madagascar) #5	
			Diospyros tropophylla (III Madagascar) #5	
			Diospyros urschii (III Madagascar) #5	
			Diospyros velutipes (III Madagascar) #5	
			Diospyros vera (III Madagascar) #5	

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	Annex A	*Annex B*	*Annex C*	*Common name*
			Diospyros vescoi (III Madagascar) (includes var. *mandrarensis*) #5 *Diospyros viguieriana* (III Madagascar) #5	
EUPHORBIACEAE				**Spurges**
		Euphorbia spp. (II) #4 (Succulent species only except for: (1) *Euphorbia misera*; (2) artificially propagated specimens of cultivars of *Euphorbia trigona*; (3) artificially propagated specimens of *Euphorbia lactea* grafted on artificially propagated root stock of *Euphorbia neriifolia*, when they are: — crested, or — fan-shaped, or — colour mutants; (4) artificially propagated specimens of cultivars of *Euphorbia*'Milii' when they are: — readily recognisable as artificially propagated specimens, and — introduced into or (re-) exported from the Union in shipments of 100 or more plants; which are not subject to the provisions of this Regulation, and (5) the species included in Annex A)		Euphorbias

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	Annex A	Annex B	Annex C	Common name
	Euphorbia ambovombensis (I)			
	Euphorbia capsaintemariensis (I)			
	Euphorbia cremersii (I) (Includes the forma *viridifolia* and the var. *rakotozafyi*)			
	Euphorbia cylindrifolia (I) (Includes the ssp. *tuberifera*)			
	Euphorbia decaryi (I) (Includes the vars. *ampanihyensis*, *robinsonii* and *sprirosticha*)			
	Euphorbia francoisii (I)			
	***Euphorbia handiensis* (II)**			
	***Euphorbia lambii* (II)**			
	Euphorbia moratii (I) (Includes the vars. *antsingiensis*, *bemarahensis* and *multiflora*)			
	Euphorbia parvicyathophora (I)			
	Euphorbia quartziticola (I)			
	***Euphorbia stygiana* (II)**			
	Euphorbia tulearensis (I)			
FOUQUIERIACEAE				**Ocotillos, boojums**
		Fouquieria columnaris (II) #4		Boojum tree
	Fouquieria fasciculata (I)			Arbol del barril
	Fouquieria purpusii (I)			
GNETACEAE				**Joint firs**
			Gnetum montanum (III Nepal) #1	
JUGLANDACEAE				**Walnuts, gavilan**
		Oreomunnea pterocarpa (II) #4		Gavilàn
LAURACEAE				
		Aniba rosaeodora (II) (also known as *A. duckei*) #12		Brazilian rosewood

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	Annex A	*Annex B*	*Annex C*	*Common name*
LEGUMINOSAE (FABACEAE)				**Legumes**
		Caesalpinia echinata (II) #10		Brazil wood
	Dalbergia nigra (I)			Brazilian rosewood
			Dalbergia darienensis (III Panama) (population of Panama) #2	
			Dalbergia louvelii (III Madagascar) #5	
			Dalbergia monticola (III Madagascar) #5	
			Dalbergia normandii (III Madagascar) #5	
			Dalbergia purpurascens (III Madagascar) #5	
			Dalbergia retusa (III Guatemala/ Panama) (Only the populations of Guatemala #5 and Panama #2; all other populations are included in Annex D)	Black rosewood
			Dalbergia stevensonii (III Guatemala) (Only the population of Guatemala; all other populations are included in Annex D) #5	Honduras rosewood
			Dalbergia xerophila (III Madagascar) #5	
			Dipteryx panamensis (III Costa Rica/Nicaragua)	Almendro
		Pericopsis elata (II) #5		Afrormosia
		Platymiscium pleiostachyum (II) #4		Quira macawood
		Pterocarpus santalinus (II) #7		Red sandalwood

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	Annex A	*Annex B*	*Annex C*	*Common name*
LILIACEAE				**Lilies**
		Aloe spp. (II) (Except for the species included in Annex A and *Aloe vera*, also known as *Aloe barbadensis*, which is not included in the Annexes to this Regulation) #4		Aloes
	Aloe albida (I)			
	Aloe albiflora (I)			
	Aloe alfredii (I)			
	Aloe bakeri (I)			
	Aloe bellatula (I)			
	Aloe calcairophila (I)			
	Aloe compressa (I) (Includes the vars. *paucituberculata*, *rugos-quamosa* and *schistophila*)			
	Aloe delphinensis (I)			
	Aloe descoingsii (I)			
	Aloe fragilis (I)			
	Aloe haworthioides (I) (Includes the var. *aurantiaca*)			
	Aloe helenae (I)			
	Aloe laeta (I) (Includes the var. *maniaensis*)			
	Aloe parallelifolia (I)			
	Aloe parvula (I)			
	Aloe pillansii (I)			
	Aloe polyphylla (I)			
	Aloe rauhii (I)			
	Aloe suzannae (I)			
	Aloe versicolor (I)			
	Aloe vossii (I)			

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	Annex A	*Annex B*	*Annex C*	*Common name*
MAGNOLIACEAE				**Magnolias**
			Magnolia liliifera var. *obovata* (III Nepal) #1	Safan
MELIACEAE				**Mahoganies, cedars**
			Cedrela fissilis (III Bolivia) #5	
			Cedrela lilloi (III Bolivia) #5	
			Cedrela odorata (III Bolivia/ Brazil. In addition, the following countries have listed their national populations: Colombia, Guatemala and Peru) #5	Spanish cedar
		Swietenia humilis (II) #4		Honduras mahogany
		Swietenia macrophylla (II) (Population of the Neotropics — includes Central and South America and the Caribbean) #6		Big-leaf mahogany
		Swietenia mahagoni (II) #5		Caribbean mahogany
NEPENTHACEAE				**Pitcher plants (old-world)**
		Nepenthes spp. (II) (Except for the species included in Annex A) #4		Tropical pitcher plants
	Nepenthes khasiana (I)			Indian pitcher plant
	Nepenthes rajah (I)			Giant tropical pitcher plant

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	Annex A	*Annex B*	*Annex C*	*Common name*
ORCHIDACEAE				**Orchids**
		ORCHIDACEAE spp. (II) (Except for the species included in Annex A) ([12]) #4		Orchids
	For all of the following Annex A orchid species, seedling or tissue cultures are not subject to the provisions of this Regulation, when: — they are obtained *in vitro*, in solid or liquid media, and — meet the definition of 'artificially propagated' in accordance with Article 56 of Commission Regulation (EC) No 865/2006, and — when introduced into or (re-)exported from the Union are transported in sterile containers			
	Aerangis ellisii (I)			
	***Cephalanthera cucullata* (II)**			Hooded helleborine
	***Cypripedium calceolus* (II)**			Lady's slipper orchid
	Dendrobium cruentum (I)			
	***Goodyera macrophylla* (II)**			Madeiran lady's-tresses
	Laelia jongheana (I)			
	Laelia lobata (I)			
	***Liparis loeselii* (II)**			Fen orchid
	***Ophrys argolica* (II)**			Eyed bee orchid

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	Annex A	*Annex B*	*Annex C*	*Common name*
	***Ophrys lunulata* (II)**			Crescent ophrys
	***Orchis scopulorum* (II)**			Madeiran orchid
	Paphiopedilum spp. (I)			Asian slipper orchids
	Peristeria elata (I)			Holy ghost orchid
	Phragmipedium spp. (I)			South American slipper orchids
	Renanthera imschootiana (I)			Red vanda
	***Spiranthes aestivalis* (II)**			Summer lady's-tresses
OROBANCHACEAE				**Broomrapes**
		Cistanche deserticola (II) #4		Desert cistanche
PALMAE (ARECACEAE)				**Palms**
		Beccariophoenix madagascariensis (II) #4		Manarano
	Chrysalidocarpus decipiens (I)			Butterfly palm
		Lemurophoenix halleuxii (II)		Hovitra varimena
			Lodoicea maldivica (III Seychelles) #13	Coco de Mer
		Marojejya darianii (II)		Ravimbe
		Neodypsis decaryi (II) #4		Triangle palm
		Ravenea louvelii (II)		Lakamarefo
		Ravenea rivularis (II)		Gora
		Satranala decussilvae (II)		Satranabe
		Voanioala gerardii (II)		Voanioala
PAPAVERACEAE				**Poppies**
			Meconopsis regia (III Nepal) #1	Himalayan poppy
PASSIFLORACEAE				
		Adenia olaboensis (II)		Vahisasety

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	Annex A	*Annex B*	*Annex C*	*Common name*
PINACEAE				**Pine family**
	Abies guatemalensis (I)			Guatemalan fir
			Pinus koraiensis (III Russian Federation) #5	
PODOCARPACEAE				**Podocarps**
			Podocarpus neriifolius (III Nepal) #1	Yellow wood
	Podocarpus parlatorei (I)			Parlatore's podocarp
PORTULACACEAE				**Portulacas, purslanes**
		Anacampseros spp. (II) #4		Purslanes
		Avonia spp. (II) #4		
		Lewisia serrata (II) #4		Saw-toothed lewisia
PRIMULACEAE				**Primulas, cyclamens**
		Cyclamen spp. (II) ([13]) #4		Cyclamens
RANUNCULACEAE				**Buttercups**
		Adonis vernalis (II) #2		Yellow adonis
		Hydrastis canadensis (II) #8		Golden seal
ROSACEAE				**Roses, cherries**
		Prunus africana (II) #4		African cherry
RUBIACEAE				Ayugue
	Balmea stormiae (I)			Ayugue
SARRACENIACEAE				**Pitcher plants (new world)**
		Sarracenia spp. (II) (Except for the species included in Annex A) #4		Pitcher plants
	Sarracenia oreophila (I)			Green pitcher plant
	Sarracenia rubra ssp. *alabamensis* (I)			Alabama canebrake pitcher plant
	Sarracenia rubra ssp. *jonesii* (I)			Mountain sweet pitcher plant

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	Annex A	Annex B	Annex C	Common name
SCROPHULARIACEAE				**Figworts**
		Picrorhiza kurrooa (II) (excludes *Picrorhiza scrophulariiflora*) #2		Indian gentian
STANGERIACEAE				**Stangerias (cycads)**
		Bowenia spp. (II) #4		Cycads
	Stangeria eriopus (I)			Stangeria
TAXACEAE				**Yews**
		Taxus chinensis and infraspecific taxa of this species (II) #2		Chinese yew
		Taxus cuspidata and infraspecific taxa of this species (II) ([14]) #2		Japanese yew
		Taxus fuana and infraspecific taxa of this species (II) #2		Tibetan yew
		Taxus sumatrana and infraspecific taxa of this species (II) #2		Sumatran yew
		Taxus wallichiana (II) #2		Himalayan yew
THYMELAEACEAE (AQUILARIACEAE)				**Agarwood, ramin**
		Aquilaria spp. (II) #4		Agarwood
		Gonystylus spp. (II) #4		Ramin
		Gyrinops spp. (II) #4		Agarwood

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	Annex A	*Annex B*	*Annex C*	*Common name*
TROCHODENDRACEAE (TETRACENTRACEAE)				**Tetracentrons**
			Tetracentron sinense (III Nepal) #1	
VALERIANACEAE				**Valerians**
		Nardostachys grandiflora (II) #2		
VITACEAE				
		Cyphostemma elephantopus (II)		Lazampasika
		Cyphostemma montagnacii (II)		Lazambohitra
WELWITSCHIACEAE				**Welwitschias**
		Welwitschia mirabilis (II) #4		Welwitschia
ZAMIACEAE				**Cycads**
		ZAMIACEAE spp. (II) (Except for the species included in Annex A) #4		Cycads
	Ceratozamia spp. (I)			Horncones
	Chigua spp. (I)			
	Encephalartos spp. (I)			Bread palms
	Microcycas calocoma (I)			Palm corcho
ZINGIBERACEAE				**Ginger lilies**
		Hedychium philippinense (II) #4		Philippine garland-flower
ZYGOPHYLLACEAE				**Lignum-vitae**
		Bulnesia sarmientoi (II) #11		Holy wood
		Guaiacum spp. (II) #2		Lignum-vitae

(1) Population of Argentina (listed in Annex B):

For the exclusive purpose of allowing international trade in wool sheared from live vicuñas of the populations included in Annex B, in cloth and in derived manufactured products and other handicraft artefacts. The reverse side of the cloth must bear the logotype adopted by the range States of the species, which are signatories to the Convenio paragraph la Conservación y Manejo de la Vicuña, and the selvages the words 'VICUÑA-ARGENTINA'. Other products must bear a label including the logotype and the designation 'VICUÑA-ARGENTINA-ARTESANÍA'. All other specimens shall be deemed to be specimens of species included in Annex A and the trade in them shall be regulated accordingly.

(2) Population of Bolivia (listed in Annex B):

For the exclusive purpose of allowing international trade in wool sheared from live vicuñas and in cloth and items made thereof, including luxury handicrafts and knitted articles. The reverse side of the cloth must bear the logotype adopted by the range States of the species, which are signatories to the Convenio paragraph la Conservación y Manejo de la Vicuña, and the selvages the words 'VICUÑA-BOLIVIA'. Other products must bear a label including the logotype and the designation 'VICUÑA-BOLIVIA-ARTESANÍA'. All other specimens shall be deemed to be specimens of species included in Annex A and the trade in them shall be regulated accordingly.

(3) Population of Chile (listed in Annex B):

For the exclusive purpose of allowing international trade in wool sheared from live vicuñas of the populations included in Annex B, and in cloth and items made thereof, including luxury handicrafts and knitted articles. The reverse side of the cloth must bear the logotype adopted by the range States of the species, which are signatories to the Convenio paragraph la Conservación y Manejo de la Vicuña, and the selvages the words 'VICUÑA-CHILE'. Other products must bear a label including the logotype and the designation 'VICUÑA-CHILE-ARTESANÍA'. All other specimens shall be deemed to be specimens of species included in Annex A and the trade in them shall be regulated accordingly.

(4) Population of Peru (listed in Annex B):

For the exclusive purpose of allowing international trade in wool sheared from live vicuñas and in the stock extant at the time of the ninth meeting of the Conference of the Parties (November 1994) of 3 249 kg of wool, and in cloth and items made thereof, including luxury handicrafts and knitted articles. The reverse side of the cloth must bear the logotype adopted by the range States of the species, which are signatories to the Convenio paragraph la Conservación y Manejo de la Vicuña, and the selvages the words 'VICUÑA-PERU'. Other products must bear a label including the logotype and the designation 'VICUÑA-PERU-ARTESANÍA'. All other specimens shall be deemed to be specimens of species included in Annex A and the trade in them shall be regulated accordingly.

(5) All species are listed in Appendix II except *Balaena mysticetus, Eubalaena* spp., *Balaenoptera acutorostrata* (except population of West Greenland), *Balaenoptera bonaerensis, Balaenoptera borealis, Balaenoptera edeni, Balaenoptera musculus, Balaenoptera omurai, Balaenoptera physalus, Megaptera novaeangliae, Orcaella brevirostris, Orcaella heinsohni, Sotalia* spp., *Sousa* spp., *Eschrichtius robustus, Lipotes vexillifer, Caperea marginata, Neophocaena phocaenoides, Phocoena sinus, Physeter macrocephalus, Platanista* spp., *Berardius* spp., *Hyperoodon* spp., which are listed in Appendix I. Specimens of the species listed in Appendix II to the Convention, including products and derivatives other than meat products for commercial purposes, taken by the people of Greenland under licence granted by the competent authority concerned, shall be treated as belonging to Annex B. A zero annual export quota is established for live specimens from the Black Sea population of *Tursiops truncatus* removed from the wild and traded for primarily commercial purposes.

(6) Populations of Botswana, Namibia, South Africa and Zimbabwe (listed in Annex B):

For the exclusive purpose of allowing: (a) trade in hunting trophies for non-commercial purposes; (b) trade in live animals to appropriate and acceptable destinations as defined in Resolution Conf. 11.20 for Botswana and Zimbabwe and for *in situ* conservation programmes for Namibia and South Africa; (c) trade in hides; (d) trade in hair; (e) trade in leather goods for commercial or non-commercial purposes for Botswana, Namibia and South Africa and for non-commercial purposes for Zimbabwe; (f) trade in individually marked and certified Ekipas incorporated in finished jewellery for non-commercial purposes for Namibia and ivory carvings for non-commercial purposes for Zimbabwe; (g) trade in registered raw ivory (for Botswana, Namibia, South Africa and Zimbabwe whole tusks and pieces) subject to the following: (i) only registered government-owned stocks, originating in the State (excluding seized ivory and ivory of unknown origin); (ii) only to trading partners that have been verified by the Secretariat, in consultation with the Standing Committee, to have sufficient national legislation and domestic trade controls to ensure that the imported ivory will not be re-exported and will be managed in accordance with all requirements of Resolution Conf. 10.10 (Rev. CoP14) concerning domestic manufacturing and trade; (iii) not before the Secretariat has verified the prospective importing countries and the registered government-owned stocks; (iv) raw ivory pursuant to the conditional sale of registered government-owned ivory stocks agreed at COP12 which are 20 000 kg (Botswana), 10 000 kg (Namibia), 30 000 kg (South Africa); (v) in addition to the quantities agreed at CoP12, government-owned ivory from Botswana, Zimbabwe, Namibia and South Africa registered by the 31 January 2007 and verified by the Secretariat may be traded and despatched, with the ivory in (g)(iv) in a single sale per destination under strict supervision of the Secretariat; (vi) the proceeds of the trade are used exclusively for elephant conservation and community conservation and development programmes within or adjacent to the elephant range; and (vii) the additional quantities specified in (g)(v) shall be traded only after the Standing Committee has agreed that the above conditions have been met; (h) no further proposals to allow trade in elephant ivory from populations already on Annex B shall be submitted to the Conference of the Parties for the period from CoP14 and ending nine years from the date of

the single sale of ivory that is to take place in accordance with provisions in paragraph (g)(i), (g)(ii), (g)(iii), (g)(vi), and (g)(vii). In addition, such further proposals shall be dealt with in accordance with Decisions 14.77 and 14.78. On a proposal from the Secretariat, the Standing Committee can decide to cause this trade to cease partially or completely in the event of non-compliance by exporting or importing countries, or in the case of proven detrimental impacts of the trade on other elephant populations. All other specimens shall be deemed to be specimens of species included in Annex A and the trade in them shall be regulated accordingly.

([7]) The following species are the only ones considered to be included in Appendix II: *Agalychnis annae*, *Agalychnis callidryas*, *Agalychnis moreletii*, *Agalychnis saltator* and *Agalychnis spurrelli*.

([8]) This listing includes the newly described taxon *Scleropages inscriptus*.

([9]) The following are not subject to the provisions of this Regulation:
Fossils;
Coral sand, that is to say, material consisting entirely or in part of finely crushed fragments of dead coral no larger than 2 mm in diameter and which may also contain, amongst other things, the remains of Foraminifera, mollusc and crustacean shell, and coralline algae;
Coral fragments (including gravel and rubble), that is to say, unconsolidated fragments of broken finger-like dead coral and other material between 2 and 30 mm measured in any direction.

([10]) Trade of specimens with source code A is allowed only if specimens traded possess cataphylls.

([11]) Artificially propagated specimens of the following hybrids and/or cultivars are not subject to the provisions of this Regulation:
Hatiora x *graeseri*
Schlumbergera x *buckleyi*
Schlumbergera russelliana x *Schlumbergera truncata*
Schlumbergera orssichiana x *Schlumbergera truncata*
Schlumbergera opuntioides x *Schlumbergera truncata*
Schlumbergera truncata (cultivars)
Cactaceae spp. colour mutants grafted on the following grafting stocks: *Harrisia*'Jusbertii', *Hylocereus trigonus* or *Hylocereus undatus*
Opuntia microdasys (cultivars)

([12]) Artificially propagated hybrids of Cymbidium, Dendrobium, Phalaenopsis and Vanda are not subject to the provisions of this Regulation, when specimens are readily recognisable as artificially propagated and do not show any signs of having been collected in the wild such as mechanical damage or strong dehydration resulting from collection, irregular growth and heterogeneous size and shape within a taxon and shipment, algae or other epiphyllous organisms adhering to leaves, or damage by insects or other pests; and

(a) when shipped in non-flowering state, the specimens must be traded in shipments consisting of individual containers (such as cartons, boxes, crates or individual shelves of CC-containers) each containing 20 or more plants of the same hybrid; the plants within each container must exhibit a high degree of uniformity and healthiness; and the shipment must be accompanied by documentation, such as an invoice, which clearly states the number of plants of each hybrid; or

(b) when shipped in flowering state, with at least one fully open flower per specimen, no minimum number of specimens per shipment is required but specimens must be professionally processed for commercial retail sale, e.g. labelled with printed labels or packaged with printed packages indicating the name of the hybrid and the country of final processing. This should be clearly visible and allow easy verification. Plants not clearly qualifying for the exemption must be accompanied by appropriate CITES documents.

([13]) Artificially propagated specimens of cultivars of *Cyclamen persicum* are not subject to the provisions of this Regulation. However, the exemption does not apply to such specimens traded as dormant tubers.

([14]) Artificially propagated hybrids and cultivars of *Taxus cuspidata*, live, in pots or other small containers, each consignment being accompanied by a label or document stating the name of the taxon or taxa and the text 'artificially propagated', are not subject to the provisions of this Regulation.

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	Annex D	*Common name*
	FAUNA	
	CHORDATA (CHORDATES)	
MAMMALIA		**Mammals**
CARNIVORA		
Canidae		**Dogs, foxes, wolves**
	Vulpes vulpes griffithi (III India) §1	Red fox
	Vulpes vulpes montana (III India) §1	Red fox
	Vulpes vulpes pusilla (III India) §1	Red fox
Mustelidae		**Badgers, martens, weasels etc.**
	Mustela altaica (III India) §1	Mountain weasel
	Mustela erminea ferghanae (III India) §1	Stoat
	Mustela kathiah (III India) §1	Yellow-bellied weasel
	Mustela sibirica (III India) §1	Siberian weasel
DIPROTODONTIA		
Macropodidae		**Kangaroos, wallabies**
	Dendrolagus dorianus	Doria's tree-kangaroo
	Dendrolagus goodfellowi	Goodfellow's tree-kangaroo
	Dendrolagus matschiei	Huon tree-kangaroo
	Dendrolagus pulcherrimus	Golden-mantled tree-kangaroo
	Dendrolagus stellarum	Seri's tree-kangaroo
AVES		**Birds**
ANSERIFORMES		
Anatidae		**Ducks, geese, swans**
	Anas melleri	Meller's duck

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	Annex D	*Common name*
COLUMBIFORMES		
Columbidae		**Doves, pigeons**
	Columba oenops	Peruvian pigeon
	Didunculus strigirostris	Tooth-billed pigeon
	Ducula pickeringii	Grey imperial-pigeon
	Gallicolumba crinigera	Mindanao bleeding-heart
	Ptilinopus marchei	Flame-breasted fruit-dove
	Turacoena modesta	Black cuckoo-dove
GALLIFORMES		
Cracidae		**Chachalacas, currassows, guans**
	Crax alector	Black curassow
	Pauxi unicornis	Horned curassow
	Penelope pileata	White-crested guan
Megapodiidae		**Megapodes, scrubfowl**
	Eulipoa wallacei	Moluccan scrubfowl
Phasianidae		**Grouse, guineafowl, partridges, pheasants, tragopans**
	Arborophila gingica	White-necklaced partridge
	Lophura bulweri	Bulwer's pheasant
	Lophura diardi	Siamese fireback
	Lophura inornata	Salvadori's pheasant
	Lophura leucomelanos	Kalij pheasant
	Syrmaticus reevesii §2	Reeves's pheasant
PASSERIFORMES		
Bombycillidae		**Waxwings**
	Bombycilla japonica	Japanese waxwing

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	Annex D	Common name
Corvidae		**Crows, magpies, jays**
	Cyanocorax caeruleus	Azure jay
	Cyanocorax dickeyi	Tufted jay
Cotingidae		**Cotingas**
	Procnias nudicollis	Bare-throated bellbird
Emberizidae		**Cardinals, seedeaters, tanagers**
	Dacnis nigripes	Black-legged dacnis
	Sporophila falcirostris	Temminck's seedeater
	Sporophila frontalis	Buffy-throated seedeater
	Sporophila hypochroma	Grey-and-chestnut seedeater
	Sporophila palustris	Marsh seedeater
Estrildidae		**Mannikins, waxbills**
	Amandava amandava	Red avadavat
	Cryptospiza reichenovii	Red-faced crimson-wing
	Erythrura coloria	Red-eared parrotfinch
	Erythrura viridifacies	Green-faced parrotfinch
	Estrilda quartinia (Frequently traded as *Estrilda melanotis*)	Yellow-bellied waxbill
	Hypargos niveoguttatus	Peters's twinspot
	Lonchura griseicapilla	Grey-headed silverbill
	Lonchura punctulata	Scaly-breasted munia
	Lonchura stygia	Black munia
Fringillidae		**Finches**
	Carduelis ambigua	Black-headed greenfinch
	Carduelis atrata	Black siskin
	Kozlowia roborowskii	Tibetan rosefinch

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	Annex D	Common name
	Pyrrhula erythaca	Grey-headed bullfinch
	Serinus canicollis	Cape canary
	Serinus citrinelloides hypostictus (Frequently traded as *Serinus citrinelloides*)	East African citril
Icteridae		**New-world blackbirds**
	Sturnella militaris	Pampas meadowlark
Muscicapidae		**Old-world flycatchers, thrushes**
	Cochoa azurea	Javan cochoa
	Cochoa purpurea	Purple cochoa
	Garrulax formosus	Red-winged laughingthrush
	Garrulax galbanus	Yellow-throated laughingthrush
	Garrulax milnei	Red-tailed laughing thrush
	Niltava davidi	Fujian niltava
	Stachyris whiteheadi	Chestnut-faced babbler
	Swynnertonia swynnertoni (Also referenced as *Pogonicichla swynnertoni*)	Swynnerton's robin
	Turdus dissimilis	Black-breasted thrush
Pittidae		**Pittas**
	Pitta nipalensis	Blue-naped pitta
	Pitta steerii	Azure-breasted pitta
Sittidae		**Nuthatches**
	Sitta magna	Giant nuthatch
	Sitta yunnanensis	Yunnan nuthatch
Sturnidae		**Mynas, starlings**
	Cosmopsarus regius	Golden-breasted starling
	Mino dumontii	Yellow-faced myna

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	Annex D	*Common name*
	Sturnus erythropygius	White-headed starling
REPTILIA		**Reptiles**
TESTUDINES		
Geoemydidae		**Freshwater turtles**
	Melanochelys trijuga	Indian black turtle
SAURIA		
Agamidae		
	Physignathus cocincinus	**Chinese water dragon**
Anguidae		
	Abronia graminea	Arboreal alligator lizard
Gekkonidae		**Geckos**
	Rhacodactylus auriculatus	New Caledonia bumpy gecko
	Rhacodactylus ciliatus	Guichenot's giant gecko
	Rhacodactylus leachianus	New Caledonia giant gecko
	Teratoscincus microlepis	Small-scaled wonder gecko
	Teratoscincus scincus	Common wonder gecko
Gerrhosauridae		**Spiny-tailed lizards**
	Zonosaurus karsteni	Karsten's girdled lizard
	Zonosaurus quadrilineatus	Four-lined girdled lizard
Iguanidae		
	Ctenosaura quinquecarinata	Club-tail iguana
Scincidae		**Skinks**
	Tribolonotus gracilis	Crocodile skink
	Tribolonotus novaeguineae	New Guinea helmet skink
SERPENTES		
Colubridae		**Typical snakes, water snakes, whip snakes**

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	Annex D	*Common name*
	Elaphe carinata §1	Taiwan stink snake
	Elaphe radiata §1	Radiated rat snake
	Elaphe taeniura §1	Taiwan beauty snake
	Enhydris bocourti §1	Bocourt's water snake
	Homalopsis buccata §1	Masked water snake
	Langaha nasuta	Northern leafnose snake
	Leioheterodon madagascariensis	Madagascar menarana snake
	Ptyas korros §1	Indochinese rat snake
	Rhabdophis subminiatus §1	Redneck keelback
Hydrophiidae		**Sea snakes**
	Lapemis curtus (Includes *Lapemis hardwickii*) §1	Shaw's sea snake
Viperidae		**Vipers**
	Calloselasma rhodostoma §1	Malayan pit viper
AMPHIBIA		
ANURA		Frogs and toads
Hylidae		**Tree frogs**
	Phyllomedusa sauvagii	Waxy monkey tree frog
Leptodactylidae		**Neotropical frogs**
	Leptodactylus laticeps	Red spotted burrow frog
Ranidae		**True frogs**
	Limnonectes macrodon	Fanged River Frog or Javan Giant Frog
	Rana shqiperica	Albanian pool frog
CAUDATA		
Hynobiidae		**Asiatic salamanders**

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	Annex D	Common name
	Ranodon sibiricus	Semirechensk salamander/Central Asian salamander/Siberian salamander
Plethodontidae		**Lungless salamanders**
	Bolitoglossa dofleini	Giant palm salamander
Salamandridae		**Newts and salamanders**
	Cynops ensicauda	Sword-tailed newt
	Echinotriton andersoni	Anderson's salamander
	Pachytriton labiatus	Paddletail newt
	Paramesotriton spp.	Warty newt
	Salamandra algira	North African fire salamander
	Tylototriton spp.	Crocodile newts
ACTINOPTERYGII		**Fish**
PERCIFORMES		
Apogonidae		
	Pterapogon kauderni	Banggai cardinalfish
	ARTHROPODA (ARTHROPODS)	
INSECTA		**Insects**
LEPIDOPTERA		Butterflies
Papilionidae		**Birdwing and swallow-tail butterflies**
	Baronia brevicornis	Short-horned baronia
	Papilio grosesmithi	
	Papilio maraho	Broad-tailed swallowtail
	MOLLUSCA (MOLLUSCS)	
GASTROPODA		
Haliotidae		
	Haliotis midae	Midas ear abalone

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	Annex D	*Common name*
	FLORA	
AGAVACEAE		**Agaves**
	Calibanus hookeri	
	Dasylirion longissimum	Beargrass
ARACEAE		**Arums**
	Arisaema dracontium	Green dragon
	Arisaema erubescens	
	Arisaema galeatum	
	Arisaema nepenthoides	
	Arisaema sikokianum	
	Arisaema thunbergii var. *urashima*	
	Arisaema tortuosum	
	Biarum davisii ssp. *marmarisense*	
	Biarum ditschianum	
COMPOSITAE (ASTERACEAE)		**Asters, daisies, costus**
	Arnica montana §3	Mountain tobacco
	Othonna cacalioides	
	Othonna clavifolia	
	Othonna hallii	
	Othonna herrei	
	Othonna lepidocaulis	
	Othonna retrorsa	
ERICACEAE		**Heathers, rhododendrons**
	Arctostaphylos uva-ursi §3	Bearberry
GENTIANACEAE		**Gentians**

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	Annex D	*Common name*
	Gentiana lutea §3	Great yellow gentian
LEGUMINOSAE (FABACEAE)		**Legumes**
	Dalbergia granadillo §4	Black rosewood
	Dalbergia retusa (Except for the population which is included in Annex C) §4	Black rosewood
	Dalbergia stevensonii (Except for the population which is included in Annex C) §4	Honduras rosewood
LILIACEAE		**Wakerobins**
	Trillium pusillum	Dwarf wakerobin
	Trillium rugelii	Ill-scented wakerobin
	Trillium sessile	Sessile-flowered wakerobin wood-lily
LYCOPODIACEAE		**Clubmosses**
	Lycopodium clavatum §3	Stagshorn clubmoss
MELIACEAE		**Mahoganies, cedars**
	Cedrela montana §4	
	Cedrela oaxacensis §4	
	Cedrela salvadorensis §4	
	Cedrela tonduzii §4	
MENYANTHACEAE		**Bogbeans**
	Menyanthes trifoliata §3	Bogbean
PARMELIACEAE		**Parmelioid lichens**

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	Annex D	*Common name*
	Cetraria islandica §3	Icelandic moss
PASSIFLORACEAE		**Desert roses**
	Adenia glauca	Desert rose
	Adenia pechuelli	Desert rose
PEDALIACEAE		**Sesame, devil's claw**
	Harpagophytum spp. §3	Devil's claw
PORTULACACEAE		**Portulas, purslanes**
	Ceraria carrissoana	
	Ceraria fruticulosa	
SELAGINELLACEAE		**Clubmosses, spikemosses**
	Selaginella lepidophylla	Rose of Jericho

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COUNCIL DIRECTIVE 92/43/EEC

of 21 May 1992

on the conservation of natural habitats and of wild fauna and flora

(OJ L 206, 22.7.1992, p. 7)

Amended by:

		Official Journal		
		No	page	date
►**M1**	Council Directive 97/62/EC of 27 October 1997	L 305	42	8.11.1997
►**M2**	Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003	L 284	1	31.10.2003
►**M3**	Council Directive 2006/105/EC of 20 November 2006	L 363	368	20.12.2006

Amended by:

►**A1**	Act of Accession of Austria, Sweden and Finland	C 241	21	29.8.1994
	(adapted by Council Decision 95/1/EC, Euratom, ECSC)	L 1	1	1.1.1995
►**A2**	Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded	L 236	33	23.9.2003

Corrected by:

►**C1** Corrigendum, OJ L 176, 20.7.1993, p. 29 (92/43)

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COUNCIL DIRECTIVE 92/43/EEC

of 21 May 1992

on the conservation of natural habitats and of wild fauna and flora

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 130s thereof,

Having regard to the proposal from the Commission ([1]),

Having regard to the opinion of the European Parliament ([2]),

Having regard to the opinion of the Economic and Social Committee ([3]),

Whereas the preservation, protection and improvement of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, are an essential objective of general interest pursued by the Community, as stated in Article 130r of the Treaty;

Whereas the European Community policy and action programme on the environment (1987 to 1992) ([4]) makes provision for measures regarding the conservation of nature and natural resources;

Whereas, the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities;

Whereas, in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; whereas given that the threatened habitats and species form part of the Community's natural heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;

Whereas, in view of the threats to certain types of natural habitat and certain species, it is necessary to define them as having priority in order to favour the early implementation of measures to conserve them;

Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable;

Whereas all the areas designated, including those classified now or in the future as special protection areas pursuant to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds ([5]), will have to be incorporated into the coherent European ecological network;

Whereas it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued;

([1]) OJ No C 247, 21. 9. 1988, p. 3 and
OJ No C 195, 3. 8. 1990, p. 1.
([2]) OJ No C 75, 20. 3. 1991, p. 12.
([3]) OJ No C 31, 6. 2. 1991, p. 25.
([4]) OJ No C 328, 7. 12. 1987, p. 1.
([5]) OJ No L 103, 25. 4. 1979, p. 1. Directive as last amended by Directive 91/244/ECC (OJ No L 115, 8. 5. 1991, p. 41).

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Whereas sites eligible for designation as special areas of conservation are proposed by the Member States but whereas a procedure must nevertheless be laid down to allow the designation in exceptional cases of a site which has not been proposed by a Member State but which the Community considers essential for either the maintenance or the survival of a priority natural habitat type or a priority species;

Whereas an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future;

Whereas it is recognized that the adoption of measures intended to promote the conservation of priority natural habitats and priority species of Community interest is a common responsibility of all Member States; whereas this may, however, impose an excessive financial burden on certain Member States given, on the one hand, the uneven distribution of such habitats and species throughout the Community and, on the other hand, the fact that the 'polluter pays' principle can have only limited application in the special case of nature conservation;

Whereas it is therefore agreed that, in this exceptional case, a contribution by means of Community co-financing should be provided for within the limits of the resources made available under the Community's decisions;

Whereas land-use planning and development policies should encourage the management of features of the landscape which are of major importance for wild fauna and flora;

Whereas a system should be set up for surveillance of the conservation status of the natural habitats and species covered by this Directive;

Whereas a general system of protection is required for certain species of flora and fauna to complement Directive 79/409/EEC; whereas provision should be made for management measures for certain species, if their conservation status so warrants, including the prohibition of certain means of capture or killing, whilst providing for the possibility of derogations on certain conditions;

Whereas, with the aim of ensuring that the implementation of this Directive is monitored, the Commission will periodically prepare a composite report based, *inter alia,* on the information sent to it by the Member States regarding the application of national provisions adopted under this Directive;

Whereas the improvement of scientific and technical knowledge is essential for the implementation of this Directive; whereas it is consequently appropriate to encourage the necessary research and scientific work;

Whereas technical and scientific progress mean that it must be possible to adapt the Annexes; whereas a procedure should be established whereby the Council can amend the Annexes;

Whereas a regulatory committee should be set up to assist the Commission in the implementation of this Directive and in particular when decisions on Community co-financing are taken;

Whereas provision should be made for supplementary measures governing the reintroduction of certain native species of fauna and flora and the possible introduction of non-native species;

Whereas education and general information relating to the objectives of this Directive are essential for ensuring its effective implementation,

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HAS ADOPTED THIS DIRECTIVE:

Definitions

Article 1

For the purpose of this Directive:

(a) *conservation* means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

(b) *natural habitats* means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural;

(c) *natural habitat types of Community interest* means those which, within the territory referred to in Article 2:

(i) are in danger of disappearance in their natural range;

or

(ii) have a small natural range following their regression or by reason of their intrinsically restricted area;

or

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(iii) present outstanding examples of typical characteristics of one or more of the nine following biogeographical regions: Alpine, Atlantic, Black Sea, Boreal, Continental, Macaronesian, Mediterranean, Pannonian and Steppic.

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Such habitat types are listed or may be listed in Annex I;

(d) *priority natural habitat types* means natural habitat types in danger of disappearence, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

►C1 The conservation status ◄ of a natural habitat will be taken as 'favourable' when:

— its natural range and areas it covers within that range are stable or increasing, and

— the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

— the conservation status of its typical species is favourable as defined in (i);

(f) *habitat of a species* means an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle;

(g) *species of Community interest* means species which, within the territory referred to in Article 2, are:

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(i) endangered, except those species whose natural range is marginal in that territory and which are not endangered or vulnerable in the western palearctic region; or

(ii) vulnerable, i.e. believed likely to move into the endangered category in the near future if the causal factors continue operating; or

(iii) rare, i.e. with small populations that are not at present endangered or vulnerable, but are at risk. The species are located within restricted geographical areas or are thinly scattered over a more extensive range; or

(iv) endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.

Such species are listed or may be listed in Annex II and/or Annex IV or V;

(h) *priority species* means species referred to in (g) (i) for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority species are indicated by an asterisk (*) in Annex II;

(i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as 'favourable' when:

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

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

— there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

(j) *site* means a geographically defined area whose extent is clearly delineated;

(k) *site of Community importance* means a site which, in the biogeographical region or regions to which ►C1 it belongs, ◄ contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

For animal species ranging over wide areas, sites of Community importance shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction;

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated;

(m) *specimen* means any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any

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other circumstances, to be parts or derivatives of animals or plants of those species;

(n) *the committee* means the committee set up pursuant to Article 20.

Article 2

1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.

Conservation of natural habitats and habitats of species

Article 3

1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.

3. Where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10.

Article 4

1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. For aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction. Where appropriate, Member States shall propose adaptation of the list in the light of the results of the surveillance referred to in Article 11.

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. That information shall include a map of the site, its name, location,

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extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21.

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the ►M3 nine ◄ biogeographical regions referred to in Article 1 (c) (iii) and of the whole of the territory referred to in Article 2 (1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying ►C1 those which host one ◄ or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5 % of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6 (2), (3) and (4).

Article 5

1. In exceptional cases where the Commission finds that a national list as referred to in Article 4 (1) fails to mention a site hosting a priority natural habitat type or priority species which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

2. If, on expiry of a consultation period not exceeding six months, the dispute remains unresolved, the Commission shall forward to the Council a proposal relating to the selection of the site as a site of Community importance.

3. The Council, acting unanimously, shall take a decision within three months of the date of referral.

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6 (2).

Article 6

1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into

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other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

Article 7

Obligations arising under Article 6 (2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4 (4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4 (1) or similarly recognized under Article 4 (2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.

Article 8

1. In parallel with their proposals for sites eligible for designation as special areas of conservation, hosting priority natural habitat types and/or priority species, the Member States shall send, as appropriate, to the Commission their estimates relating to the Community co-financing which they consider necessary to allow them to meet their obligations pursuant to Article 6 (1).

2. In agreement with each of the Member States concerned, the Commission shall identify, for sites of Community importance for which co-financing is sought, those measures essential for the maintenance or re-establishment at a favourable conservation status of the priority natural habitat types and priority species on the sites concerned, as well as the total costs arising from those measures.

3. The Commission, in agreement with the Member States concerned, shall assess the financing, including co-financing, required for the operation of the measures referred to in paragraph 2, taking into

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account, amongst other things, the concentration on the Member State's territory of priority natural habitat types and/or priority species and the relative burdens which the required measures entail.

4. According to the assessment referred to in paragraphs 2 and 3, the Commission shall adopt, having regard to the available sources of funding under the relevant Community instruments and according to the procedure set out in Article 21, a prioritized action framework of measures involving co-financing to be taken when the site has been designated under Article 4 (4).

5. The measures which have not been retained in the action framework for lack of sufficient resources, as well as those included in the abovementioned action framework which have not received the necessary co-financing or have only been partially co-financed, shall be reconsidered in accordance with the procedure set out in Article 21, in the context of the two-yearly review of the action framework and may, in the maintime, be postponed by the Member States pending such review. This review shall take into account, as appropriate, the new situation of the site concerned.

6. In areas where the measures dependent on co-financing are postponed, Member States shall refrain from any new measures likely to result in deterioration of those areas.

Article 9

The Commission, acting in accordance with the procedure laid down in Article 21, shall periodically review the contribution of Natura 2000 towards achievement of the objectives set out in Article 2 and 3. In this context, a special area of conservation may be considered for declassification where this is warranted by natural developments noted as a result of the surveillance provided for in Article 11.

Article 10

Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological ►C1 coherence of the Natura ◄ 2000 network, to encourage the management of features of the landscape which are of major importance for wild fauna and flora.

Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or the traditional systems for marking field boundaries) or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species.

Article 11

Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.

Protection of species

Article 12

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

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

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

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

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

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.

3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.

4. Member States shall establish a system to monitor the incidential capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

Article 13

1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV (b), prohibiting:

(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.

2. The prohibitions referred to in paragraph 1 (a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.

Article 14

1. If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status.

2. Where such measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11. Such measures may also include in particular:

— regulations regarding access to certain property,

— temporary or local prohibition of the taking of specimens in the wild and exploitation of certain populations,

— regulation of the periods and/or methods of taking specimens,

— application, when specimens are taken, of hunting and fishing rules which take account of the conservation of such populations,

— establishment of a system of licences for taking specimens or of quotas,

— regulation of the purchase, sale, offering for sale, keeping for sale or transport for sale of specimens,

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— breeding in captivity of animal species as well as artificial propagation of plant species, under strictly controlled conditions, with a view to reducing the taking of specimens of the wild,

— assessment of the effect of the measures adopted.

Article 15

In respect of the capture or killing of species of wild fauna listed in Annex V (a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV (a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI (a);

(b) any form of capture and killing from the modes of transport referred to in Annex VI (b).

Article 16

1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

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

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

(d) for the purpose of research and education, of repopulating and reintroducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.

2. Member States shall forward to the Commission every two years a report in accordance with the format established by the Committee on the derogations applied under paragraph 1. The Commission shall give its opinion on these derogations within a maximum time limit of 12 months following receipt of the report and shall give an account to the Committee.

3. The reports shall specify:

(a) the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used;

(b) the means, devices or methods authorized for the capture or killing of animal species and the reasons for their use;

(c) the circumstances of when and where such derogations are granted;

(d) the authority empowered to declare and check that the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons ►C1 are to carry out the ◄ task;

▼B

(e) the supervisory measures used and the results obtained.

Information

Article 17

1. Every six years from the date of expiry of the period laid down in Article 23, Member States shall draw up a report on the implementation of the measures taken under this Directive. This report shall include in particular information concerning the conservation measures referred to in Article 6 (1) as well as evaluation of the impact of those measures on the conservation status of the natural habitat types of Annex I and the species in Annex II and the main results of the surveillance referred to in Article 11. The report, in accordance with the format established by the committee, shall be forwarded to the Commission and made accessible to the public.

2. The Commission shall prepare a composite report based on the reports referred to in paragraph 1. This report shall include an appropriate evaluation of the progress achieved and, in particular, of the contribution of Natura 2000 to the achievement of the objectives set out in Article 3. A draft of the part of the report covering the information supplied by a Member State shall be forwarded to the Member State in question for verification. After submission to the committee, the final version of the report shall be published by the Commission, not later than two years after receipt of the reports referred to in paragraph 1, and shall be forwarded to the Member States, the European Parliament, the Council and the Economic and Social Committee.

3. Member States may mark areas designated under this Directive by means of Community notices designed for that purpose by the committee.

Research

Article 18

1. Member States and the Commission shall encourage the necessary research and scientific work having regard to the objectives set out in Article 2 and the obligation referred to in Article 11. They shall exchange information for the purposes of proper coordination of research carried out at Member State and at Community level.

2. Particular attention shall be paid to scientific work necessary for the implementation of Articles 4 and 10, and transboundary cooperative research between Member States shall be encouraged.

Procedure for amending the Annexes

Article 19

Such amendments as are necessary for adapting Annexes I, II, III, V and VI to technical and scientific progress shall be adopted by the Council acting by qualified majority on a proposal from the Commission.

Such amendments as are necessary for adapting Annex IV to technical and scientific progress shall be adopted by the Council acting unanimously on a proposal from the Commission.

▼B

Committee

▼M2

Article 20

The Commission shall be assisted by a committee.

Article 21

1. Where reference is made to this Article, Articles 5 and 7 of Decision 1999/468/EC [1] shall apply, having regard to the provisions of Article 8 thereof.

The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at three months.

2. The Committee shall adopt its rules of procedure.

▼B

Supplementary provisions

Article 22

In implementing the provisions of this Directive, Member States shall:

(a) study the desirability of re-introducing species in Annex IV that are native to their territory where this might contribute to their conservation, provided that an investigation, also taking into account experience in other Member States or elsewhere, has established that such re-introduction contributes effectively to re-establishing these species at a favourable conservation status and that it takes place only after proper consultation of the public concerned;

(b) ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction. The results of the assessment undertaken shall be forwarded to the committee for information;

(c) promote education and general information on the need to protect species of wild fauna and flora and to conserve their habitats and natural habitats.

Final provisions

Article 23

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within two years of its notification. They shall forthwith inform the Commission thereof.

2. When Member States adopt such measures, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

[1] Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ L 184, 17.7.1999, p. 23).

▼B

3. Member States shall communicate to the Commission the main provisions of national law which they adopt in the field covered by this Directive.

Article 24

This Directive is addressed to the Member States.

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ANNEX I

NATURAL HABITAT TYPES OF COMMUNITY INTEREST WHOSE CONSERVATION REQUIRES THE DESIGNATION OF SPECIAL AREAS OF CONSERVATION

Interpretation

Guidance on the interpretation of habitat types is given in the 'Interpretation Manual of European Union Habitats' as approved by the committee set up under Article 20 ('Habitats Committee') and published by the European Commission ([1]).

The code corresponds to the NATURA 2000 code.

The sign '*' indicates priority habitat types.

1. COASTAL AND HALOPHYTIC HABITATS

11. Open sea and tidal areas

1110 Sandbanks which are slightly covered by sea water all the time

1120 * *Posidonia* beds (*Posidonion oceanicae*)

1130 Estuaries

1140 Mudflats and sandflats not covered by seawater at low tide

1150 * Coastal lagoons

1160 Large shallow inlets and bays

1170 Reefs

1180 Submarine structures made by leaking gases

12. Sea cliffs and shingle or stony beaches

1210 Annual vegetation of drift lines

1220 Perennial vegetation of stony banks

1230 Vegetated sea cliffs of the Atlantic and Baltic Coasts

1240 Vegetated sea cliffs of the Mediterranean coasts with endemic *Limonium* spp.

1250 Vegetated sea cliffs with endemic flora of the Macaronesian coasts

13. Atlantic and continental salt marshes and salt meadows

1310 *Salicornia* and other annuals colonizing mud and sand

1320 *Spartina* swards (*Spartinion maritimae*)

1330 Atlantic salt meadows (*Glauco-Puccinellietalia maritimae*)

1340 * Inland salt meadows

14. Mediterranean and thermo-Atlantic salt marshes and salt meadows

1410 Mediterranean salt meadows (*Juncetalia maritimi*)

1420 Mediterranean and thermo-Atlantic halophilous scrubs (*Sarcocornetea fruticosi*)

1430 Halo-nitrophilous scrubs (*Pegano-Salsoletea*)

15. Salt and gypsum inland steppes

1510 * Mediterranean salt steppes (*Limonietalia*)

1520 * Iberian gypsum vegetation (*Gypsophiletalia*)

1530 * Pannonic salt steppes and salt marshes

([1]) 'Interpretation Manual of European Union Habitats', version EUR 15/2″ adopted by the Habitats Committee on 4 October 1999 and 'Amendments to the "Interpretation Manual of European Union Habitats" with a view to EU enlargement' (Hab. 01/11b-rev. 1) adopted by the Habitats Committee on 24 April 2002 after written consultation, European Commission, Directorate General for Environment.

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16. Boreal Baltic archipelago, coastal and landupheaval areas

1610 Baltic esker islands with sandy, rocky and shingle beach vegetation and sublittoral vegetation

1620 Boreal Baltic islets and small islands

1630 * Boreal Baltic coastal meadows

1640 Boreal Baltic sandy beaches with perennial vegetation

1650 Boreal Baltic narrow inlets

2. COASTAL SAND DUNES AND INLAND DUNES

21. Sea dunes of the Atlantic, North Sea and Baltic coasts

2110 Embryonic shifting dunes

2120 Shifting dunes along the shoreline with *Ammophila arenaria* (‘white dunes’)

2130 * Fixed coastal dunes with herbaceous vegetation (“grey dunes’)

2140 * Decalcified fixed dunes with *Empetrum nigrum*

2150 * Atlantic decalcified fixed dunes (*Calluno-Ulicetea*)

2160 Dunes with *Hippophaë rhamnoides*

2170 Dunes with *Salix repens* ssp. *argentea* (*Salicion arenariae*)

2180 Wooded dunes of the Atlantic, Continental and Boreal region

2190 Humid dune slacks

21A0 Machairs (* in Ireland)

22. Sea dunes of the Mediterranean coast

2210 *Crucianellion maritimae* fixed beach dunes

2220 Dunes with *Euphorbia terracina*

2230 *Malcolmietalia* dune grasslands

2240 *Brachypodietalia* dune grasslands with annuals

2250 * Coastal dunes with *Juniperus* spp.

2260 *Cisto-Lavenduletalia* dune sclerophyllous scrubs

2270 * Wooded dunes with *Pinus pinea* and/or *Pinus pinaster*

23. Inland dunes, old and decalcified

2310 Dry sand heaths with *Calluna* and *Genista*

2320 Dry sand heaths with *Calluna* and *Empetrum nigrum*

2330 Inland dunes with open *Corynephorus* and *Agrostis* grasslands

2340 * Pannonic inland dunes

3. FRESHWATER HABITATS

31. Standing water

3110 Oligotrophic waters containing very few minerals of sandy plains (*Littorelletalia uniflorae*)

3120 Oligotrophic waters containing very few minerals generally on sandy soils of the West Mediterranean, with *Isoetes* spp.

3130 Oligotrophic to mesotrophic standing waters with vegetation of the *Littorelletea uniflorae* and/or of the *Isoëto-Nanojuncetea*

3140 Hard oligo-mesotrophic waters with benthic vegetation of *Chara* spp.

3150 Natural eutrophic lakes with *Magnopotamion* or *Hydrocharition* — type vegetation

3160 Natural dystrophic lakes and ponds

3170 * Mediterranean temporary ponds

3180 * Turloughs

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3190 Lakes of gypsum karst

31A0 * Transylvanian hot-spring lotus beds

32. Running water — sections of water courses with natural or semi-natural dynamics (minor, average and major beds) where the water quality shows no significant deterioration

3210 Fennoscandian natural rivers

3220 Alpine rivers and the herbaceous vegetation along their banks

3230 Alpine rivers and their ligneous vegetation with *Myricaria germanica*

3240 Alpine rivers and their ligneous vegetation with *Salix elaeagnos*

3250 Constantly flowing Mediterranean rivers with *Glaucium flavum*

3260 Water courses of plain to montane levels with the *Ranunculion fluitantis* and *Callitricho-Batrachion* vegetation

3270 Rivers with muddy banks with *Chenopodion rubri* p.p. and *Bidention* p.p. vegetation

3280 Constantly flowing Mediterranean rivers with *Paspalo-Agrostidion* species and hanging curtains of *Salix* and *Populus alba*

3290 Intermittently flowing Mediterranean rivers of the *Paspalo-Agrostidion*

4. TEMPERATE HEATH AND SCRUB

4010 Northern Atlantic wet heaths with *Erica tetralix*

4020 * Temperate Atlantic wet heaths with *Erica ciliaris* and *Erica tetralix*

4030 European dry heaths

4040 * Dry Atlantic coastal heaths with *Erica vagans*

4050 * Endemic macaronesian heaths

4060 Alpine and Boreal heaths

4070 * Bushes with *Pinus mugo* and *Rhododendron hirsutum* (*Mugo-Rhododendretum hirsuti*)

4080 Sub-Arctic *Salix* spp. Scrub

4090 Endemic oro-Mediterranean heaths with gorse

40A0 * Subcontinental peri-Pannonic scrub

40B0 Rhodope *Potentilla fruticosa* thickets

40C0 * Ponto-Sarmatic deciduous thickets

5. SCLEROPHYLLOUS SCRUB (MATORRAL)

51. Sub-Mediterranean and temperate scrub

5110 Stable xerothermophilous formations with *Buxus sempervirens* on rock slopes (*Berberidion* p.p.)

5120 Mountain *Cytisus purgans* formations

5130 *Juniperus communis* formations on heaths or calcareous grasslands

5140 * *Cistus palhinhae* formations on maritime wet heaths

52. Mediterranean arborescent matorral

5210 Arborescent matorral with *Juniperus* spp.

5220 * Arborescent matorral with *Zyziphus*

5230 * Arborescent matorral with *Laurus nobilis*

53. Thermo-Mediterranean and pre-steppe brush

5310 *Laurus nobilis* thickets

5320 Low formations of Euphorbia close to cliffs

5330 Thermo-Mediterranean and pre-desert scrub

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54. Phrygana

5410 West Mediterranean clifftop phryganas (*Astragalo-Plantaginetum subulatae*)

5420 Sarcopoterium spinosum phryganas

5430 Endemic phryganas of the *Euphorbio-Verbascion*

6. NATURAL AND SEMI-NATURAL GRASSLAND FORMATIONS

61. Natural grasslands

6110 * Rupicolous calcareous or basophilic grasslands of the *Alysso-Sedion albi*

6120 * Xeric sand calcareous grasslands

6130 Calaminarian grasslands of the *Violetalia calaminariae*

6140 Siliceous Pyrenean *Festuca eskia* grasslands

6150 Siliceous alpine and boreal grasslands

6160 Oro-Iberian *Festuca indigesta* grasslands

6170 Alpine and subalpine calcareous grasslands

6180 Macaronesian mesophile grasslands

6190 Rupicolous pannonic grasslands (*Stipo-Festucetalia pallentis*)

62. Semi-natural dry grasslands and scrubland facies

6210 Semi-natural dry grasslands and scrubland facies on calcareous substrates (*Festuco-Brometalia*) (* important orchid sites)

6220 * Pseudo-steppe with grasses and annuals of the *Thero-Brachypodietea*

6230 * Species-rich *Nardus* grasslands, on silicious substrates in mountain areas (and submountain areas in Continental Europe)

6240 * Sub-Pannonic steppic grasslands

6250 * Pannonic loess steppic grasslands

6260 * Pannonic sand steppes

6270 * Fennoscandian lowland species-rich dry to mesic grasslands

6280 * Nordic alvar and precambrian calcareous flatrocks

62A0 Eastern sub-Mediterranean dry grasslands (*Scorzoneratalia villosae*)

62B0 * Serpentinophilous grassland of Cyprus

62C0 * Ponto-Sarmatic steppes

62D0 Oro-Moesian acidophilous grasslands

63. Sclerophillous grazed forests (dehesas)

6310 Dehesas with evergreen *Quercus* spp.

64. Semi-natural tall-herb humid meadows

6410 *Molinia* meadows on calcareous, peaty or clayey-silt-laden soils (*Molinion caeruleae*)

6420 Mediterranean tall humid grasslands of the *Molinio-Holoschoenion*

6430 Hydrophilous tall herb fringe communities of plains and of the montane to alpine levels

6440 Alluvial meadows of river valleys of the *Cnidion dubii*

6450 Northern boreal alluvial meadows

6460 Peat grasslands of Troodos

65. Mesophile grasslands

6510 Lowland hay meadows (*Alopecurus pratensis, Sanguisorba officinalis*)

6520 Mountain hay meadows

6530 * Fennoscandian wooded meadows

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7. RAISED BOGS AND MIRES AND FENS

71. Sphagnum acid bogs

7110 * Active raised bogs

7120 Degraded raised bogs still capable of natural regeneration

7130 Blanket bogs (* if active bog)

7140 Transition mires and quaking bogs

7150 Depressions on peat substrates of the *Rhynchosporion*

7160 Fennoscandian mineral-rich springs and springfens

72. Calcareous fens

7210 * Calcareous fens with *Cladium mariscus* and species of the *Caricion davallianae*

7220 * Petrifying springs with tufa formation (*Cratoneurion*)

7230 Alkaline fens

7240 * Alpine pioneer formations of the *Caricion bicoloris-atrofuscae*

73. Boreal mires

7310 * Aapa mires

7320 * Palsa mires

8. ROCKY HABITATS AND CAVES

81. Scree

8110 Siliceous scree of the montane to snow levels (*Androsacetalia alpinae and Galeopsietalia ladani*)

8120 Calcareous and calcshist screes of the montane to alpine levels (*Thlaspietea rotundifolii*)

8130 Western Mediterranean and thermophilous scree

8140 Eastern Mediterranean screes

8150 Medio-European upland siliceous screes

8160 * Medio-European calcareous scree of hill and montane levels

82. Rocky slopes with chasmophytic vegetation

8210 Calcareous rocky slopes with chasmophytic vegetation

8220 Siliceous rocky slopes with chasmophytic vegetation

8230 Siliceous rock with pioneer vegetation of the *Sedo-Scleranthion* or of the *Sedo albi-Veronicion dillenii*

8240 * Limestone pavements

83. Other rocky habitats

8310 Caves not open to the public

8320 Fields of lava and natural excavations

8330 Submerged or partially submerged sea caves

8340 Permanent glaciers

9. FORESTS

(Sub)natural woodland vegetation comprising native species forming forests of tall trees, with typical undergrowth, and meeting the following criteria: rare or residual, and/or hosting species of Community interest

90. Forests of Boreal Europe

9010 * Western Taïga

9020 * Fennoscandian hemiboreal natural old broad-leaved deciduous forests (*Quercus, Tilia, Acer, Fraxinus or Ulmus*) rich in epiphytes

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9030	* Natural forests of primary succession stages of landupheaval coast
9040	Nordic subalpine/subarctic forests with *Betula pubescens* ssp. *czerepanovii*
9050	Fennoscandian herb-rich forests with *Picea abies*
9060	Coniferous forests on, or connected to, glaciofluvial eskers
9070	Fennoscandian wooded pastures
9080	* Fennoscandian deciduous swamp woods
91.	**Forests of Temperate Europe**
9110	*Luzulo-Fagetum* beech forests
9120	Atlantic acidophilous beech forests with *Ilex* and sometimes also *Taxus* in the shrublayer (*Quercion robori-petraeae or Ilici-Fagenion*)
9130	*Asperulo-Fagetum* beech forests
9140	Medio-European subalpine beech woods with *Acer* and *Rumex arifolius*
9150	Medio-European limestone beech forests of the *Cephalanthero-Fagion*
9160	Sub-Atlantic and medio-European oak or oak-hornbeam forests of the *Carpinion betuli*
9170	*Galio-Carpinetum* oak-hornbeam forests
9180	* *Tilio-Acerion* forests of slopes, screes and ravines
9190	Old acidophilous oak woods with *Quercus robur* on sandy plains
91A0	Old sessile oak woods with *Ilex* and *Blechnum* in the British Isles
91B0	Thermophilous *Fraxinus angustifolia* woods
91C0	* Caledonian forest
91D0	* Bog woodland
91E0	* Alluvial forests with *Alnus glutinosa* and *Fraxinus excelsior* (*Alno-Padion, Alnion incanae, Salicion albae*)
91F0	Riparian mixed forests of *Quercus robur, Ulmus laevis* and *Ulmus minor*, *Fraxinus excelsior* or *Fraxinus angustifolia*, along the great rivers (*Ulmenion minoris*)
91G0	* Pannonic woods with *Quercus petraea* and *Carpinus betulus*
91H0	* Pannonian woods with *Quercus pubescens*
91I0	* Euro-Siberian steppic woods with *Quercus* spp.
91J0	* *Taxus baccata* woods of the British Isles
91K0	Illyrian *Fagus sylvatica* forests (*Aremonio-Fagion*)
91L0	Illyrian oak-hornbeam forests (*Erythronio-Carpinion*)
91M0	Pannonian-Balkanic turkey oak –sessile oak forests
91N0	* Pannonic inland sand dune thicket (*Junipero-Populetum albae*)
91P0	Holy Cross fir forest (*Abietetum polonicum*)
91Q0	Western Carpathian calcicolous *Pinus sylvestris* forests
91R0	Dinaric dolomite Scots pine forests (*Genisto januensis-Pinetum*)
91S0	* Western Pontic beech forests
91T0	Central European lichen Scots pine forests
91U0	Sarmatic steppe pine forest
91V0	Dacian Beech forests (*Symphyto-Fagion*)
91W0	Moesian beech forests
91X0	* Dobrogean beech forests
91Y0	Dacian oak & hornbeam forests
91Z0	Moesian silver lime woods

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91AA * Eastern white oak woods

91BA Moesian silver fir forests

91CA Rhodopide and Balkan Range Scots pine forests

92. Mediterranean deciduous forests

9210 * Apeninne beech forests with *Taxus* and *Ilex*

9220 * Apennine beech forests with *Abies alba* and beech forests with *Abies nebrodensis*

9230 Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*

9240 *Quercus faginea* and *Quercus canariensis* Iberian woods

9250 *Quercus trojana* woods

9260 *Castanea sativa* woods

9270 Hellenic beech forests with *Abies borisii-regis*

9280 *Quercus frainetto* woods

9290 *Cupressus* forests (*Acero-Cupression*)

92A0 *Salix alba* and *Populus alba* galleries

92B0 Riparian formations on intermittent Mediterranean water courses with *Rhododendron ponticum, Salix* and others

92C0 *Platanus orientalis* and *Liquidambar orientalis* woods (*Platanion orientalis*)

92D0 Southern riparian galleries and thickets (*Nerio-Tamaricetea* and *Securinegion tinctoriae*)

93. Mediterranean sclerophyllous forests

9310 Aegean *Quercus brachyphylla* woods

9320 *Olea* and *Ceratonia* forests

9330 *Quercus suber* forests

9340 *Quercus ilex* and *Quercus rotundifolia* forests

9350 *Quercus macrolepis* forests

9360 * Macaronesian laurel forests (*Laurus, Ocotea*)

9370 * Palm groves of *Phoenix*

9380 Forests of *Ilex aquifolium*

9390 * Scrub and low forest vegetation with *Quercus alnifolia*

93A0 Woodlands with *Quercus infectoria* (*Anagyro foetidae-Quercetum infectoriae*)

94. Temperate mountainous coniferous forests

9410 Acidophilous *Picea* forests of the montane to alpine levels (*Vaccinio-Piceetea*)

9420 Alpine *Larix decidua* and/or *Pinus cembra* forests

9430 Subalpine and montane *Pinus uncinata* forests (* if on gypsum or limestone)

95. Mediterranean and Macaronesian mountainous coniferous forests

9510 * Southern Apennine *Abies alba* forests

9520 *Abies pinsapo* forests

9530 * (Sub-) Mediterranean pine forests with endemic black pines

9540 Mediterranean pine forests with endemic Mesogean pines

9550 Canarian endemic pine forests

9560 * Endemic forests with *Juniperus* spp.

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9570	* *Tetraclinis articulata* forests
9580	* Mediterranean *Taxus baccata* woods
9590	* *Cedrus brevifolia* forests (*Cedrosetum brevifoliae*)
95A0	High oro-Mediterranean pine forests

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ANNEX II

ANIMAL AND PLANT SPECIES OF COMMUNITY INTEREST WHOSE CONSERVATION REQUIRES THE DESIGNATION OF SPECIAL AREAS OF CONSERVATION

Interpretation

(a) Annex II follows on from Annex I for the establishment of a consistent network of special areas of conservation.

(b) The species listed in this Annex are indicated:

— by the name of the species or subspecies, or

— by all the species belonging to a higher taxon or to a designated part of that taxon.

The abbreviation 'spp.' after the name of a family or genus designates all the species belonging to that family or genus.

(c) Symbols

An asterisk (*) before the name of a species indicates that it is a priority species.

Most species listed in this Annex are also listed in Annex IV. Where a species appears in this Annex but does not appear in either Annex IV or Annex V, the species name is followed by the symbol (o); where a species which appears in this Annex also appears in Annex V but does not appear in Annex IV, its name is followed by the symbol (V).

(a) *ANIMALS*

VERTEBRATES

MAMMALS

INSECTIVORA

Talpidae

Galemys pyrenaicus

CHIROPTERA

Rhinolophidae

Rhinolophus blasii

Rhinolophus euryale

Rhinolophus ferrumequinum

Rhinolophus hipposideros

Rhinolophus mehelyi

Vespertilionidae

Barbastella barbastellus

Miniopterus schreibersii

Myotis bechsteinii

Myotis blythii

Myotis capaccinii

Myotis dasycneme

Myotis emarginatus

Myotis myotis

Pteropodidae

Rousettus aegyptiacus

RODENTIA

Gliridae

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Myomimus roachi

Sciuridae

* *Marmota marmota latirostris*

* *Pteromys volans (Sciuropterus russicus)*

Spermophilus citellus (Citellus citellus)

* *Spermophilus suslicus (Citellus suslicus)*

Castoridae

Castor fiber (except the Estonian, Latvian, Lithuanian, Finnish and Swedish populations)

Cricetidae

Mesocricetus newtoni

Microtidae

Microtus cabrerae

* *Microtus oeconomus arenicola*

* *Microtus oeconomus mehelyi*

Microtus tatricus

Zapodidae

Sicista subtilis

CARNIVORA

Canidae

* *Alopex lagopus*

* *Canis lupus* (except the Estonian population; Greek populations: only south of the 39th parallel; Spanish populations: only those south of the Duero; Latvian, Lithuanian and Finnish populations).

Ursidae

* *Ursus arctos* (except the Estonian, Finnish, and Swedish populations)

Mustelidae

* *Gulo gulo*

Lutra lutra

Mustela eversmanii

* *Mustela lutreola*

Vormela peregusna

Felidae

Lynx lynx (except the Estonian, Latvian and Finnish populations)

* *Lynx pardinus*

Phocidae

Halichoerus grypus (V)

* *Monachus monachus*

Phoca hispida bottnica (V)

* *Phoca hispida saimensis*

Phoca vitulina (V)

ARTIODACTYLA

Cervidae

* *Cervus elaphus corsicanus*

Rangifer tarandus fennicus (o)

▼M3

Bovidae

* *Bison bonasus*

Capra aegagrus (natural populations)

* *Capra pyrenaica pyrenaica*

Ovis gmelini musimon (Ovis ammon musimon) (natural populations — Corsica and Sardinia)

Ovis orientalis ophion (Ovis gmelini ophion)

* *Rupicapra pyrenaica ornata(Rupicapra rupicapra ornata)*

Rupicapra rupicapra balcanica

* *Rupicapra rupicapra tatrica*

CETACEA

Phocoena phocoena

Tursiops truncatus

REPTILES

CHELONIA (TESTUDINES)

Testudinidae

Testudo graeca

Testudo hermanni

Testudo marginata

Cheloniidae

* *Caretta caretta*

* *Chelonia mydas*

Emydidae

Emys orbicularis

Mauremys caspica

Mauremys leprosa

SAURIA

Lacertidae

Lacerta bonnali (Lacerta monticola)

Lacerta monticola

Lacerta schreiberi

Gallotia galloti insulanagae

* *Gallotia simonyi*

Podarcis lilfordi

Podarcis pityusensis

Scincidae

Chalcides simonyi (Chalcides occidentalis)

Gekkonidae

Phyllodactylus europaeus

OPHIDIA (SERPENTES)

Colubridae

* *Coluber cypriensis*

Elaphe quatuorlineata

Elaphe situla

* *Natrix natrix cypriaca*

▼M3

Viperidae

* *Macrovipera schweizeri (Vipera lebetina schweizeri)*

*Vipera ursinii (*except *Vipera ursinii rakosiensis)*

* *Vipera ursinii rakosiensis*

AMPHIBIANS

CAUDATA

Salamandridae

Chioglossa lusitanica

Mertensiella luschani (Salamandra luschani)

* *Salamandra aurorae (Salamandra atra aurorae)*

Salamandrina terdigitata

Triturus carnifex (Triturus cristatus carnifex)

Triturus cristatus (Triturus cristatus cristatus)

Triturus dobrogicus (Triturus cristatus dobrogicus)

Triturus karelinii (Triturus cristatus karelinii)

Triturus montandoni

Triturus vulgaris ampelensis

Proteidae

* *Proteus anguinus*

Plethodontidae

Hydromantes (Speleomantes) ambrosii

Hydromantes (Speleomantes) flavus

Hydromantes (Speleomantes) genei

Hydromantes (Speleomantes) imperialis

Hydromantes (Speleomantes) strinatii

Hydromantes (Speleomantes) supramontis

ANURA

Discoglossidae

* *Alytes muletensis*

Bombina bombina

Bombina variegata

Discoglossus galganoi(including Discoglossus 'jeanneae')

Discoglossus montalentii

Discoglossus sardus

Ranidae

Rana latastei

Pelobatidae

* *Pelobates fuscus insubricus*

FISH

PETROMYZONIFORMES

Petromyzonidae

Eudontomyzon spp. (o)

Lampetra fluviatilis (V) (except the Finnish and Swedish populations)

Lampetra planeri (o) (except the Estonian, Finnish, and Swedish populations)

▼M3

Lethenteron zanandreai (V)

Petromyzon marinus (o) (except the Swedish populations)

ACIPENSERIFORMES

Acipenseridae

* *Acipenser naccarii*

* *Acipenser sturio*

CLUPEIFORMES

Clupeidae

Alosaspp. (V)

SALMONIFORMES

Salmonidae

Hucho hucho (natural populations) (V)

Salmo macrostigma (o)

Salmo marmoratus (o)

Salmo salar (only in fresh water) (V) (except the Finnish populations)

Coregonidae

* *Coregonus oxyrhynchus* (anadromous populations in certain sectors of the North Sea)

Umbridae

Umbra krameri (o)

CYPRINIFORMES

Cyprinidae

Alburnus albidus (o) *(Alburnus vulturius)*

Anaecypris hispanica

Aspius aspius (V) (except the Finnish populations)

Barbus comiza (V)

Barbus meridionalis (V)

Barbus plebejus (V)

Chalcalburnus chalcoides (o)

Chondrostoma genei (o)

Chondrostoma lusitanicum (o)

Chondrostoma polylepis (o) *(including C. willkommi)*

Chondrostoma soetta (o)

Chondrostoma toxostoma (o)

Gobio albipinnatus (o)

Gobio kessleri (o)

Gobio uranoscopus (o)

Iberocypris palaciosi (o)

* *Ladigesocypris ghigii* (o)

Leuciscus lucumonis (o)

Leuciscus souffia (o)

Pelecus cultratus (V)

Phoxinellus spp. (o)

* *Phoxinus percnurus*

Rhodeus sericeus amarus (o)

▼M3

Rutilus pigus (V)

Rutilus rubilio (o)

Rutilus arcasii (o)

Rutilus macrolepidotus (o)

Rutilus lemmingii (o)

Rutilus frisii meidingeri (V)

Rutilus alburnoides (o)

Scardinius graecus (o)

Cobitidae

Cobitis elongata (o)

Cobitis taenia (o) (except the Finnish populations)

Cobitis trichonica (o)

Misgurnus fossilis (o)

Sabanejewia aurata (o)

Sabanejewia larvata (o) *(Cobitis larvata* and *Cobitis conspersa)*

SILURIFORMES

Siluridae

Silurus aristotelis (V)

ATHERINIFORMES

Cyprinodontidae

Aphanius iberus (o)

Aphanius fasciatus (o)

* *Valencia hispanica*

* *Valencia letourneuxi (Valencia hispanica)*

PERCIFORMES

Percidae

Gymnocephalus baloni

Gymnocephalus schraetzer (V)

* *Romanichthys valsanicola*

Zingel spp. ((o) except *Zingel asper* and *Zingel zingel* (V)*)*

Gobiidae

Knipowitschia (Padogobius) panizzae (o)

Padogobius nigricans (o)

Pomatoschistus canestrini (o)

SCORPAENIFORMES

Cottidae

Cottus gobio (o) (except the Finnish populations)

Cottus petiti (o)

INVERTEBRATES

ARTHROPODS

CRUSTACEA

Decapoda

Austropotamobius pallipes (V)

* *Austropotamobius torrentium* (V)

▼**M3**

Isopoda

* *Armadillidium ghardalamensis*

INSECTA

Coleoptera

Agathidium pulchellum (o)

Bolbelasmus unicornis

Boros schneideri (o)

Buprestis splendens

Carabus hampei

Carabus hungaricus

* *Carabus menetriesi pacholei*

* *Carabus olympiae*

Carabus variolosus

Carabus zawadszkii

Cerambyx cerdo

Corticaria planula (o)

Cucujus cinnaberinus

Dorcadion fulvum cervae

Duvalius gebhardti

Duvalius hungaricus

Dytiscus latissimus

Graphoderus bilineatus

Leptodirus hochenwarti

Limoniscus violaceus (o)

Lucanus cervus (o)

Macroplea pubipennis (o)

Mesosa myops (o)

Morimus funereus (o)

* *Osmoderma eremita*

Oxyporus mannerheimii (o)

Pilemia tigrina

* *Phryganophilus ruficollis*

Probaticus subrugosus

Propomacrus cypriacus

* *Pseudogaurotina excellens*

Pseudoseriscius cameroni

Pytho kolwensis

Rhysodes sulcatus (o)

* *Rosalia alpina*

Stephanopachys linearis (o)

Stephanopachys substriatus (o)

Xyletinus tremulicola (o)

Hemiptera

Aradus angularis (o)

▼M3

Lepidoptera

Agriades glandon aquilo (o)

Arytrura musculus

* *Callimorpha (Euplagia, Panaxia) quadripunctaria* (o)

Catopta thrips

Chondrosoma fiduciarium

Clossiana improba (o)

Coenonympha oedippus

Colias myrmidone

Cucullia mixta

Dioszeghyana schmidtii

Erannis ankeraria

Erebia calcaria

Erebia christi

Erebia medusa polaris (o)

Eriogaster catax

Euphydryas (Eurodryas, Hypodryas) aurinia (o)

Glyphipterix loricatella

Gortyna borelii lunata

Graellsia isabellae (V)

Hesperia comma catena (o)

Hypodryas maturna

Leptidea morsei

Lignyoptera fumidaria

Lycaena dispar

Lycaena helle

Maculinea nausithous

Maculinea teleius

Melanargia arge

* *Nymphalis vaualbum*

Papilio hospiton

Phyllometra culminaria

Plebicula golgus

Polymixis rufocincta isolata

Polyommatus eroides

Pseudophilotes bavius

Xestia borealis (o)

Xestia brunneopicta (o)

* *Xylomoia strix*

Mantodea

Apteromantis aptera

Odonata

Coenagrion hylas (o)

Coenagrion mercuriale (o)

▼M3

Coenagrion ornatum (o)

Cordulegaster heros

Cordulegaster trinacriae

Gomphus graslinii

Leucorrhinia pectoralis

Lindenia tetraphylla

Macromia splendens

Ophiogomphus cecilia

Oxygastra curtisii

Orthoptera

Baetica ustulata

Brachytrupes megacephalus

Isophya costata

Isophya harzi

Isophya stysi

Myrmecophilus baronii

Odontopodisma rubripes

Paracaloptenus caloptenoides

Pholidoptera transsylvanica

Stenobothrus (Stenobothrodes) eurasius

ARACHNIDA

Pseudoscorpiones

Anthrenochernes stellae (o)

MOLLUSCS

GASTROPODA

Anisus vorticulus

Caseolus calculus

Caseolus commixta

Caseolus sphaerula

Chilostoma banaticum

Discula leacockiana

Discula tabellata

Discus guerinianus

Elona quimperiana

Geomalacus maculosus

Geomitra moniziana

Gibbula nivosa

* *Helicopsis striata austriaca* (o)

Hygromia kovacsi

Idiomela (Helix) subplicata

Lampedusa imitatrix

* *Lampedusa melitensis*

Leiostyla abbreviata

Leiostyla cassida

▼M3

Leiostyla corneocostata

Leiostyla gibba

Leiostyla lamellosa

* *Paladilhia hungarica*

Sadleriana pannonica

Theodoxus transversalis

Vertigo angustior (o)

Vertigo genesii (o)

Vertigo geyeri (o)

Vertigo moulinsiana (o)

BIVALVIA

Unionoida

Margaritifera durrovensis (Margaritifera margaritifera) (V)

Margaritifera margaritifera (V)

Unio crassus

Dreissenidae

Congeria kusceri

(b) ***PLANTS***

PTERIDOPHYTA

ASPLENIACEAE

Asplenium jahandiezii (Litard.) Rouy

Asplenium adulterinum Milde

BLECHNACEAE

Woodwardia radicans (L.) Sm.

DICKSONIACEAE

Culcita macrocarpa C. Presl

DRYOPTERIDACEAE

Diplazium sibiricum (Turcz. ex Kunze) Kurata

* *Dryopteris corleyi* Fraser-Jenk.

Dryopteris fragans (L.) Schott

HYMENOPHYLLACEAE

Trichomanes speciosum Willd.

ISOETACEAE

Isoetes boryana Durieu

Isoetes malinverniana Ces. & De Not.

MARSILEACEAE

Marsilea batardae Launert

Marsilea quadrifolia L.

Marsilea strigosa Willd.

OPHIOGLOSSACEAE

Botrychium simplex Hitchc.

Ophioglossum polyphyllum A. Braun

GYMNOSPERMAE

PINACEAE

▼M3

* *Abies nebrodensis* (Lojac.) Mattei

ANGIOSPERMAE

ALISMATACEAE

* *Alisma wahlenbergii* (Holmberg) Juz.

Caldesia parnassifolia (L.) Parl.

Luronium natans (L.) Raf.

AMARYLLIDACEAE

Leucojum nicaeense Ard.

Narcissus asturiensis (Jordan) Pugsley

Narcissus calcicola Mendonça

Narcissus cyclamineus DC.

Narcissus fernandesii G. Pedro

Narcissus humilis (Cav.) Traub

* *Narcissus nevadensis* Pugsley

Narcissus pseudonarcissus L. subsp. *nobilis* (Haw.) A. Fernandes

Narcissus scaberulus Henriq.

Narcissus triandrus L. subsp. *capax* (Salisb.) D. A. Webb.

Narcissus viridiflorus Schousboe

ASCLEPIADACEAE

Vincetoxicum pannonicum (Borhidi) Holub

BORAGINACEAE

* *Anchusa crispa* Viv.

Echium russicum J.F.Gemlin

* *Lithodora nitida* (H. Ern) R. Fernandes

Myosotis lusitanica Schuster

Myosotis rehsteineri Wartm.

Myosotis retusifolia R. Afonso

Omphalodes kuzinskyanae Willk.

* *Omphalodes littoralis* Lehm.

* *Onosma tornensis* Javorka

Solenanthus albanicus (Degen & al.) Degen & Baldacci

* *Symphytum cycladense* Pawl.

CAMPANULACEAE

Adenophora lilifolia (L.) Ledeb.

Asyneuma giganteum (Boiss.) Bornm.

* *Campanula bohemica* Hruby

* *Campanula gelida* Kovanda

Campanula romanica Săvul.

* *Campanula sabatia* De Not.

* *Campanula serrata* (Kit.) Hendrych

Campanula zoysii Wulfen

Jasione crispa (Pourret) Samp. subsp. *serpentinica* Pinto da Silva

Jasione lusitanica A. DC.

CARYOPHYLLACEAE

▼M3

Arenaria ciliata L. subsp. *pseudofrigida* Ostenf. & O.C. Dahl

Arenaria humifusa Wahlenberg

* *Arenaria nevadensis* Boiss. & Reuter

Arenaria provincialis Chater & Halliday

* *Cerastium alsinifolium* Tausch *Cerastium dinaricum* G. Beck & Szysz.

Dianthus arenarius L. subsp. *arenarius*

* *Dianthus arenarius* subsp. *bohemicus* (Novak) O.Schwarz

Dianthus cintranus Boiss. & Reuter subsp. *cintranus* Boiss. & Reuter

* *Dianthus diutinus* Kit.

* *Dianthus lumnitzeri* Wiesb.

Dianthus marizii (Samp.) Samp.

* *Dianthus moravicus* Kovanda

* *Dianthus nitidus* Waldst. et Kit.

Dianthus plumarius subsp. *regis-stephani* (Rapcs.) Baksay

Dianthus rupicola Biv.

* *Gypsophila papillosa* P. Porta

Herniaria algarvica Chaudhri

* *Herniaria latifolia* Lapeyr. subsp. *litardierei* Gamis

Herniaria lusitanica (Chaudhri) subsp. *berlengiana* Chaudhri

Herniaria maritima Link

* *Minuartia smejkalii* Dvorakova

Moehringia jankae Griseb. ex Janka

Moehringia lateriflora (L.) Fenzl.

Moehringia tommasinii Marches.

Moehringia villosa (Wulfen) Fenzl

Petrocoptis grandiflora Rothm.

Petrocoptis montsicciana O. Bolos & Rivas Mart.

Petrocoptis pseudoviscosa Fernández Casas

Silene furcata Rafin. subsp. *angustiflora* (Rupr.) Walters

* *Silene hicesiae* Brullo & Signorello

Silene hifacensis Rouy ex Willk.

* *Silene holzmanii* Heldr. ex Boiss.

Silene longicilia (Brot.) Otth.

Silene mariana Pau

* *Silene orphanidis* Boiss

* *Silene rothmaleri* Pinto da Silva

* *Silene velutina* Pourret ex Loisel.

CHENOPODIACEAE

* *Bassia (Kochia) saxicola* (Guss.) A. J. Scott

* *Cremnophyton lanfrancoi* Brullo et Pavone

* *Salicornia veneta* Pignatti & Lausi

CISTACEAE

Cistus palhinhae Ingram

Halimium verticillatum (Brot.) Sennen

▼M3

Helianthemum alypoides Losa & Rivas Goday

Helianthemum caput-felis Boiss.

* *Tuberaria major* (Willk.) Pinto da Silva & Rozeira

COMPOSITAE

* *Anthemis glaberrima* (Rech. f.) Greuter

Artemisia campestris L. subsp. *bottnica* A.N. Lundström ex Kindb.

* *Artemisia granatensis* Boiss.

* *Artemisia laciniata* Willd.

Artemisia oelandica (Besser) Komaror

* *Artemisia pancicii* (Janka) Ronn.

* *Aster pyrenaeus* Desf. ex DC

* *Aster sorrentinii* (Tod) Lojac.

Carlina onopordifolia Besser

* *Carduus myriacanthus* Salzm. ex DC.

* *Centaurea alba* L. subsp. *heldreichii* (Halacsy) Dostal

* *Centaurea alba* L. subsp. *princeps* (Boiss. & Heldr.) Gugler

* *Centaurea akamantis* T. Georgiadis & G. Chatzikyriakou

* *Centaurea attica* Nyman subsp. *megarensis* (Halacsy & Hayek) Dostal

* *Centaurea balearica* J. D. Rodriguez

* *Centaurea borjae* Valdes-Berm. & Rivas Goday

* *Centaurea citricolor* Font Quer

Centaurea corymbosa Pourret

Centaurea gadorensis G. Blanca

* *Centaurea horrida* Badaro

Centaurea immanuelis-loewii Degen

Centaurea jankae Brandza

* *Centaurea kalambakensis* Freyn & Sint.

Centaurea kartschiana Scop.

* *Centaurea lactiflora* Halacsy

Centaurea micrantha Hoffmanns. & Link subsp. *herminii* (Rouy) Dostál

* *Centaurea niederi* Heldr.

* *Centaurea peucedanifolia* Boiss. & Orph.

* *Centaurea pinnata* Pau

Centaurea pontica Prodan & E. I. Nyárády

Centaurea pulvinata (G. Blanca) G. Blanca

Centaurea rothmalerana (Arènes) Dostál

Centaurea vicentina Mariz

Cirsium brachycephalum Juratzka

* *Crepis crocifolia* Boiss. & Heldr.

Crepis granatensis (Willk.) B. Blanca & M. Cueto

Crepis pusilla (Sommier) Merxmüller

Crepis tectorum L. subsp. *nigrescens*

Erigeron frigidus Boiss. ex DC.

* *Helichrysum melitense* (Pignatti) Brullo et al

▼M3

Hymenostemma pseudanthemis (Kunze) Willd.

Hyoseris frutescens Brullo et Pavone

* *Jurinea cyanoides* (L.) Reichenb.

* *Jurinea fontqueri* Cuatrec.

* *Lamyropsis microcephala* (Moris) Dittrich & Greuter

Leontodon microcephalus (Boiss. ex DC.) Boiss.

Leontodon boryi Boiss.

* *Leontodon siculus* (Guss.) Finch & Sell

Leuzea longifolia Hoffmanns. & Link

Ligularia sibirica (L.) Cass.

* *Palaeocyanus crassifolius* (Bertoloni) Dostal

Santolina impressa Hoffmanns. & Link

Santolina semidentata Hoffmanns. & Link

Saussurea alpina subsp. *esthonica* (Baer ex Rupr) Kupffer

* *Senecio elodes* Boiss. ex DC.

Senecio jacobea L. subsp. *gotlandicus* (Neuman) Sterner

Senecio nevadensis Boiss. & Reuter

* *Serratula lycopifolia* (Vill.) A.Kern

*Tephroseris longifolia (*Jacq.) Griseb et Schenk subsp. *moravica*

CONVOLVULACEAE

* *Convolvulus argyrothamnus* Greuter

* *Convolvulus fernandesii* Pinto da Silva & Teles

CRUCIFERAE

Alyssum pyrenaicum Lapeyr.

* *Arabis kennedyae* Meikle

Arabis sadina (Samp.) P. Cout.

Arabis scopoliana Boiss

* *Biscutella neustriaca* Bonnet

Biscutella vincentina (Samp.) Rothm.

Boleum asperum (Pers.) Desvaux

Brassica glabrescens Poldini

Brassica hilarionis Post

Brassica insularis Moris

* *Brassica macrocarpa* Guss.

Braya linearis Rouy

* *Cochlearia polonica* E. Fröhlich

* *Cochlearia tatrae* Borbas

* *Coincya rupestris* Rouy

* *Coronopus navasii* Pau

Crambe tataria Sebeok

Diplotaxis ibicensis (Pau) Gómez-Campo

* *Diplotaxis siettiana* Maire

Diplotaxis vicentina (P. Cout.) Rothm.

Draba cacuminum Elis Ekman

▼M3

Draba cinerea Adams

Draba dorneri Heuffel.

Erucastrum palustre (Pirona) Vis.

* *Erysimum pieninicum* (Zapal.) Pawl.

* *Iberis arbuscula* Runemark

Iberis procumbens Lange subsp. *microcarpa* Franco & Pinto da Silva

* *Jonopsidium acaule* (Desf.) Reichenb.

Jonopsidium savianum (Caruel) Ball ex Arcang.

Rhynchosinapis erucastrum (L.) Dandy ex Clapham subsp. *cintrana* (Coutinho) Franco & P. Silva *(Coincya cintrana* (P. Cout.) Pinto da Silva)

Sisymbrium cavanillesianum Valdés & Castroviejo

Sisymbrium supinum L.

Thlaspi jankae A.Kern.

CYPERACEAE

Carex holostoma Drejer

* *Carex panormitana* Guss.

Eleocharis carniolica Koch

DIOSCOREACEAE

* *Borderea chouardii* (Gaussen) Heslot

DROSERACEAE

Aldrovanda vesiculosa L.

ELATINACEAE

Elatine gussonei (Sommier) Brullo et al

ERICACEAE

Rhododendron luteum Sweet

EUPHORBIACEAE

* *Euphorbia margalidiana* Kuhbier & Lewejohann

Euphorbia transtagana Boiss.

GENTIANACEAE

* *Centaurium rigualii* Esteve

* *Centaurium somedanum* Lainz

Gentiana ligustica R. de Vilm. & Chopinet

Gentianella anglica (Pugsley) E. F. Warburg

* *Gentianella bohemica* Skalicky

GERANIACEAE

* *Erodium astragaloides* Boiss. & Reuter

Erodium paularense Fernández-González & Izco

* *Erodium rupicola* Boiss.

GLOBULARIACEAE

* *Globularia stygia* Orph. ex Boiss.

GRAMINEAE

Arctagrostis latifolia (R. Br.) Griseb.

Arctophila fulva (Trin.) N. J. Anderson

Avenula hackelii (Henriq.) Holub

Bromus grossus Desf. ex DC.

▼M3

Calamagrostis chalybaea (Laest.) Fries

Cinna latifolia (Trev.) Griseb.

Coleanthus subtilis (Tratt.) Seidl

Festuca brigantina (Markgr.-Dannenb.) Markgr.-Dannenb.

Festuca duriotagana Franco & R. Afonso

Festuca elegans Boiss.

Festuca henriquesii Hack.

Festuca summilusitana Franco & R. Afonso

Gaudinia hispanica Stace & Tutin

Holcus setiglumis Boiss. & Reuter subsp. *duriensis Pinto da Silva*

Micropyropsis tuberosa Romero — Zarco & Cabezudo

Poa granitica Br.-Bl. subsp. *disparilis* (E. I. Nyárády) E. I. Nyárády

* *Poa riphaea* (Ascher et Graebner) Fritsch

Pseudarrhenatherum pallens (Link) J. Holub

Puccinellia phryganodes (Trin.) Scribner + Merr.

Puccinellia pungens (Pau) Paunero

* *Stipa austroitalica* Martinovsky

* *Stipa bavarica* Martinovsky & H. Scholz

Stipa danubialis Dihoru & Roman

* *Stipa styriaca* Martinovsky

* *Stipa veneta* Moraldo

* *Stipa zalesskii* Wilensky

Trisetum subalpestre (Hartman) Neuman

GROSSULARIACEAE

* *Ribes sardoum* Martelli

HIPPURIDACEAE

Hippuris tetraphylla L. Fil.

HYPERICACEAE

* *Hypericum aciferum* (Greuter) N.K.B. Robson

IRIDACEAE

Crocus cyprius Boiss. et Kotschy

Crocus hartmannianus Holmboe

Gladiolus palustris Gaud.

Iris aphylla L. subsp. *hungarica* Hegi

Iris humilis Georgi subsp. *arenaria* (Waldst. et Kit.) A. et D.Löve

JUNCACEAE

Juncus valvatus Link

Luzula arctica Blytt

LABIATAE

Dracocephalum austriacum L.

* *Micromeria taygetea* P. H. Davis

Nepeta dirphya (Boiss.) Heldr. ex Halacsy

* *Nepeta sphaciotica* P. H. Davis

Origanum dictamnus L.

▼M3

Phlomis brevibracteata Turril

Phlomis cypria Post

Salvia veneris Hedge

Sideritis cypria Post

Sideritis incana subsp. *glauca* (Cav.) Malagarriga

Sideritis javalambrensis Pau

Sideritis serrata Cav. ex Lag.

Teucrium lepicephalum Pau

Teucrium turredanum Losa & Rivas Goday

* *Thymus camphoratus* Hoffmanns. & Link

Thymus carnosus Boiss.

* *Thymus lotocephalus* G. López & R. Morales *(Thymus cephalotos* L.*)*

LEGUMINOSAE

Anthyllis hystrix Cardona, Contandr. & E. Sierra

* *Astragalus algarbiensis* Coss. ex Bunge

* *Astragalus aquilanus* Anzalone

Astragalus centralpinus Braun-Blanquet

* *Astragalus macrocarpus* DC. subsp. *lefkarensis*

* *Astragalus maritimus* Moris

Astragalus peterfii Jáv.

Astragalus tremolsianus Pau

* *Astragalus verrucosus* Moris

* *Cytisus aeolicus* Guss. ex Lindl.

Genista dorycnifolia Font Quer

Genista holopetala (Fleischm. ex Koch) Baldacci

Melilotus segetalis (Brot.) Ser. subsp. *fallax Franco*

* *Ononis hackelii* Lange

Trifolium saxatile All.

* *Vicia bifoliolata* J.D. Rodríguez

LENTIBULARIACEAE

* *Pinguicula crystallina* Sm.

Pinguicula nevadensis (Lindb.) Casper

LILIACEAE

Allium grosii Font Quer

* *Androcymbium rechingeri* Greuter

* *Asphodelus bento-rainhae* P. Silva

* *Chionodoxa lochiae* Meikle in Kew Bull.

Colchicum arenarium Waldst. et Kit.

Hyacinthoides vicentina (Hoffmans. & Link) Rothm.

* *Muscari gussonei* (Parl.) Tod.

Scilla litardierei Breist.

* *Scilla morrisii* Meikle

Tulipa cypria Stapf

Tulipa hungarica Borbas

▼M3

LINACEAE

* *Linum dolomiticum* Borbas

* *Linum muelleri* Moris *(Linum maritimum muelleri)*

LYTHRACEAE

* *Lythrum flexuosum* Lag.

MALVACEAE

Kosteletzkya pentacarpos (L.) Ledeb.

NAJADACEAE

Najas flexilis (Willd.) Rostk. & W.L. Schmidt

Najas tenuissima (A. Braun) Magnus

OLEACEAE

Syringa josikaea Jacq. Fil. ex Reichenb.

ORCHIDACEAE

Anacamptis urvilleana Sommier et Caruana Gatto

Calypso bulbosa L.

* *Cephalanthera cucullata* Boiss. & Heldr.

Cypripedium calceolus L.

Dactylorhiza kalopissii E.Nelson

Gymnigritella runei Teppner & Klein

Himantoglossum adriaticum Baumann

Himantoglossum caprinum (Bieb.) V.Koch

Liparis loeselii (L.) Rich.

* *Ophrys kotschyi* H.Fleischm. et Soo

* *Ophrys lunulata* Parl.

Ophrys melitensis (Salkowski) J et P Devillers-Terschuren

Platanthera obtusata (Pursh) subsp. *oligantha* (Turez.) Hulten

OROBANCHACEAE

Orobanche densiflora Salzm. ex Reut.

PAEONIACEAE

Paeonia cambessedesii (Willk.) Willk.

Paeonia clusii F.C. Stern subsp. *rhodia* (Stearn) Tzanoudakis

Paeonia officinalis L. subsp. *banatica* (Rachel) Soo

Paeonia parnassica Tzanoudakis

PALMAE

Phoenix theophrasti Greuter

PAPAVERACEAE

Corydalis gotlandica Lidén

Papaver laestadianum (Nordh.) Nordh.

Papaver radicatum Rottb. subsp. *hyperboreum* Nordh.

PLANTAGINACEAE

Plantago algarbiensis Sampaio *(Plantago bracteosa* (Willk.) G. Sampaio)

Plantago almogravensis Franco

PLUMBAGINACEAE

Armeria berlengensis Daveau

▼M3

* *Armeria helodes* Martini & Pold

Armeria neglecta Girard

Armeria pseudarmeria (Murray) Mansfeld

* *Armeria rouyana* Daveau

Armeria soleirolii (Duby) Godron

Armeria velutina Welw. ex Boiss. & Reuter

Limonium dodartii (Girard) O. Kuntze subsp. *lusitanicum* (Daveau) Franco

* *Limonium insulare* (Beg. & Landi) Arrig. & Diana

Limonium lanceolatum (Hoffmans. & Link) Franco

Limonium multiflorum Erben

* *Limonium pseudolaetum* Arrig. & Diana

* *Limonium strictissimum* (Salzmann) Arrig.

POLYGONACEAE

Persicaria foliosa (H. Lindb.) Kitag.

Polygonum praelongum Coode & Cullen

Rumex rupestris Le Gall

PRIMULACEAE

Androsace mathildae Levier

Androsace pyrenaica Lam.

* *Cyclamen fatrense* Halda et Sojak

* *Primula apennina* Widmer

Primula carniolica Jacq.

Primula nutans Georgi

Primula palinuri Petagna

Primula scandinavica Bruun

Soldanella villosa Darracq.

RANUNCULACEAE

* *Aconitum corsicum* Gayer *(Aconitum napellus* subsp. *corsicum)*

Aconitum firmum (Reichenb.) Neilr subsp. *moravicum* Skalicky

Adonis distorta Ten.

Aquilegia bertolonii Schott

Aquilegia kitaibelii Schott

* *Aquilegia pyrenaica* D.C. subsp. *cazorlensis* (Heywood) Galiano

* *Consolida samia* P.H. Davis

* *Delphinium caseyi* B.L.Burtt

Pulsatilla grandis Wenderoth *Pulsatilla patens* (L.) Miller

* *Pulsatilla pratensis* (L.) Miller subsp. *hungarica* Soo

* *Pulsatilla slavica* G.Reuss.

* *Pulsatilla subslavica* Futak ex Goliasova

Pulsatilla vulgaris Hill. subsp. *gotlandica* (Johanss.) Zaemelis & Paegle

Ranunculus kykkoensis Meikle

Ranunculus lapponicus L.

* *Ranunculus weyleri* Mares

RESEDACEAE

▼M3

**Reseda decursiva Forssk.*

ROSACEAE

Agrimonia pilosa Ledebour

Potentilla delphinensis Gren. & Godron

Potentilla emilii-popii Nyárády

* *Pyrus magyarica* Terpo

Sorbus teodorii Liljefors

RUBIACEAE

Galium cracoviense Ehrend.

* *Galium litorale* Guss.

Galium moldavicum (Dobrescu) Franco

* *Galium sudeticum* Tausch

* *Galium viridiflorum* Boiss. & Reuter

SALICACEAE

Salix salvifolia Brot. subsp. *australis* Franco

SANTALACEAE

Thesium ebracteatum Hayne

SAXIFRAGACEAE

Saxifraga berica (Beguinot) D.A. Webb

Saxifraga florulenta Moretti

Saxifraga hirculus L.

Saxifraga osloënsis Knaben

Saxifraga tombeanensis Boiss. ex Engl.

SCROPHULARIACEAE

Antirrhinum charidemi Lange

Chaenorrhinum serpyllifolium (Lange) Lange subsp. *lusitanicum* R. Fernandes

* *Euphrasia genargentea* (Feoli) Diana

Euphrasia marchesettii Wettst. ex Marches.

Linaria algarviana Chav.

Linaria coutinhoi Valdés

Linaria loeselii Schweigger

* *Linaria ficalhoana* Rouy

Linaria flava (Poiret) Desf.

* *Linaria hellenica* Turrill

Linaria pseudolaxiflora Lojacono

* *Linaria ricardoi* Cout.

Linaria tonzigii Lona

* *Linaria tursica* B. Valdés & Cabezudo

Odontites granatensis Boiss.

* *Pedicularis sudetica Willd.*

Rhinanthus oesilensis (Ronniger & Saarsoo) Vassilcz

Tozzia carpathica Wol.

Verbascum litigiosum Samp.

Veronica micrantha Hoffmanns. & Link

▼M3

* *Veronica oetaea* L.-A. Gustavsson

SOLANACEAE

**Atropa baetica* Willk.

THYMELAEACEAE

* *Daphne arbuscula* Celak

Daphne petraea Leybold

* *Daphne rodriguezii* Texidor

ULMACEAE

Zelkova abelicea (Lam.) Boiss.

UMBELLIFERAE

* *Angelica heterocarpa* Lloyd

Angelica palustris (Besser) Hoffm.

* *Apium bermejoi* Llorens

Apium repens (Jacq.) Lag.

Athamanta cortiana Ferrarini

* *Bupleurum capillare* Boiss. & Heldr.

* *Bupleurum kakiskalae* Greuter

Eryngium alpinum L.

* *Eryngium viviparum* Gay

* *Ferula sadleriana* Lebed.

Hladnikia pastinacifolia Reichenb.

* *Laserpitium longiradium* Boiss.

* *Naufraga balearica* Constans & Cannon

* *Oenanthe conioides* Lange

Petagnia saniculifolia Guss.

Rouya polygama (Desf.) Coincy

* *Seseli intricatum* Boiss.

Seseli leucospermum Waldst. et Kit

Thorella verticillatinundata (Thore) Briq.

VALERIANACEAE

Centranthus trinervis (Viv.) Beguinot

VIOLACEAE

Viola delphinantha Boiss.

* *Viola hispida* Lam.

Viola jaubertiana Mares & Vigineix

Viola rupestris F.W. Schmidt subsp. *relicta* Jalas

LOWER PLANTS

BRYOPHYTA

Bruchia vogesiaca Schwaegr. (o)

Bryhnia novae-angliae (Sull & Lesq.) Grout (o)

* *Bryoerythrophyllum campylocarpum* (C. Müll.) Crum. *(Bryoerythrophyllum machadoanum* (Sergio) M. O. Hill) (o)

Buxbaumia viridis (Moug.) Moug. & Nestl. (o)

Cephalozia macounii (Aust.) Aust. (o)

Cynodontium suecicum (H. Arn. & C. Jens.) I. Hag. (o)

▼M3

Dichelyma capillaceum (Dicks) Myr. (o)

Dicranum viride (Sull. & Lesq.) Lindb. (o)

Distichophyllum carinatum Dix. & Nich. (o)

Drepanocladus (Hamatocaulis) vernicosus (Mitt.) Warnst. (o)

Encalypta mutica (I. Hagen) (o)

Hamatocaulis lapponicus (Norrl.) Hedenäs (o)

Herzogiella turfacea (Lindb.) I. Wats. (o)

Hygrohypnum montanum (Lindb.) Broth. (o)

Jungermannia handelii (Schiffn.) Amak. (o)

Mannia triandra (Scop.) Grolle (o)

* *Marsupella profunda* Lindb. (o)

Meesia longiseta Hedw. (o)

Nothothylas orbicularis (Schwein.) Sull. (o)

Ochyraea tatrensis Vana (o)

Orthothecium lapponicum (Schimp.) C. Hartm. (o)

Orthotrichum rogeri Brid. (o)

Petalophyllum ralfsii (Wils.) Nees & Gott. (o)

Plagiomnium drummondii (Bruch & Schimp.) T. Kop. (o)

Riccia breidleri Jur. (o)

Riella helicophylla (Bory & Mont.) Mont. (o)

Scapania massolongi (K. Müll.) K. Müll. (o)

Sphagnum pylaisii Brid. (o)

Tayloria rudolphiana (Garov) B. & S. (o)

Tortella rigens (N. Alberts) (o)

SPECIES FOR MACARONESIA

PTERIDOPHYTA

HYMENOPHYLLACEAE

Hymenophyllum maderensis Gibby & Lovis

DRYOPTERIDACEAE

* *Polystichum drepanum* (Sw.) C. Presl.

ISOETACEAE

Isoetes azorica Durieu & Paiva ex Milde

MARSILEACEAE

* *Marsilea azorica* Launert & Paiva

ANGIOSPERMAE

ASCLEPIADACEAE

Caralluma burchardii N. E. Brown

* *Ceropegia chrysantha* Svent.

BORAGINACEAE

Echium candicans L. fil.

* *Echium gentianoides* Webb & Coincy

Myosotis azorica H. C. Watson

Myosotis maritima Hochst. in Seub.

CAMPANULACEAE

▼M3

* *Azorina vidalii* (H. C. Watson) Feer

Musschia aurea (L. f.) DC.

* *Musschia wollastonii* Lowe

CAPRIFOLIACEAE

* *Sambucus palmensis* Link

CARYOPHYLLACEAE

Spergularia azorica (Kindb.) Lebel

CELASTRACEAE

Maytenus umbellata (R. Br.) Mabb.

CHENOPODIACEAE

Beta patula Ait.

CISTACEAE

Cistus chinamadensis Banares & Romero

* *Helianthemum bystropogophyllum* Svent.

COMPOSITAE

Andryala crithmifolia Ait.

* *Argyranthemum lidii* Humphries

Argyranthemum thalassophylum (Svent.) Hump.

Argyranthemum winterii (Svent.) Humphries

* *Atractylis arbuscula* Svent. & Michaelis

Atractylis preauxiana Schultz.

Calendula maderensis DC.

Cheirolophus duranii (Burchard) Holub

Cheirolophus ghomerytus (Svent.) Holub

Cheirolophus junonianus (Svent.) Holub

Cheirolophus massonianus (Lowe) Hansen & Sund.

Cirsium latifolium Lowe

Helichrysum gossypinum Webb

Helichrysum monogynum Burtt & Sund.

Hypochoeris oligocephala (Svent. & Bramw.) Lack

* *Lactuca watsoniana* Trel.

* *Onopordum nogalesii* Svent.

* *Onorpordum carduelinum* Bolle

* *Pericallis hadrosoma* (Svent.) B. Nord.

Phagnalon benettii Lowe

Stemmacantha cynaroides (Chr. Son. in Buch) Ditt

Sventenia bupleuroides Font Quer

* *Tanacetum ptarmiciflorum* Webb & Berth

CONVOLVULACEAE

* *Convolvulus caput-medusae* Lowe

* *Convolvulus lopez-socasii* Svent.

* *Convolvulus massonii* A. Dietr.

CRASSULACEAE

Aeonium gomeraense Praeger

▼M3

Aeonium saundersii Bolle

Aichryson dumosum (Lowe) Praeg.

Monanthes wildpretii Banares & Scholz

Sedum brissemoretii Raymond-Hamet

CRUCIFERAE

* *Crambe arborea* Webb ex Christ

Crambe laevigata DC. ex Christ

* *Crambe sventenii* R. Petters ex Bramwell & Sund.

* *Parolinia schizogynoides* Svent.

Sinapidendron rupestre (Ait.) Lowe

CYPERACEAE

Carex malato-belizii Raymond

DIPSACACEAE

Scabiosa nitens Roemer & J. A. Schultes

ERICACEAE

Erica scoparia L. subsp. *azorica* (Hochst.) D. A. Webb

EUPHORBIACEAE

* *Euphorbia handiensis* Burchard

Euphorbia lambii Svent.

Euphorbia stygiana H. C. Watson

GERANIACEAE

* *Geranium maderense* P. F. Yeo

GRAMINEAE

Deschampsia maderensis (Haeck. & Born.) Buschm.

Phalaris maderensis (Menezes) Menezes

GLOBULARIACEAE

* *Globularia ascanii* D. Bramwell & Kunkel

* *Globularia sarcophylla* Svent.

LABIATAE

* *Sideritis cystosiphon* Svent.

* *Sideritis discolor* (Webb ex de Noe) Bolle

Sideritis infernalis Bolle

Sideritis marmorea Bolle

Teucrium abutiloides L'Hér.

Teucrium betonicum L'Hér.

LEGUMINOSAE

* *Anagyris latifolia* Brouss. ex. Willd.

Anthyllis lemanniana Lowe

* *Dorycnium spectabile* Webb & Berthel

* *Lotus azoricus* P. W. Ball

Lotus callis-viridis D. Bramwell & D. H. Davis

* *Lotus kunkelii* (E. Chueca) D. Bramwell & al.

* *Teline rosmarinifolia* Webb & Berthel.

* *Teline salsoloides* Arco & Acebes.

▼M3

Vicia dennesiana H. C. Watson

LILIACEAE

* *Androcymbium psammophilum* Svent.

Scilla maderensis Menezes

Semele maderensis Costa

LORANTHACEAE

Arceuthobium azoricum Wiens & Hawksw.

MYRICACEAE

* *Myrica rivas-martinezii* Santos.

OLEACEAE

Jasminum azoricum L.

Picconia azorica (Tutin) Knobl.

ORCHIDACEAE

Goodyera macrophylla Lowe

PITTOSPORACEAE

* *Pittosporum coriaceum* Dryand. ex. Ait.

PLANTAGINACEAE

Plantago malato-belizii Lawalree

PLUMBAGINACEAE

* *Limonium arborescens* (Brouss.) Kuntze

Limonium dendroides Svent.

**Limonium spectabile* (Svent.) Kunkel & Sunding

**Limonium sventenii* Santos & Fernández Galván

POLYGONACEAE

Rumex azoricus Rech. fil.

RHAMNACEAE

Frangula azorica Tutin

ROSACEAE

* *Bencomia brachystachya* Svent.

Bencomia sphaerocarpa Svent.

* *Chamaemeles coriacea* Lindl.

Dendriopoterium pulidoi Svent.

Marcetella maderensis (Born.) Svent.

Prunus lusitanica L. subsp. *azorica* (Mouillef.) Franco

Sorbus maderensis (Lowe) Dode

SANTALACEAE

Kunkeliella subsucculenta Kammer

SCROPHULARIACEAE

* *Euphrasia azorica* H.C. Watson

Euphrasia grandiflora Hochst. in Seub.

* *Isoplexis chalcantha* Svent. & O'Shanahan

Isoplexis isabelliana (Webb & Berthel.) Masferrer

Odontites holliana (Lowe) Benth.

Sibthorpia peregrina L.

▼**M3**

SOLANACEAE

* *Solanum lidii* Sunding

UMBELLIFERAE

Ammi trifoliatum (H. C. Watson) Trelease

Bupleurum handiense (Bolle) Kunkel

Chaerophyllum azoricum Trelease

Ferula latipinna Santos

Melanoselinum decipiens (Schrader & Wendl.) Hoffm.

Monizia edulis Lowe

Oenanthe divaricata (R. Br.) Mabb.

Sanicula azorica Guthnick ex Seub.

VIOLACEAE

Viola paradoxa Lowe

LOWER PLANTS

BRYOPHYTA

* *Echinodium spinosum* (Mitt.) Jur. (o)

* *Thamnobryum fernandesii* Sergio (o).

▼B

ANNEX III

CRITERIA FOR SELECTING SITES ELIGIBLE FOR IDENTIFICATION AS SITES OF COMMUNITY IMPORTANCE AND DESIGNATION AS SPECIAL AREAS OF CONSERVATION

STAGE 1: **Assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II (including priority natural habitat types and priority species)**

A. *Site assessment criteria for a given natural habitat type in Annex I*

(a) Degree of representativity of the natural habitat ►C1 type on the site. ◄

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

B. *Site assessment criteria for a given species in Annex II*

(a) Size and density of the population of the species present on the site in relation to the populations present within national territory.

(b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.

(c) Degree of isolation of the population present on the site in relation to the natural range of the species.

(d) Global assessment of the value of the site for conservation of the species concerned.

C. On the basis of these criteria, Member States will classify the sites which they propose on the national list as sites eligible for identification as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

D. That list will show the sites containing the priority natural habitat types and priority species selected by the Member States on the basis of the criteria in A and B above.

STAGE 2: **Assessment of the Community importance of the sites included on the national lists**

1. All the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance.

2. The assessment of the Community importance of other sites on Member States' lists, i.e. their contribution to maintaining or re-establishing, at a favourable conservation status, a natural habitat in Annex I or a species in Annex II and/or to the coherence of Natura 2000 will take account of the following criteria:

(a) relative value of the site at national level;

(b) geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

(c) total area of the site;

(d) number of natural habitat types in Annex I and species in Annex II present on the site;

(e) global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both ►C1 the characteristic or unique ◄ aspect of its features and the way they are combined.

▼M3

ANNEX IV

ANIMAL AND PLANT SPECIES OF COMMUNITY INTEREST IN NEED OF STRICT PROTECTION

The species listed in this Annex are indicated:

— by the name of species or subspecies, or

— by the body of species belonging to a higher taxon or to a designated part of that taxon.

The abbreviation 'spp.' after the name of a family or genus designates all the species belonging to that family or genus.

(a) ***ANIMALS***

VERTEBRATES

MAMMALS

INSECTIVORA

Erinaceidae

Erinaceus algirus

Soricidae

Crocidura canariensis

Crocidura sicula

Talpidae

Galemys pyrenaicus

MICROCHIROPTERA

All species

MEGACHIROPTERA

Pteropodidae

Rousettus aegyptiacus

RODENTIA

Gliridae

All species except *Glis glis* and *Eliomys quercinus*

Sciuridae

Marmota marmota latirostris

Pteromys volans (Sciuropterus russicus)

Spermophilus citellus (Citellus citellus)

Spermophilus suslicus (Citellus suslicus)

Sciurus anomalus

Castoridae

Castor fiber (except the Estonian, Latvian, Lithuanian, Polish, Finnish and Swedish, populations)

Cricetidae

Cricetus cricetus (except the Hungarian populations)

Mesocricetus newtoni

Microtidae

Microtus cabrerae

Microtus oeconomus arenicola

Microtus oeconomus mehelyi

Microtus tatricus

▼M3

Zapodidae

Sicista betulina

Sicista subtilis

Hystricidae

Hystrix cristata

CARNIVORA

Canidae

Alopex lagopus

*Canis lupus (*except the Greek populations north of the 39th parallel; Estonian populations, Spanish populations north of the Duero; Bulgarian, Latvian, Lithuanian, Polish, Slovak populations and Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management)

Ursidae

Ursus arctos

Mustelidae

Lutra lutra

Mustela eversmanii

Mustela lutreola

Vormela peregusna

Felidae

Felis silvestris

Lynx lynx (except the Estonian population)

Lynx pardinus

Phocidae

Monachus monachus

Phoca hispida saimensis

ARTIODACTYLA

Cervidae

Cervus elaphus corsicanus

Bovidae

Bison bonasus

Capra aegagrus (natural populations)

Capra pyrenaica pyrenaica

Ovis gmelini musimon (Ovis ammon musimon) (natural populations — Corsica and Sardinia)

Ovis orientalis ophion (Ovis gmelini ophion)

Rupicapra pyrenaica ornata (Rupicapra rupicapra ornata)

Rupicapra rupicapra balcanica

Rupicapra rupicapra tatrica

CETACEA

All species

REPTILES

TESTUDINATA

Testudinidae

Testudo graeca

▼M3

Testudo hermanni

Testudo marginata

Cheloniidae

Caretta caretta

Chelonia mydas

Lepidochelys kempii

Eretmochelys imbricata

Dermochelyidae

Dermochelys coriacea

Emydidae

Emys orbicularis

Mauremys caspica

Mauremys leprosa

SAURIA

Lacertidae

Algyroides fitzingeri

Algyroides marchi

Algyroides moreoticus

Algyroides nigropunctatus

Gallotia atlantica

Gallotia galloti

Gallotia galloti insulanagae

Gallotia simonyi

Gallotia stehlini

Lacerta agilis

Lacerta bedriagae

Lacerta bonnali (Lacerta monticola)

Lacerta monticola

Lacerta danfordi

Lacerta dugesi

Lacerta graeca

Lacerta horvathi

Lacerta schreiberi

Lacerta trilineata

Lacerta viridis

Lacerta vivipara pannonica

Ophisops elegans

Podarcis erhardii

Podarcis filfolensis

Podarcis hispanica atrata

Podarcis lilfordi

Podarcis melisellensis

Podarcis milensis

Podarcis muralis

▼M3

Podarcis peloponnesiaca

Podarcis pityusensis

Podarcis sicula

Podarcis taurica

Podarcis tiliguerta

Podarcis wagleriana

Scincidae

Ablepharus kitaibelii

Chalcides bedriagai

Chalcides ocellatus

Chalcides sexlineatus

Chalcides simonyi (Chalcides occidentalis)

Chalcides viridianus

Ophiomorus punctatissimus

Gekkonidae

Cyrtopodion kotschyi

Phyllodactylus europaeus

Tarentola angustimentalis

Tarentola boettgeri

Tarentola delalandii

Tarentola gomerensis

Agamidae

Stellio stellio

Chamaeleontidae

Chamaeleo chamaeleon

Anguidae

Ophisaurus apodus

OPHIDIA

Colubridae

Coluber caspius

Coluber cypriensis

Coluber hippocrepis

Coluber jugularis

Coluber laurenti

Coluber najadum

Coluber nummifer

Coluber viridiflavus

Coronella austriaca

Eirenis modesta

Elaphe longissima

Elaphe quatuorlineata

Elaphe situla

Natrix natrix cetti

Natrix natrix corsa

▼M3

Natrix natrix cypriaca

Natrix tessellata

Telescopus falax

Viperidae

Vipera ammodytes

Macrovipera schweizeri (Vipera lebetina schweizeri)

Vipera seoanni (except Spanish populations)

Vipera ursinii

Vipera xanthina

Boidae

Eryx jaculus

AMPHIBIANS

CAUDATA

Salamandridae

Chioglossa lusitanica

Euproctus asper

Euproctus montanus

Euproctus platycephalus

Mertensiella luschani (Salamandra luschani)

Salamandra atra

Salamandra aurorae

Salamandra lanzai

Salamandrina terdigitata

Triturus carnifex (Triturus cristatus carnifex)

Triturus cristatus (Triturus cristatus cristatus)

Triturus italicus

Triturus karelinii (Triturus cristatus karelinii)

Triturus marmoratus

Triturus montandoni

Triturus vulgaris ampelensis

Proteidae

Proteus anguinus

Plethodontidae

Hydromantes (Speleomantes) ambrosii

Hydromantes (Speleomantes) flavus

Hydromantes (Speleomantes) genei

Hydromantes (Speleomantes) imperialis

Hydromantes (Speleomantes) strinatii (Hydromantes (Speleomantes) italicus)

Hydromantes (Speleomantes) supramontis

ANURA

Discoglossidae

Alytes cisternasii

Alytes muletensis

Alytes obstetricans

▼M3

Bombina bombina

Bombina variegata

*Discoglossus galganoi (*including *Discoglossus 'jeanneae')*

Discoglossus montalentii

Discoglossus pictus

Discoglossus sardus

Ranidae

Rana arvalis

Rana dalmatina

Rana graeca

Rana iberica

Rana italica

Rana latastei

Rana lessonae

Pelobatidae

Pelobates cultripes

Pelobates fuscus

Pelobates syriacus

Bufonidae

Bufo calamita

Bufo viridis

Hylidae

Hyla arborea

Hyla meridionalis

Hyla sarda

FISH

ACIPENSERIFORMES

Acipenseridae

Acipenser naccarii

Acipenser sturio

SALMONIFORMES

Coregonidae

Coregonus oxyrhynchus (anadromous populations in certain sectors of the North Sea, except the Finnish populations)

CYPRINIFORMES

Cyprinidae

Anaecypris hispanica

Phoxinus percnurus

ATHERINIFORMES

Cyprinodontidae

Valencia hispanica

PERCIFORMES

Percidae

Gymnocephalus baloni

Romanichthys valsanicola

▼M3

Zingel asper

INVERTEBRATES

ARTHROPODS

CRUSTACEA

Isopoda

Armadillidium ghardalamensis

INSECTA

Coleoptera

Bolbelasmus unicornis

Buprestis splendens

Carabus hampei

Carabus hungaricus

Carabus olympiae

Carabus variolosus

Carabus zawadszkii

Cerambyx cerdo

Cucujus cinnaberinus

Dorcadion fulvum cervae

Duvalius gebhardti

Duvalius hungaricus

Dytiscus latissimus

Graphoderus bilineatus

Leptodirus hochenwarti

Pilemia tigrina

Osmoderma eremita

Phryganophilus ruficollis

Probaticus subrugosus

Propomacrus cypriacus

Pseudogaurotina excellens

Pseudoseriscius cameroni

Pytho kolwensis

Rosalia alpina

Lepidoptera

Apatura metis

Arytrura musculus

Catopta thrips

Chondrosoma fiduciarium

Coenonympha hero

Coenonympha oedippus

Colias myrmidone

Cucullia mixta

Dioszeghyana schmidtii

Erannis ankeraria

Erebia calcaria

▼M3

Erebia christi

Erebia sudetica

Eriogaster catax

Fabriciana elisa

Glyphipterix loricatella

Gortyna borelii lunata

Hypodryas maturna

Hyles hippophaes

Leptidea morsei

Lignyoptera fumidaria

Lopinga achine

Lycaena dispar

Lycaena helle

Maculinea arion

Maculinea nausithous

Maculinea teleius

Melanargia arge

Nymphalis vaualbum

Papilio alexanor

Papilio hospiton

Parnassius apollo

Parnassius mnemosyne

Phyllometra culminaria

Plebicula golgus

Polymixis rufocincta isolata

Polyommatus eroides

Proserpinus proserpina

Pseudophilotes bavius

Xylomoia strix

Zerynthia polyxena

Mantodea

Apteromantis aptera

Odonata

Aeshna viridis

Cordulegaster heros

Cordulegaster trinacriae

Gomphus graslinii

Leucorrhinia albifrons

Leucorrhinia caudalis

Leucorrhinia pectoralis

Lindenia tetraphylla

Macromia splendens

Ophiogomphus cecilia

Oxygastra curtisii

▼M3

Stylurus flavipes

Sympecma braueri

Orthoptera

Baetica ustulata

Brachytrupes megacephalus

Isophya costata

Isophya harzi

Isophya stysi

Myrmecophilus baronii

Odontopodisma rubripes

Paracaloptenus caloptenoides

Pholidoptera transsylvanica

Saga pedo

Stenobothrus (Stenobothrodes) eurasius

ARACHNIDA

Araneae

Macrothele calpeiana

MOLLUSCS

GASTROPODA

Anisus vorticulus

Caseolus calculus

Caseolus commixta

Caseolus sphaerula

Chilostoma banaticum

Discula leacockiana

Discula tabellata

Discula testudinalis

Discula turricula

Discus defloratus

Discus guerinianus

Elona quimperiana

Geomalacus maculosus

Geomitra moniziana

Gibbula nivosa

Hygromia kovacsi

Idiomela (Helix) subplicata

Lampedusa imitatrix

Lampedusa melitensis

Leiostyla abbreviata

Leiostyla cassida

Leiostyla corneocostata

Leiostyla gibba

Leiostyla lamellosa

Paladilhia hungarica

▼M3

Patella ferruginea

Sadleriana pannonica

Theodoxus prevostianus

Theodoxus transversalis

BIVALVIA

Anisomyaria

Lithophaga lithophaga

Pinna nobilis

Unionoida

Margaritifera auricularia

Unio crassus

Dreissenidae

Congeria kusceri

ECHINODERMATA

Echinoidea

Centrostephanus longispinus

(b) ***PLANTS***

Annex IV (b) contains all the plant species listed in Annex II (b) ([1]) plus those mentioned below:

PTERIDOPHYTA

ASPLENIACEAE

Asplenium hemionitis L.

ANGIOSPERMAE

AGAVACEAE

Dracaena draco (L.) L.

AMARYLLIDACEAE

Narcissus longispathus Pugsley

Narcissus triandrus L.

BERBERIDACEAE

Berberis maderensis Lowe

CAMPANULACEAE

Campanula morettiana Reichenb.

Physoplexis comosa (L.) Schur.

CARYOPHYLLACEAE

Moehringia fontqueri Pau

COMPOSITAE

Argyranthemum pinnatifidum (L.f.) Lowe subsp. *succulentum* (Lowe) C. J. Humphries

Helichrysum sibthorpii Rouy

Picris willkommii (Schultz Bip.) Nyman

Santolina elegans Boiss. ex DC.

Senecio caespitosus Brot.

Senecio lagascanus DC. subsp. *lusitanicus* (P. Cout.) Pinto da Silva

Wagenitzia lancifolia (Sieber ex Sprengel) Dostal

([1]) Except bryophytes in Annex II (b).

▼**M3**

CRUCIFERAE

Murbeckiella sousae Rothm.

EUPHORBIACEAE

Euphorbia nevadensis Boiss. & Reuter

GESNERIACEAE

Jankaea heldreichii (Boiss.) Boiss.

Ramonda serbica Pancic

IRIDACEAE

Crocus etruscus Parl.

Iris boissieri Henriq.

Iris marisca Ricci & Colasante

LABIATAE

Rosmarinus tomentosus Huber-Morath & Maire

Teucrium charidemi Sandwith

Thymus capitellatus Hoffmanns. & Link

Thymus villosus L. subsp. *villosus* L.

LILIACEAE

Androcymbium europaeum (Lange) K. Richter

Bellevalia hackelli Freyn

Colchicum corsicum Baker

Colchicum cousturieri Greuter

Fritillaria conica Rix

Fritillaria drenovskii Degen & Stoy.

Fritillaria gussichiae (Degen & Doerfler) Rix

Fritillaria obliqua Ker-Gawl.

Fritillaria rhodocanakis Orph. ex Baker

Ornithogalum reverchonii Degen & Herv.-Bass.

Scilla beirana Samp.

Scilla odorata Link

ORCHIDACEAE

Ophrys argolica Fleischm.

Orchis scopulorum Simsmerh.

Spiranthes aestivalis (Poiret) L. C. M. Richard

PRIMULACEAE

Androsace cylindrica DC.

Primula glaucescens Moretti

Primula spectabilis Tratt.

RANUNCULACEAE

Aquilegia alpina L.

SAPOTACEAE

Sideroxylon marmulano Banks ex Lowe

SAXIFRAGACEAE

Saxifraga cintrana Kuzinsky ex Willk.

Saxifraga portosanctana Boiss.

▼**M3**

Saxifraga presolanensis Engl.

Saxifraga valdensis DC.

Saxifraga vayredana Luizet

SCROPHULARIACEAE

Antirrhinum lopesianum Rothm.

Lindernia procumbens (Krocker) Philcox

SOLANACEAE

Mandragora officinarum L.

THYMELAEACEAE

Thymelaea broterana P. Cout.

UMBELLIFERAE

Bunium brevifolium Lowe

VIOLACEAE

Viola athois W. Becker

Viola cazorlensis Gandoger

▼M3

ANNEX V

ANIMAL AND PLANT SPECIES OF COMMUNITY INTEREST WHOSE TAKING IN THE WILD AND EXPLOITATION MAY BE SUBJECT TO MANAGEMENT MEASURES

The species listed in this Annex are indicated:

— by the name of the species or subspecies, or

— by the body of species belonging to a higher taxon or to a designated part of that taxon.

The abbreviation 'spp.' after the name of a family or genus designates all the species belonging to that family or genus.

(a) ***ANIMALS***

VERTEBRATES

MAMMALS

RODENTIA

Castoridae

Castor fiber (Finnish, Swedish, Latvian, Lithuanian, Estonian and Polish populations)

Cricetidae

Cricetus cricetus (Hungarian populations)

CARNIVORA

Canidae

Canis aureus

Canis lupus (Spanish populations north of the Duero, Greek populations north of the 39th parallel, Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management, Bulgarian, Latvian, Lithuanian, Estonian, Polish and Slovak populations)

Mustelidae

Martes martes

Mustela putorius

Felidae

Lynx lynx (Estonian population)

Phocidae

All species not mentioned in Annex IV

Viverridae

Genetta genetta

Herpestes ichneumon

DUPLICIDENTATA

Leporidae

Lepus timidus

ARTIODACTYLA

Bovidae

Capra ibex

Capra pyrenaica (exceptCapra pyrenaica pyrenaica)

Rupicapra rupicapra (exceptRupicapra rupicapra balcanica,Rupicapra rupicapra ornata andRupicapra rupicapra tatrica)

▼M3

AMPHIBIANS

ANURA

Ranidae

Rana esculenta

Rana perezi

Rana ridibunda

Rana temporaria

FISH

PETROMYZONIFORMES

Petromyzonidae

Lampetra fluviatilis

Lethenteron zanandrai

ACIPENSERIFORMES

Acipenseridae

All species not mentioned in Annex IV

CLUPEIFORMES

Clupeidae

Alosa spp.

SALMONIFORMES

Salmonidae

Thymallus thymallus

Coregonus spp. (exceptCoregonus oxyrhynchus — anadromous populations in certain sectors of the North Sea)

Hucho hucho

Salmo salar (only in fresh water)

CYPRINIFORMES

Cyprinidae

Aspius aspius

Barbus spp.

Pelecus cultratus

Rutilus friesii meidingeri

Rutilus pigus

SILURIFORMES

Siluridae

Silurus aristotelis

PERCIFORMES

Percidae

Gymnocephalus schraetzer

Zingel zingel

INVERTEBRATES

COELENTERATA

CNIDARIA

Corallium rubrum

▼M3

MOLLUSCA

GASTROPODA — STYLOMMATOPHORA

Helix pomatia

BIVALVIA — UNIONOIDA

Margaritiferidae

Margaritifera margaritifera

Unionidae

Microcondylaea compressa

Unio elongatulus

ANNELIDA

HIRUDINOIDEA — ARHYNCHOBDELLAE

Hirudinidae

Hirudo medicinalis

ARTHROPODA

CRUSTACEA — DECAPODA

Astacidae

Astacus astacus

Austropotamobius pallipes

Austropotamobius torrentium

Scyllaridae

Scyllarides latus

INSECTA — LEPIDOPTERA

Saturniidae

Graellsia isabellae

(b) ***PLANTS***

ALGAE

RHODOPHYTA

CORALLINACEAE

Lithothamnium coralloides Crouan frat.

Phymatholithon calcareum (Poll.) Adey & McKibbin

LICHENES

CLADONIACEAE

Cladonia L. subgenus *Cladina* (Nyl.) Vain.

BRYOPHYTA

MUSCI

LEUCOBRYACEAE

Leucobryum glaucum (Hedw.) AAngstr.

SPHAGNACEAE

Sphagnum L. spp. (except *Sphagnum pylaisii* Brid.)

PTERIDOPHYTA

Lycopodium spp.

ANGIOSPERMAE

AMARYLLIDACEAE

Galanthus nivalis L.

▼**M3**

Narcissus bulbocodium L.

Narcissus juncifolius Lagasca

COMPOSITAE

Arnica montana L.

Artemisia eriantha Tem

Artemisia genipi Weber

Doronicum plantagineum L. subsp. *tournefortii* (Rouy) P. Cout.

Leuzea rhaponticoides Graells

CRUCIFERAE

Alyssum pintadasilvae Dudley.

Malcolmia lacera (L.) DC. subsp. *graccilima* (Samp.) Franco

Murbeckiella pinnatifida (Lam.) Rothm. subsp. *herminii* (Rivas-Martinez) Greuter & Burdet

GENTIANACEAE

Gentiana lutea L.

IRIDACEAE

Iris lusitanica Ker-Gawler

LABIATAE

Teucrium salviastrum Schreber subsp. *salviastrum* Schreber

LEGUMINOSAE

Anthyllis lusitanica Cullen & Pinto da Silva

Dorycnium pentaphyllum Scop. subsp. *transmontana* Franco

Ulex densus Welw. ex Webb.

LILIACEAE

Lilium rubrum Lmk

Ruscus aculeatus L.

PLUMBAGINACEAE

Armeria sampaio (Bernis) Nieto Feliner

ROSACEAE

Rubus genevieri Boreau subsp. *herminii* (Samp.) P. Cout.

SCROPHULARIACEAE

Anarrhinum longipedicelatum R. Fernandes

Euphrasia mendonçae Samp.

Scrophularia grandiflora DC. subsp. *grandiflora* DC.

Scrophularia berminii Hoffmanns & Link

Scrophularia sublyrata Brot.

▼B

ANNEX VI

PROHIBITED METHODS AND MEANS OF CAPTURE AND KILLING AND MODES OF TRANSPORT

(a) **Non-selective means**

MAMMALS

— Blind or mutilated animals used as live decoys

— Tape recorders

— Electrical and electronic devices capable of killing or stunning

— Artificial light sources

— Mirrors and other dazzling devices

— Devices for illuminating targets

— Sighting devices for night shooting comprising an electronic image magnifier or image converter

— Explosives

— Nets which are non-selective according to their principle or their conditions of use

— Traps which are non-selective according to their principle or their conditions of use

— Crossbows

— Poisons and poisoned or anaesthetic bait

— Gassing or smoking out

— Semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition

FISH

— Poison

— Explosives

(b) **Modes of transport**

— Aircraft

— Moving motor vehicles

II

(Acts whose publication is not obligatory)

COUNCIL

COUNCIL DECISION

of 3 December 1981

concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats

(82/72/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 235 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament (1),

Having regard to the opinion of the Economic and Social Committee (2),

Whereas a programme of action of the European Communities on the environment was adopted by the declaration of 22 November 1973 (3), and supplemented by the resolution of 17 May 1977 (4); whereas the aim of an environment policy in the Community, as defined in these acts, is to improve the setting and quality of life and the surroundings and living conditions of the peoples of the Community; whereas to this end it is, in particular, necessary to ensure the sound management of resources and of the natural environment and avoid any exploitation of them which causes significant damage to the ecological balance; whereas, further, common solutions to environment problems with States outside the Community should be sought, particularly in international organizations;

Whereas, as part of the Community programme of action on the environment, the Council adopted Directive 79/409/EEC on the conservation of wild birds (5), which covers the protection, management and control of these species and lays down rules for their exploitation;

Whereas the Community has participated in negotiations within the Council of Europe for a Convention on the conservation of European wildlife and natural habitats; whereas that Convention was signed on 19 September 1979;

Whereas participation by the Community in the implementation of the said Convention is necessary in order to attain one of the objectives of the Community; whereas the powers necessary for this end are not provided for by the Treaty, other than Article 235 thereof;

Whereas the Community will take part in such implementation by exercising the powers resulting from existing common rules and those acquired by it by virtue of future acts adopted by the Council as well as by making use of the results of Community action (research — exchange of information) undertaken in the areas concerned;

Whereas it is necessary for the Community to approve the said Convention;

(1) OJ No C 175, 14. 7. 1980, p. 17.
(2) OJ No C 53, 3. 3. 1980, p. 50.
(3) OJ No C 112, 20. 12. 1973, p. 1.
(4) OJ No C 139, 13. 6. 1977, p. 1.
(5) OJ No L 103, 25. 4. 1979, p. 1.

Whereas the conditions of life for wild flora and fauna in Greenland are fundamentally different from those of wild flora and fauna in the other regions of the Community because of the general circumstances and in particular the climate, the low density of population and the exceptional size and geographical situation of the island; whereas, because of this fact, the Council has already had to exclude Greenland from the scope of the Directive on the conservation of wild birds; whereas therefore Greenland should also be excluded from the scope of the Convention,

HAS DECIDED AS FOLLOWS:

Article 1

The Convention on the conservation of European wildlife and natural habitats is hereby approved on behalf of the European Economic Community.

The text of the Convention is annexed to this Decision.

Article 2

The President of the Council shall deposit the instrument of approval as provided for in Article 19 of the Convention (1) for the territories in which the Treaty establishing the European Economic Community is applied under the conditions laid down in that Treaty, with the exception of Greenland.

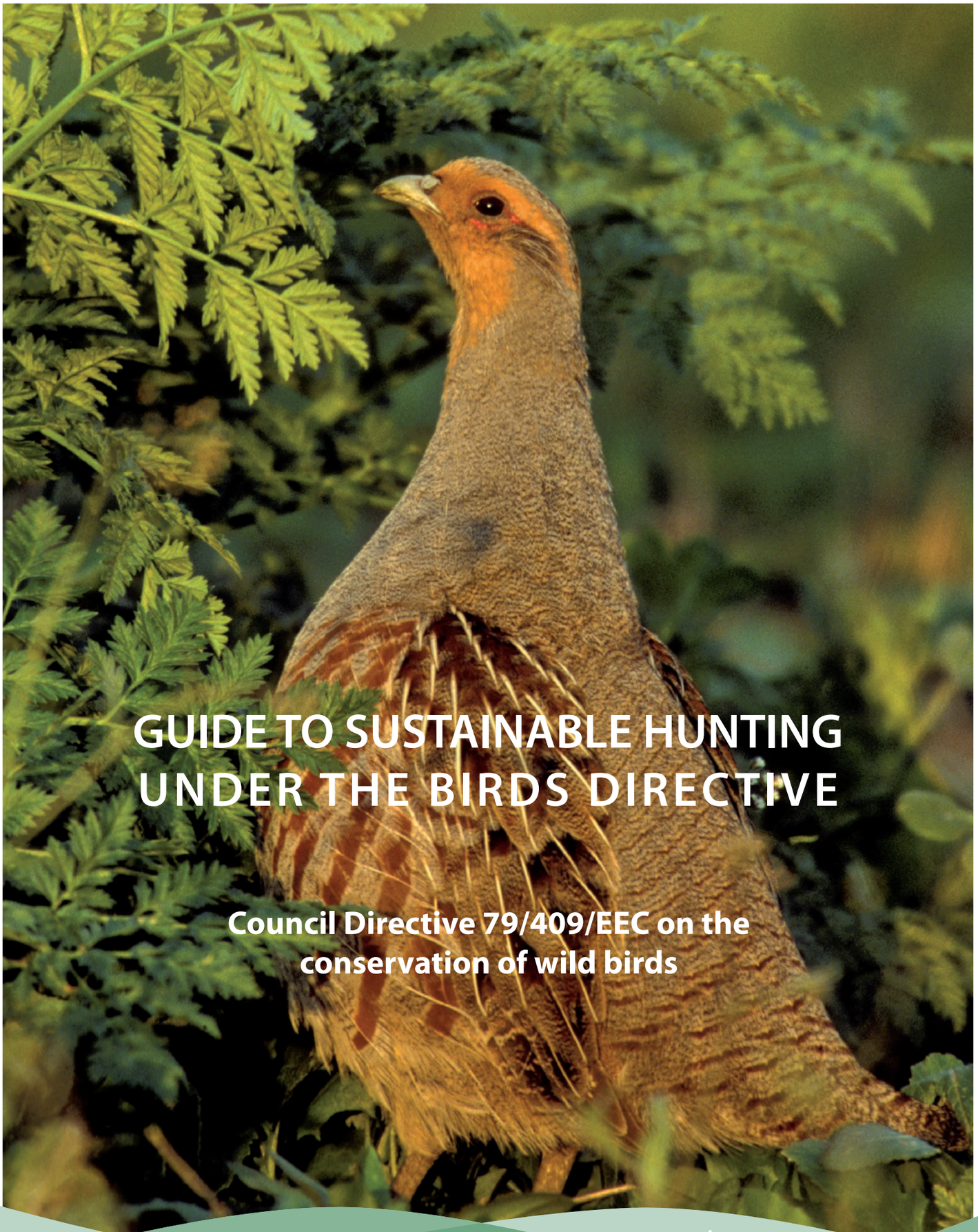
Done at Brussels, 3 December 1981.

For the Council

The President

T. KING

(1) The date of entry into force of the Convention will be published in the *Official Journal of the European Communities* by the General Secretariat of the Council.



GUIDE TO SUSTAINABLE HUNTING UNDER THE BIRDS DIRECTIVE

Council Directive 79/409/EEC on the conservation of wild birds

nature

EUROPEAN COMMISSION

environment

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Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive"

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"Guidance document on Hunting under the Birds Directive"

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FOREWORD

Council Directive 79/409/EEC on the conservation of wild birds[1] (the so-called "Birds Directive") provides a common framework for the conservation of naturally occurring species of wild birds and their habitats throughout the European Union. The directive owes its origin to the fact that wild birds, which are mainly migratory, represent a shared heritage of the Member States and whose effective protection is typically a transfrontier problem entailing common responsibilities.

The Birds Directive fully recognises the legitimacy of hunting of wild birds as a form of sustainable use. Hunting is an activity that provides significant social, cultural, economic and environmental benefits in different regions of the European Union. It is limited to certain species, listed in the Directive, which also provides a series of ecological principles and legal requirements relating to this activity, to be implemented through Member States legislation. This provides the framework for the management of hunting.

There has been a lot of controversy and in recent years some confrontation, over the compatibility of hunting with certain requirements of the Directive. The controversy is often fed by differing interpretations of those requirements.

The Commission has therefore recognised the need to start a new dialogue with a view to developing co-operation between all governmental and non-governmental organisations concerned with the conservation and wise and sustainable use of our wild birds. With a view to this it launched a 'Sustainable Hunting Initiative' in 2001 aimed at improved understanding of the legal and technical aspects of the Directive's provisions on hunting as well as developing a programme of scientific, conservation and awareness raising measures to promote sustainable hunting under the directive.

This guidance document aims to fulfil one of the key objectives of the dialogue by providing better clarification of the requirements of the Directive relating to hunting, within the existing legal framework and strongly based on scientific principles and data and the overall conservation aim of the directive. This builds on the work that has already taken place on the key concepts of Article 7(4) of the Directive[2].

Why a guide on hunting?

There is clearly a demand for improved guidance on the hunting provisions of the Directive. This is evident from the extent of litigation on the subject. There have also been many questions to the Commission on this subject including those from the European Parliament. This must also be seen in the context of the increased polarisation as is evidenced by contrasting petitions to Parliament from hunting and bird conservation organisations, which have secured the signatures of millions of people.

[1] OJ No L 103, 25.4.1979, p.1

[2] Key concepts of Article 7(4) of Directive 79/409/EEC. Period of reproduction and prenuptial migration of Annex II bird species in the EU (September 2001).

Linked to this demand is a real need for improved clarity. Some Member States want to know what are the possibilities to fix hunting seasons outside the limits imposed by Article 7(4), which may be overly constraining, as appears to be the case for a small number of problematic species (such as the Mallard *Anas platyrhynchos* and the Wood Pigeon *Columba palumbus*) with early pre-nuptial migration and/or long reproduction periods, and wish to consider recourse to Article 9 derogations.

There is already positive experience from the development of guidance on Article 6 of Council Directive 92/43/EEC[3] on the conservation of natural habitats and of wild flora and fauna ("the Habitats Directive"). This is seen as a proactive rather than reactive approach that stimulates coherent reflection and avoids interpretation developing in an ad hoc and inconsistent way. However, it must be recognised that, unlike Article 6 of the Habitats Directive, the provisions of the Birds Directive are much older and have been subject to more extensive case-law, a factor which any interpretative guidance must take into account.

This document will also be of value to the Commission services in any contemplated action in this field and will provide principal stakeholders with some security in terms of what they can expect.

Limits of the guide

The guide is intended to be bound by and faithful to the text of the Directive and the wider principles underpinning Community environmental law. It is not legislative in character (not making new rules but providing guidance on the application of those that exist). As such this document reflects only the views of the Commission services and is not of a binding nature.

It should be stressed that **it rests with the EU Court of Justice to provide definitive interpretation of a Directive**. Therefore, the guidance provided will need to evolve in line with any emerging jurisprudence on this subject.

The guide intends to fully respect the existing case law of the Court, which is already quite extensive. This determines aspects of the guide, especially where clear positions have already been established by the Court.

The guide also aims to explain the ecological principles that underpin the management of hunting under the Directive and makes use of best available scientific data, although it is recognised that the lack of good quality scientific data creates a constraint in so far as trying to correctly and accurately manage populations.

It recognises that the management of hunting is the responsibility of the Member States, including their role in determine hunting seasons within their territory in accordance with the requirements of the Directive.

[3] OJ L206 of 22.07.1992, p.7

Scope of guide

The essential focus of the guide is on the timing of recreational hunting. However, other issues relevant to hunting are covered as appropriate. Its legal focus is primarily on huntable species listed in Annex II of the Directive as well as the relevant provisions of Articles 7 and 9 but all other Articles will be examined as relevant. Particular consideration is given to examining the basis for exercising derogations, especially under Article 9. 1 (c). The guide not only deals with legal provisions but also covers scientific and technical dimensions given in the directive which are relevant to the conservation of wild birds.

Structure of the guide

The guide is presented in three main chapters. The first chapter provides an overview of hunting within the framework of the Directive, including consideration of the relevant preambles and Articles.

The second chapter considers in more details the relevant legal and technical provisions of Article 7, including the specific conditions related to fixing hunting seasons under the Directive.

The third chapter then examines the possibilities for allowing for some hunting under the system of derogations that apply under Article 9 of the Directive. Different parts of the document are supplemented by Figures where additional information is considered useful to the guidance.

INTRODUCTION

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Common Snipes - Acrylic painting by Pieter Verstappen

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1 INTRODUCTION

1.1 Hunting within the Overall Scheme of the Directive

1.1.1 Council Directive 79/409/EEC is a wide-ranging instrument aimed at the general conservation of wild birds in the European Union. Addressing several aspects of conservation (including safeguards for habitats, controls on trade and hunting and promotion of research), it follows a standard layout for this type of legal instrument: a preamble with recitals, Articles containing substantive provisions, and a series of Annexes.

1.2 Preamble

1.2.1 The recitals in the preamble reflect the structure of the body of the Directive. The preamble is often used as an aid to interpreting the substantive provisions of secondary legislation, and has been cited by the Court in this regard in relation to the Directive[4].

1.2.2 As with any directive the interpretation needs to have regard to the different language versions, all of which are valid. In the context of the present guide it is to be noted that some phrases (e.g. 'judicious use', 'rearing season') in the different language versions merit careful attention. It is important when looking at the different language versions to elicit a meaning that best reflects the purpose and context of the terms under examination.

1.3 Species Covered by the Directive

1.3.1 Article 1 of the Directive states that it relates to the "*conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.*" The case law of the Court confirms that, when implementing the Directive, the Member States have an obligation to protect species of wild birds occurring in the territory of the Community, and not merely those species occurring in their national territories[5].

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[4] For example, see point 21 of case C-57/89, *Commission of the European Communities v Federal Republic of Germany*. In this case, which concerned the application of the habitat protection provisions of Directive 79/409/EEC, the Court observed : « *That interpretation of Article 4(4) of the Directive is borne out, moreover, by the ninth recital in the preamble, which underlines the special importance which the Directive attaches to special conservation measures concerning the habitats of the birds listed in Annex I in order to ensure their survival and reproduction in their area of distribution. It follows that the power of the Member States to reduce the extent of a special protection area can be justified only on exceptional grounds."*

[5] In its judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, the Court noted at paragraph 6 : *« The Directive is based on the consideration that effective bird protection is typically a transfrontier environment problem entailing common responsibilities for the Member States (third recital in the preamble). »*. In this context, the preamble to the Directive notes that *" effective bird protection is typically a trans-frontier environment problem entailing common responsibilities."*

1.3.2 Protection does not extend to specimens bred in captivity[6]. Nonetheless, in cases where captive bred individuals are released into or return to the wild, and are indistinguishable from wild individuals of the same species occurring in the same areas, it is reasonable to consider that the terms of the Directive are applicable[7].

1.3.3 The Commission has sought to list the wild bird species coming within the Directive's scope[8]. This list covers all bird species that naturally occur in the Member States, including accidental visitors. It does not extend to introduced species unless they are explicitly mentioned in one of the Annexes to the Directive (e.g. the Wild Turkey *Meleagris gallopavo*). However, introduced species are covered by the terms of the Directive in a Member State if they are native to another Member State.

1.4 General Orientation of Directive

1.4.1 Article 2 contains the general obligation on Member States to "*take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level."* As this Article requires the protection of bird species to be balanced against other interests, a question has arisen as to whether this Article comprises a derogation independent from the general requirements of the Directive. The Court has confirmed that it does not, including with specific regard to hunting[9]. Nonetheless, the Court's pronouncements show that Article 2 is not

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[6] Judgment of 8 February 1996, Criminal proceedings v Didier Vergy, case C-149/94, ECR 1996, p. 299.

[7] In areas where the only specimens of a huntable species in the wild are of released individuals from captive bred stock it would be reasonable to conclude that hunting seasons for this species must be fixed in a way that takes full regard for non permissible periods for similar species (e.g. release of Chukars *Alectoris chukar* in the Alps and possible confusion risk with Rock Partridge *Alectoris graeca*).

[8] A list of bird species covered by the Directive has been prepared by the Commission and presented to the Committee for the Adaptation to Technical and Scientific Progress (commonly referred to as the ORNIS Committee), established pursuant to Article 16 of the Directive. This is not a legal listing but is intended for guidance in application of the Directive. It is available on the web site of DG ENV at http://ec.europa.eu/environment/nature/conservation/wildbirds/eu_species/index_en.htm

[9] In its judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, the Court noted at paragraph 8 : « *In this context it is necessary to refer to Article 2 of the Directive, which requires Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, and from which it is therefore clear that the protection of birds must be balanced against other requirements, such as those of an economic nature. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the Directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation.* » . In its Judgment of 8 July 1987, Commission/Italy, case 262/85, ECR 1987, p.3073, the Court rejected arguments by the Italian government that departures from the requirements of Article 7(4) could be based directly on Article 2. It noted at paragraph 37 : « *…it must be stressed that Article 2, as observed above, is not an independent derogation from the obligations and requirements of the Directive.* »

without relevance and weight when considering the interpretation of other provisions of the Directive. In this regard, its provisions have value as a general orientation guide as to what the Directive requires and allows.

1.5 Conservation of Habitats

1.5.1 Article 3 and 4 address the conservation of habitats. They include provisions related to prevention of significant disturbance within special protection areas (SPAs) classified pursuant to Article 4 (1) and (2). The Commission does not consider that socio-economic activities – of which hunting is an example - necessarily contravene these provisions. However, it is necessary that such activities within SPAs to be properly managed and monitored to avoid such significant disturbance[10].

1.5.2 The Commission has already prepared a guidance document covering the provisions of Article 6(2), (3) and (4) of Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna ("the Habitats Directive"), which replace the provisions of Article 4(4), first sentence with regard to classified SPAs[11]. This existing document discusses disturbance. It is appropriate to have regard to the principle of proportionality in considering the matter of hunting under Article 6 of the Habitats Directive. The relevant section of the Article 6 guide is to be read in the sense that effects, which are not significant in terms of the conservation objectives for the NATURA 2000 site, are not to be considered as contravening Article 6(2) of the Habitats Directive.

1.5.3 Hunting is only one of the many potential uses of NATURA 2000 sites, alongside uses such as agriculture, fisheries and other forms of recreation. There is no general presumption against hunting in NATURA 2000 areas under the nature directives. However, it is clear that hunting and other human activities have potential to lead to a temporary reduction in use of habitats within a site. Such activities would be significant if they would lead to a pronounced reduction in the capacity of the site to support the species for which it was designated and would also result in reduced hunting potential.

1.5.4 There will be specific instances where hunting is incompatible with the conservation objectives of individual sites. Examples may be where there is the occurrence of rare species which is highly sensitive to disturbance alongside potential quarry species. Such instances can only be determined on a site by site basis.

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[10] The report on a workshop on 'Hunting in and around NATURA 2000 areas' organised by the European Commission during Greenweek in April 2002 is to be found on the web site of DG Environment at :
http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/report_green_week_en.pdf

[11] "Managing Natura 2000 sites: The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC", European Commission, Office for Official Publications of the European Communities, Luxembourg

1.5.5 Sustainable hunting can provide beneficial consequences to habitat conservation in and around sites. This is considered further in section 2.4.20-2.4.23 of the guide.

1.5.6 Ensuring that hunting or other activities does not lead to significant disturbance will depend on a variety of factors such as the nature and extent of the site and of the activity as well as on the species present. There is a need to understand the reasons why the site is important for nature conservation leading to its inclusion in NATURA 2000, which provides the basis for determining its conservation objectives. Such an understanding provides an essential starting point for determining the specific management actions that are needed to conserve the site.

1.5.7 In order to reconcile human use with the conservation objectives the Commission advocates the development of management plans, which make provision for ensuring that activities in and around SPAs under the Birds Directive as well as sites designated under the Habitats Directive (which are collectively known as the NATURA 2000 network) are consistent with the ecological requirements of the species or habitats types of EU conservation interest for which these sites have been designated. It is reasonable to expect that those who exploit natural resources such as wild birds have also a responsibility to ensure that their activities are sustainable and not detrimental to the populations concerned. In conclusion, therefore the Commission believes that hunting activities on NATURA 2000 sites are essentially management issues to be determined predominantly at local level. This management would be best structured with a management plan which ensures that activities are compatible with the conservation objectives for which the sites have been designated.

1.5.8 Depending on the nature of the NATURA 2000 sites and hunting practices such management plans should give consideration to the provision of adequate no hunting refuge zones. A comprehensive research programme in Denmark has shown that the careful establishment of hunting free zones can increase at the same time site use by waterfowl and hunting opportunities in the vicinity of such areas[12]. The concept of hunting free zones is also well established in other Member States and is not restricted to NATURA 2000 areas (e.g. reserves de chasse in France).Basic Species Protection Prohibitions.

[12] Madsen, Pihl & Clausen (1998), Establishing a reserve network for waterfowl in Denmark: a biological evaluation of needs and consequences. Biological Conservation 85: 241-256.
Madsen & Fox (1997), The impact of hunting disturbance on waterfowl populations: The concept of flyway networks of disturbance-free areas. *Gibier faune sauvage* 14: 201-209. However, this particular model may not be applicable to Member States or areas where hunters' access and hunting pressure are regulated differently (e.g. private property owners).

1.6 Basic Species Protection Prohibitions

1.6.1 Article 5 of the Directive requires Member States to take the requisite measures to "*establish a general system of protection for all species referred to in Article 1".*
The basic prohibition on hunting is found in Article 5 (a) of the Directive, which requires Member States to prohibit in particular the *"deliberate killing or capture by any method*". [13]

1.6.2 Article 6(1) contains the basic prohibition on trading in birds that are protected under Article 1. Specifically " *Member States shall prohibit, for all the bird species referred to in Article 1, the sale, transport for sale, keeping for sale and the offering for sale of live or dead birds and of any readily recognisable parts or derivatives of such birds."*

1.7 Exceptions to Basic Prohibitions

1.7.1 The Directive provides for exceptions to the general prohibitions set out in Articles 5 and 6.

1.7.2 The trade in species listed in Annex III of the Directive is permitted, provided that the conditions and restrictions within Articles 6 (2) and 6 (3) are observed.

1.7.3 In relation to hunting, species listed in Annex II may be hunted under Article 7 of the Directive owing *"to their population level, geographical distribution level and reproductive rate throughout the Community ".* Where a species is not listed in Annex II, an exception to the prohibitions in Article 5 is only possible where the strict requirements of Article 9 are fulfilled.

1.7.4 The Article 7 hunting exception to the Article 5 prohibitions is subject to several conditions set out in Article 7. Member States are required to ensure "*that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2.*" They are also required to ensure that "*the species to which hunting laws apply are not hunted during the rearing season or during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds*." The Court of Justice has interpreted the last-mentioned

[13] Article 5 also requires Member States to prohibit the:
- deliberate destruction of, or damage to, their nests and eggs or removal of their nests (Art 5 (b))
- taking their eggs in the wild and keeping these eggs even if empty (Art 5 (c))
- deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as disturbance would be significant having regard to the objectives of this Directive (Art 5 (d))
- keeping birds of species the hunting and capture of which is prohibited (Art 5 (e))

provision as requiring that Member States set the hunting period so as to ensure that the period *"guarantees complete protection of the species concerned*."[14] The requirements of Article 7 are considered in detail in Chapter 2.

1.7.5 Further qualifications are set out in Article 8, which requires Member States to prohibit « *the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV (a).* Hunting from the modes of transport and under the conditions mentioned in Annex IV(b) is also required to be prohibited.

1.7.6 In addition to the exceptions for trade and hunting set out in Articles 6(2),(3) and 7, Article 9 allows Member States to derogate (i.e. depart)from the basic prohibitions in Article 5, 6, 7 and 8 provided three conditions are fulfilled: there is no other satisfactory solution ; one of the reasons listed in 9(1)(a), 9(1)(b), or 9(1)(c) applies; and the technical requirements of Article 9(2) are fulfilled. These conditions are considered in detail in Chapter 3. Article 9 also provides for a system of annual derogation reports from the Member States to the Commission[15].

1.7.7 Derogations under Article 9 are also possible with regard to the prohibitions set out in Article 7 and 8.

1.8 Research

1.8.1 Article 10 requires Member States to encourage research and *« any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1. »*. The Court of Justice confirmed that this provision creates an obligation for Member States and has to be transposed and implemented in national domestic legal orders[16]. Particular attention is required to be paid to research and work on subjects listed in Annex V. A number of categories of research listed in Annex V are relevant to hunting, especially items (c) "*listing of data on the population levels of migratory species as shown by ringing*" and (d) "*assessing the influence of taking wild birds on population levels"*. Item (e) "*Developing or refining ecological methods for preventing the type of damage caused by birds*" is also relevant to species which may cause damage. The case-law of the Court of Justice underscores the importance of using the best available scientific information as a basis for implementing the Directive[17].

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[14] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67 paragraph 13.
[15] On the basis of these annual reports the Commission provides a report on the use of derogations under the Birds Directive to the Convention on the Conservation of European Wildlife and Natural Habitats. This biannual report is provided in fulfilment of Article 9(2) of the Convention.
[16] Judgement of 13 December 2007, Commission/Ireland, C-418/04, paragraphs 266-275.
[17] In its judgment of 17 January 1991, Commission/Italy, Case C-157/89, ECR 1991, p.57, paragraph 15, the Court accepted that, in the absence of specific Italian reference material, the Commission was entitled to rely on a more general ornithological reference work in support of its contentions, especially as the Italian government had not adduced alternative scientific studies.

1.8.2 However, it must be acknowledged that, in relation to the categories of research relevant to huntable species, high quality information on a series of even basic features of the migratory system of many huntable species remains extremely limited. The proper hunting management of migratory birds implies an adequate knowledge of the functional system of staging, moulting, fattening and wintering areas representing a migratory route, or flyway. In order to better apply the Directive, there is a need for enhanced understanding of geographical distribution of flyways, seasonality of movements and ecological requirements of migratory birds across the EU. Relevant studies can best be performed on individually marked birds; recoveries of ringed birds provide exact locations of migrants in time and space, and represent the best source of information for such large-scale analyses. Migration studies can provide the necessary information both at the level of species and geographical population; they also offer the unique opportunity to describe migratory patterns for different sex- and age-classes, which is an important parameter for the proper management of wild populations.

1.9 Introduction of Non-naturally occurring Bird Species

1.9.1 Article 11 relates to the prevention of damage to local flora and fauna by the introduction of bird species which do not occur naturally in the wild state in the European territory of the Member States. One of the most documented cases is the threat posed by the North American Ruddy Duck *Oxyura jamaicensis* to the endangered native European White-headed Duck *Oxyura leucocephala* through hybridisation as well as competition and displacement. There is potential for introductions to not only pose a threat to rare species but also to more widespread species, including those at present subject to hunting.

1.10 Reporting

1.10.1 Article 12 concerns the general reporting obligations of the Member States and Commission. These three-yearly general Member State reports are to be distinguished from the annual Member State derogation reports referred to in Article 9. The Commission reports produced pursuant to Article 12 are a valuable reference for several hunting-related issues. For example, the second report on the implementation of the Directive[18] contained information on the status of Annex II species in the Member States, on special measures taken by the Member States for wise use of hunted species, as well as a record of earlier discussions in the Committee established under the Directive ("the ORNIS Committee") on several important concepts such as wise use and small numbers.

[18] COM(93) 572 final.

1.11 Stand-Still Clause

1.11.1 Article 13 states that «*application of the measures taken pursuant to this Directive may not lead to deterioration of the present situation as regards the conservation of species of birds referred to in Article 1.* » This is an example of a « *stand-still clause.* » Such clauses appear in a significant number of Community environmental Directives. They are aimed at ensuring that the implementation of the Directives concerned will not worsen the initial status of the environmental features sought to be conserved.

1.12 Possibility of Stricter National Measures

1.12.1 Article 14 provides that Member States may introduce stricter protective measures than those provided for under the Directive. This reflects a general approach to Community environmental legislation, which has since been enshrined in the Treaty, whereby Member States retain a freedom to exceed the level of protection agreed by the Community. With reference to hunting, some Member States have set national limitations going beyond what the Directive requires – for example, they have prohibited the hunting of certain species that are huntable under the Directive.

1.12.2 It is important to note that the faculty of adopting stricter measures is not unrestricted. Member States must respect rules in the EC Treaty concerning freedom of trade, as is confirmed by a decision of the Court in Case C-169/89, *Criminal proceedings against Gourmetterie Van den Burg*[19]. In addition, where it can be demonstrated that the huntability of a bird species is clearly linked to conservation benefits for that and/or for other wild bird species as a result of hunting-associated habitat conservation measures, it may be appropriate, where a hunting ban is contemplated, to consider any disbenefits that may arise for habitat conservation.

1.13 Adapting the Directive

1.13.1 Articles 15 to 17 contain provisions relating to the adaptation to technical and scientific progress of Annexes I and V, as well as to the adaptation of Annex III. These provisions give a role to a committee established under Article 16,

[19] Judgment of 23 May 1990, Criminal proceedings v Gourmetterie Van den Burg, case C-169/89, ECR 1990, p. 2143. This case involved a request from a Dutch Court to the Court of Justice for an interpretative ruling following the prosecution in the Netherlands of an individual for possession of a Red Grouse, *Lagopus lagopus,* lawfully shot and killed in the United Kingdom. The Court drew a distinction between migratory species and endangered species listed in Annex I, and other species, such as Red Grouse. Noting the special emphasis the Directive placed on protection of migratory and endangered species, it stated at paragraph 12 : « *It follows from those general objectives laid down by Directive 79/409 for the protection of birds that the Member States are authorized, pursuant to Article 14 of the directive, to introduce stricter measures to ensure that the aforesaid species are protected even more effectively.With regard to the other bird species covered by Directive 79/409, the Member States are required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive, but are not authorized to adopt stricter protective measures than those rovided for under the directive, except as regards species occurring within their territory.*

consisting of representatives of the Member States and Commission. While formally the regulatory role of this committee is quite limited, in practice the representatives on the Committee – now known as the "ORNIS Committee" – have an important advisory role and regularly discuss all aspects of the implementation of the Directive, including hunting aspects. With reference to changes to the hunting provisions of the Directive, the Committee has no formal role. Any relevant amendments to either the body of the Directive or Annex II require adoption by the Council of Ministers and European Parliament[20] on the basis of a proposal from the Commission.

[20] To date Annex II has been amended by one secondary instrument, Council Directive 94/24/EEC. This modified Annex II of Directive 79/409/EEC to include five species of *Corvidae*, which can cause damage to crops, and for which control measures were formerly only possible under Article 9 derogations.

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2 PROVISIONS OF ARTICLE 7



Mallards - Oil painting by Pieter Verstappen

2 PROVISIONS OF ARTICLE 7

Text of Article 7

"*1. Owing to their population level, geographical distribution and reproductive rate throughout the community, the species listed in Annex II may be hunted under national legislation. Member states shall ensure that the hunting of these species does not jeopardise conservation efforts in their distribution area.*

2. The species referred to in Annex II/1 may be hunted in the geographical sea and land area where this Directive applies.

3. The species referred to in Annex II/2 may be hunted only in the member states in respect of which they are indicated.

4. Member states shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2. They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season nor during the various stages of reproduction. In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds. Member states shall send the commission all relevant information on the practical application of their hunting regulations."

2.1 Introduction

2.1.1 Article 7 provides an explicit basis for hunting under the Directive. By reference to Annex II it lists the species that may be hunted throughout the Community (listed in Annex II part 1) and those that may be hunted within specified Member States (listed in Annex II part 2). It also sets out the principles to be respected with regard to hunting, including with regard to the fixing of hunting seasons.

2.1.2 This chapter of the guide starts with a brief reference to the need for appropriate transposition. It then deals in turn with the species that are huntable, the general principles and criteria to be respected in hunting (non-jeopardisation of conservation efforts, wise use, and ecologically balanced control). It finally considers the specific conditions relating to fixing hunting seasons.

2.1.3 As regards hunting seasons the chapter ends with a discussion of overlaps between the hunting periods and prohibited periods under Article 7(4) of the Directive.

2.2 Formal considerations

2.2.1 The relevant provisions of Article 7 of the Directive need to be fully and clearly transposed by the Member States." In Case C-159/99, *Commission v Italy*[21], the Court observed that "*the provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty".* In Case C-339/87, *Commission v the Netherlands,* the Court also noted that "*mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation on Member States to which a Directive is addressed, pursuant to Article 189 of the Treaty."*[22]

2.3 Huntable species

RATIONALE FOR ALLOWING HUNTING

2.3.1 Article 7 allows for the hunting of certain species of bird. Due to their population level, geographical distribution and reproductive rate throughout the Community, hunting of these species is considered to constitute acceptable exploitation.

2.3.2 Whereas bird hunting in Europe is mainly a recreational activity and is generally not carried out to regulate bird populations, it may also be a tool to control damage-caused by certain bird species (see section 2.4.31 onwards on ecologically balanced control).

WHICH SPECIES CAN BE HUNTED?

2.3.3 The species that may be hunted are listed in Annex II of the Directive. This comprises two parts. Those species listed in Annex II part 1 may be hunted in all Member States. The species listed in Annex II part 2 may only be hunted in those countries for which they are indicated. The number of potentially huntable species present in each Member State is shown in Figure 1.

2.3.4 Apart from adaptations resulting from the accession of new Member States, there has been one amendment of Annex II part 2 to take account of the latest knowledge on the situation of birds. This resulted in the addition of five species of *Corvidae* to Annex II/2 and the removal of three species of waders from Annex II/2 for Italy (species which closely resemble the globally threatened species Slender-billed Curlew *Numenius tenuirostris).*

2.3.5 Hunting is carried out under national legislation. The listing of a species in Annex II does not oblige a Member State to allow for it to be hunted. It is

[21] Judgment of 17 May 2001, Commission/Italy, case C-159/99, ECR 2001, p.4007, paragraph 32.
[22] Judgment of 15 March 1990, Commission/Netherlands, case C-339/87, ECR 1990, p.851. This position reflects the Court's earlier decision in its judgment of 23 February 1988, Commission/Italy, case 429/85, ECR 1988, p.843.

merely an option of which the Member States may or may not avail themselves.

2.4 General principles and criteria to be respected in hunting

2.4.1 Article 7(1) and 7(4) of the Directive provide a number of general principles that must be applied in relation to the practice of hunting. Each of these is considered in turn.

NON JEOPARDISATION OF CONSERVATION EFFORTS IN AREA OF DISTRIBUTION

2.4.2 Member States must ensure that hunting is compatible with the maintenance of the populations of the species concerned at a satisfactory level and that the practice does not jeopardise conservation efforts in their area of distribution. This clearly implies that the practice of hunting must not represent a significant threat to efforts for the conservation of both huntable as well as non-huntable species. The national hunting regime should take into account this potential disturbing aspect of hunting. This provision needs to be assessed in the light of the nature and geographical scope of the 'conservation efforts' in question, as these may vary from a local to an international level (e.g. flyway management plan).

2.4.3 An example to illustrate this point is the Ferruginous Duck *Aythya nyroca,* a non-huntable bird species, which is globally threatened. This species has a late reproduction period, which can make it vulnerable to the opening of hunting seasons for other species in areas where it is still breeding.

2.4.4 As regards the area of distribution of species it is clear that for most species this is not restricted to the area of the Member State concerned with hunting but applies to the species range. This is particularly relevant to migratory species. If species are subject to excessive hunting along their migration route it may impinge on conservation efforts elsewhere, including those outside the European Union.

2.4.5 The area of application of the Directive is the European territory of the Member States to which the Treaty applies. However, for species whose range extends beyond the area covered by the Directive the international commitments entered into by the Community may also be relevant in this context.

WISE USE

2.4.6 Wise use is not defined in the Birds Directive. An explanation of the notion of wise use, developed in conjunction with the ORNIS Committee, is given in the second report on the application of the Directive[23]. This looked at potential impact of hunting on species both at the levels of their populations and their use of habitats. I

[23] Pp. 8-9 of Second Report on application of Directive 79/409/EEC (COM(93)572 final). This explanation has been used and further developed in the present guide.

2.4.7 In the context of hunting wise use clearly implies sustainable consumptive use with an emphasis on maintaining populations of species at a favourable conservation status. The concept appears to correspond well with the definition on sustainable utilisation given in Convention on Biological Diversity (CBD)[24]: "*the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations*." The Birds Directive is one of the legal instruments of the European Union to implement this Convention.

2.4.8 Guidance on the issue of wise use has also been developed under the Ramsar Convention. The 3rd Meeting of the Conference of the Contracting Parties to the Convention (1987) have agreed a definition which states that '*the wise use of wetlands is their sustainable utilization*[25] *for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem*'.

2.4.9 It can therefore be reasonably concluded that the concept of wise use is the same as the concept of 'sustainable utilisation' compatible with the conservation of natural resources, thus corresponding to the concept of sustainability laid down in the Community 5th Environmental Action Programme.

2.4.10 Hunting, which represents a consumptive use of wildlife, therefore must be seen in the broader context of sustainable use of resources. The concept of wise use needs not necessarily be limited to consumptive use. It must recognise that birdwatchers, nature lovers, scientists and society as a whole also have a legitimate right to enjoy or explore wildlife, as long as they exercise this right responsibly. It is generally accepted that the value of environmental resources includes both use values and existence values. The principle of wise use thus should cover the provision of access to and enjoyment of wildlife for non-hunter users in the countryside, which should be managed in a sustainable way and should also aim to provide benefits to local communities[26].

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[24] The "sustainable use" objective is referred to in most of the substantive Articles of the Convention providing *inter alia* for the integration of sustainable use into national decision-making; the regulation and management of biological resources to ensure their conservation and sustainable use; the adoption of measures to avoid or minimize adverse impacts on biological diversity; the monitoring of ecosystems and habitats required by migratory species and species of economic value or cultural importance; the promotion of research which contributes to sustainable use.

[25] Sustainable utilization is defined as "human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations". Natural properties of the ecosystem are defined as "those physical, biological or chemical components, such as soil, water, plants, animals and nutrients, and the interactions between them".

[26] Recently, IUCN's Policy Statement on Sustainable Use of Wild Living Resources (Annex to Resolution 2.29, Amman, 2000), also concluded that "Both consumptive and non-consumptive use of biological diversity are fundamental to the economies, cultures, and well-being of all nations and peoples."

2.4.11 In the following sections a number of aspects of wise, relevant to huntable bird species are examined. This includes population impact, habitat use, game management and the conservation status of species. These sections underline the challenge of applying the concept of wise use for both sedentary and migratory bird species. Finally, the important role of education, training and awareness raising in promoting wise use is highlighted.

- **Relevance to huntable species**

2.4.12 Most of the scientific work on the sustainability of hunting has been focused on water birds (excluding gulls), tetraonids and partridges (the latter two groups belonging to the Galliformes, often referred to as "gamebirds"). These birds differ very much in ecology and behaviour. Most water birds are typically long-distance migrants, which breed widely in Northern Europe and winter in patchily distributed wetlands in temperate to tropic regions. Because of their congregatory behaviour significant hunting disturbance[27] affects a many times more birds than the numbers actually killed by hunting. However, a recent scientific literature review on energetic physiology of birds has challenged the assumption that hunting always will give rise to disturbance which will significantly threaten the survival of wild birds (see section 2.6.17). Furthermore, a high hunting take restricted to a local level may not affect these local populations in the long term, given sufficient availability of food, where shot birds are able to be replaced by birds from elsewhere or through other biological compensatory mechanisms. However, this may not be the case where high hunting pressure is exercised over wider part of the range of a species.

2.4.13 On the contrary gamebirds that are sedentary species sometimes have complex social systems, of which local populations can benefit much from proper hunting management. A high hunting take may result in population reduction. Water birds and gamebirds are the main quarry species in the Europe, comprising 71% of all Annex II taxa. The remaining categories of Annex II species are gulls (7%), pigeons (6%), and passerines (15%).

- **Wise use and population impact**

2.4.14 Given that the overall objective of the Directive is the maintenance of bird population at a favourable conservation status[28] this should be reflected in the principle of wise use. From a general understanding of population dynamics and the theory of the taking of migratory birds it can be concluded that low

[27] Significant disturbance of birds in wetlands from hunting can cause considerable under-use of the resource, also putting pressure on non-quarry species. Local displacements and reduced stopover times may even have impacts on populations at the flyway level, because of over-winter density-dependence. However, the impact of disturbance at the level of flyway populations is at present poorly understood and therefore meriting investigation.

[28] Whereas the term 'favourable conservation status' is not mentioned explicitly in the Directive (was introduced in 1992 in the Habitats Directive) it is implicit from the requirements of Article 2 of the Directive.

levels of taking are likely to have little effect on spring populations' size[29]. Moderate levels are unlikely to cause populations of huntable species to decline but will reduce the size of the spring population. Very high levels of taking are likely to lead to a decline in populations. For most species this level of taking is unknown[30].

2.4.15 So that hunting does not lead to the decline of huntable species the general approach in wildlife management is to ensure that hunting of species does not exceed the range between 'maximum' and 'optimum' sustainable yield[31]. This concept would appear to be easier to apply to sedentary than to migratory species. In the absence of good information on population dynamics and hunting take of sedentary and migratory species high levels of exploitation should generally be avoided.

2.4.16 Furthermore, there is a need for sound, scientifically based monitoring mechanisms to ensure that any use is maintained at levels which can be sustained by the wild populations without adversely affecting the species' role in the ecosystem or the ecosystem itself. This should include information on bag statistics, which is at present lacking or poorly developed for most species throughout the European Union[32].

- **Wise use and habitat use**

2.4.17 Significant disturbance from hunting or other human activities is likely to restrict the use of habitats where it is taking place. This may result in birds subjected to hunting having to cover greater distances or to adapt their behaviour to escape hunting. It may even result in a failure to utilise habitats with a relatively high human presence. It is therefore important to ensure that the management of such activities is carried out in a way that avoids disturbance which would significantly effect the conservation values of the sites in question (see also section 1.5 of the guide).

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[29] This depends on the timing of taking. A small take in Spring when the population is usually at its lowest annual level, can have disproportionate effects on population structure, if the species is subject to differential migration

[30] Working Document no. XI/189/91 of the Ornis Committee, as reproduced in the Second report on the application of Directive No 79/409/EEC on the conservation of wild birds (COM (93) 572, 24.11.1993, page 11)

[31] Sustainable yield may be defined as the removal of resources from the environment at a rate that allows balanced replacement by natural processes. Under normal conditions density dependent processes maintain bird populations at a stable level. The yield of a species is directly linked to its reproduction rate and its survival rate. Though annual harvesting can remove a sizeable proportion of a population, this is offset by a lower natural mortality and/or better reproduction rate. The maximum number of birds that can be hunted each year will be achieved when the largest number of birds is breeding at the fastest possible rate. This is achieved when breeding stock is reduced considerably below habitat capacity (Newton, I. 1998. Population limitation in Birds). Hunting usually reduces breeding populations of birds with low natural mortality (K-strategists, i.e geese) but their reproductive rates are higher than in non-hunted populations. This is termed the *maximum sustainable yield*. Because of the vagaries in ecological systems harvesting rates are usually set at a somewhat lower rate, which is defined as the *optimal sustainable yield*. Good management of populations can increase this yield.

[32] Other information may be relevant for certain species such as studies on crippling rates and impact of shotgun pellets in birds on their survival (eg see Madsen, J. and H. Noer 1996. Decreased survival of pink-footed geese *Anser brachyrhynchus* carrying shotgun pellet. Wildlife Biology 2 : 75-82.

2.4.18 This is particularly relevant in wetlands where large concentrations of wild birds, including huntable species, occur. In the Commission's Communication on the wise use and conservation of wetlands[33] sustainable wetland resource use is identified as one of the key wetland issues. Specific reference is made to bird exploitation: *"Waterfowl hunting in European wetlands is a popular leisure activity and can be an important source of income for wetland owners. Rightly, hunting associations are becoming an important driving force for wetland conservation. The principle of using the waterfowl resource in a sustainable way can substantially contribute to wetland conservation, providing it includes the use of non-toxic shot, the setting of bag limits, the creation of an adequate network of game refuges, and the adaptation of the hunting seasons to the ecological requirements of the species. These are also aspects covered by Council Directive […] on the conservation of wild birds"*.

2.4.19 The issue of the environmental pollution from lead shot arising from ammunition also needs to be considered in the context of wise use. It is increasingly recognised that the use of lead shot poses a significant threat to wild birds and their habitats, especially wetlands[34]. Whereas there is no explicit mention of lead shot in the Birds Directive any use of it in Special Protection Areas that leads to deterioration of habitats or significant disturbance to birds is incompatible with the protection requirements of these sites. The need to phase out the use of lead shot in wetlands has already been recognised in international forums such as the Ramsar Convention and the African Eurasian Waterbird Agreement.

- **Hunting and game management**

2.4.20 The notion of wise use should also incorporate the positive role that can derive from game management. This implies a set of measures such as the provision of better habitat, better nutrition, less predation, less disease or less poaching which improve the living conditions of huntable and other species. Therefore, whereas annual harvesting can remove a sizeable proportion of the population this is offset by gains due to a lower natural mortality and/or better reproduction rate. Sound management practices, in accordance with the wise use principle, should also take into account the needs of non-huntable species and the ecosystem. This can result in populations of game and other species on managed land being significantly higher than on unmanaged areas. This principle contrasts markedly with harvesting a wildlife resource in a situation where no management is undertaken. A harvested population, even when stable and being hunted sustainably, will inevitably be maintained at a lower level than an unharvested one under similar conditions. The beneficial consequences of game management are most evident with sedentary species[35].

[33] Wise use and conservation of wetlands (COM (95) 189, 29.05.1995).

[34] See for example Newsletter of the African Eurasian Waterbird Agreement, Special edition: Lead Poisoning in Waterbirds through the ingestion of spent lead shot. Special Issue 1, September 2002.

[35] However, it must be recognised that certain wetlands have been actively managed for migratory waterfowl (e.g. *Camargue* in France). There is also management of bogs directly linked to the hunting of Snipe *Gallinago gallinago.*

2.4.21 Some of the most important wildlife sites in Europe have survived the pressures of development and destruction due to the interests of game management. For example the United Kingdom has the largest areas of heather moorland anywhere in Europe largely due to its value for grouse hunting, which provided a strong basis from preventing the loss of this habitat from commercial afforestation and other threats. In Spain the remaining populations of Spanish Imperial Eagle *Aquila adalberti* mainly survived on large private game estates, where the hunting was formerly almost exclusively focussed on big game. In France, wild populations of Grey Partridge *Perdix perdix* are high in certain regions with intensive farming (e.g. *Beauce, Picardie*) as a result of management efforts, in particular the creation of thousands of hectares of 'wildlife set aside' with financial support of hunters.

2.4.22 Hunting can therefore support conservation through wise use. Steps taken to improve the condition for target species can not only enhance the sustainable yield but also benefit a range of other animals and plants that have similar requirements. Woodland managed for Pheasants *Phasianus colchicus* is more diverse than woodland managed exclusively for forestry. Field margins managed to help Partridges *Perdix perdix* also benefit wild flowers, butterflies and other invertebrates.

2.4.23 However, game management focused at artificially raising population levels of single species may be detrimental to some other species, particularly if it is linked to illegal persecution of birds of prey.

- **Wise use and conservation status of huntable species**

2.4.24 Bird species may be considered as having an unfavourable conservation status[36] when the sum of influences acting on the species concerned negatively affect the long-term distribution and abundance of its populations. This would include a situation where population dynamics data shows that the species is not maintaining itself on a long-term basis as a viable component of its natural habitats[37]. It is, of course, generally not advisable to subject such species or populations to hunting, even if hunting is not the cause of or contributing to their unfavourable conservation status. However, allowing hunting of a

[36] The term conservation status of a species is defined in Article 1 i) of Council Directive 92/43/EEC as "the sum of influences acting on the species concerned that may affect the long-term distribution and abundance of its populations …." It is considered to be favourable when "population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitat, and the natural range of the species is neither being reduced nor is likely to be reduced in the foreseeable future, and there is, and will continue to be, a sufficiently large habitat to maintain its population on a long-term basis.". Although the term is not explicitly mentioned in Directive 79/409/EEC the principles underpinning it are equally applicable in relation to the objectives of this Directive.

[37] Favourable conservation status assumes population viability: the concept of a "viable" population number that represents a threshold for survival versus extinction (Fiedler & Jain 1992, Conservation Biology). Viability of populations lies at the heart of the requirement laid down in Article 2 of the Directive, which contains the general obligation of population maintenance. Viable populations are integral to demonstrating a secure conservation status, but it encompasses more than just a stable population. Extrinsic forces, such as habitat loss, over-harvesting, and competition by introduced species, often lead to population decline. Random fluctuations that increase as populations become smaller can lead to extinction even of populations that have, on average, positive population growth when below carrying capacity.

species can provide a strong incentive to manage habitats and address other factors contributing to population decline, therefore contributing to the objective of restoring populations to favourable conservation status.

2.4.25 The issue of allowing the continuation of hunting of species with an unfavourable status was raised during the discussion on the last proposed amendment of Annex II of the Directive. In section 2.7 of the report[38] of the European Parliament's Committee on the Environment, Public Health and Consumer Protection on the Commission's 1991 proposal[39] to modify the Birds Directive, it was stated that 'Where a species is declining, hunting cannot by definition be sustainable unless it forms part of a properly running management plan that also involves habitat conservation and other measures that will slow and ultimately reverse the decline.'

2.4.26 Where such management plans are prepared, aiming at restoring the species' population levels they should apply to all populations, peripheral as well as central. Indeed, peripheral populations may play a particularly important role in the process through which species adapt to changes in the environment. In the European context, this process is fundamental. Furthermore, such plans can exist at different territorial levels (e.g. at EU, national or local levels).

2.4.27 Community management plans are being developed for Annex II species that have been identified as having an unfavourable conservation status. Those plans that have already been approved by the Member States, within the framework of the ORNIS Committee, are available on the web site of DG Environment. These framework plans do not have any separate legal status under the Directive. However, the success in their implementation and the extent to which the declines in huntable species are halted and reversed, as evidenced by appropriate monitoring, may ultimately determine if the continued hunting of these species is justified under the Directive or if other measures are required.

2.4.28 Management plans aimed at the recovery of species need to be underpinned with monitoring programmes that are able to detect changes in conservation status of the species concerned. This monitoring should include assessments of the hunting harvest and the role that this is playing in the dynamics of the population.

2.4.29 Finally, it should be noted that temporary moratoria on hunting certain species with an unfavourable conservation status, not necessarily as a result of hunting, introduced by Member States in agreement with hunter organisations represents a potentially important approach. Such an approach, if combined with a programme of conservation action for the species, can provide a strong incentive to different interests, including hunters, to work together to restore the species to a favourable conservation status. An important consideration for hunters is that such moratoria need to be seen and perceived as 'temporary' and not leading more or less automatically to a permanent hunting ban.

[38] PE 154. 220/fin
[39] COM (91) 0042 – C3 – 0180/91

- **Wise use and education, training and awareness**

2.4.30 The notion of wise use of natural resources implies also proper knowledge and skills. Hunters should be well informed about the need for correct species identification, good practices, hunting and the law, need for reporting etc. Illegal activities (shooting protected species, use of illegal trapping devices, shooting out of season or in prohibited areas, illegal use of poisons) are contrary to the 'principle of wise use' and are not in accordance with the principle of conservation through sustainable use. Furthermore, the illegal actions of a small number of hunters can also bring the entire activity of hunting into serious disrepute. As hunters are the most effective custodians of the hunted areas it is in their long-term interests to increasingly oppose such activities and to be seen to do so. There is also a need to inform people about the principle of conservation through sustainable use.

ECOLOGICALLY BALANCED CONTROL

2.4.31 This principle is not defined in the Directive. However, the 8th recital of the preamble of the Birds Directive suggests that it may not refer primarily to recreational utilisation but to population management aimed at species conservation: '*Whereas conservation is aimed at the long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe; whereas it makes it possible to control natural resources and governs their use on the basis of the measures necessary for the maintenance and adjustment of the natural balances between species as far as is reasonably possible'.*

2.4.32 Furthermore, Article 1 refers to "protection, management and control", while pursuant to Article 2 measures shall be taken to maintain populations or to adapt populations to a level "which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements". The latter may mean that the control is not only focused on "balances between species" but could also be aimed at the protection of economic interests (e.g. damage prevention).

2.4.33 "Ecologically balanced control" implies that the measures taken should be ecologically sound and in proportion to the problem to be solved taking into account the conservation status of the species involved. Control measures may be considered necessary only for few Annex II species (e.g. crows, pigeons, gulls). This appears to be the main incentive for the listing of five species of *Corvidae* in Annex II/2 with the 1994 adaptation of the Directive.

2.4.34 On the contrary, for most other quarry species management measures are aimed at the increase or the restoration of population numbers in view of both conservation and hunting interests.

2.4.35 Application of this principle in the framework of Article 7(4) offers enhanced possibilities to the control measures for the protection of flora and fauna, that

may be taken under the derogation regime of 9 (1a). However, the extent to which populations of damage causing species can be effectively regulated during the regular hunting season alone is unclear. Other methods need to be explored such as scaring of birds, which can at least temporarily and locally solve the problem of damage.

2.4.36 Other dimensions to ecologically balanced control need consideration. These include the extent to which it should relate to ensuring demographically balanced exploitation of a species (e.g. not removing a surplus of any sex or age cohort). Also it needs to ensure that impacts on populations harvested do not result in imbalances in the ecosystem (favouring the development of another species through lack of competition).

2.5 Specific conditions related to fixing hunting seasons

2.5.1 Article 7(4) of the Directive lays down a number of key principles relating to the fixing of hunting seasons, the objective of which is to ensure that hunting does not take place during the most vulnerable periods of the annual cycle of huntable species.

2.5.2 For sedentary species it requires that they are not hunted during their rearing season or during the various stages of reproduction. In the case of migratory species it requires that they be not hunted during their period of reproduction or during their return to their rearing grounds.

2.5.3 The Court has stated that 'the second and third sentences of Article 7(4) of the Directive are designed to secure a **complete system of protection** in the periods during which the survival of wild birds is particularly under threat. Consequently, protection against hunting activities cannot be confined to the majority of birds of a given species, as determined by average reproductive cycles and migratory movements."[40]

THE KEY CONCEPTS WORK: REPRODUCTION AND PRE-NUPTIAL MIGRATION PERIODS

2.5.4 The Commission and the ORNIS Committee have recognised the need to have a clear interpretation of these concepts of Article 7(4) in the light of the 1994 Court of Justice's ruling, and how to apply them to the bird species of Annex II and have already carried out a review of information on the period of prenuptial migration and reproduction of each Annex II species for each Member State where that species occurs[41]. The ORNIS Committee has approved this review, which provides definitions for both the 'period of reproduction' and 'return to the breeding areas', which are outlined below.

[40] Judgment of 17 January 1991, Commission/Italy, Case C-157/89, ECR 1991, p.57, paragraph 14. There are also references to the concept of complete protection in the following judgements: 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67 and judgment of 7 December 2000, Commission/France, case C-38/99, ECR 2000, p.10941.

[41] Key concepts of Article 7(4) of Directive 79/409/EEC. Period of Reproduction and Prenuptial migration of Annex II Bird Species in the EU. September 2001 (document available at http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/key_concepts_en.htm).

- **Period of reproduction**[42]

2.5.5 '**Breeding season'**[43] was defined using the definition of Cramp & Simmons (1997)[44]: "*the breeding season is the period during which a species lays and incubates its eggs and rears its young to the flying stage.*" However, the '**reproduction period**' not only covers the breeding season but also includes the occupation of the breeding areas as well as the period of dependence of young birds after leaving the nest (previously recognised in the 1993 Commission report on the application of the Birds Directive[45]). A scheme, which deals with the different stages of reproduction, was agreed by the 'ORNIS committee' as an appropriate general scheme for the period of reproduction (see Figure 2). The sequence and importance of the elements of this general scheme may vary by species according to differences in breeding biology.

- **Return to the breeding areas**[46]

2.5.6 Return to the breeding areas is an annual displacement, in one of more stages, of birds from their wintering areas back to nesting grounds. The wintering period ends with departure from the wintering areas where migrant birds have been more or less stationary since the end of the post-nuptial (autumn) migration. The return to the breeding areas is commonly called 'pre-nuptial migration' or 'spring migration'.

2.5.7 In Europe, return migration movements are mostly directed North, Northeast or Northwest. This means that migrants from African winter quarters first cross the Mediterranean, then pass through central Europe on their way to their Northern European breeding areas. This migration normally takes several weeks (including breaks at resting places on the way) but individual birds can complete the journey in one or a few days. The start, end and length of the migration season in a particular country are determined by a number of biological, geographical and methodological factors.

2.5.8 Regarding the beginning of the pre-nuptial migration, all individuals of a species within a same region do not end their wintering period at the same time. Not only are there individual differences, but also within a single wintering area, birds of different populations having different annual cycles come together. Birds belonging to northern populations, for example, often start their return flight much later than birds breeding more to the south. An extreme case is the so-called 'leapfrog' migration (e.g. in the Redshank *Tringa*

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[42] Note that Article 7(4) refers both to 'rearing season' and 'the various stages of reproduction' (cf. French version *'les différents stades de reproduction et de dépendance'*; German version *'Einzelnen Phasen der Brut - und Aufzuchtzeit'*); Dutch version '*zolang de jonge vogels het nest nog niet hebben verlaten*').

[43] This term is considered equal and better English than the term 'rearing season' used in Article 7(4).

[44] Cramp, S. & Simmons, K.E.L. (eds.). 1977. *Birds of the Western Palearctic,* Volume 1. Oxford, Oxford University Press. 722 pp.

[45] COM (93) 572 final. *Second report on the application of Council Directive 79/409/EEC on the conservation of wild birds.* Brussels, 24 November 1993.

[46] "return to breeding areas" is taken as a synonym of "return to the rearing grounds"

totanus): birds breeding in more northern latitudes travel greater distances and move to more southerly wintering areas than those that nest farther south.

2.5.9 The fact that birds leave a wintering area does not necessarily mean that they start their return migration. They can move to other wintering quarters because of changes in the local ecological conditions, exhaustion of food resources, disturbance or changes in climatic conditions. When migratory and sedentary birds of the same species coexist on the same wintering grounds, the situation can be even more complex. Thus, apparent discrepancies may arise among the data for large countries. Major differences between neighbouring regions can reflect ecological differences more than actual differences in migration timing. For example, although the southern parts of Spain (*Andalucía*) and Italy (*Sicilia*) are situated on the same latitude (37th) this does not necessarily imply similar arrival dates of migrants because different populations might be involved.

2.5.10 The length of the migration period does not only depend on the North-south extension of the country concerned but also on the availability and the use of resting-places. A typical example concerns the Bar-tailed Godwits *Limosa lapponica* which migrate from the African winter quarters to Siberian breeding areas. After a continuous flight from the *Banc d'Arguin* in Western Africa, they stay several weeks in the Wadden Sea. The migration period length is also determined by the quantity and the geographical range of the birds involved: a small population can pass in a few days while a numerous species with an extensive breeding range can have a prolonged migratory season encompassing several months. Moreover, the migration period can also be extended if a country is passed over by several populations with different time schedules.

- **Applying the 'key concepts' definitions to different Annex II species**

2.5.11 In general, for migratory species, the stage of reproduction identifying the start of the period of reproduction is the 'occupation of the breeding sites'. However, the occupation of the breeding sites is generally difficult to use where the species is mainly locally resident or where there is a mixing of locally resident and migratory birds. In these cases, the stage identifying the start of the period of reproduction is the 'construction of the nest'. In those situations where the stage retained is difficult to recognise in the field, a mention is made to the corresponding number of decades counted from the start of egg laying (generally well known for most species).

2.5.12 In general, the stage retained to identify the end of the period of reproduction is the 'full flight of young birds', i.e. fledging of all broods including second or third broods for some species (e.g. rails/*Rallidae*, pigeons/*Columbidae*, thrushes/*Turdidae*). Full flight means that young birds are capable of sustained, continuous flight to a similar capacity as adult birds and corresponds to the 'independence of young birds. Nonetheless, for certain species (e.g. crows/*Corvidae*) the full flight occurs before 'independence of young birds'. Young birds are independent when the loss of parental care

and/or feeding does not significantly lower survival prospects of young. In those situations where the 'full flight/independence of young' is difficult to establish in the field, a mention is made to the corresponding number of decades counted from the end of hatching.

2.5.13 The stage that is used to identify the start and end of the period of reproduction for each Annex II species has been determined in relation to their biology. On the basis of this and the available information from different Member States the pre-nuptial and reproduction periods have been determined for each species[47]. It is recognised that there are likely to be differences in quality of the data for species across the EU and that there will be a need to regularly update this review, taking into account new and better data as it becomes available. Apart from this regular review it will also be necessary to account for any changes in migration or timing of breeding that may result from climate change effects, and to account for changes in timing as a result of other environmental pressures.

2.6 Assuring a system of complete protection where staggered opening and closing dates are considered

2.6.1 According to the consistent case-law of the Court *" national authorities are not empowered by the Directive to fix closing dates for the hunting season which vary according to the species of bird, unless the Member State concerned can adduce evidence, based on scientific and technical data relevant to each individual case, that staggering the closing dates for hunting does not impede the complete protection of the species of bird liable to be affected by such staggering*" [48] On condition that "complete protection of the species" is guaranteed, the Court has also held that "the fixing of closing dates, which vary between the different parts of the territory of a Member State, is compatible with the Directive" [49].

2.6.2 In cases C-435/92 and C-38/99, the Court recognised two difficulties with the staggering of closing dates, which are also relevant to opening dates: disturbance of other species and the risk of confusion. These are examined below and a proposed approach to addressing them is given.

[47] As regards presentation of the data for each species a number of general principles were applied (see p.7 of key concepts report). Where there is a range of dates in timing of pre-nuptial migration or reproduction the earliest date has been chosen. Likewise, where significant between year variation occurs on a regular basis, data from the earliest periods have been taken. Where different populations migrate through a country the earliest migrating population has been used. However, extreme, outlining and erratic data were excluded due to their unpredictable nature.

[48] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67, paragraph 22 ; judgment of 7 December 2000, Commission/France, case C-38/99, ECR 2000, p.10941, paragraph 43.

[49] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67, paragraph 27.

2.6.3 This phenomenon depends on a series of factors, including in particular the similarity between huntable species for which there is an open hunting season, and those for which the hunting season has ended or has still to commence, the conditions under which hunting is taking place and hunter proficiency.

2.6.4 In case C-435/92[50] the Court noted that, with regard to the risk that certain species for which hunting has already been closed will be subject to indirect depletion owing to confusion with the species for which hunting is still open, it must be emphasised that the third sentence of Article 7(4) of the directive is specifically intended to prevent those species from being exposed to the risk of depletion due to hunting during the period of pre-mating migration, requiring the Member States to take all necessary measures to prevent any hunting during that period.

2.6.5 The risk of confusion between different bird species is well recognised and has already been the subject of a number of specialist identification guides[51]. On the basis of criteria such as similarity in appearance and plumage, habitat use and behaviour (including calls) it is possible to categorise huntable species into groups of 'look-alike' species for the purpose of minimising the risk of confusion. This should be under the responsibility of the competent authorities that are responsible for authorising hunting seasons. Figure 3 is presenting one possible scheme for such a categorisation.

2.6.6 If staggering of hunting dates is to be allowed the opening and closing dates must be fixed for each group of 'look-alike' species in a way that ensures that there are not overlaps with non-permissible periods under the directive.

2.6.7 Any grouping of look-alike species needs to be adapted to the circumstances of time and place in which hunting is carried out. Firstly, for a risk to be real the huntable species (or group of species) must be present and huntable in the area during the timeframe in question. Secondly, other 'confusable' huntable species, for which the hunting season is closed, should also have a predictable and significant presence.

2.6.8 Furthermore, as regards hunting in early autumn it should be noted that surface duck species are mainly in eclipse plumage at this stage (males assume plumage similar to females during moult) which makes distinguishing them at this time significantly more difficult.

2.6.9 In addition, the problem of confusion is compounded by the fact that different bird species frequently co-exist. For example ducks, waders and thrushes

[50] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67, paragraph 18.

[51] A good example of guides that focus on the identification of difficult groups of bird species are 'The Macmillan Guide to Bird Identification' by Alan Harris, Laurel Tucker and Keith Vinicombe. 1989. ISBN 1-85627-641-4 and the companion volume 'The Macmillan Birder's Guide to European and Middle Eastern Birds", by Alan Harris, Hadoram Shirihai and David Christie, 1996.

frequently move in flocks of mixed species. A group of ducks may be comprised of four or even five different species. Therefore, in such circumstances 'selective' shooting can become very difficult.

2.6.10 The categories of confusable species focus on different groups of the huntable species listed in Annex II of the directive. However, it should also be noted that the risk of confusion is not limited to huntable species and may represent a conservation threat to certain vulnerable or endangered species (e.g. Ferruginous Duck *Aythya nyroca*, Marbled Teal *Marmaronetta angustirostris*, Lesser White-fronted Goose *Anser erythropus* Crested Coot *Fulica cristata*) in particular areas where hunting takes place. This problem would need to be addressed in the overall context of the management of these sites.

2.6.11 The second factor that needs to be considered is the conditions under which hunting is taking place. This will depend upon factors such as the observation distance. The further a bird is from the hunter the greater is the difficulty in determining its specific characteristics (size, plumage etc.) Identification of flying birds will depend on the time that the bird is visible, which can be quite short. Therefore, the type of hunting is likely to influence the level of risk of confusion.

2.6.12 Likewise, the lighting conditions can also play an important role. Poor visibility at sunrise and sunset or at night can significantly reduce the capacity to distinguish bird species[52]. Particular weather conditions such as fog and rain can also reduce the possibility to correctly identify birds in the wild.

2.6.13 Finally, the issue of hunter proficiency also has an important influence. This will depend on the training and experience of the hunter. This applies at all times of the hunting season and is also relevant to distinguishing huntable from non-huntable species (e.g. Knots *Calidris canutus* from other small waders; Skylarks *Alauda arvensis* from other larks). Training and awareness schemes to assist hunters with species identification should be encouraged or enhanced where they already exist, as appropriate. Hunters should not shoot at a bird unless they are confident of its identity. However, many hunters specialise in particular groups of birds and rarely hunt species about which they do not have earlier experience. In this way hunters become specialists in the identification of their favourite target species.

RISK OF DISTURBANCE

2.6.14 This phenomenon will depend, *inter alia*, on the type of hunting, its intensity, frequency and duration, the species concerned and the habitats used, as well as on the availability of alternative refuge areas.

[52] Identification guidance has been produced by hunters on this subject (e.g. *'Reconnaître les oiseaux la nuit'* by Philippe du Cheyron for the *Association Picarde des chasseurs de gibier d'eau*).

2.6.15 In case C-435/92[53] the Court noted that hunting activity can lead to disturbance of wildlife and that it may affect the conservation status of the species concerned, independently of the extent to which it depletes numbers. The Court stated that the consequences of such activity are 'particularly serious for groups of birds, which, during the season of migration and wintering, tend to gather together in flocks and rest in areas which are often very confined or even enclosed. Disturbances caused by hunting force these animals to devote most of their energy to moving to other spots and to fleeing, to the detriment of time spent feeding and resting for the purpose of migration. These disturbances are reported to have an adverse impact on the level of energy of each individual and the mortality rate of all the populations concerned. The effects of disruption caused by hunting birds of other species are particularly significant for those species whose return migration takes place earlier'.

2.6.16 Disturbance is considered to most likely have an impact on bird populations during periods of the annual cycle when food is scarce or unavailable and birds have difficulty in meeting their energy and nutrient requirements[54]. This is most acute when birds need to build up their reserves prior to periods of high energy demand such as prior to migration or during periods, during severe adverse weather conditions or before commencing breeding[55].With regard to the severe weather conditions there are provisions in different Member States to introduce' cold weather hunting bans'.

2.6.17 A recent review of the scientific literature on energetic physiology of birds has challenged the assumption that hunting always will give rise to disturbance that will pose a significant threat to the survival of bird populations[56]. The energy balance of birds is a key factor in determining the reproductive success and survival potential of birds. This review demonstrates that under certain conditions birds can show high physiological and behavioural adaptability, through increase of food-intake rate and shift from a night-time to a day-time feeding or vice-versa, to offset the significant energetic and nutritional stresses that can result from disturbance, including hunting disturbance. As long as birds have access, even intermittently, to sufficient food resources (i.e. within acceptable levels of disturbance and food availability) then they are able to compensate to changes in their energy balance in response to disturbance

[53] Judgment of 19 January 1994, Association pour la Protection des Animaux Sauvages and others v Préfet de Maine-et-Loire and Préfet de Loire-Atlantique, case C-435/92, ECR 1994, p.67, paragraph 17.

[54] Madsen, J. 1995. Impacts of disturbance on migratory waterfowl. Ibis 137, Suppl 1 : 67-74.

[55] Mainguy, J., Bety, J., Gauthier, G. and Giroux, J.-F. (2002) Are body condition and reproductive effort of laying greater snow geese affected by the spring hunt? The Condor 104: 156-161

[56] Boos, M., J-P. Arnauduc, J-P. Robin. 2002 '*Effets du dérangement sur l'énergétique chez les oiseaux et les possibilités de compensation nutritionelles'* Rapport final de convention de recherche CNRS/FNC. Centre d'Ecologie et Physiologie Energétiques, France. The assumptions underpinning the conclusions of this study included the following: that the mean disturbance frequency to which birds actively react by flying was from 1 to 2.5 disturbances an hour; that the mean flight time was between 1 to 2 minutes per disturbance; that the period of disturbance extended over 10 hours per day; that food supply was not a limiting factor; that the birds were not in an advanced stage of preparation for reproduction, especially for egg production.

sources (see example of study of diving ducks on large shallow lake)[57]. Even if there are significant behavioural changes from this disturbance the impact on the energy equilibrium is small.

2.6.18 However, behavioural responses to disturbance are complex and may be underestimated especially where hunting is intense. For example the time lost after landing before birds resume feeding may take up to one hour (and if repeated disturbance up to 2 hours). This may affect other behavioural activities (social, preening, resting, mating). Disturbance is also likely to lead to increased vigilance to the detriment of feeding. Also there are currently few studies to support the assumption that birds have free and ample access to food resources to compensate. Birds will seek alternative undisturbed sites, which may not be nearby or where there may not be an adequate food supply. Furthermore, different categories of birds vary in their level of sensitivity to disturbance in relation to their biology and behaviour and dependency on different habitats. Notwithstanding, even though feeding behaviour can be disturbed there is a general lack of studies to determine if birds over a short or long-time scale cannot efficiently feed, particularly as energy income via food intake has to be considered in both the short and the long-term.

2.6.19 In the absence of empirical studies the consequences of a lack of energy balance on the reproductive success and survival of species is still not fully understood. According to the conclusions of the above mentioned review birds are unable to compensate if, in addition to the energy loss from disturbance there is no access to food resources during consecutive days (e.g. during adverse weather conditions) or during the active period prior to and during reproduction. This latter view is supported by studies of geese (which are capital breeders – i.e. dependant on energy reserves laid down before arrival on the breeding grounds) which have shown that disturbance can significantly reduce the reproductive success[58].

2.6.20 Allowing for staggered hunting dates during prenuptial migration is likely to present a greater risk to birds than at the end of the period of reproduction possibly due to the higher energetic demands of birds at this time. Other factors may play a role (e.g. shorter day length in February than in August with less potential daylight feeding time). The energy strategy over the annual cycle is an important fact. It has been shown for different waterfowl that February corresponds to a spontaneously and endogenously programmed build down of body fuels even when food is available *ad libitum.* This regulation of body reserves is associated with the voluntary decrease of food intake[59].

[57] Evans, D.M. and K.R. Day (2001) Does shooting disturbance affect diving ducks wintering on shallow lakes? A case study on Lough Neagh, Northern Ireland. Biological Conservation 98 : 315-323. Evans, D.M. and K.R. Day (2002). Hunting disturbance on a large shallow lake: the effectiveness of waterfowl refuges. Ibis 144 : 2-8. It should be noted in this study that birds used a large offshore area of the lake as refuge area during hunting and that most species fed at night when hunting did not take place.

[58] Madsen. J. 1995. Impacts of disturbance on migratory waterfowl. Ibis. 139 : S67-S74. Mainguy, J. , J. Bêty, G. Gauthier, J-F Giroux. 2002. Are body condition and reproductive effort of laying Greater Snow Geese affected by the Spring hunt? The Condor. 104 : 156-161. It should be noted that these studies relate to high levels of disturbance in Spring.

[59] M. Boos, pers. comm.

Furthermore, the demography of the population normally differs significantly between these two periods, with a relatively high adult cohort in the population in spring, which represent potential breeders, supplemented by a large proportion of immature birds in autumn.

2.6.21 There is a lack of consistent information and research on birds at flyway level to better evaluate the effect of disturbances, such as hunting, on bird populations and their conservation status[60]. Various studies have shown that poorly managed hunting can seriously reduce the carrying capacity of wetlands to support water birds. The location of hunting in relation to feeding areas may also be relevant.

2.6.22 As regards minimising the potential impact of human disturbance on bird populations during periods of staggering of hunting dates full account must therefore be taken of the need for supplementary undisturbed refuge areas that provide for both the resting and feeding requirements of affected birds. The design of such areas needs to ensure that there are sufficient opportunities for good quality feeding and other activities within them. This needs to be determined on an area by area basis in relation to the ecological, behavioural, nutrient and energy requirements of the different huntable species affected by staggered hunting dates. In this regard there has recently been increased research and development of appropriate and more effective methods to manage existing refuge and buffer areas, especially in wetland areas[61].

WHAT CONDITIONS NEED TO BE MET IF A MEMBER STATES WANTS TO AVAIL OF STAGGERED OPENING AND/OR CLOSING DATES FOR HUNTING UNDER ARTICLE 7(4) OF THE DIRECTIVE?

2.6.23 To ensure that this is consistent with the principle of complete protection, as interpreted by the Court of Justice, Member States must be able to demonstrate at the relevant geographic level at which staggering is intended to be applied that there are non-significant risks of confusion and disturbance.

2.6.24 As regards the risk of confusion this would require the categorisation of groups of 'look-alike' huntable species using the same habitat types at the same time and the fixing of the same opening and closing dates for hunting of these groups in a way to avoid overlapping with non-permissible periods. It also requires a determination that the conditions under which hunting takes

[60] See for example Hill, D., D. Hockin, D. Price, G. Tucker, R.Morris, J. Treeweek. 1997. Bird disturbance : improving the quality and utility of disturbance research. J. Appl.Ecol. 34, 275-288.

[61] for example the following studies: Fox, A.D. and J. Madsen (1997). Behavioural and distributional effects of hunting disturbance on waterbirds in Europe: implications for refuge design. J. Appl. Ecol. 35: 386-397. Madsen, J. 1998a. Experimental refuges for migratory waterfowl in Danish wetlands. I. Baseline of the disturbance effects of recreational activities. J. Appl. Ecol. 35 : 386-397. Madsen, J. 1998b. Experimental refuges for migratory waterfowl in Danish wetlands. II. Tests of hunting disturbance effects. J. Appl. Ecol. 35 : 398-417. Rogers, J.A. Jr, et H.T. Smith. 1997. Buffer zone distances to protect foraging and loafing waterbirds from human disturbance in Florida. Wildl. Soc. Bull. 25 : 139-145.

place do not give rise to a significant risk of confusion between different huntable species.

2.6.25 As regards the risk of disturbance there is a need to demonstrate a balance between the intensity, frequency and duration of hunting, and the availability and proximity of sufficient undisturbed areas offering adequate feeding and roosting areas.

2.6.26 There needs to be adequate enforcement measures to ensure that the above provisions are respected.

2.6.27 Finally, in areas which may be subject to staggered hunting seasons [62], integrated planning that takes full account of hunting and other potential disturbances on the birds and their use of the natural resources would appear to be a valuable management tool. Such planning should incorporate scientific monitoring to evaluate the potential impacts on the bird species concerned.

2.6.28 A suggested schema for considering the conditions that need to be fulfilled to ensure compatibility of staggered opening and closing dates is proposed (Figure 4).

2.7 Overlaps analysis

2.7.1 A preliminary comparison between existing hunting season periods and the agreed pre-nuptial and reproduction periods for huntable species in each Member States reveals that there are a wide range of potential or actual overlaps[63], which vary in extent between the different species. All Member States are concerned although the majority of them only have problems for a relatively small number of species. The problem of overlaps appears to be more complex in those Member States where hunting dates are fixed at regional levels. However, it should be noted that for the majority of species in the different Member States there is no overlap.

2.7.2 Data on reproduction and pre-nuptial migration periods in the 'Key concepts' analysis report is presented in 10 day periods (decades). Consequently the degree of accuracy is 10 days. Therefore, an overlap of one decade between hunting date and the period of prenuptial migration or reproduction is categorised as 'a theoretical overlap' as during this period it is possible that there may not actually be an overlap. For periods of greater than 1 decade of overlap there is no such uncertainty as this is therefore a 'real overlap'.

2.7.3 Furthermore, as the overlap analysis at the level of the Member State there may be situations where hunting in particular regions of larger Member State is actually in conformity with the requirements of Article 7(4), because the breeding season may end or return migration may start later than in the country as a whole.

[62] The scale of such planning would need to be determined in relation to the geographic scope of application of the area subject to staggering.
[63] Overlap analysis – DG Environment, 2002.

2.7.4 This analysis reveals that there are problems of overlaps in both the reproduction and pre-nuptial migration periods. Some current hunting regulations allow hunting:
- extending into period of pre-nuptial migration (and sometimes the reproduction period at the same time)
- starting before end of reproduction period
- at other times of the reproduction period

2.7.5 The most problematic species is the Wood Pigeon *Columba palumbus* (overlap for 13 Member States with up to 15 decades in Ireland). The Mallard *Anas platyrhynchos* also appears to be a problem in eight Member States (with up to 5 decades overlap). Overlaps (or theoretical overlaps) for several Crow species *Corvidae* (up to 9 decades) occur in several of the Member States.

2.7.6 Several of these overlaps appear to be linked to species with long reproduction periods (or late reproduction) and/or early migration periods. Other possible explanations for the overlaps may be linked to the inappropriateness of hunting during the normal period or due to the unavailability of the huntable species at this time. A more detailed examination of different categories of overlap is given in Chapter 3.

2.7.7 It would also appear that there are cases of hunting of species under Article 7(4), which may be justified in the context of controlling damage-causing species under Article 9.1 of the Directive.

- **Possible solutions to overlap problem**

2.7.8 For each case of overlap there is a need for full compliance with the requirements of Article 7(4). Therefore, in all cases there will be a need to bring the national and/or regional legislation that fixes hunting dates under Article 7(4) of the Directive into conformity.

2.7.9 However, it is recognised that some limited flexibility can be exercised in interpreting data with a view to determining opening and closing dates for hunting seasons in accordance with Article 7(4) of the Directive. The 'Key concepts' document has allowed for the exclusion of erratic, outlier and extreme data in determining the pre-nuptial and migration periods for different huntable bird species. Furthermore, it is possible to exclude overlaps of one 10 day period as, based on the level of precision of the data, these can be considered as theoretical overlaps (see section 2.7.2).

2.7.10 If hunting seasons are set for the country as a whole, they should not overlap with the breeding and return migration periods as identified in the "Key concepts" document. If regional hunting seasons overlap with national reproduction or return migration periods scientific and technical data could provide evidence that such overlap does in fact not occur because breeding ends earlier or return migration starts later in the region concerned. This may be the case particularly in countries with profound climatic differences

between the southern and northern parts[64] and or with similar climatic differences between regions situated at different altitudes. In each case there would be a need to demonstrate clearly distinguishable regions, where on the basis of clear scientific evidence on pre-nuptial migration and/or reproduction periods, such differential opening and closing dates could be justified. In the absence of regional data the overlap analysis has to be based on national data (or if not available reference should be made to data from neighbouring parts of Europe, cf. Conclusion C-157/89, para. 16). It should be noted however, that large distance within a country is not in itself evidence for regional variation in migration patterns because migratory birds can easily cover hundreds of kilometres in one day.

2.7.11 Likewise, where the breeding range of a species with a prolonged reproduction period is clearly geographically restricted in a Member State, with late localised breeding of this species, it may be permissible to allow for earlier opening dates for hunting seasons of the species outside of these areas. In such circumstances there would be a need for the geographic areas to be at the appropriate scale to ensure that territories with late breeders are not subject to hunting seasons until the reproduction period has ended.

2.7.12 The situation regarding the Mallard *Anas platyrhynchos*, which has a prolonged combined pre-nuptial and reproduction period in some Member States deserves particular mention (see also section 3.4.33 and figure 7). In some countries a large proportion of the population is comprised of captive bred specimens[65]. Captive bred specimens as such are not covered by the terms of the directive (as confirmed by the decision of the Court of Justice in Case C-149/94[66]). In application of the directive account needs to be taken of the mixing of captive bred and wild stocks. Introducing a high level of captive bred birds into the population may result in abnormal population behaviour, including that relating to pre-nuptial migration and reproduction periods. This would appear to be particularly the case in relation to the prolonged breeding seasons of this species[67]. In light of the fact that highly artificial human-derived factors are superimposed on the biological pattern, it would seem to be appropriate in those countries containing a high percentage of an artificial population to make allowance for any distortion in the pre-nuptial migration and breeding data when fixing the hunting season of this species under Article 7 to bring it into alignment with that for other similar surface duck species. This would also have the added value of reducing hunting pressure during this period on these other species which are less plentiful than the Mallard.

2.7.13 One other most obvious solution to avoid overlap under Article 7(4) is shortening or shifting the hunting season, which, if necessary, could be

[64] For example in Sweden the time of breaking up of the ice on lakes varies from 15 March in the south to 15 June in the mountainous parts in the north. This difference corresponds to up to 9 decades and has profound phenological consequences.

[65] For example, whereas the French breeding population of the Mallard is estimated at 30000-60000 pairs, game breeders produce 1.4 million Mallard each year (source: Y.Ferrand, Office National de la Chasse et de la Faune Sauvage).

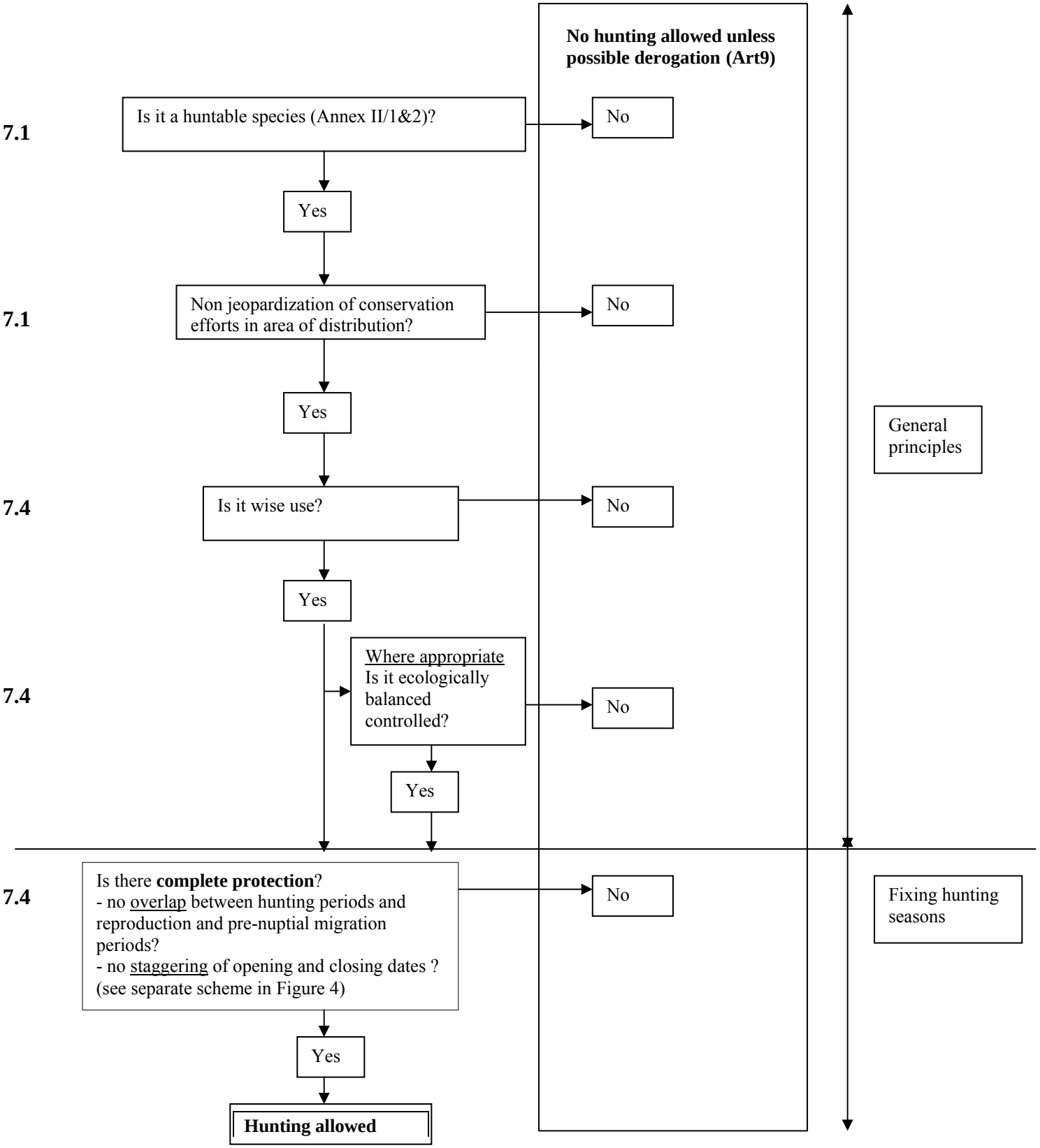
[66] Judgment of 8 February 1996, Criminal proceedings v Didier Vergy, case C-149/94, ECR 1996, p.299.

[67] Cramp and Simmons KEL, Birds of the Western Palearctic, 1977, p.516 Oxford University Press).

combined with a proportional increase in hunting days (if hunting is restricted to certain days in the week).

2.7.14 In any case such solutions have to be examined if an Article 9 derogation is considered necessary. The next chapter of this guide examines the possibility for allowing for some hunting under the derogation system of Article 9 of the Directive. Several damage-causing species for which overlapping hunting dates exist at present may be more appropriately treated under Article 9(1)(a) of the Directive. The possibility for limited hunting of certain species outside the normal hunting period, as a form of 'judicious use' under Article 9(1)(c), is also explored in the next chapter of the guide.

Summary issues to consider to allow for hunting and fixing hunting seasons under Article 7



3 PROVISIONS OF ARTICLE 9



Grey Lag Geese - Acrylic painting by Pieter Verstappen

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3 PROVISIONS OF ARTICLE 9

Text of Article 9

"1. Member states may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution , for the following reasons :

(a) - in the interests of public health and safety,
- in the interests of air safety,
- to prevent serious damage to crops , livestock , forests , fisheries and water,
- for the protection of flora and fauna;

(b) for the purposes of research and teaching , of re-population , of re-introduction and for the breeding necessary for these purposes;

(c) to permit, under strictly supervised conditions and on a selective basis , the capture , keeping or other judicious use of certain birds in small numbers.

2. The derogations must specify:
- the species which are subject to the derogations,
- the means, arrangements or methods authorized for capture or killing,
- the conditions of risk and the circumstances of time and place under which such derogations may be granted,
- the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom,
- the controls which will be carried out.

3. Each year the member states shall send a report to the Commission on the implementation of this Article.

4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of these derogations are not incompatible with this Directive. It shall take appropriate steps to this end."

3.1 Introduction

3.1.1 Derogations are 'exceptions' which allow for some flexibility in the application of a law. A limited number of activities normally prohibited under the Birds Directive (Articles 5-8) are permissible by way of such derogations, where particular problems or situations exist or may arise. The possibilities for use of these derogations are constrained. They must be justified in relation to the overall objectives of the Directive and comply with the specific conditions for derogations described in Article 9. Member States do not need to consult the Commission before applying derogations but are obliged to report all derogations to the European Commission in annual derogation reports.

3.1.2 In this chapter major considerations relating to the use of derogations, particularly with regard to hunting, are reviewed. Firstly, formal legal considerations are examined. Secondly, the need to ensure that conditions for derogations are satisfied is explained. Then the three major conditions for use of derogations are explored. These are the issue of 'no other satisfactory solutions', the need to demonstrate one of the reasons allowed under Article 9(1)(a) to (c), which is followed by a section dealing with the need to satisfy the formal conditions set out in Article 9.2. Finally, reference is made to the reporting of derogations by Member States under Article 9.3 and the role of the Commission under Article 9.4 in ensuring that these are compatible with the requirements of the directive.

3.2 Formal legal considerations

3.2.1 Certain basic formal considerations must be taken into account in any use of derogations.

3.2.2 The national legislation on which derogations are based needs to fully and accurately mirror the provisions of Article 9. According to the established case-law[68] related to transposition of the Directive, the Court of Justice stated that *"the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the Directive must be reproduced in specific national provisions, since a faithful transposition becomes particularly important in a case where the management of the common heritage is entrusted to the Member States in their respective territories."* In Case C-159/99, *Commission v Italy,* which also related to the Directive's transposition, the Court observed that "*the provisions of Directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty"*[69].

3.2.3 In Case C-339/87, the Court also confirmed that observance of the requirements of Article 9 in practice was not a substitute for proper formal transposition. It noted that "*mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation on Member States to which a Directive is addressed, pursuant to Article 189 of the Treaty."*[70]

3.2.4 Derogations should not be compromised by non-compliance with the provisions from which they derogate. In particular, the prohibitions and other requirements from which derogations are made should be properly transposed into national law. Furthermore, in accordance with general legal principles, the

[68] For instance: Judgment of 15 March 1990, Commission/Netherlands, case C-339/87, ECR 1990, p.851, paragraph 28; judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraph 24.
[69] Judgment of 17 May 2001, Commission/Italy, case C-159/99, ECR 2001, p.4007, paragraph 32.
[70] Judgment of 15 March 1990, Commission/Netherlands, case C-339/87, ECR 1990, p.851. This position reflects the Court's earlier decision in its judgment of 23 February 1988, Commission/Italy, case 429/85, ECR 1988, p.843.

grounds justifying derogations need to be strictly interpreted to avoid undermining the main provisions of the Directive.

3.2.5 The Court confirmed[71] that Article 9 is to be interpreted as meaning that it authorizes the Member States to derogate from the general prohibition on hunting protected species laid down by Articles 5 and 7 of the directive only by measures which refer in sufficient detail to the factors mentioned in Article 9(1) and (2). In exercising their powers concerning the granting of derogations, in accordance with Article 9 of the Directive the authorities of the Member States must take account of various criteria relating to geographic, climatic, environmental and biological factors and, in particular, to the situation regarding the species' reproduction and total annual mortality rate owing to natural causes[72]. A licence or other instrument embodying a derogation should therefore be complete and explicit in referring to the conditions that a derogation must satisfy.

3.2.6 This enables the Commission, the Court[73] and, mainly, the national authorities to supervise the derogations granted. It should be recalled that, according to Articles 242 and 243 of the EC Treaty, the Court may, if it considers that circumstances so require, order that application of the contested act be suspended and may in any cases before it prescribe any necessary interim measures. In a recent case[74], the Court ordered Italy to suspend the application of a regional law granting hunting derogations.

3.2.7 When granting derogations, the national authorities bear the burden of proof[75] and must motivate their decisions in a clear and sufficient manner. According to the Court, "*the relevant national legislation applicable must specify the criteria for the derogation in a clear and precise manner and require the authorities responsible for applying them to take account of those criteria. In respect of exceptional arrangements, which must be interpreted strictly and impose on the authority taking the decision the burden of proving that those conditions are present for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of the Directive*"[76].

[71] Judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223, paragraph 21 and judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 10.

[72] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraph 25.

[73] For instance, in the case of the hunting using limed twigs in the Community of Valencia (Spain) (method known as 'parany'), the Court refers to the preamble of the contested decree granting the derogation (judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619).

[74] Order of 19 décembre 2006, Commission/Italy, case C-503/06R, ECR 2006, p.141.

[75] See for instance the case of spring hunting in Finland (judgment of 15 December 2005, Commission/Finland, ECR 2005, p.11033), where the Finnish Government has not provided evidence to support its assertions (e.g. paragraphs 35, 39 and 41).

[76] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraph 34.

3.2.8 In addition, the Court has provided useful clarification with regard to the effectiveness of the national control mechanisms of the decisions granting derogations. In Case C-60/05[77], the Court stressed that "*the relevant national procedural framework applicable must guarantee not only that the lawfulness of decisions granting authorisations derogating from the system of protection laid down by the Directive may be verified in a timely manner but also that the conditions attached to those decisions are complied with"*. Based on the need to ensure the power of the competent national authorities to intervene in a timely and effective manner, the Court ruled that *"the administrative procedures provided for are organised in such a way that both the decisions of the competent authorities authorising hunting derogations and the manner in which those decisions are applied are subject to effective control exercised in a timely manner"*.

3.3 Ensuring that Overall Conditions for Derogations are Satisfied

3.3.1 Before a valid derogation can be given under Article 9, the competent national authority needs to consider and properly address several conditions concerning the derogation's prior justification and subsequent application.

3.3.2 In Case C-118/94, *Associazione Italiana per il World Wildlife Fund and Others v. Regione Veneto*, the Court noted[78] that the use of Article 9 is subject to three conditions: *"It is important also to bear in mind that the Court has stated that the possibility provided for in Article 9 of derogating from the restrictions on hunting, as well as from the other restrictions and prohibitions contained in Articles 5, 6 and 8 of the Directive, is subject to three conditions. First, the Member State must restrict the derogation to cases in which there is no other satisfactory solution. Secondly, the derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c). Thirdly, the derogation must comply with the precise formal conditions set out in Article 9.2, which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. Although Article 9 therefore authorizes wide derogations from the general system of protection, it must be applied appropriately in order to deal with precise requirements and specific situations (judgements in Case 247/85 Commission v Belgium [1987] ECR 3029, paragraph 7, and Case 262/85 Commission v Italy [1987] ECR 3073, paragraph 7)."*

3.3.3 Non-respect of any one of these conditions may render a derogation invalid. It is therefore necessary for the Member State authorities to carefully examine the applicability of all three conditions, irrespective of the number and identity of the authorities within their territory responsible for applying that provision[79]. As noted in paragraph 3.2.5 above, any derogation should also be

[77] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, mainly paragraphs 42-47.
[78] See paragraph 21 of the judgment.
[79] See in particular the judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraphs 41.

explicit in its references to these conditions. In terms of the structure of the present guide, Sections 3.4, 3.5 and 3.6 deal with each of the three conditions in turn.

3.4 First Condition for Derogations: Showing there is 'No other Satisfactory Solution'

3.4.1 As has been noted at paragraph 3.3.2 above, derogations are only possible in cases where there is no other satisfactory solution. This is an overarching condition that all derogations must satisfy.

GENERAL CONSIDERATIONS

3.4.2 An analysis of whether there is "no other satisfactory solution" can be considered as having three parts: What is the problem or specific situation[80] that needs to be addressed? Are there other solutions? If so, will these resolve the problem or specific situation for which the derogation is sought? Before answers are sought to the second and third parts, it should be clear that the problem or specific situation is capable of being covered by Article 9(1)(a) to (c).

3.4.3 This approach is illustrated by Case C-10/96, *Ligue Royale Belge pour la Protection des Oiseaux ASBL, Société d'Etudes Ornithologiques AVES ASBL v. Région Wallonne*[81] - the most extensive decision of the Court of Justice to date on "no other satisfactory solution". Although this case involved very specific circumstances, it is of considerable assistance in any general analysis of how this condition should be addressed. It is therefore worth looking at in some detail.

3.4.4 The background was a challenge made in the Belgian Court against two orders of the Walloon Region, which, *inter alia*, authorised the capture, under specified conditions, of certain species of birds protected by the Directive. The aim of the purported derogation was to supply bird fanciers with wild specimens to enable more successful captive-breeding to be carried out. Contesting the validity of the orders, the *Ligue Royale* and AVES argued that the capture of wild birds was in principle prohibited by the Directive and that derogations from that prohibition could, according to Article 9, be permitted only if there was no other satisfactory solution, such as breeding in captivity. They contended that there were extensive and adequate opportunities for breeding the species whose capture was authorised by the contested orders.

3.4.5 Two lines of argument were advanced by the Belgian authorities as to why there was no satisfactory alternative to allowing the capture of wild birds. The first related to the difficulties of immediately obliging bird fanciers to make the changes necessary to ensure more successful breeding using only captive-bred birds. The second related to the risk to successful captive breeding posed

[80] The recitals to the Directive relate the possibility of derogations to " certain specific situations".
[81] Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, case C-10/96, ECR 1996, p.6775.

by a lack of genetic diversity in captive breeding stocks. These two rationales are reflected in the questions referred by the Belgian *Conseil d'État* to the Court of Justice for interpretation[82].

3.4.6 In essence, the Court rejected the first line of argument, but, with several qualifications, accepted the possibility of derogations to deal with problems of consanguinity[83].

3.4.7 In analysing the issue of other solutions, the Court noted that the actions to be permitted under the derogation (in this case capture of wild birds for recreational purposes) were an example of "judicious use" and thus came within the exhaustive reasons that constitute the second condition referred to in Case C-118/94, (see paragraph 3.3.2 above), i.e. a derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c)[84]. This underlines the inter-relationship between the issue of other satisfactory solutions and the reasons for the derogation. In practical terms, there is little point in examining the issue of other solutions if the actions concerned by the derogation do not come within the scope of Article 9(1)(a) to (c).

3.4.8 The Court observed that, in the specific circumstances of the case, there was another solution to capturing wild birds under the derogation, namely breeding exclusively using captive specimens.

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[82] The questions referred to the Court were the following:
"1. Do Articles 5, 9 and 18 of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds allow a Member State to take account, on a decreasing basis and over a specified period, of the fact that the prohibition of capturing birds for recreational purposes would compel numerous fanciers to alter their installations and to abandon certain habits where that State recognizes that breeding is possible but is not yet feasible on a large scale for that reason?
2. Do Articles 5, 9 and 18 of Directive 79/409/EEC allow Member States, and if so to what extent, to authorize the capture of birds living naturally in the wild state within European territory with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings?'

[83] The Court responded to the questions posed as follows:
"1. Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, and in particular Article 9(1)(c) thereof, must be interpreted as meaning that a Member State may not, on a decreasing basis and for a limited period, authorize the capture of certain protected species in order to enable bird fanciers to stock their aviaries, where breeding and reproduction of those species in captivity are possible but are not yet practicable on a large scale by reason of the fact that many fanciers would be compelled to alter their installations and change their habits.
2. National authorities are authorized under Directive 79/409, and in particular under Article 9(1)(c) thereof, to permit the capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings, on condition that there is no other satisfactory solution, it being understood that the number of specimens which may be captured must be fixed at the level of what proves to be objectively necessary to provide a solution for those problems, subject always to observance of the maximum limit of `small numbers' referred to in that provision.".

[84] The Court's reasoning includes the following: "*15 It should first be pointed out that the Court has held, at paragraph 38 of its judgment in Case 262/85 Commission v Italy [1987] ECR 3073, that the capture and sale of wild birds with a view to keeping them for use as live decoys or for recreational purposes in fairs and markets may constitute judicious use authorized bArticle 9(1)(c) of the Directive. 16 It cannot therefore be ruled out that the capture of certain protected species for recreational purposes, such as that intended to enable fanciers to stock their aviaries, may also constitute judicious use within the meaning of Article 9(1)(c)."*

3.4.9 The Court then examined whether this other solution could be considered satisfactory, noting:
"*20 In those circumstances, breeding and reproduction in captivity could be regarded as not constituting an `other satisfactory solution' only if it were established that, were it not for the capture of birds in the wild, those activities could not prosper.*
21 Consequently, the fact that the breeding and reproduction in captivity of the species concerned are not yet feasible on a large scale by reason of the installations and the inveterate habits of bird fanciers, habits which, moreover, have been encouraged by domestic rules derogating from the general scheme of the Directive, is not in itself such as to cast doubt on the satisfactory nature of the alternative solution to capturing birds in the wild."

3.4.10 It is evident from this passage as well as remarks of the Advocate General that, where another solution exists, any arguments that it is not "satisfactory" will need to be strong and robust. As the Advocate General observes: *"The essential unifying characteristic of paragraphs (a), (b) and (c) of Article 9.1 is that a prohibition laid down in the Directive in the interests of bird protection may have to yield to other requirements; a derogation under this provision can therefore only be a last resort. In this context the term `satisfactory' may be interpreted as meaning a solution which resolves the particular problem facing the national authorities, and which at the same time respects as far as possible the prohibitions laid down in the Directive; a derogation may only be allowed where no other solution which does not involve setting aside these prohibitions can be adopted."*

3.4.11 It is therefore clear that another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of the derogation. The Advocate General remarks: *" It is in the nature of environmental protection that certain categories of persons may be required to amend their behaviour in pursuit of a general good; in this case, the abolition, as a consequence of the Directive, of `tenderie' or `the capture of birds for recreational purposes', which Belgium sought so stoutly to defend in ratifying the Bern Convention, is one example. That such activities may be `ancestral' or partake of an `historical and cultural tradition' does not suffice to justify a derogation from the Directive."*

3.4.12 On the other hand, the cautious[85] admission by the Court of the possibility of a derogation based on the risk of consanguinity demonstrates that, under certain circumstances, the condition as to no other satisfactory alternative may be satisfied. The Advocate General observes[86]: *"The determination of whether*

[85] The caution of the Court is evident in the following passage: *"25 It must next be borne in mind that, as already indicated in paragraph 17 of this judgment, a derogation from Article 5(a) of the Directive may be accorded only if there is no other satisfactory solution. In particular, that condition would not be met if it were possible to obviate the problems of consanguinity by cooperation and exchanges of specimens between breeding establishments."*

[86] Opinion of Mr Advocate General Fennelly delivered on 7 November 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, Case C-10/96, paragraph 39.

another satisfactory solution exists in a given factual situation is, of course, a matter for the national court. Such a determination must, in my view, be founded on objectively verifiable factors, such as the scientific and technical considerations suggested by the Commission." Against this background, it seems reasonable to state as a general proposition that any determination that another solution is unsatisfactory should be based on objectively verifiable factors, and that close attention needs to be paid to the scientific and technical evaluation of these. In Case C-79/03[87], the Court focused on those factors in order to assess the compatibility of the derogations granted hunting using limed twigs in the Spanish Community of Valencia. It seems that the arguments based on the *"deeply rooted tradition"* of hunting practices are not sufficient in order to justify the need for derogations[88]. In addition, in its judgement of 16 October 2003, the Court took a rigorous view with regard to the "need" and the "purpose" of a derogation[89]. A final point is worth noting from the decision in Case C-10/96[90] - the need to limit a derogation to the extent necessary to resolve the problem addressed. Thus, while there might be no other satisfactory solution to the risk of consanguinity than capture of a supplementary stock of wild birds, the number of specimens involved must be "*fixed at the level of what proves to be objectively necessary to provide a solution for those problems".* This limitation is distinct from the limitation of "small numbers" in Article 9(1)(c), although the limitation for small numbers must be observed as an overall "cap".

"NO OTHER SATISFACTORY SOLUTION" IN RELATION TO HUNTING

3.4.13 A basic question arises as to whether, as a matter of law and fact, this condition can ever be satisfied in relation to hunting, especially proposed extensions of hunting seasons. In the case of recreational hunting, this question is inextricably linked to the question of whether such hunting can be considered a "judicious use" for purposes of Article 9(1)(c). Clarification has been provided by the Court of Justice in its judgment in Case C-182/02 *Ligue pour la protection des oiseaux and others*[91], which arose out of a preliminary reference from the French *Conseil d'État* Having confirmed that recreational hunting may constitute a "judicious use" (see section 3.5 below), the Court declared that a derogation under Article 9(1)(c) could only be given where there is no other satisfactory solution.

3.4.14 The Court did not describe at length under what circumstances recreational hunting would meet the condition as to "no other satisfactory solution".

[87] Judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619.
[88] Judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619, paragraph 27.
[89] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 16. The Court confirmed this approach in the following rulings: judgment of 9 June 2005, Commission/Spain, case C-135/04, ECR 2005, p.5261, paragraph 19 and judgment of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraph 33.
[90] Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, case C-10/96, ECR 1996, p.6775.
[91] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02.

However, in paragraph 16 of the judgement, the Court provides important clarification, noting that this condition

"cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection (see, to that effect, Commission v Italy, paragraph 39). There would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive."

3.4.15 The reference to "need" and "purpose" of a derogation underlines, as does the judgement in Case C-10/96[92], the importance of demonstrating that there are compelling reasons to justify a derogation. This approach has been confirmed by the following rulings of the Court with regard to the hunting of woodpigeons in the Spanish province of Guipúzco[93] and the spring hunting in Finland[94].

3.4.16 Furthermore, the second sentence quoted explicitly rules out the possibility of a derogation where the sole purpose is to extend a hunting season for wild birds that are available to be hunted during a normal open season. The Court has shown itself ready to carry out an "opportunity" check (*contrôle d'opportunité*)[95] for granting derogations.

3.4.17 In Case C-344/03, the Court also ruled that hunting in the autumn, or in the spring, of other species birds present "*by way of replacement"* cannot be regarded as another satisfactory solution within the meaning of Article 9(1)(c) of the Directive. According to the Court, *"such a solution would risk rendering that provision nugatory, at least partially, because it would allow in certain territories for prohibitions on hunting certain species of birds, even though hunting in small numbers might, in theory, not jeopardise the maintenance of their populations at a satisfactory level and, therefore, constitute judicious use of those species (see, to that effect, Ligue pour la protection des oiseaux and Others, paragraph 17). Moreover, unless all bird species are considered to be equivalent for the purposes of hunting, that solution would, in any event, be a source of legal uncertainty, because the basis on which it may be considered that the hunting of a given species can replace the hunting of another species is not clear from the applicable legislation"*[96].

[92] Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, case C-10/96, ECR 1996, p.6775.
[93] Judgment of 9 June 2005, Commission/Spain, case C-135/04, ECR 2005, p.5261, paragraph 19.
[94] Judgment of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraph 33.
[95] An examination of whether, in a specific set of circumstances, a derogation is justified.
[96] Judgment of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraph 44.

POSSIBLE OBJECTIVELY VERIFIABLE FACTORS AND SCIENTIFIC AND TECHNICAL CONSIDERATIONS

3.4.18 In the light of the decision of the Court in Case C-182/02[97], it requires to be examined whether there are needs - or, to use expressions found in the Advocate General's Opinion in Case C-10/96, objectively verifiable factors and scientific and technical considerations[98] - that would justify derogations for hunting on the basis that there is no other satisfactory solution to a specific situation.

- **Hunting with a non-recreational justification**

3.4.19 It is generally accepted that some huntable bird species can jeopardise the interests referred to in Article 9(1)(a) outside of the hunting season allowed under Article 7. It is also generally accepted that, in order to safeguard these interests, there may sometimes be no satisfactory solution other than destruction of birds. In this context, it would seem reasonable that the use of hunting is a legitimate means of safeguarding the interests mentioned in Article 9(1)(a). Of course, in this instance, hunting serves a non-recreational objective (i.e. damage prevention).

3.4.20 The species for which Article 9(1)(a) are invoked are sometimes referred to as 'pest species'. The justifications for their control include 'to prevent serious damage to crops, livestock, forests, fisheries and water' as well as 'for the protection of flora and fauna'. The first justification in particular relates to a wide range of species, including members of the *Corvidae*, *Columbidae*, *Sturnidae*, *Laridae* and *Anseridae*[99]. Several of the species concerned are widespread and relatively abundant and are considered to have a favourable conservation status (see Figure 5 for consideration).

- **Hunting for recreational purposes**

3.4.21 As regards hunting for recreation, it would seem reasonable to consider that, in terms of objectively verifiable factors and scientific and technical considerations, the findings of the Overlap Analysis (see Chapter 2) are pertinent.

3.4.22 It has already been noted from the Overlap Analysis that, to a significant extent, hunting is permitted in some Member States during periods precluded under Article 7(4), thus requiring steps to ensure alignment of hunting seasons with the requirements of the Directive.

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[97] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02.

[98] Opinion of Mr Advocate General Fennelly delivered on 7 November 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, Case C-10/96, paragraph 39.

[99] This category also applies to species not listed in Annex II such as the Cormorant *Phalacrocorax carbo*

3.4.23 The first and primary reaction should, of course, be to ensure compliance with Article 7(4). This would be consistent with the second sentence of paragraph 16 of the judgement in Case C-182/02[100].

3.4.24 The question that then arises is whether there are factors which merit consideration of the scope for derogations in relation to the overlaps. It would appear that, in some cases, the overlaps may be correlated to a number of biological and conservation factors and there may be arguments as to why these may merit being looked at as possible objectively verifiable factors. Whereas these factors need to be examined on a species by species basis, several broad categories of overlap emerge, which need to be considered. For individual species or populations several of the different categories may simultaneously apply.

3.4.25 It should be stressed that in considering these factors for the purpose of derogation possibilities of Article 9(1) it will always be necessary to carry out an in-depth examination of the populations of the species and to have particular regard to the circumstances. Furthermore, it again needs to be emphasised that derogations are intended to address exceptional situations and that the factors mentioned should not be seen as justifying a general, systematic extension of hunting periods for general convenience. Before any derogations is granted, an assessment on a case by case basis and based on clear scientific evidence should take place. This approach is in line with the relevant case-law of the Court[101].

To assist reflection on the matter, a number of possible situations are outlined below. It should be stressed that the presentation of these situations does not imply that the Commission accepts that they constitute grounds for derogation.

- *Species for which hunting may be impractical or inappropriate during significant parts of normal period*

3.4.26 For example, for some species, which exist in cold climates, it may not be practical or appropriate to allow for hunting during cold periods of prolonged physiological stress. Examples may include species of the Grouse family *Tetraonidae* in mountainous environments. From a conservation point of view it may be less damaging to these species to allow some limited hunting during

[100] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02. In order to assess if France had restricted the derogation to cases in which there was no other satisfactory solution, the Court examined whether it was necessary that the hunting period under a derogation coincides, without need, with periods in which the Birds Directive aims to provide particular protection. According to the Court, "there would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive."

[101] See in particular the following judgments of: Judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223, paragraph 21; judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraphs 13-19.

closed periods than during the normal hunting season[102]. However, any consideration given to this matter should take full account of the needs of species during the short summer to ensure successful reproduction, moulting and preparations for winter and be based on clear scientific evidence. Furthermore, the judgement in Case C-182/02 makes it clear that an extension for the sole purpose of extending the hunting season would be unlawful.

- *Species which may be unavailable in parts of range during most of normal hunting period*

3.4.27 The absence of species in particular regions during normal hunting periods due to migration patterns may also be a factor for consideration. In its judgement in Case C-182/02[103] the Court has not excluded the possibility of hunting under derogation outside normal periods fixed in accordance with Article 7. Such hunting would be permissible in "territories" not used by birds during the normal hunting period.

3.4.28 The identification of territories to which such derogations may be applied should be done on a scale which is related to the movement and distribution of the species concerned. It should also include consideration of the opportunities for hunting the particular species within a given region. The granting of derogations on the basis of the absence of the species from 'local' territories within a region where such species are present during the normal hunting period would not be appropriate. This line has also been confirmed by the Court in Case C-135/04, related to the hunting of woodpigeons in the Spanish province of Guipúzcoa[104].

3.4.29 Any such derogation would need to be assessed on a case by case basis. For some migratory species that do not spend the winter in a Member State there may be consistently good opportunities for a hunting season in such territories, while the species is on post reproduction migration. This is an important factor in any consideration of allowing hunting seasons outside normal permissible periods.

3.4.30 In Case C-344/03, the Court ruled on the issue of the permissibility of hunting birds on pre-nuptial migration and conditions that should apply[105]. The case concerned the following species: eider *(Somateria mollissima)*, golden-eye *(Bucephala clangula)*, red-breasted merganser *(Mergus serrator)*, goosander *(Mergus merganser)*, velvet scoter *(Melanitta fusca)* and tufted duck *(Aythya fuligula)*. The Court assessed the situation species by species with a view to verifying whether the sole purpose of the derogation was to extend the hunting seasons for those species in territories which they already frequent during the hunting seasons fixed in accordance with Article 7 of the Directive. On the

[102] In some Member States hunting there is a statutory suspension of hunting during periods of prolonged cold weather.
[103] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 16.
[104] Judgment of 9 June 2005, Commission/Spain, case C-135/04, ECR 2005, p.5261, paragraphs 20-22.
[105] Judgement of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraphs 29-46.

basis of the scientific evidence available, the Court concluded that those species could also be hunted in autumn and ruled that the derogation had not complied with the condition that there be no other satisfactory solution.

- *Species with prolonged (pre-nuptial and) reproduction periods*

3.4.31 This category refers to a relatively small number of species with prolonged breeding periods during which several clutches are produced. This may also be combined with a pre-nuptial migration period although the duration of the breeding period is the most significant factor. Examples include *Anas platyrhynchos, Aythya fuligula*, *Columba palumbus*, *Streptopelia decaocto*. This category applies in particular to the latter two species. Despite the fact that the Wood Pigeon *Columba palumbus* and Collared Dove *Streptopelia decaocto* have breeding seasons spread over 6-8 months the peak of breeding activity is over two months[106]. Several of these species are very plentiful and have a favourable conservation status (see Figure 5 for consideration).

3.4.32 For the majority of these species, the very late clutches are second or even third ones, or even replacement clutches. In general, the viability of late born chicks is probably very low because of climatic conditions in autumn and a lack of time to develop properly and accumulate enough food before winter. In such circumstances, they may provide a low contribution to the overall recruitment of the population. However, the production of late clutches may also be linked to availability of abundant food supply at this time and therefore represent a significant contribution to the population. For example, the breeding success of Collared Doves in eastern Germany increased throughout the season from 32% in March to 70% in August-October. It would therefore appear necessary to determine the significance of early and late breeding to overall population success.

3.4.33 Some prolonged breeding periods can also be linked to human influences (e.g. availability of cereals as late food for *Columbus palumbus* in the UK and Netherlands[107]). The prolonged breeding season of the Mallard, *Anas platyrhynchos,* in some areas may be related to the presence of domestic strains selected for long breeding seasons[108]. This illustrates the fact that human-derived, artificial factors may superimpose on the biological pattern and distort it through prolongation of reproduction periods.

[106] According to a study by R.K. Murton (Bird Study, 5, 157-183. 1958) breeding peaked from late July till the end of September. A Dutch study showed a clear peak of nests with eggs at the turn of August to September (Bijlsma 1980). Birds of the Western Palearctic (1985, 325): "Considerable variation even within countries, with urban birds in Britain nesting significantly earlier (starting second half of February) than rural (starting second half of March to second half of April); peak laying period for urban birds second half of April and first half of May, and for rural first half of July to first half of September; differences dictated by food availability (Murton 1958, Cramp, S 1972. Ibis 114, 163-171)." For Collared Dove BWP (1985, 350) states merely "Prolonged throughout range."

[107] Murton (1958), Bijlsma (1980).

[108] (Cramp, S and Simmons K.E.L, Birds of the Western Palearctic 1977, 516).

3.4.34 The situation for *Anas platyrhynchos*[109] and *Columba palumbus*, which are the most problematic species in many Member States, is indicated in Figures 6 and 7. This shows that restricting the hunting season to normal periods under Article 7(4) would result in it being excluded for up to 25 of the 35 decades (i.e. periods of ten days) in the annual cycle of these species. The biological factors result in a hunting season that is 5 decades shorter than is the case for many other quarry species. There would not appear to be conservation needs requiring such a constraint, given their prolific numbers and conservation status. These species are key quarry species in many parts of the EU and central to the whole recreational hunting activity there. Furthermore, the presence of domestic strains of Mallard *Anas platyrhynchos* in different parts of its wintering range may contribute to this different behaviour as regards both pre-nuptial migration and reproduction periods, although this factor merits further scientific study and it is therefore proposed that where this highly artificial situation exists it may be partly accommodated within the framework of Article 7 of the directive (see section 2.7.11-2.7.12).

- *Species with reproduction period with prolonged parental care*

3.4.35 For several groups of birds (e.g. *Tetraonidae*, *Phasianidae*, *Laridae*, *Anseridae*) the period of dependence of the young from hatching to full fledging can be very prolonged. In fact, for young of the *Anseridae,* the period of offspring parental care can continue through to spring migration (for these species the fledging of young is considered to be the end of dependency for the purposes of Article 7(4)). For the *Tetraonidae,* an extremely precautionary approach has been taken in defining the period of dependence of the young birds, which may last for 6-9 decades after hatching. This phenomenon of a prolonged period of dependency when combined with late (replacement) clutches can result in the reproduction period extending up to the end of September for several species. Because of this late date, the viability of chicks born of these late clutches of *Tetraonidae* is uncertain owing to meteorological conditions in the mountains in autumn.

3.4.36 In considering whether objectively verifiable factors exist it may also be appropriate for the scientific and technical considerations to take some account of the beneficial consequences for the conservation of bird species that may accrue from game management linked to a contemplated exercise of the derogation. For example, hunters may take care of game habitats on a voluntary basis, nest boxes may be offered in large quantities, and supplementary food offered at proper occasions. Upland heather management and lawful predator control as a consequence of game management not only benefits Red Grouse *Lagopus lagopus* but also has wider environmental benefits[110].

[109] The prolonged breeding season of the Mallard in some areas may be related to the presence of domestic strains selected for long breeding seasons (Cramp, S and Simmons K.E.L. 1977. Birds of the Western Palearctic p. 516. Oxford University Press).

[110] Report of the UK raptor working group. 2000. Peterborough. Department of the Environment, Transport and the Regions / Joint Nature Conservation Committee. ISBN 1 85397 078 6.

3.5 Second Condition for Derogations: Demonstrating One of the Reasons Allowed Under Article 9(1)(a) (b) and (c)

3.5.1 As has been noted at paragraph 3.3.2, a derogation must be based on at least one of the reasons listed exhaustively in Article 9(1)(a), (b) and (c).

ARTICLE 9(1)(A) DEROGATIONS

3.5.2 Article 9(1)(a) of the Directive lists a number of reasons, which may justify the use of derogations. They are:

- In the interests of public health and safety
- In the interests of air safety
- To prevent serious damage to crops, livestock, forests, fisheries and water
- For the protection of flora and fauna

3.5.3 These provisions are not restricted to huntable bird species (listed in Annex II of the Directive) but apply to all bird species for which there is justification for use of the derogation. However, many of the species that are considered to pose problems under Article 9(1)(a) (so-called pest species) are listed in Annex II of the Directive and therefore can be controlled during the normal hunting period in accordance with the provisions of Article 7 of the Directive[111].

3.5.4 Therefore, Article 9(1)(a) would mainly apply for huntable species in situations where control measures are to be exercised during the pre-nuptial and reproduction periods. The possibilities for its use are considered below.

"In the interests of public health and safety and in the interests of air safety"

3.5.5 The first and second reason under subsection (a) concern "interests of public health and safety" and "interests of air safety" respectively. Public health and safety may be locally affected where the presence or the feeding of birds causes a demonstrable risk to human health or increases risk of accidents. In many cases habitat alterations or exclusion of birds will be appropriate solutions. For example, at many airports, management measures are taken to prevent bird strikes with aeroplanes.

3.5.6 Such solutions involve in particular habitat management (to reduce the attractiveness to birds and in particular flocks of birds) and various scaring techniques including sometimes shooting. In most cases other satisfactory solutions are available which are more effective and durable than hunting, with the exception of falconry. Therefore under Article 9 these must be used instead.

[111] Council Directive 94/24/EC amended Annex II of Directive 79/409/EEC to include five species of *Corvidae*, which can cause damage to crops, livestock and fauna and for which control measures were formerly only possible under Article 9 derogation. Their listing in Annex II facilitated balanced regulation of their populations.

'To prevent serious damage to crops, livestock, forests, fisheries and water'

3.5.7 The third reason for derogation under subsection (a) concerns the prevention of serious damage to crops, livestock, forests, fisheries and water. This derogation, which is intended to regulate 'damage-causing birds', has a number of dimensions. Firstly, it clearly relates to economic interest. Secondly, it is intended to prevent damage; therefore it is not a response to already proven damage but of the strong likelihood that this will take place in the absence of action. Thirdly, there must be a basis for concluding that damage will be serious in the absence of action.

3.5.8 Bird damage is usually caused by feeding (crops, livestock, fisheries), destruction (crops, forests), and pollution (water).

3.5.9 Such bird damage concerns a wide spectrum of species, including the *Corvidae*, *Columbidae*, *Sturnus vulgaris*, *Laridae* and *Anseridae*. Of those Annex II species many are also the subject of long overlaps (over 40 days) between hunting seasons and the periods of breeding and return migration.

3.5.10 Damage to interests other than those mentioned, e.g. other forms of property or other damaging situations, is not covered.

3.5.11 The damage concerned must be serious. In this regard the European Court has noted that "*the aim of this provision of the Directive is not to prevent the threat of minor damage*."[112] Two aspects may be noted: the likelihood and extent of damage. The chance of the occurrence of damage does not suffice. If damage is not yet apparent, past experience should demonstrate a high probability of the occurrence of damage. Furthermore, it should concern serious damage to an economic interest, indicating that this does not cover mere nuisance and normal business risk.

3.5.12 As always with derogations, it is necessary to consider the available solutions. Hunting will not always be an effective solution. Any control method is vulnerable to the removed birds being replaced from elsewhere and shot birds will, after some time, be replaced by other birds.

3.5.13 In Case C-79/03, which related to the hunting by means of limed twigs aiming to avoid serious damages to crops in the Spanish Community of Valencia, the Court ruled on the existence of alternatives and on the relevance of this type of hunting to avoid damages[113]. According to the Commission, there were other satisfactory solutions for preventing the alleged serious damage caused by the thrushes to vineyards and olive groves (e.g. hunting with guns and the use of bird scarers which were successfully carried out in other autonomous communities in Spain). The Spanish authorities claimed that the hunting by means of limed twigs provided a satisfactory solution for preventing damages, as the use of bird scarers was too expensive in relation to the cost of the

[112] "*The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive.*" (judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029paragraph 56).
[113] Judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619.

damage caused and their use can cause fires, while the use of guns would have entailed an increase in the number of hunting permits and an extension of the hunting season.

3.5.14 The Court observed that in other regions of Spain facing the same problems (where there was large-scale cultivation of olives and grapes and where there was also large populations of thrushes), hunting using limed twigs was not permitted, but thrushes could be shot, as a selective method of culling. The Court also noted that 80% of the limed twigs were to be found in one province for which 69.5% were in areas without olive groves or vineyards; thus, the justification based on prevention of serious damage to those crops did not appear to be consistent with such a situation. Consequently, the Court considered that hunting by means of the limed twigs was not justified under Article 9(1)(a) of the Directive[114].

3.5.15 However, there will be cases where hunting of birds to control damage is justified. In order to maximise damage prevention, control measures for a species that causes damage are most likely to be effective when the population is at its seasonal minimum and when there is the least availability of replacement birds – typically this is the breeding or pre-breeding period. When devising pest control strategies, logic suggests that the first approach should be to make the control local in time and place to where the damage is occurring. However, widespread species that can cause damage over large areas, such as the Wood Pigeon *Columba palumbus*, may justify derogations that are more generalised in their territorial scope[115].

"for the protection of flora and fauna"

3.5.16 The fourth reason for derogation under subsection (a) concerns the protection of flora and fauna. The types of fauna or flora are not specified but would appear to be different from the flora and fauna of economic interest covered by other provisions of Article 9(1)(a). The case for using the derogation is likely to be strongest where it is linked to the maintenance of populations of species that are rare or threatened but is not limited to such species. Furthermore, there appears not to be a need in this case to demonstrate a likelihood of serious effect before applying the derogation.

3.5.17 Birds may affect flora and fauna by predation, grazing, demolition, trampling, accumulation of droppings etc. A relatively small number of species is allegedly blamed for this: e.g. Herring Gull *Larus argentatus*, Crow *Corvus corone*, Magpie *Pica pica*[116]. A long-term impact on other populations of flora and fauna is only likely when localised occurrences are involved. Each case should be considered thoroughly and decided on advice from the conservation

[114] Judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619, paragraphs 25 and 28.
[115] As regards the use of general authorisations to deal with such situations, this is discussed in more detail sections 3.6.10 to 12 in relation to Article 9(2).
[116] Certain species not listed in Annex II of the directive are also involved (e.g. Cormorant *Phalacrocorax carbo).*

authorities. Decisions should be made on best available scientific information available. The following questions might be answered:

- Does it concern threatened, rare or other populations of naturally occurring species with an unfavourable conservation status?
- Are the 'flora and fauna' in question in a poorer conservation status than the species for which the derogation is sought?
- Does it concern other important biodiversity considerations?
- Is good scientific evidence available on the long-term impact on the affected population(s)?
- Are "other satisfactory solutions" not available, thus is population control necessary to effectively reduce or prevent the "ecological damage"?

3.5.18 With regard to "other satisfactory solutions", the extent to which predation is directly related to habitat loss, habitat deterioration or modification (e.g. loss of vegetation cover) or other environmental factors should be considered. Where such a direct relationship exists, it may be appropriate to consider predator control in combination with habitat restoration or better management of human activities. For example, predation of colonies of tern (*Sterna)* species by gull (*Larus)* species may be related to an overall increase in gull populations linked to increased food provided by poorly managed waste disposal sites.

3.5.19 Where the case for protection is supported by compelling elements, control (which may include hunting) could be considered. It would therefore appear that only in specific situations, to be determined by the conservation authorities or their agencies, could control of birds be an appropriate management measure, at the relevant geographical level, to effectively reduce the negative impact of certain bird species on vulnerable flora and fauna.

ARTICLE 9(1)(B) DEROGATIONS

3.5.20 Article 9(1)(b) allows the possibility for use of derogations for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these populations. The links between these possibilities and hunting are likely to be very limited, although it may be relevant in cases where there are breeding programmes for game species with a view to their re-population or re-introduction. There may also be cases where other hunting research projects may justify the use of this type of derogation.

ARTICLE 9(1)(C) DEROGATIONS

3.5.21 Article 9(1)(c) allows for the use of derogations for the capture, keeping or other judicious use of certain birds. Apart from general conditions, there are four specific conditions, which must be respected in order to apply a derogation under Article 9(1)(c). It must represent 'judicious use'. It must relate to 'small numbers'. It is only permissible if carried out under 'supervised conditions'. Finally it must be on a 'selective basis'. The Court ruling in Case C-60/05 clarifies several issues with regard to the conditions of

Article 9(1)(c) and the type of national administrative framework required for the effective implementation of this provision[117].

- **"Certain Birds"**

3.5.22 Whereas it is mentioned that this derogation can apply to "certain birds", these are not specified in the Directive. In negotiations leading to the adoption of the Directive, there was reference to the need to provide for a derogation to allow the taking of birds of prey for falconry[118]. However, it may be concluded that this derogation can also apply to other bird species for which judicious use is justified. In Case C-182/02, the Court stated[119] that the condition as to "certain birds in small numbers"*"cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level."* It is therefore difficult to conceive of circumstances where an Article 9(1)(c) derogation would be justified for a species that has an unfavourable conservation status,

- **Judicious Use**

3.5.23 9(1)(c)A fundamental question arises as to whether hunting can constitute a "judicious use" for the purposes of Article 9(1)(c). This question has now been answered by the Court in Case C-182/02 *Ligue pour la protection des oiseaux and others.* Based on previous case-law[120], the Court stated that:

"It is clear from the foregoing that the hunting of wild birds for recreational purposes during the periods mentioned in Article 7(4) of the Directive may constitute a judicious use authorised by Article 9(1)(c) of that directive, as do the capture and sale of wild birds even outside the hunting season with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets" [121].

3.5.24 It is evident from the same judgment that recreational hunting does not automatically constitute a judicious use. Having noted the need for a hunting derogation to ensure the maintenance of the population concerned at a satisfactory level, the Court observed that:

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[117] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083.

[118] The Economic and Social Committee in its opinion on the proposal for a Council Directive on bird conservation of 25 May 1977 (O.J. N° C 152/3 of 29.6.77) stated *"2.8.1. The absence of a possibility of derogating in order to take birds of prey for falconry was noted. It was pointed out to the Commission that this was a legitimate and ancient sport, which if properly controlled, harmed neither birds of prey populations nor the populations of birds pursued in the course of falconry. Some provisions should be made therefore to allow the continuation of this on a controlled basis"*

[119] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 17.

[120] See in particular judgment of 8 July 1987, Commission/Italy, case 262/85, ECR 1987, p.3073, paragraph 38, but also judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, paragraph 7 and judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223, paragraph 21.

[121] See paragraph 11 of the judgment. This has been recently confirmed in the judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraph 32.

"If that condition is not fulfilled, the use of birds for recreational hunting cannot, in any event, be considered judicious and, accordingly, acceptable for the purposes of the 11th recital in the preamble to the Directive." 32 60/05

3.5.25 Judicious use is not defined in the Directive, although it is clear from Article 9(1)(c) that it can include the capture and keeping of certain birds. It is also worth noting that, while, in the English version of the Directive, the word "use" is repeated in the phrase "wise use" in Article 7 and the phrase "judicious use" in Article 9.1(c), other language versions employ different terms in these two phrases. In many of these versions, the equivalent word for "use" in the phrase "judicious use" has an exploitative connotation[122]. The Commission has previously stated: '*This concept is to include activities which make a vital contribution to improving the efficiency of the general system for the protection of wild birds established by the Directive. It may also include other use provided that this does not jeopardise the general objectives of the Directive and it may include hunting using birds of prey in the context of falconry'*[123]. However, any exploitative connotation carried by the term "use" needs to be balanced by the connotations of responsibility, restraint and good judgement imparted by "judicious". This is confirmed by the observation of the Court in Case C-182/02 referred to in paragraph 3.5.22 above.

3.5.26 Falconry provides an illustration of circumstances which amount to a non-respect of Articles 5 (prohibition on killing or capture of wild birds) and 7 (huntable species) but which, in the Commission's view, nonetheless represent a "judicious use". Although falconry is explicitly mentioned in Article 7(4) of the Directive, the practice is limited to huntable species listed in Annex II/1 and Annex II/2 of the Directive for the Member States concerned. In the United Kingdom, the skylark *Alauda arvensis* constitutes one of the main quarry species for the Merlin *Falco columbarius.* Falconry using merlins is practised, but the skylark is not amongst the species listed in Annex II/2 for this Member State. For this reason, the United Kingdom authorises, by way of derogation, the hunting of small numbers of skylarks by merlin. The Commission considers that this is justifiable as a "judicious use" under Article 9(1)(c) by reason of the fact that the merlin has a natural propensity to hunt skylarks. It should be noted that this is not the only instance in which hunting might be the subject of a derogation pursuant to Article 9(1)(c).

- **Small Numbers**

3.5.27 In order to meet the requirements of Article 9(1)(c) the derogations must only relate to "small numbers". Therefore it would be appropriate to be able to determine a quantity to fix a threshold below which the derogation is automatically considered as meeting the requirements of the notion of "small numbers".

[122] Other languages: "utilisation raisonnée " as against "exploitation judicieuse" (FR); "fornuftig udnyttelse" ,fornuftig anvendelse (DK); "saggia utilizzazione" , impieghi misurati (IT); "utilización razonable" , "explotación prudente" (ES); "förnuftigt utnyttjande",. förnuftig användning (SE); "ορθολογική χρησιμοποίηση", "ορθολογική εκμετάλευση" (GR).

[123] From Second Report on Birds Directive (pp 9-10)

3.5.28 In Case 252/85, *Commission v France*[124], the Court considered the issue of small numbers in the following passage: "*In this respect, it is apparent from Article 2, in conjunction with the 11th recital of the preamble to the Directive, that the criterion of small quantities is not an absolute criterion but rather refers to the maintenance of the level of the total population and to the reproductive situation of the species concerned."* As noted earlier, in Case C-182/02, the Court stated[125] that the condition as to "certain birds in small numbers"*"cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level."*

3.5.29 The Commission considers that the notion of "small numbers" is therefore necessarily relative. A size cannot be small or large except in relation to another size. It must also not be detrimental to maintenance of the population level and take full account of the conservation status of the species concerned.

In its recent judgements the Court has confirmed the Commission's approach and provided further legal clarification on the issue of small numbers[126].

Determining the size

3.5.30 The question arises as to the size to which "small numbers" are to be compared. Since all the cases of derogations concern the taking of birds i.e. an annual loss for the population affected, the most appropriate solution is to compare the numbers involved in this taking to the overall annual mortality, defined as the sum of deaths due to natural causes and to the taking of birds under Article 7 if applicable.

3.5.31 It is therefore proposed that the threshold of "small quantities" should be fixed as a given percentage of the total annual mortality of the population(s) concerned by the derogation.

3.5.32 For sedentary species, "population concerned" means the population of the geographical region in which the derogation is sought to be applied. For species on migration, it means the population of the regions from which the largest numbers of migratory birds come before passing through the region where the derogation is sought be applied during the period the latter is in force. During the winter period, it means the minimum wintering population present in the region where the derogation is sought to be applied. In cases where the population is shared by different Member States, there may be use of derogations on migratory birds of the same population in the different countries. In such circumstances it would be necessary to restrict the

[124] Judgment of 27 April 1988, Commission/France, case 252/85, ECR 1988, p.2243.
[125] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 17.
[126] See the following judgements: judgment of 9 December 2004, Commission/Spain, case C-79/03, ECR 2004, p.11619, paragraphs 36 and 41; judgment of 15 December 2005, Commission/Finland, case C-344/03, ECR 2005, p.11033, paragraphs 53-54; judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083, paragraphs 25-27.

population concerned to that occurring in the territory to which the derogation applies at the time when the taking takes place, so as to minimise cumulative effects.

3.5.33 There is also a temporal dimension to determining the reference population at the time of application of the derogation. For example, the taking of Wood Pigeons *Columba palumbus* in autumn, when there is a surplus of young birds will be very different from the taking of sea ducks on spring migration, when the impacts will proportionately be higher on the adult population of pre-breeders. There may also be cases where a species undergoes differential migration (e.g. Ruff *Philomachus pugnax*) and this needs to be taken into consideration in determining the reference population.

3.5.34 In order to determine an exact figure for the threshold, two approaches are possible:
- the figure must be much lower, by at least an order of size, than those figures characteristic of the taking of birds under Article 7. A figure of 1% meets this condition.
- the taking must have a negligible effect on the population dynamics of the species concerned. A figure of 1% or less meets this condition as the parameters of population dynamics are seldom known to within less than one percentage point and bird taking amounting to less than 1% can be ignored from a mathematical point of view in model studies.

3.5.35 Hunting bag statistics exist for only a few Member States and species and the data is of variable quality. Whereas hunting bags may generally be proportional to population size, hunting pressures do not necessarily provide an appropriate approach as they focus on determining a threshold for derogation on the basis of hunting take and not in terms of population size. The implication that the greater the hunting take in a region the more birds that could be hunted under derogation may also not be considered as good conservation practice. Such an approach would also discriminate against regions that may have limited hunting possibilities under normal hunting seasons.

3.5.36 The overall annual mortality is an appropriate parameter to quantify small numbers because it takes population size, status and population dynamics into account. Within this framework "small numbers" should be considered as being any taking of around 1% of the annual mortality for species which may be hunted, it being understood that conformity with Article 9 of the Directive depends in any event on compliance with the other provisions of the Article.

The Court follows the same approach as regards the application of Article 9, which is summarized in the paragraphs 25-27 of Case C-60/05[127]:

25 *"It is also important to note that, in exercising their powers concerning the grant of derogations, in accordance with Article 9 of the Directive the authorities of the Member States must take account of various criteria which*

[127] Judgment of 8 June 2006, WWF Italia and others, case C-60/05, ECR 2006, p.5083.

relate to geographic, climatic, environmental and biological factors and, in particular, to the situation regarding the species' reproduction and total annual mortality rate owing to natural causes.

26 As to those criteria, the Court pointed out in Case C-79/03 Commission v Spain [2004] ECR I-11619, paragraph 36, and Case C-344/03 Commission v Finland [2005] ECR I-0000, paragraph 53, that, according to the document entitled 'Second report [of the Commission] on the application of Directive 79/409/EEC on the conservation of wild birds' of 24 November 1993 (COM(93) 572 final), 'small numbers' are any sample of less than 1% of the total annual mortality rate of the population in question (average value) for those species which are not to be hunted and a sample in the order of 1% for those species which may be hunted. The Court stated in that regard that those quantities are based on the work of the ORNIS Committee for the Adaptation to Technical and Scientific Progress under the Directive, instituted under Article 16 of the latter and consisting of representatives of the Member States.

27 It is also clear from the judgments cited above in Commission v Spain, paragraph 41, and Commission v Finland, paragraph 54, that although the percentages referred to above are not legally binding, they can none the less constitute, by reason of the scientific value of the work of the ORNIS Committee and the absence before the Court of any element of scientific proof to the contrary, a basis of reference for assessing whether a derogation granted under Article 9(1)(c) of the Directive complies with that provision (see by analogy, in respect of the relevance of scientific data in the field of ornithology, Case C-3/96 Commission v Netherlands [1998] ECR I-3031, paragraphs 69 and 70, and Case C-374/98 Commission v France [2000] ECR I-10799, paragraph 25)."

<u>Calculating annual mortality rates</u>

3.5.37 One of the perceived difficulties in applying the annual mortality for estimating small numbers is the fact that mortality rates are described for a limited number of species and usually for only part of their populations. Whereas estimates of annual mortality vary in availability and quality, they do exist for most huntable species (see Figure 8) which summarises published mortality rates for these species in two key scientific reference sources; 'Birds of the Western Palaearctic' and the'Kompendium der Vögel Mitteleuropas').

3.5.38 Furthermore, it is possible to calculate, on the basis of the available scientific literature for biologically similar species estimates for species for which no data is available at present (see worked example for *Rallus aquaticus* in Figure 9).

3.5.39 There will be a need to refine and improve the data on annual mortality of different species and populations, including developing the use of ringing

data[128]. The availability of good quality scientific information on population size and natural mortality is a prerequisite of reliable calculations. In cases where such data is lacking or incomplete there would be a need to use minimum estimates of population size and mortality rates, based on best available data. Furthermore, any application of derogations for a species must be underpinned by robust monitoring systems for the populations concerned to ensure that the taking is not detrimental to their conservation status.

Small numbers and conservation status of species

3.5.40 Derogations should not be granted for species or populations with an unfavourable conservation status, which are declining within the European Union (or in a Member State considering exercising such derogations), whose area of distribution (breeding or wintering) is contracting, or with very low population levels, unless it can be clearly demonstrated that use of such derogations are beneficial to the conservation status of the species/population concerned. Any consideration of use of derogations for such species should only be in the framework of a conservation management plan for them, aimed at their recovery to favourable conservation status. The Commission is of the view that this conclusion is consistent with the Court judgement in case C-182/02 (paragraph 17). In that case, the Court confirmed in paragraph 17 of its judgement that a hunting derogation will not be justified if it does not ensure the maintenance of the population of the species at a satisfactory level. The need to ensure the maintenance of the species population at a satisfactory level is not explicitly mentioned in Article 9. It seems that the Court took into account the general orientation of the Birds Directive set out in Article 2 and the 11th recital. Moreover, there is an obvious analogy with Article 16 of Directive 92/43/EEC, which states that the derogation must not be "detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range". Therefore, the need to ensure the maintenance of the population of the species at a satisfactory level becomes a pre-condition for granting derogations. It should also be noted that Article 9(4) of directive 79/409/EEC also implies that the use of derogations must not be incompatible with the objectives of the directive.

3.5.41 A list of huntable migratory species that are considered at present to have an unfavourable conservation status at the European Union level is given in Figure 10.
Member States should also take into consideration the conservation status of sedentary species within their territory. Figure 11 provides an overview for different grouse and pheasant species.

3.5.42 For abundant species with a favourable conservation status, taking in excess of the 1% threshold (up to 5% of annual mortality) may be considered following an in-depth scientific analysis by the competent authority which authorises the derogation. This would be in order to verify that the derogation is not incompatible with the objectives of the Directive.

[128] Annex V of the directive, which lists areas of research that require particular attention, includes 'listing of data on the population levels of migratory species as shown by ringing'.

Need to ensure a consistent application of derogations in small numbers

3.5.43 In the framework of a reference for a preliminary ruling from the *Tribunale amministrativo regionale per la Lombardia*[129], the Court provided clarification as regards the interpretation of Article 9(1)(c) of the Directive concerning the conditions for the exercise by the Member States of the derogations. The Court replied to the four questions as follows:

3.5.44 As regards the transposition requirements and the need to govern all the situations subject to the derogation system, the Court ruled that Article 9(1)(c) of Directive 79/409/EEC *"requires the Member States, irrespective of the internal allocation of powers prescribed by the national legal system, upon adoption of measures implementing that provision to ensure that, in all cases of application of the derogation provided for therein and for all the protected species, authorised hunting does not exceed a ceiling consistent with the restriction on that hunting to small numbers imposed by that provision, and that ceiling must be determined on the basis of strict scientific data".*

3.5.45 With regard to the level of precision which must characterise national implementing provisions in respect of the technical criteria on the basis of which a quota corresponding to 'small numbers' of birds may be fixed, the Court considered that *"national implementing provisions concerning the 'small numbers' referred to in Article 9(1)(c) of Directive 79/409 must enable the authorities responsible for authorising hunting derogations in respect of birds of a given species to rely on criteria which are sufficiently precise as to the quantitative ceilings to be complied with".*

3.5.46 The third question related to how the competent national authorities are to ensure that the maximum number of birds of a given species which may be hunted is not exceeded in the entire national territory. The Court replied that *"upon implementation of Article 9(1)(c) of Directive 79/409, the Member States are required to ensure that, irrespective of the number and identity of the authorities within their territory responsible for applying that provision, the amount of authorised hunting derogations in respect of each protected species by each of those authorities does not exceed the ceiling compatible with the restriction on that hunting to 'small numbers', fixed for that species for the entire national territory".*

3.5.47 Finally, as regards the control of hunting derogations, the Court ruled that *"the obligation on the Member States to ensure that hunting of birds is carried out only in 'small numbers', in accordance with Article 9(1)(c) of Directive 79/409, requires that the administrative procedures provided for are organised in such a way that both the decisions of the competent authorities authorising hunting derogations and the manner in which those decisions are applied are subject to effective control exercised in a timely manner".*

[129] Judgement of 8 June 2006, Commission/Italy, case C-60/05, ECR 2006, p.5083.

- **Strictly Supervised and Selective Basis**

3.5.48 Having regard to the fact that all derogations must in any case comply with the precise formal conditions of Article 9.2, the express reference in Article 9(1)(c) to "*under strictly supervised conditions and on a selective basis"* might be argued to be redundant. However, the context suggests that, by this express reference, the legislator intended a greater level of constraint than might otherwise arise.

3.5.49 The principle of strictly supervised conditions implies that any use of this type of derogation must involve clear authorisations that must be related to particular individuals, places, times and quantities. It also implies the need for a strong element of enforcement of such derogations to ensure compliance.

3.5.50 The principle of 'selectivity' is also essential. It means that the activity in question must be highly specific in its effect, targeting one species (or group of closely related species), or even one gender or age class of that species (e.g. mature males only), with the exception of all others.

3.5.51 It also implies that certain technical aspects of the method used can verifiably demonstrate selectivity. There is a need to come to a view on methods which of themselves are not entirely selective (e.g. use of certain nets) unless combined with the skills and experience of the operator, or by a combination of both. In case the method of taking results in specimens being killed, the selectivity method should be at a very high level. When birds are taken alive and may then be released unharmed, there is a need to ensure that fully verifiable safeguards apply. Furthermore, this type of derogation would also relate to Article 8 of the Directive, which refers to the need to avoid large-scale and non-selective capture and killing of bird species, particularly those involving the proscribed methods in Annex IV of the Birds Directive. In this regard Case C-79/03 is a good example[130].

3.5.52 The issue of selectivity also implies that full regard is given to minimising the risk of confusion and risk of disturbance to species that are not the subject of the derogation[131]. Taking these considerations into account is consistent with the requirement to strictly interpret the grounds invoked to justify derogations. It can be argued that such an approach has already been endorsed by the Court. On several occasions[132], the Court has stated that Article 9 derogations from the general system of protection must be applied appropriately in order to deal with precise requirements and specific situations. In addition, with regard to derogations aiming at the prevention of serious damage, which constitutes the third reason for derogation under 9(1)(a), the Court stated that "t*he fact that a*

[130] See in particular paragraphs 25-26 of the judgment of 9 December 2004 (Commission/Spain, case C-79/03, ECR 2004, p.11619). The Court compares the hunting by means of limed twigs to the hunting with guns.
[131] See section 2.6 of the guide.
[132] See judgments of: 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, paragraph 7; 8 July 1987, Commission/Italy, case 262/85, ECR 1987, p.3073, paragraph 7; judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223, paragraph 21.

certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive"[133].

3.5.53 Case 252/85[134] is of assistance in examining the scope of the requirement concerning strictly supervised conditions and selectivity. The Court satisfied itself that the requirements had been met by France, which had stressed that the use of the limes and nets in question involved individual authorisations[135] and that there were strict territorial, temporal and personal controls in order to guarantee the selective nature of the capture.

3.5.54 Against this background, it would seem reasonable to propose that the phrases *"under strictly supervised conditions and on a selective basis"* should be understood to imply a system of individual authorisations (or narrow-category authorisations involving a high degree of accountability), and should imply strict territorial, temporal and personal controls.

3.6 Third Condition for Derogations: Satisfying Precise Formal Conditions Set Out in Article 9(2)

3.6.1 As has been noted at paragraph 3.3.2 above, the third condition that derogations must satisfy relates to compliance with the precise formal conditions set out in Article 9(2). In the words of the Court in Case C-118/94[136], these formal conditions "*are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them."*

TAKING ACCOUNT OF EACH OF THE FORMAL CONDITIONS

3.6.2 The case-law confirms the importance of taking account of each of the formal conditions in Article 9(2). This is illustrated by Case C-247/85, *Commission v Belgium*[137]. In that case, the Commission, in its fourth ground of complaint, had objected to Belgian legislation authorising certain persons to capture, kill, destroy or drive away house sparrows, tree sparrows and starlings and to destroy their eggs, nests and broods. The Court rejected a Belgian defence that the legislation complied with Article 9 *inter alia* noting: *"Furthermore, the derogations do not comply with the criteria and conditions of Article 9(2) in so far as they mention neither the circumstances of time and place in which they may be granted nor the controls which will be carried out."*

3.6.3 In relation to the derogations the following formal conditions need to be respected and specified in any licence granting derogations

[133] Judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029, paragraph 56.
[134] Judgment of 27 April 1988, Commission/France, case 252/85, ECR 1988, p.2243.
[135] See judgment of 27 April 1988, Commission/France, case 252/85, ECR 1988, p.2243, paragraph 26.
[136] Judgment of 7 March 1996, Associazione Italiana per il WWF and others v Regione Veneto, case C-118/94, ECR 1996, p.1223.
[137] Judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029.

The species, which are the subject to the derogations

3.6.4 The species concerned need to be clearly indicated. This generally implies identification at individual species level. However, there may be circumstances, which might provide for several similar species being covered by the same derogation.

The means, arrangements or methods authorised for capture or killing

3.6.5 These must clearly be specified and applications of the derogation restricted to them.

The conditions of risk and the circumstances of time and place under which such derogations may be granted

3.6.6 This should include details of the level of risk attached to the use of the method, (including how often it will be inspected etc.) as well as precise details on the timing and location of the derogation. Precautions to restrict the risk for other species may also be appropriate.

The authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within the limits and by whom

3.6.7 Within each Member State certain designated authorities are responsible for issuing derogations. The exact terms should be set out in the relevant legislation for each country (or region thereof). For example, in the absence of alternative solutions, an airport authority may apply for a derogation to take several species of bird that are attempting to nest on the airfield because they are in danger of interfering with aircraft safety. The application is made to a derogation authority which then issues a derogation to the airport authority permitting specific activities and specifying the methods by which they can be carried out and the species involved.

3.6.8 Where the authority to grant derogations is given at sub-national levels (e.g. by regional administration) there is a need for a co-ordinating overview of the granting of derogations at Member State level to avoid the risk that the sum of the derogations may exceed permissible levels.

The controls which will be carried out

3.6.9 A derogation authorises acts that would otherwise be an offence under the legislation transposing the Birds Directive. Therefore, there needs to be compliance with certain specified conditions that are set out in the derogation. This must be underpinned by appropriate enforcement.

AUTHORISATIONS TO A GENERAL CATEGORY OF PERSON

3.6.10 A question which arises is whether, in relation to pest control derogations under Article 9(1)(a), it is possible to satisfy the formal conditions of Article

9(2) by way of general authorisations, i.e. authorisations not given to specific individuals but rather to a general category of authorised person such as landowners and their agents. While the reference to "strictly supervised conditions" in Article 9(1)(c) suggests that this is not possible for derogations based on that provision, the wording of Article 9(2) does not appear to preclude such general authorisations for derogations based on Article 9(1)(a).

3.6.11 Case 247/85, *Commission v Belgium*[138] is pertinent, again in relation to the Commission's fourth ground of complaint. The Court recalled that the wording of the Belgian legislation provided that: "*Occupants and hunting-right owners, their attorneys or sworn wardens and officials and servants of the water and forestry authorities shall be permitted to at any time to capture, kill, destroy or drive away the birds, as well as their eggs and broods, mentioned in Annex I to this decree."* In rejecting the Belgian defence that the legislation complied with Article 9, the Court was critical of the lack of justification for a general authorisation. The Court commented:
"If the three species specified in Annex I to the royal decrees cause serious damage to crops and orchards or are responsible for pollution and noise in towns or certain regions, Belgium is in principle authorised to provide for a derogation from the general system of protection provided for in Articles 5, 6 and 7.34. However, as was stated above, a derogation under Article 9 must, according to Article 9 (1), cover specific situations and, according to Article 9(2), comply with the requirements stated therein. The general derogations provided for in Articles 4 and 6 of the royal decrees do not comply with those criteria and conditions. The Belgian rules do not indicate the reasons regarding the protection of public health or the prevention of serious damage to crops or other fields mentioned in Article 9 (1) (a) of the Directive which might necessitate the granting to such a wide category of persons of a permanent derogation, applying throughout Belgium, from the protection provided for by the Directive ".

3.6.12 Assuming of course that the derogation covers all the aspects referred to in Article 9(2), the above passage from the judgement in Case 247/85 suggests that the reasons justifying the grant of a derogation to a wide category of person should be compelling and clearly specified in the derogation. With regard to derogations under Article 9(1) c it is also important to note the specific conditions that are mentioned in it.

3.7 Article 9.3 and 4

3.7.1 The reporting obligations on the use of derogations are laid down in Article 9.3 of the directive. This requires Member States to provide an annual report to the Commission on the implementation of Article 9. The Commission and the Member States, within the framework of the ORNIS Committee, have agreed a reporting period that covers the period from January to December. In order to allow a reasonable time for compiling national reports and it has also

[138] Judgment of 8 July 1987, Commission/Belgium, case 247/85, ECR 1987, p.3029.

been agreed with Member States that reports are forwarded to the Commission by September of the following year at the latest[139].

3.7.2 Article 9.3 does not define the precise content of the national reports. It is clear that the information must be factual and relate to cover the details of Article 9(1) and (2). A scheme has been agreed between the Commission and the Member States to provide information under the following headings:

- the reasons (9.1 a to c),
- the species concerned,
- in case of 9.1.c, the numbers of individuals concerned
- the means, arrangements or method authorised for capture or killing
- the conditions of risk and the circumstances of time and place under which such derogations may be granted
- the authority empowered and number of authorisations delivered
- the controls carried out.

3.7.3 Also relevant is information on the region(s) concerned, as well as the period for which the licence is granted[140]. Where pertinent it should also indicate the number of individuals taken under a derogation. This is especially important in the context of derogations granted in the context of Article 9(1)c.

3.7.4 A derogation information system has been developed by the Joint Nature Conservation Committee in the United Kingdom to facilitate data entry for derogations in a standard format by different Member States.

3.7.5 On the basis of the information provided in the derogation reports, especially that relating to Article 9(3), the Commission is required under Article 9(4) to ensure that the use of derogations does not result in consequences that are incompatible with the Directive

3.7.6 The Commission evaluates the derogations reported in order to verify their compatibility with the directive. This involves an examination of the reported use of derogations under each of the different categories of derogations. This includes a determination for derogations granted under Article 9.1.c if the threshold of 'small numbers' is being exceeded, in cases where there may be concerns that this requirement is not being met.

3.7.7 In cases where the Commission concludes that the use of derogations is not in conformity with the requirements of the directive it retains the right to take legal action against the Member State concerned.

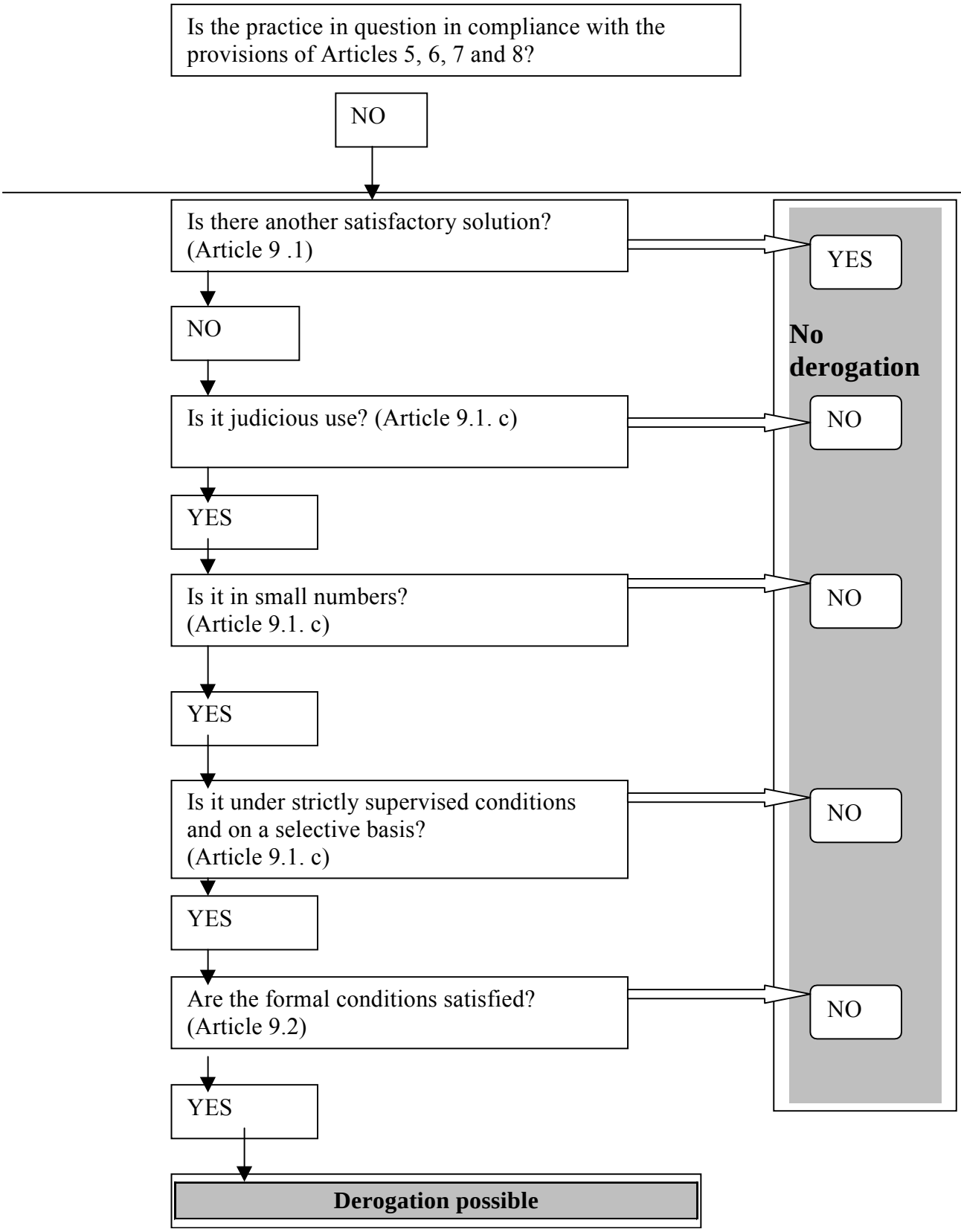
3.7.8 In accordance with its obligations under Article 9.2 of the Convention on the Conservation of European Wildlife and natural Habitats (Berne Convention) the Commission compiles a bi-annual report on the application of derogations

[139] In cases where there are serious delays of Member States in providing these annual reports the Commission can take legal action against the countries concerned under Article 226 of the Treaty.

[140] A derogation information system has been developed for the Commission by the Joint Nature Conservation Committee in the United Kingdom to facilitate data entry for derogations in a standard format by different Member States. This system is presently under revision/adaptation.

by Member States, on the basis of the national reports, which it sends to the Standing Committee of the Convention.

Summary of conditions to be fulfilled for a derogation to be granted under Article 9§1 under c) of the "Birds Directive"



4 FIGURES



Common Pheasants - Acrylic painting by Pieter Verstappen

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4 FIGURES

Figure 1 – Actual and potential number of huntable species in each Member State

Figure 2– Different stages of reproduction

Figure 3 – One possible scheme for categorisation of 'look-alike' huntable species

Figure 4 – Questionnaire for assessing compatibility of staggered hunting seasons for Annex II species with Article 7(4) of the Directive

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Figure 6 – *Columba palumbus* – WOOD PIGEON

Figure 7 – *Anas platyrhynchos* MALLARD

Figure 8 – Some published mortality rates for Annex II.1 species

Figure 9 – Example of calculation of small number for the Water Rail (*Rallus aquaticus*), species for which no mortality data is published.

Figure 10 – Huntable species (Annex II) with unfavourable conservation status

Figure 11 – Overview of different grouses and pheasant species

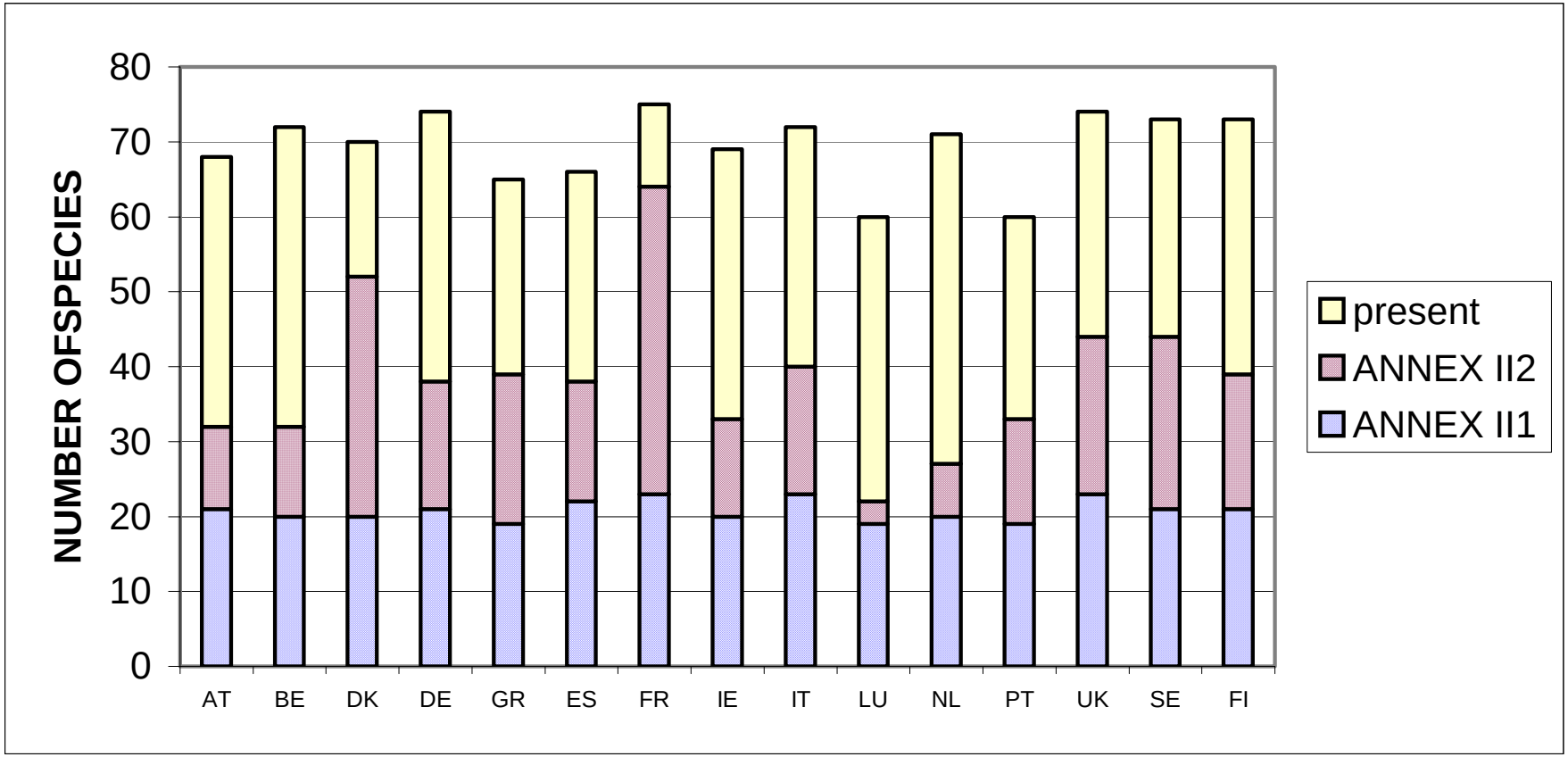


Figure 1: Number of actual and potentially huntable species present in each Member State including those:
a) listed in **Annex II.1** (hunting allowed in all Member States)
b) listed in **Annex II.2** (hunting only for Member States for which indicated)
c) listed in Annex II.2 (but not for Member State in question, even though **present**)

Figure 2: Different stages of reproduction.

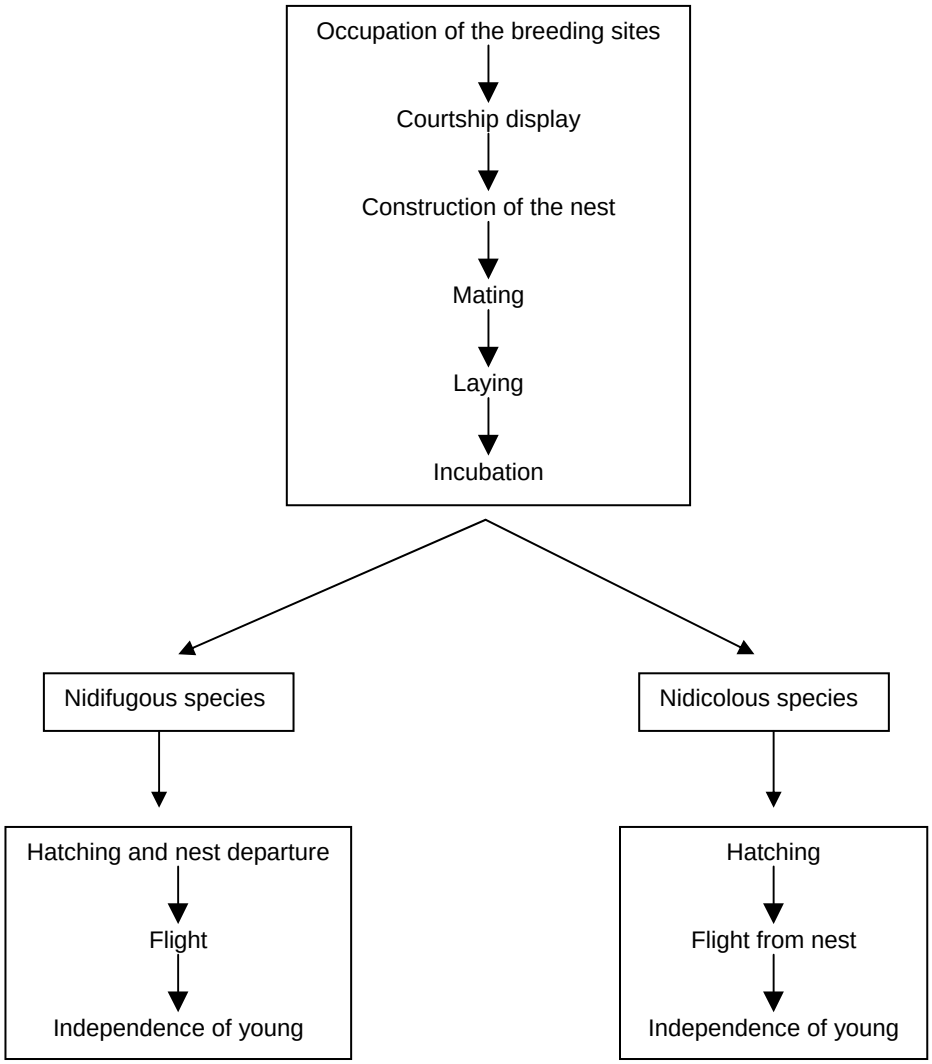


Figure 3: One possible scheme for categorisation of 'look-alike' huntable species

Groups of "look-alikes"	Confusable species in groups	Habitats types and others criteria to be considered	Countries for which species are listed in annex II	When problems most likely to occur if staggered opening or closing dates are used to extend hunting seasons
Grey geese	*Anser anser* *Anser fabalis* *Anser brachyrhynchus* *Anser albifrons*	In winter grasslands and arable lands Calls distinctive	All Member States except Greece, Ireland, Luxembourg, Netherlands and Portugal	End of the hunting period
Eclipse male Female and immature dabbling ducks	*Anas penelope* *Anas strepera* *Anas crecca* *Anas platyrhynchos* *Anas acuta* *Anas querquedula* *Anas clypeata*	Wetlands Calls often distinctive	All Member States	Beginning of the hunting period Mostly between July and September, when the males are in eclipse and immatures have not moulted yet
Eclipse male Female and immature diving ducks	*Aythya ferina* *Aythya fuligula* *Aythya marila* *(Netta rufina)* *(Bucephala clangula)*	Wetlands including Marine	All Member States At Sea, mostly Baltic Sea (Dk, SW, SF)	Beginning of the hunting period Mostly between July and September, when the males are in eclipse and immatures have not moulted yet End of the hunting period
Scoters (females and immatures)	*Melanitta nigra* *Melanitta fusca* *(Imature Somateria)* *(Immature Aythya marila)*	mainly marine	At Sea, mostly Baltic Sea (Dk, SW, SF)	Beginning and end of the hunting period
Female and imm. Mergus ducks	*Mergus merganser* *Mergus serrator*	Wetlands, including coastal areas	Fennoscandia (DK, SW, SF)	End of the hunting period
Female and immature *Lagopus* Grouse	*Lagopus lagopus scoticus* *Lagopus mutus*	Heathlands, uplands Species normally segregated altitudinally	United-Kingdom	Beginning and end of the hunting period
Female and immature *Tetrao* Grouse	*Tetrao urogallus* *Tetrao tetrix*	Woods, clearings, heathlands Pronounced size difference should normally facilitate identification	Tetrao in the Alps (AT, It) and Fennoscandia (SW, SF)	Beginning and end of the hunting period
Alectoris partridges	*Alectoris rufa* *Alectoris graeca* *Alectoris chuckar* *Alectoris barbara*	For A. graeca, A. barbara and A. cchukar dry rocky slopes For A. rufa and A. chukar (where introduced) arable lands, heaths, other farmlands and open lowland. .	Where overlaps in the distribution occur (South eastern France for rufa and graeca; Thraki for graeca and chuckar, southern Andalucia for barbara and rufa)	Beginning and end of the hunting period
Quail and young gamebirds	*Coturnix coturnix* Young *Perdix* or *Alectoris* (Young *Phasianus colchicus)*	Arable lands, farmlands.	Gr, Es, Fr, It, Pt	Beginning of the hunting period
Large plovers and Ruff	*Pluvialis squatarola* *Pluvialis apricaria* *Philomachus pugnax*	In autumn and winter P. squatarola mostly on mudflats or sea shores; P. apricaria mostly on arable land or meadows Calls and underwings are distinctive	Fr, Ie, UK, Pt	End of the hunting period for Pluvialis Beginning of the hunting period, August
Snipes	*Gallinago gallinago* *Lymnocryptes minimus*	Marshes and wet meadows	All Member States except Be, De, Lu, Nl, SF	Beginning and end of the hunting period
Godwits Curlews and Whimbrel	*Limosa limosa* *Limosa lapponica* *Numenius arquata* *Numenius phaeopus*	In autumn and winter on mudflats and seashores Heaths, open lowlands, wet meadows, mudflats Calls are distinctive	FR, UK, IE	Beginning and end of the hunting period
Large *Tringa* sandpipers	*Tringa erythropus* *Tringa totanus* *Tringa nebularia*	Seashores, mudflats Calls are distinctive	Fr	Beginning and end of the hunting period
Small gulls in immature and winter plumage	*Larus ridibundus* *Larus canus*		AT, FR, ES, SW, FI	Beginning and end of the hunting period
Large gulls immature plumages	*Larus fuscus* *Larus argentatus* *Larus cachinnans* *Larus marinus*	Nearly everywhere, except high mountains and wooded areas	Dk, De, Es, Sw, SF	Beginning and end of the hunting period
Columba pigeons and doves	*Columba livia* *Columba palumbus* *Columba oenas*	Wild C. livia in rocky habitats, domesticated form near human habitations	Where wild and feral C. livia occur together (Sp, Corsica, Pt,…)	Beginning and end of the hunting period

Groups of "look-alikes"	**Confusable species in groups**	**Habitats types and others criteria to be considered**	**Countries for which species are listed in annex II**	**When problems most likely to occur if staggered opening or closing dates are used to extend hunting seasons**
Streptopelia doves	*Streptopelia turtur* *Streptopelia decaocto*	Collared Dove is more prone to live in town and villages	At, De, Fr, It, Gr, Pt…	Beginning of the hunting period
Thrushes	*Turdus merula, female* *Turdus philomelos* *Turdus iliacus* *Turdus viscivorus* *Turdus pilaris*	Wide range of habitats Calls distinctive	Gr, Es, Fr, It, Pt Opening and closing dates are usually the same for all the species in the group, exept in Italy where T. viscivorus is protected	Beginning and end of the hunting period
Crows	*Corvus corone* *Corvus frugilegus* *(Corvus monedula)*	Wide range of habitats Calls often distinctive	DK, De, Gr, Es, Fr, Lu, Pt	Beginning and end of the hunting period

Figure 4: Questionnaire For Assessing Compatibility Of Staggered Hunting Seasons For Annex II Bird Species With Article 7§4 Of Directive 79/409/EEC

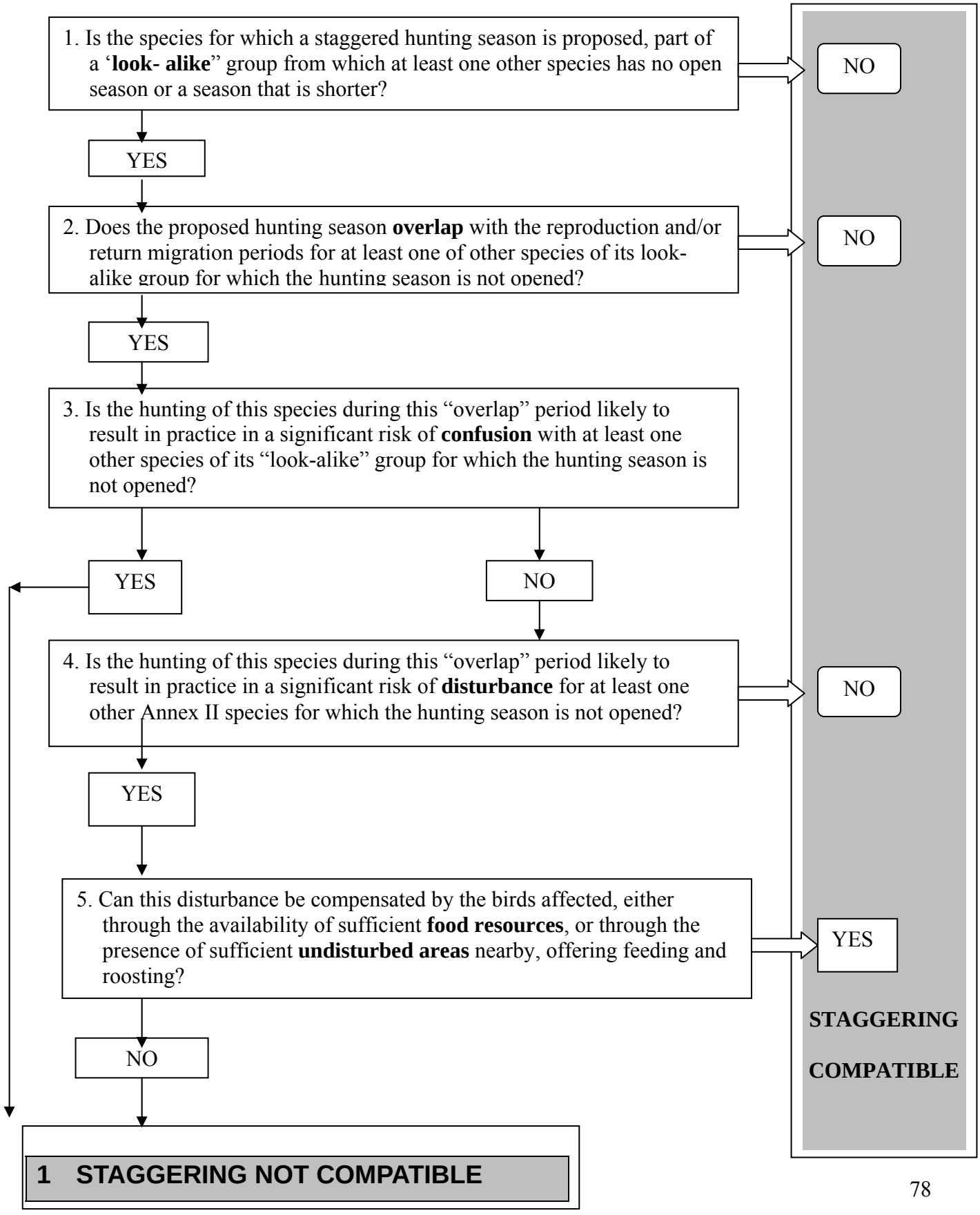


Figure 5: List of huntable species with a very favourable conservation status

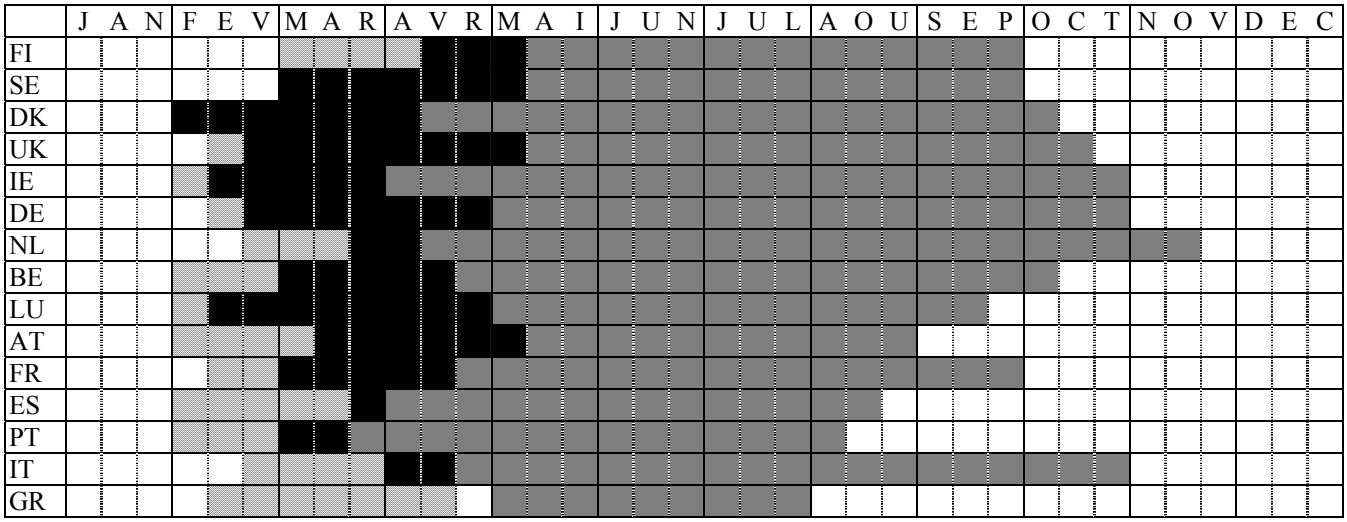
Criteria used to determine "very favourable status":

- SPEC 4 (Species whose global populations are concentrated in Europe - i.e. species with more than 50% of their global population or range in Europe – but which have a favourable conservation status in Europe) or NON SPEC species and Secure European Threat Status (SPEC = species of European conservation concern) [141],
- no important declines in the breeding or wintering populations (less than 10% of the national breeding populations declining more than 20% in size; less than 2% of the national breeding populations declining more than 50% in size; less than 10% of the national breeding populations declining more than 20% in range; less than 2% of the national breeding populations declining more than 50% in range; or less than 10% of the national wintering populations declining more than 20% in size; less than 2% of the national wintering populations declining more than 50% in size)
- very large population (> 1000000 pairs),

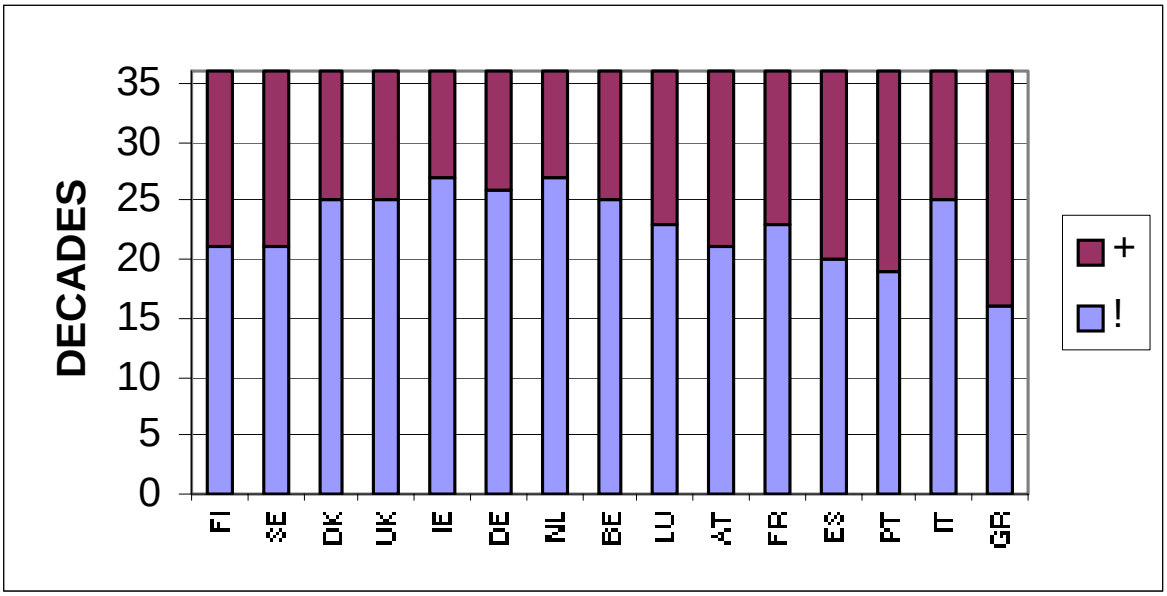
Species	Spec status	% of breeding population size declined by >20%	>50%	range declined by >20%	>50%	% of winter. pop. size declined by >20%	>50%
Anas platyrhynchos	Non Spec ;	9	0	7	0	1	1
Columba livia	Non Spec ;	1	0	0	0		
Columba palumbus	Spec 4	0	0	0	0		
Turdus pilaris	Spec 4	1	0	0	0		
Turdus iliacus	Spec 4	0	0	0	0		
Turdus viscivorus	Spec 4	5	0	4	0		
Garrulus glandarius	non Spec	0	0	0	0		
Pica pica	non Spec	0	0	0	0		
Corvus monedula	Spec 4	2	0	2	0		
Corvus frugilegus	Non Spec	1	0	0	0		
Corvus corone	Non Spec	0	0	0	0		

[141] Birds in Europe Their conservation status, BirdLife Conservation Series N°3, 1994.

Figure 6: Columba palumbus - WOODPIGEON

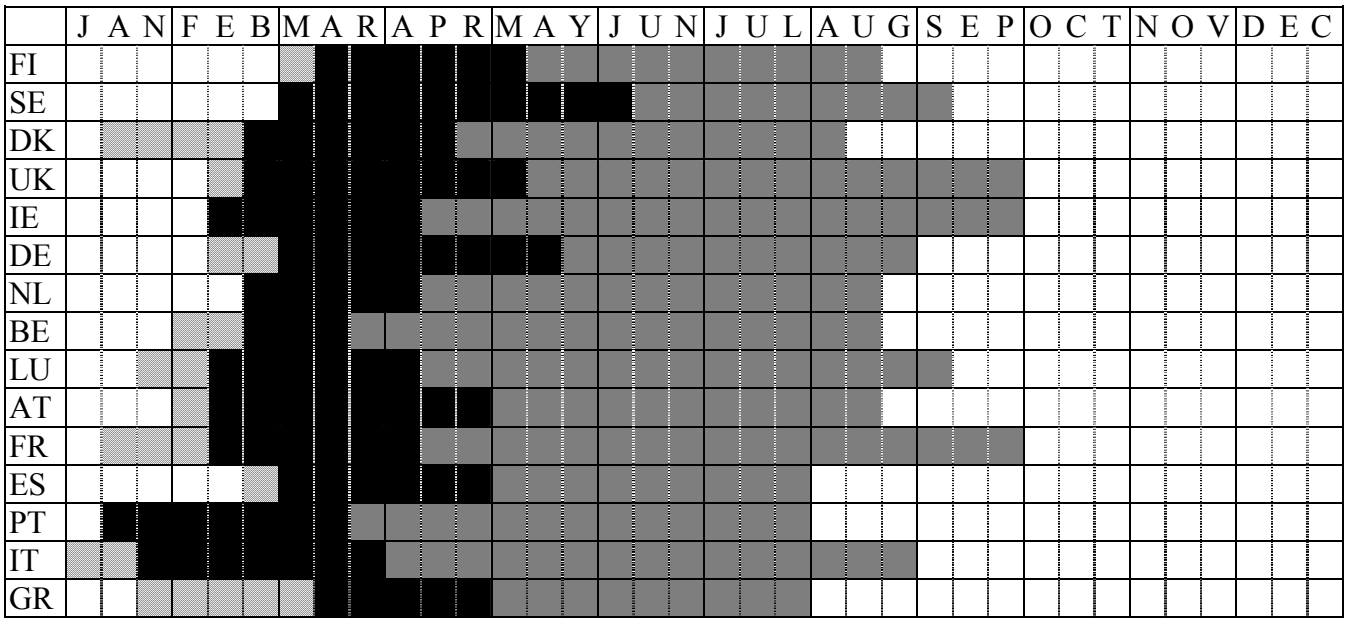


	period of reproduction
	migration + reproduction
	pre-nuptial migration

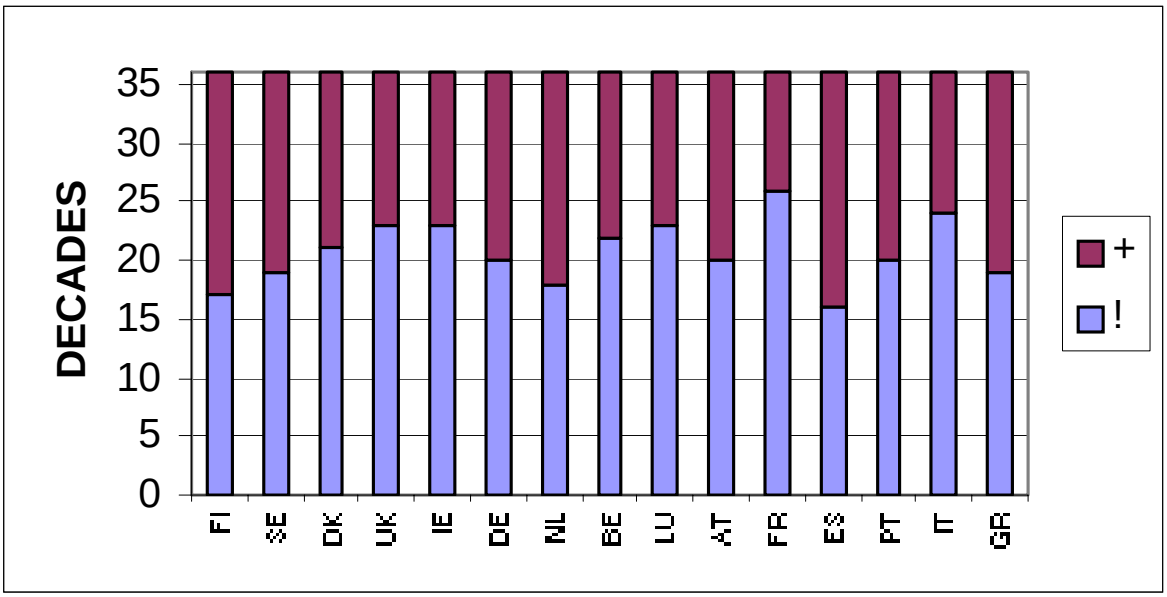


+ = potential huntable period under Article 7(4)
! = breeding + pre-nuptial migration period

Figure 7: Anas platyrhynchos MALLARD



	period of reproduction
	migration + reproduction
	pre-nuptial migration



+ = potential huntable period under Article 7(4)
! = breeding + pre-nuptial migration period

Figure 8: Some published mortality rates

Part 1: Annexe II.1 species

Species	**Mortality rate**
Anser fabalis	KVM No data (Anser brachyrhynchus: ad 26%; from 4 to 16 months 42% ; total of individuals >4 months old 21.5%) BWP No data
Anser anser	KVM Ad (Breeding IS) 23% ; Ad (Breeding DK) ca 33% BWP Icelandic population: mean annual mortality adults 23% (ringing), over 4 months old 22% (censuses), perhaps declining from 1960 to 1971; adult life expectancy 3.8 years (Boyd and Ogilvie 1972). Mean annual mortality of birds ringed Denmark as young and adults 33%; further life expectancy of full-grown young 2.3 years and of adults 2.6 years (Paludan 1973).
Branta canadensis	KVM Ad GB 22% BWP England: mean annual mortality of adults 22%; life expectancy 3.9 years (Boyd 1962)
Anas penelope	KVM Adults ringed birds: 47% BWP Mean annual mortality adults ringed north-west Europe 47%; life expectancy 1.6 years (Boyd 1962).
Anas strepera	KVM No data BWP No data
Anas crecca	KVM Ad from 47 to 60%; birds from first year with mortality rate higher than adults BWP Annual mortality. Britain 1949–55, male 49%, female 57%; Pembrokeshire, Wales, both sexes, 64% in 1934–8, 49% in 1945–8, 65% in 1949–53, but in war years 1941–5 only 39%; about three-fifths of male losses and half of female probably attributable to man (Boyd 1957a). For both sexes, 55% France, 58% Italy and Spain; in both areas, mortality of 1st-year birds higher than that for 1–2 year olds; for 1–2 year olds, mortality Europe 47%, USSR 51% (Tamisier 1972c).
Anas plathyrhynchos	KVM CH, recoveries of adult ringed birds: 58% captive bred, 52% wild birds; DK captive bred 1st year 90.6%, following years 55% (with high hunting pressure) NW Eur Ad: 48% SF first year 64%, following years 55% S 76% to 64% BWP From ringing in north-west Europe, mean annual mortality adults 48%, life expectancy 1.6 years (Boyd 1962). Finland: mortality 64% first year, 55% in succeeding years (Grenquist 1970). Sweden: mortality 76% juveniles, 64%. adults (Curry-Lindahl et al. 1970).
Anas acuta	KVM No data BWP Mean annual adult mortality, based on USSR recoveries, 48% (Boyd 1962).
Anas querquedula	KVM No data BWP No data
Anas clypeata	KVM GB Ad 44% BWP Mean annual mortality adults ringed Britain 44%; life expectancy 1.8 years (Boyd 1962).
Aythya ferina	KVM No data BWP No data
Aythya fuligula	KVM Ad varies between 20-25% and 46% BWP Mean annual mortality adults ringed northwest Europe 46%, life expectancy 1.7 years (Boyd 1962).
Lagopus l. scoticus	BWP Scotland: annual mortality c. 65% (Jenkins et al. 1967; A Watson).
Lagopus mutus	KVM No data BWP No data
Alectoris graeca	KVM No data BWP No data
Alectoris rufa	KVM No data BWP No data
Perdix perdix	KVM Dk 84%; CS 80-82% BWP Surveys of data from many areas show mean population levels determined by density dependent factors, above all nest predation. Proportion of September population shot closely related to density where shooting formalized, now varying from 20 to 30% annually. Winter losses in Britain, excluding shooting, currently c. 45%, with little annual variation; not related to density and considerable evidence that weather conditions not important. Winter losses and spring dispersal of pairs contribute little to variation in mean breeding densities (G R Potts). Annual mortality rates of reared and released Danish birds after 1 April of 2nd calendar year 84.0 ± 2.8%, compared with 80.2 ± 3.8% for birds released Italy and 82.1 ± 7.2% for birds released Czechoslovakia (Paludan 1963). In Poland, mortality in 12 months after 1 September of year of birth 77.6% and 56% in following years (Olech 1971)

Species	**Mortality rate**
Phasianus colchicus	KVM Dk first year 84%, following years 58% (high pressure of hunting) BWP No information on wild populations. Many studies on managed populations in Europe and North America show high mortality, especially in males and 1st year birds e.g. in Denmark mean annual mortality of males 78.1%, of females 62.3%, and for all birds mortality 81.4% in 1st year of life and 58.4% in succeeding years (Paludan 1959a).
Fulica atra	KVM First year 76-87%; 2nd year 48-72%; NL First year 79%; following years 25%; found dead 1st year 32%; following years 22% BWP Mortality in 1st year of life in various samples from north-west Europe between 76% and 87%, and in 2nd year between 48% and 72%; probably lower limits nearer true position (Glutz et al. 1973). Recoveries of 686 birds ringed Switzerland in winter: 371 in calendar year of ringing, 125 in 2nd year, 83 in 3rd, 51 in 4th, 19 in 5th, and 36 in 6th year and after (Glutz 1964). Annual survival mortality rates of pulli ringed Netherlands, 1934–73: shot birds (sample 93) ¾2179% 1st year, 7525% later years; found dead (sample 138)¾68) 32% 1st year, 7822% later years (Cavé 1977).
Lymnocryptes minimus	KVM No data BWP Limited data suggested annual mortality of 76%, but almost certainly too high (Boyd 1962).
Gallinago gallinago	KVM B 52-57%; Dk 47%; GB 52%; BWP Annual mortality from weighted mean of various samples 51.9 ± 5.43%, no detectable differences between rates in 1st year after fledging and later years (Boyd 1962). Belgium: mean annual mortality for birds shot 56.7% compared with 52.0% for those found dead; hunting mortality declined after 1st year (Dhondt and Van Hecke 1977). West Germany: mortality in 1st year 65 % (Glutz von Blotzheim *et al*. 1977). Denmark: mean annual adult mortality 47.1 ± 2.80 (Fog 1978). Finland: mean annual mortality 46.9% (Pertunnen 1980c).
Scolopax rusticola	KVM 1st year 55-65%; following years 40-50%.higher for fennoscandinavian populations. BWP Britain: annual mortality 54% in 1st year, 39% in succeeding years, 1 August–31 July (Kalchreuter 1975); earlier estimates (Lack 1943, Boyd 1962) gave 56% and 55% for 1st years, and 37% and 40.7% respectivelyin succeeding years, with annual adult mortality markedly higher in 1931–40 than in 1921–30, reasons unknown (Boyd 1962). Norway and Sweden; annual mortality 67% in 1st year, 52% in succeeding years (Kalchreuter 1979); Finland and Baltic 72% and 54% respectively (Kalchreuter 1975). Finland: mortality in 1st year 61.7%, 48.4% in succeeding years (Pertunnen 1980a). Fenno-Scandia: 65.6% in 1st year, 50.6% in succeeding years (Clausager 1974). Netherlands: annual adult mortality 50.0% (Clausager 1974).
Columba livia (1)	KVM No data BWP England (Salford): mortality in 1st year of life 43 ± 7.3%, annual adult mortality 33.5 ± 4.9% (Murton et al. 1972b). England (Flamborough Head): annual adult mortality from shot sample c. 30% (Murton and Clarke 1968).
Columba palumbus	KVM GB 35-41%, juv 60-70%; Dk juv 54.3%; Ad 41.3%; NL ca 46% BWP Britain: juvenile mortality c. 74%, annual adult mortality c. 36% (Murton 1965b). Netherlands: 1911–53 (when no bounty paid for shooting) 1st-year mortality 49%, annual adult mortality 50%; 1959–62 (bounty) 1st-year 55%, adult 61% (Doude van Troostwijk 1964a); 1911–81 1st-year and adult both 46% (Glutz and Bauer 1980). Denmark: 1st-year mortality 54.7%, adult mortality 41.3% (Søndergaard 1983). Finland: 1st-year mortality 41.7%, 2nd-year mortality 47.6%, mortality in later years 30.5% (Saari 1979b)

(1) the populations quoted here are wild populations of *Columba livia* and not the populations from domestic pigeons.

Part 2: Annexe II.2 species

Species	Mortality rate
Cygnus olor	KVM GB 1st year: 58%; 2nd and 3rd years: 30%; 4 th and 5th years 22% (Coleman & Minton 1980); ca 30% after 1 year; 30% 2nd year; 25% 3 rd and 4th year (Bacon 1980). BWP Britain: annual mortality 3–12 months 32.1%, 1–2 years 35.4%, 2–3 years and 3–4 years 25.0%, breeders over 4 years 18–20%; life expectancy at 4 years 4•8 years (Beer and Ogilvie 1972). Denmark: annual mortality 26% (Bloch 1971). Sweden: annual mortality 1965–70, 28.5%, but only 21.0% at most if severe winter of 1969–70 excluded (Mathiasson 1973a).
Anser brachyrhynchus	KVM ad 26%; from 4 to 16 months 42% ; total of individuals > 4 months old 21.5% BWP Mean annual mortality of adults 26%, and of 4–16 months old 42% (from ringing). Mean annual mortality of all over 4 months 21.5% (from censuses), with evidence of decline in rate 1950–72 (Boyd and Ogilvie 1969).
Anser albifrons[142]	KVM KVM *A. a. albifrons* : > 1an 30.9%; *Anser a. flavirostris*: 34% BWP A. a. albifrons: mean annual mortality (birds wintering Britain) 28% birds wintering Netherlands, 30.9% (Doude van Troostwijk 1974) A. a. flavirostris: mean annual mortality 34%;
Branta bernicla	KVM Ad GB 17%, positively correlated with reproduction BWP Mean adult annual mortality of B. b. bernicla wintering Britain 14%, and B. b. hrota from Spitsbergen 17% (Boyd 1962).
Netta rufina	KVM No data BWP No data
Aythya marila	KVM No data BWP Mean annual mortality adults ringed Iceland 52% (Boyd 1962).
Somateria mollisima	KVM Ad 20-40% BWP Netherlands: annual mortality of birds ringed as fledglings 1965–70 averaged 17%; femelle annual mortality ranged from 15%–61% in 1964—68 reflecting poisoning by chlorinated hydrocarbons, and 2%–8% from 1969–71 after control measures (Swennen 1972). Denmark: annual mortality 20% (Paludan 1962). Adults ringed north-west Europe: mean annual mortality 39%, life expectancy 2.1 years (Boyd 1962)
Clangula hyemalis	KVM No data BWP Mean annual mortality of adults ringed Iceland 28%; life expectancy 3.1 years (Boyd 1962).
Melanitta nigra	KVM No data BWP Birds ringed Iceland: mean annual mortality of adults 23%; life expectancy 3.8 years (Boyd 1962)
Melanitta fusca	KVM No data BWP No data
Bucephala clangula	KVM Nesting female: 37% BWP Annual mortality (breeding femelle) Sweden: c. 37%; life expectancy ca 3 years (adult life expectancy ca 2 years, Nilsson 1971).
Mergus serrator	KVM No data BWP No data
Mergus merganser	KVM No data BWP Adult mean annual mortality 40%, life expectancy 2.0 years (Boyd 1962).
Bonasa bonasia	KVM No data BWP No data
Lagopus l . lagopus	KVM No data BWP USSR: 60–86% for adults and 90–95% for 1st-year birds (in years 1971–5 when lemming *Lemmus lemmus* scarce on Bolshezemolsk tundra, predatory pressures led to high mortality of (Vorgnin 1976)). (for *Lagopus lagopus scoticus* in Scotland : annual mortality ca 65% (Jenkins *et al*. 1967).No data for EU
Tetrao tetrix[143]	KVM SF imm. first winter 64% ; Ad population stable 47% BWP In Finland, mean annual adult mortality probably varies from 40% to 60%, with annual and local fluctuations (Helminen 1963).

[142] These mortality rates are considered too high for *Anser albifrons flavirostris*. Most recent analyses for this sub-species give first year mortality of 32.2% and adult mortality of 21.5% (Fox, A.D. & Stroud, D.A. 2002. *Anser albifrons flavirostris* Greenland White Fronted Goose. BWP Update. In press).

[143] According to long term data the first winter mortality rate (September to the following spring) of Capercaillie *Tetrao urogallus* is 76% and of Black Grouse *Tetrao tetrix* is 64%. In stable populations the annual mortality rates of adult Capercaillie and Black Grouse are 29% and 47% respectively. Both species present sex-related differences in juvenile mortality. Linden, H. 1981 Estimation of juvenile mortality in the Capercaillie *Tetrao urogallus* and the Black Grouse *Tetrao tetrix*, from indirect evidence. Finnish Game Research 39 : 35-51.

Species	Mortality rate
Tetrao urogallus	KVM USSR Ad ca 54-59%; SF 30% BWP USSR: in 2 areas survival mortality from hatching to 1 September 48 52 % for males and 59 41 % for females; in following year rates 46 54 % and 33 67 % and in subsequent years 59 41 % and 54 46 % respectively (Semenov-Tyan-Schanskii 1959).
Alectoris barbara	KVM No data BWP No data
Alectoris chukar	KVM No data BWP No data
Coturnix coturnix	KVM No data BWP No data
Meleagris gallopavo	KVM No data BWP No data
Rallus aquaticus	KVM No data BWP No data
Gallinula chloropus	KVM Data from ringing (recoveries) 1st year 69% BWP Of 90 ringed West Germany, 69% died in 1st year of life and 23% in 2nd year (Glutz et al. 1973).
Haematopus ostralegus	KVM GB from fledging to sexual maturity total mortality rate of 74-80%; imm 40%; BWP Netherlands: mean mortality in first year after fledging 36 %; from 1 to 15 years old 15.9% annually (Boyd 1962). Mortality from hatching to I month after fledging, Wales, 84 % (Harris 1969). Mortality from fledging to sexual maturity 74 % and 80 % calculated from Harris (Harris 1969, Harris 1970 respectively) (Glutz et al. 1975); mean annual mortality of immatures c. 40 % (Harris 1967). West Germany: mean mortality from fledging to average age (5–6 years) when first caught breeding c. 62 %; survival mortality rate of breeding birds 1949–63 constant for all age-groups at c. 94 6 % (Schnakenwinkel 1970); in Wales, 1963–8, survival mortality rate of breeding birds 872-13–98 % (Harris 1970b).
Pluvialis apricaria	KVM GB 1st winter 41%, following winters 22% (Parr 1980); NL recoveries of rings 1st year 53%; following years 39%. BWP Netherlands: 123 recoveries of autumn-ringed full-grown birds showed 53% died in 1st year after ringing, thereafter 39.0 ± 5.42% annually. Iceland: 31 recoveries of nestlings and juveniles indicated mortality 66% in 1st calendar year and 46.5 ± 10.3% annually thereafter (Boyd 1962). Scotland: adult mortality c. 22% (Parr 1980).
Pluvialis squatarola	KVM No data BWP No data
Vanellus vanellus	KVM 1st year (from 1 August to 31 March) GB 38%; Central Europe 40%; Scandinavia 40%, Dk 44%; following years GB 32%; Central Europe 29%; Scandinavia 33%, Dk 33%; varies from 30 to 36% between 2nd and 11th year, after that ca 43%. BWP Europe. Mortality of young from 31 August to following 31 March (thus excluding high mortality in early weeks) 39.7%, varying from 30.4% to 57.5% for birds ringed in different countries, with 37.5% in Britain and Ireland, 40.1% in central Europe, and 40.4% in Scandinavia. Thereafter, annual mortality 32.2% (33.9% Britain and Ireland, 29.4% central Europe, 33.1% Scandinavia). For further details and discussion, see Glutz et al. (Glutz et al. 1975).
Calidris canutus	KVM No data BWP Average annual adult mortality 32.4±3.18% (Boyd 1962)
Philomachus pugnax	KVM various sources (ring) 47% BWP Annual mortality 47.6 ± 3.61%, with little difference between 1st and later years; possibly sex difference not significant (Boyd 1962)
Limosa limosa	KVM NL 1st year 38%; 2nd year 32%; 3rd and following years 37% BWP Netherlands: annual mortality in 1st year (to 15 May) 37.6%, in 2nd year 32%, and in later years average 36.9% (Glutz et al. 1977).
Limosa lapponica	KVM No data BWP Annual mortality rate 29.5 ± 7.9%, but apparently c. 79% in ‚1st calendar year after ringing' (Boyd 1962).
Numenius phaeopus	KVM No data BWP According to small sample (13) annual mortality 30.8 ± 9.1% (Boyd 1962).
Numenius arquata	KVM GB 1st year (after fledging) 53%; 2nd year 37% following years 26% NL 1st year (ringed as pulli) 66%; 2st to 4th year 28%; SF 64% up to 31.12 of first year; 55% following years BWP Britain: mean annual mortality (n = 287) 53.0% in 1st year from fledging, 37.0% in 2nd year and 26.4%, subsequently (Bainbridge and Minton 1978). Netherlands: mean annual mortality (n = 137) in 1st year after ringing as pulli 66.4% and c. 28% for 2nd-4th years (Glutz et al. 1977). Finland: mean annual mortality (n = 245) 64% up to 31 December after ringing as pulli, and 55% in later years (Grenquist 1965).
Tringa erythropus	KVM No data BWP No data

Species	Mortality rate
Tringa totanus	KVM im 1st year >50%; following years 20-30% BWP Mortality in 1st year after fledging 55%; calculated adult mortality varied widely in various samples from 17.7% to 56.9%, probably affected by ring loss, with best estimate probably from Swedish sample (55) at 31.5% (Boyd 1962). In German colony, calculated adult mortality 28.7% in 1st year after ringing, decreasing with age in successive years (30%, 20%, and 18%), but this based on return of adults to colony, so perhaps due to increasing nest-site loyalty with age (Grosskopf 1959; Boyd 1962).
Tringa nebularia	KVM No data BWP No data
Larus ridibundus	KVM juveniles mortality 56% (surviving after fledging at the end of 1st year: 44%) Adult ca 15 to 40 % BWP Britain and Ireland: mean mortality 1945–72, 38.3% in first 6 months, 27.5% in 2nd calendar year, and c. 24% thereafter; in north-west England 1908–24 mortality much higher (c. 60% in first 6 months) due to shooting (Flegg and Cox 1975). Camargue (France): mean annual adult mortality decreased to 16% during period of expansion, largely due to exploitation of new food sources in winter (Lebreton and Isenmann 1976).
Larus cachinnans	KVM No data BWP No data
Larus canus	KVM Estonia 1st year 54%; 2nd year 25%, following years 26%; SF 29%; Former Eastern Germany 16%; NW 15%; Dk 26% and GB 34% BWP Average annual mortality of 347 birds over 2 years old ringed Denmark, 26.0% (Sørensen 1977). Average annual adult mortality, Estonia, c. 15% (Onno 1968b).
Larus fuscus	KVM No data BWP No data
Larus argentatus	KVM Ad ca 10% BWP Considerable variations in published estimates for Europe and North America. Mortality in 1st year of life: Britain 17% (Chabrzyk and Coulson 1978), 30% (Brown 1967b), 18% (Harris 1970a); Denmark 22% (Paludan 1951); North America 38–62% (Paynter 1966), 27-32% (Kadlec and Drury 1968). Mortality in 2nd year of life: Britain 7.3% (Chabrzyk and Coulson 1978). Adult mortality: Britain 6.5% (Chabrzyk and Coulson 1978), 10% (Parsons 1971a), 10% (Harris 1970a); West Germany 10% (Drost et al. 1961); Denmark 15% (Paludan 1951); North America 4–9% (Kadlec and Drury 1968), but 15–20% suggested by subsequent studies (Kadlec 1976).
Larus marinus	KVM No data BWP No data
Columba oenas	KVM 50% ; GB 44-61% BWP Britain: 1st-year mortality ca 60%, adult mortality ca 46.3%, but lower in late 1950s and early 1960s (R J O'Connor and C J Mead). Finland: 1st-year mortality 57.5%, adult mortality 44.5% (Saari 1979b)
Streptopelia decaocto	KVM GB 1st year ca 69%; following years 39%; D 50-75% and 35-55% BWP England: juvenile mortality 69% annual adult mortality 39% (Coombs et al. 1981). Sweden: annual mortality 29% (Bentz 1982). Central Europe: mortality in 1st year of life 50–75%, annual adult mortality 35–55% (Glutz and Bauer 1980).
Streptopelia turtur	KVM GB juv 64%; adult ca 50% BWP Britain: estimated 1st-year mortality c. 64%, annual adult mortality c. 50% (Murton 1968).
Alauda arvensis	KVM Ad. 30-35%, majority in winter BWP England: average annual adult mortality 33.5%; average mortality of young during 1st year after independence 38% (Delius 1965).

Species	Mortality rate
Turdus merula	KVM from ringed birds: 1st year 69%; following years 40-52% BWP Britain: annual mortality 58% in 1st year (from 1 August), 38% in 2nd, 50% in 3rd, 40% in 4th and 5th (Lack 1943); annual mortality 54% in 1st year of life (from 1 August), 40% in 2nd (Lack 1946b); annual mortality after end of 1st calendar year 44±1.5%, irrespective of age, with no significant sex difference; possibly lower in north; varied annually from 34% in 1933–4 to 69% in 1928–9 (Coulson 1961); at Oxford, annual juvenile mortality 59% (Snow 1958b); annual mortality decreased from c. 50% in 1951–2 to c. 32% in 1960–1, apparently not due to weather (Snow 1966b); annual adult mortality in London 41.8±1.0%, in rural southern England 34.9±0.5% (Batten 1973); mortality highest March–June; traffic and predation by cats have played progressively bigger role in mortality (Batten 1978); annual adult mortality 41% in males, 60% in females (Naylor 1978). Belgium: annual adult mortality 69% (Verheyen 1958); annual adult mortality 52.2±2.3%, or 45.8±2.5% excluding those shot or otherwise killed by man; annual juvenile mortality 12.4±1.9% (Van Steenbergen 1971). France: annual urban mortality 25% in males, 33% in females (Ribaut 1964). West Germany: annual mortality 49%, for urban birds 28% (Erz 1964). Finland: annual overall mortality 58–59% (Haukioja 1969). Czechoslovakia: mortality in 1st year of life 68.4%, in 2nd year 56.3%, in 3rd year 30% (Beklová 1972); mortality in 1st year 72% (Havlín 1961).
Turdus pilaris	KVM N ca 53% (higherr for birds of the first year); SF ca 65%; CH ca 69% BWP Switzerland: annual mortality 60–70%, independent of age (Furrer 1977). Finland: annual overall mortality 61–65% (Haukioja 1969).
Turdus philomelos	KVM CS 1st year 58%; following years 44%; F respectively 59% and 46%; BWP Britain: mortality in 1st year of life (from 1 August) 53%, in 2nd year 40% (Lack 1946b). Finland: annual overall mortality 54% (Haukioja 1969).
Turdus iliacus	KVM adult ca 50% BWP Finland: annual overall mortality 57–58% (Haukioja 1969).
Turdus viscivorus	KVM GB Ad 48% BWP Britain: annual adult mortality 48%; mortality of fledged young to end of 1st calendar year 62% (Snow 1969a).
Sturnus vulgaris	KVM recoveries of rings in Europe 1st year 60-73%; following years 50-68% BWP Britain: mortality in 1st year of life (from 1 August) 48%, in 2nd year 48% (Lack 1946); annual mortality 52.8% ±1•0% (Coulson 1960). Finland: annual mortality 46% ± 4.4% (Haukioja 1969). Czechoslovakia: mortality in 1st year 68.1%, in 9th year, 22.2%, in 10th year 14.2% (Beklová 1972).
Garrulus glandarius	KVM from recoveries of rings 1st year 61% BWP Britain: mortality in 1st calendar year 40%, in 2nd year 55%, and in 3rd–5th years 41% (Holyoak 1971). Europe: mortality in 1st year of life 60.7% (Busse 1969).
Pica pica	KVM Eur from recoveries of rings 1st year 69% GB male adult 25%, female adult 40%... BWP Britain and Finland: mortality in 1st calendar year 46%, in 2nd year 58%, in 3rd–5th years 55% (Holyoak 1971). Urban population, Britain: mortality in 1st year after leaving nest 44%, in successive years 30%, 24%, 32%, 46%, and 86% (Tatner 1986). Finland: annual mortality based on all recoveries 61 ± 4.3%, probably too high; for breeding birds 47 ±7.9% probably a good estimate (Haukioja 1969). Europe: mortality in 1st year of life 69.0% (Busse 1969).
Corvus monedula	KVM from recoveries of rings 1st year 46% BWP Britain: mortality in 1st calendar year 38%, in 2nd year 36%, in 3rd–5th years 43% (Holyoak 1971). Finland: annual mortality 35 ± SE 3•2% (Haukioja 1969). Europe: mortality in 1st year of life 45.5% (Busse 1969).
Corvus frugilegus	KVM from recoveries of rings 1st year 54% BWP Britain: mortality in 1st calendar year 59%, in 2nd year 51%, in 3rd–5th years 25% (Holyoak 1971). Europe: mortality in 1st year 54% (Busse 1969).
Corvus corone	KVM from recoveries of rings 1st year 62% BWP Britain and Finland: mortality in 1st calendar year 61%, 2nd year 45%, 3rd-5th years 48% (Holyoak 1971). Finland: annual mortality 47 ±2.3% (Haukioja 1969). Europe: mortality in 1st year of life 62.4% (Busse 1969)

Legend:

KVM = Kompendium der Vögel Mitteleuropas (Bezzel E. 1985. Kompendium der Vögel Mitteleuropas - Nonpasseriformes Nichtsingvögel. AULA-Verlag Gmbh, Wiesbaden & Bezzel E.

1993. Kompendium der Vögel Mitteleuropas - Passeres Singvögel. AULA-Verlag Gmbh, Wiesbaden
BWP = Birds of the Western Palearctic (Cramp S. & C M Perrins (eds). 1973-1994. Handbook of the birds of the Western Palearctic Vol 1, 2, 3, 4, 5 & 8. Oxford University Press, Oxford.)

Figure 9: Example of calculation of small number for the Water Rail (*Rallus aquaticus*), species for which no mortality data is published.

European population of *Rallus aquaticus* 130,000 pairs = 260,000 birds (from The EBCC ATLAS of European Breeding Birds)

a) adult mortality rate 25% [144]➔survival rate = 75% survival of the adults = 195,000 birds after one year

- necessary recruitment (in the hypothesis of population stability) = 65,000 birds
- young birds mortality 50% [145]➔there must be 130,000 young birds in autumn ➔on average 1 young by pair/female
- uptake is carried out therefore on (260,000 + 130,000) 390,000 birds, the mortality of which is of ca 33.33%
- 130,000 birds die, 1% of that = 1,300 birds
- 1,300 birds can be regarded as a small number (at the level of the continent)

b) if the adult mortality rate 60% [146]➔average survival rate = 40% = 104,000 birds after one year

- necessary recruitment (in the hypothesis of population stability) = 156,000 birds
- young birds mortality 6050% ➔there must be 312,000 youngs in autumn ➔on average 2.4 young by pair/female
- uptake is carried out therefore on (260,000 + 312,000) 572,000 birds, the average mortality of which is ca 60%
- 343,200 birds die, 1% of that = 3,432 birds
- 3,500 birds can be regarded as a small number (at the level of the continent)

[144] According to the data of literature 25% corresponds to the lowest mortality rate met for birds of more than one year of a Rallidae.
[145] According to the data of literature 50% corresponds to a low mortality rate for birds of first year of a Rallidae.
[146] According to the data of literature 60% corresponds to a high average mortality rate for one species of a Rallidae.

Figure 10: Huntable species (Annex II) with unfavourable conservation status

SPEC CAT 2 Vulnerable Large decl.		
Limosa limosa	**98 NERI**	(Black-tailed Godwit / Barge à queue noir)
SPEC CAT 2 Declining Moderate decl.		
Tringa totanus	**98 NERI**	(Redshank / Chevalier gambette)
Larus canus		(Common Gull / Goéland cendré)
SPEC CAT 3 Vulnerable Large decl.		
Anas strepera	**00 WI**	(Gadwall / Canard chipeau)
Anas acuta	**98 NERI**	(Pintail / Canard pilet)
Anas querquedula	**98 ONC**	(Gargany / Sarcelle d'été)
Coturnix coturnix	**99 ONC**	(Quail / Caille des blés
Lymnocryptes minimus	**98 NERI**	(Jack snipe / Bécassine sourde)
[Scolopax rusticola, winter	**98 ONC**	(Woodcock / Bécasse des bois)][147]
Limosa lapponica, winter		(Bar-tailed Godwit / Barge rousse)
Alauda arvensis	**98 ONC**	(Skylark Alouette des champs)
SPEC CAT 3 Vulnerable <2 500 p, Localized, winter		
Branta bernicla		(Brent goose / Bernache cravant)
SPEC CAT 3 Declining Moderate decl.		
Netta rufina	**99 ONC**	(Red-crested Pochard / Nette rousse)
Numenius arquata, winter	**98 NERI**	(Curlew / Courlis cendré)
Streptopelia turtur	**98 ONC**	(Turtle Dove / Tourterelle des bois)
SPEC CAT 3, w Localized Localized		
Aythya ferina	**99 ONC**	(Pohcard / Fuligule milouinan)
Melanitta fusca	**00 WI**	(Velvet Scoter / Macreuse brune)
Calidris canutus		(Knot / Bécasse maubèche)
Gallinago gallinago		(Snipe / Bécassine des marais)
Pluvialis apricaria		(Golden Plover / Pluvier doré)
Vanellus vanellus	**99 ONC**	(Lapwing / Vanneau huppé)
Philomachus pugnax		(Ruff / Chevalier combattant)

NERI = Danish National Environmental Research Unit
ONC = Office Nationale de la Chasse
WI = Wetlands International

SPEC Category 2 - species whose global populations are concentrated in Europe (>50% of their global breeding or wintering populations occurs in Europe) and which have an Unfavourable Conservation Status in Europe.

SPEC Category 3 - species whose global populations are not concentrated in Europe(<50% of their global breeding or wintering populations occurs in Europe), but which have an Unfavourable Conservation Status in Europe.

[147] The listing of *Scolopax rusticola* as having unfavourable conservation status in the EU has been challenged on the basis of more recent data. According to the EU draft management plan (Ferrand, Y. and F. Gossmann (2001) Elements for a Woodcock Management plan. Game and Wildlife Science, vol. 18(1), March 2001, p. 115-139) the numbers of breeding Woodcock are considered stable or increasing in Member States, with the exception of the United Kingdom. The UK population is geographically restricted and its dynamics can be separated from the other European populations. The status of wintering birds for most European countries is not known.

Figure 11 Overview of conservation status of different grouse and pheasant species, listed in Annex II of the Birds Directive, at EU and Member State levels.

Species	Annex II	Annex I	Status	EU	SE	FI	DK	UK	IE	NL	BE	LU	DE	AT	FR	ES	PT	IT	GR
Alectoris barbara	2	**yes**	**3 (E)**	(-1)	---	---	---	---	---	---	---	---	---	---	---	0	---	(-1)	---
Alectoris chukar	2	no	**3 V**	—	---	---	---	---	---	---	---	---	---	---	---	---	---	---	(-1)
Alectoris graeca graeca	1	no	**2 (V)**	(-1)	---	---	---	---	---	---	---	---	---	---	---	---	---	---	(-1)
Alectoris graeca saxatilis	1	**yes**		—	---	---	---	---	--	---	---	---	---	**-1**	F	---	---	**-1**	---
Alectoris graeca whitakeri	1	**yes**		—	---	---	---	---	---	---	---	---	---	---	---	---	---	—[1]	---
Alectoris rufa	1	no	**2 V**	—	---	---	---	0	---	---	---	---	---	---	—[2]	**-1**	---	(0)	---
Bonasa bonasia	2	**yes**	S	—	**-1**	**-1**	---	---	---	---	**-1**	**-1**	**-2**	**-1**	**-1**	---	---	**-1**	0
Lagopus l . lagopus	2	no	S	**?**	?	**-1**	---	---	---	---	---	---	---	---	---	---	---	---	---
Lagopus l. scoticus	1	no		—	---	---	---	**-1**	**-1**	---	---	---	---	---	---	---	---	---	---
Lagopus mutus helveticus	1	**yes**	S	?	---	---	---	---	---	---	---	---	0	0	0	---	---	**-1**	---
Lagopus mutus mutus	1	no		0	0	F	---	0	---	---	---	---	---	---	---	---	---	---	---
Lagopus mutus pyrenaicus	1	**yes**		**?**	---	---	---	---	---	---	---	---	---	---	?	**-1**	---	---	---
P. perdix hispaniensis	1	**yes**	**3 V**	—	---	---	---	---	---	---	---	---	---	---	---	**-1**	---	---	---
P. perdix italica	1	**yes**		—	---	---	---	---	---	---	---	---	---	---	---	---	---	**-1**	---
Perdix perdix perdix	1	no		—	**-1**	**-2**	**-1**	**-1**	**-2**	**-1**	**-2**	**-1**	**-2**	**-1**	**-1**	---	---	---	(-1)
Phasianus colchicus	1	no	S	0	-2	0	+1	+1	0	---	F	-1	0	F	0	+1	---	0	0
Tetrao tetrix britannicus	2	no	**3 V**	—	---	---	---	**-1**	---	---	---	---	---	---	---	---	---	---	---
Tetrao tetrix tetrix	2	**yes**		—	**-1**	**-1**	**-1**	---	---	**-2**	**-2**	---	**-2**	**-1**	**-1**	---	---	F	---
Tetrao urogallus	2	**yes**	S	—	0	**-1**	---	**-2**	---	---	---	---	**-2**	**-1**	**-1**	0	---	**-1**	0

Status:
2= SPEC 2 (see figure 10)
3= SPEC 3
E= endangered
V= vulnerable
S= secure

Population trend
+1 = small increase (20-49%)
0 = stable (with overall change <20%)
-1 = small decrease (20-49%)
-2 = large decrease (>= 50%)
F= fluctuating (with changes at least 20% but no clear trend)
?= unknown

Additional sources

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5 ANNEX

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Guidance document on hunting under
Council Directive 79/409/EEC on the conservation of wild birds
"The Birds Directive"

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European Commission

MANAGING NATURA 2000 SITES

The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC



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MANAGING NATURA 2000 SITES

The provisions of Article 6 of the 'Habitats' Directive 92/43/CEE



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Biodiversity is increasingly recognised as an inestimable element of our common heritage. The last Eurobarometer shows that European citizens take a great interest in the protection of rare and endangered species and habitats. This is the purpose of the Natura 2000 ecological network established by the 'Habitats' directive, which was adopted in 1992. The network, which also embraces areas established under the 'Birds' directive, will provide a strong protection for Europe's finest wildlife areas.

The management of the Natura 2000 sites is essential for their conservation. But to be successful it requires, in the first instance, the active involvement of the people who live in and depend upon these areas. The measures for managing Natura 2000 sites are given in Article 6 of the 'Habitats' directive. However, as this is a concise legal text, many of the key concepts are not easy to understand.

I consider it important that we have a clear and accessible understanding of these key provisions of the directive as this will provide the basis for it to be applied throughout the Community on an equal footing.

This document is therefore intended to facilitate the interpretation of Article 6 by competent authorities in the Member States. I hope it assists them in fully applying it and I would encourage them to further develop guidelines for the different actors concerned.

This important document, which aims at a better understanding of Community legislation by the citizens, should also be seen as part of the openness and transparency policy of the European Commission.



Margot Wallström
Commissioner for the Environment

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Foreword

Why an interpretation guide for Article 6?

Article 6 of the 'Habitats' Directive (92/43/EEC) plays a crucial role in the management of the sites that make up the Natura 2000 network. With the spirit of integration in mind, it indicates the various tasks involved so that the nature conservation interests of the sites can be safeguarded.

Many questions have been raised about the significance of this article by Member States and operators. At first glance it seems to be broad and not well defined, but a thorough analysis, linking it with the other articles of the directive, makes it easier to understand and apply. Nevertheless, Article 6 should not be seen in isolation. In particular, if its application leads to specific requirements, it should be remembered that Article 8 envisages the co-financing of some of the measures necessary to meet the objectives of the directive.

Purpose and target of this document

This document aims at providing guidelines to the Member States on the interpretation of certain key concepts used in Article 6 of the 'Habitats' directive.

The primary targets of the document are Member State authorities and not individuals. It is however expected that it will also facilitate the understanding of the mechanics of the 'Habitats' directive by the various bodies and groups concerned, especially if it is complemented with more detailed guidance which should be drawn up by the Member States themselves.

Nature and limitations of the document

The document has been drafted by the services of the Environment Directorate-General of the European Commission, following relevant informal discussions held with the nature protection authorities of the Member States (see Annex V for a list). As such, the document reflects only the views of Commission services and is not of a binding nature. It should be stressed that in the last resort it rests with the European Court of Justice to interpret a directive.

The interpretations provided by the Commission services cannot go beyond the directive. This is particularly true for this directive as it enshrines the subsidiarity principle and as such lets a large margin of manoeuvre to the Member States for the practical implementation of specific measures related to the various sites of the Natura 2000 network. In any case, the Member States are free to choose the appropriate way they wish to implement the practical measures, provided the latter serve the general purpose of the directive.

However interpretative, this document is not intended to give absolute answers to site-specific questions. As a matter of fact, such matters should be dealt with on a case-by-case basis, while bearing in mind the orientations provided by the document.

The present version is not meant to be a definitive one; indeed, the document may be revised in the future, according to experience that will arise from the implementation of Article 6 in the Member States and from any future case law. Furthermore, the Commission services have arranged for the prepa-

ration of more specific, methodological guidance on the assessment of plans and projects under Article 6(3) and 6(4); such guidance, once ready, is intended to be complementary to this document.

Structure of the document

After an introductory note on the overall content and logic of Article 6, there follows a detailed presentation of each paragraph (6(1), 6(2), 6(3), 6(4)) according to the same general scheme. This involves an introduction to the article and its scope, and then discussion of the main concepts and issues raised, on the basis of the Commission's knowledge, existing jurisprudence of the European Court of Justice, and other relevant directives.

The key points arising from the Commission's analyses are summarised (in bold characters) at the end of each section, in order to facilitate a quick reading of the relevant conclusions. Full references of Court cases quoted throughout the text are provided as an annex at the end of the document.

1. Introduction

Article 6 in context



1.1. Placed within the overall scheme of Directives 92/43/EEC and 79/409/EEC as well as within a wider context

Before addressing Article 6 in detail, it is worth recalling its place within the overall scheme of Directive 92/43/EEC as well as that of Directive 79/409/EEC ([1]) and its relationship with a wider legal context.

The first chapter of Directive 92/43/EEC, comprising Articles 1 and 2, is entitled 'Definitions'. This chapter sets out the aim of the directive which is to '*contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies*' ([2]). It also provides a general orientation, referring to the need for measures taken pursuant to the directive to be designed to maintain or restore certain habitats and species '*at favourable conservation status*' ([3]), while, at the same time, referring to the need for measures taken pursuant to the directive to '*take account of economic, social and cultural requirements and regional and local characteristics*' ([4]).

The main specific requirements of Directive 92/43/EEC are grouped under the two subsequent chapters. The first is entitled 'Conservation of natural habitats and habitats of species' and comprises Articles 3 to 11 inclusive. The second is entitled 'Protection of species' and comprises Articles 12 to 16 inclusive.

The 'Conservation of natural habitats and habitats of species' chapter addresses the most ambitious and far-reaching challenge of the directive — the establishment and conservation of the network of sites known as Natura 2000. Within this chapter, Article 6 sets out provisions which govern the conservation and management of Natura 2000 sites. Seen in this context, Article 6 is one of the most important of the 24 articles of the directive, being the one which most determines the relationship between conservation and land use.

The article has three main sets of provisions. Article 6(1) makes provision for the establishment of the necessary conservation measures, and is focused on positive and proactive interventions. Article 6(2) makes provision for avoidance of habitat deterioration and significant species disturbance. Its emphasis is therefore preventive. Article 6(3) and (4) set out a series of procedural and substantive safeguards governing plans and projects likely to have a significant effect on a Natura 2000 site. Within this structure, it can be seen that there is a distinction between Article 6(1) and (2) which define a general regime and Article 6(3) and (4) which define a procedure applying to specific circumstances.

Considered globally, the provisions of Article 6 reflect the general orientation expressed in the recitals of the directive. This involves the need to promote biodiversity by maintaining or restoring certain habitats and species at 'favourable conservation status' within the context of Natura 2000 sites, while taking into account economic, social, cultural and regional requirements, as a means to achieve sustainable development.

Apart from the place of Article 6 within the overall scheme of Directive 92/43/EEC, it is also relevant to mention its *relationship with the scheme of Directive 79/409/EEC* on the conservation of wild birds.

([1]) OJ L 206, 22.7.1992, p. 7 and OJ L 103, 25.4.1979, p. 1 respectively.

([2]) Article 2(1).

([3]) Article 2(2).

([4]) Article 2(3).

- In the first place, the scheme of the earlier directive is broadly comparable with that of the latter. In particular, the 'Conservation of natural habitats and habitats of species' chapter of Directive 92/43/EEC has its parallel in Articles 3 and 4 of Directive 79/409/EEC.
- In the second place, there has been an important degree of merger or fusion between the schemes of both directives. First, special protection areas (SPAs) classified under the earlier directive are now an integral part of the Natura 2000 network ([5]). Second, the provisions of Article 6(2), (3) and (4) of Directive 92/43/EEC have been made applicable to SPAs ([6]). In this document, most comments on Article 6 are framed by reference to sites proposed under Directive 92/43/EEC. Generally speaking, these comments will apply, *mutatis mutandis*, to sites classified under Directive 79/409/EEC.

Seen in a wider context — that of the Treaty establishing the European Community — Article 6 can be regarded as a key framework for giving effect to the principle of integration, since it encourages Member States to manage the protected areas in a sustainable way and since it sets the limits of activities which can impact negatively on protected areas while allowing some derogations in specific circumstances.

Seen in an **international context**, Article 6 helps achieve the aims of relevant international nature conservation conventions such as the Berne Convention ([7]) and the Biodiversity Convention ([8]), while at the same time creating a more detailed framework for site conservation and protection than these conventions themselves do.

Article 6 is a key part of the chapter of Directive 92/43/EEC entitled 'Conservation of natural habitats and habitats of species'. It sets out the framework for site conservation and protection, and includes proactive, preventive and procedural requirements. It is relevant to special protection areas under Directive 79/409/EEC as well as to sites based on Directive 92/43/EEC. The framework is a key means of achieving the principle of environmental integration and ultimately sustainable development.

1.2. Relation with protection of species chapter

As mentioned above, the chapter of Directive 92/43/EEC entitled 'Protection of species' covers Articles 12 to 16 inclusive and deals with strictly protected animal and plant species listed in Annex IV of the directive.

Articles 12, 13 and 14, which are applicable from the date of implementation of Directive 92/43/EEC, i.e. 10 June 1994, cover certain plant and animal species which also figure in Annex II of the directive, and which therefore benefit from the provisions of Article 6 within the Natura 2000 sites hosting them.

As a consequence, an action may at the same time fall within the scope of both chapters.

([5]) Article 3(1) of Directive 92/43/EEC provides that 'the Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC'.

([6]) Article 7 of Directive 92/43/EEC.

([7]) Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the Conservation of European Wildlife and Natural Habitats (OJ L 38, 10.2.1982, p. 1).

([8]) Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ L 309, 13.12.1993, p. 1).

For example, the destruction of a resting place of the brown bear, *Ursus arctos,* may contravene the prohibition of Article 12(1)(d) while also running counter to Article 6 if the resting place is within a Natura 2000 site for the species.

While this may appear to result in duplication, a few points should be noted.

- In the first place, certain species of plant and animal covered by Articles 12, 13 and 14 do not figure within Annex II. Thus, they do not benefit directly from site conservation and protection within Natura 2000.
- In the second place, for species such as *Ursus arctos* which benefit from both the chapter on conservation of natural habitats and habitats of species and the chapter on protection of species, the protection afforded by Article 6 is limited to the Natura 2000 network whereas the protection afforded by the chapter on protection of species is not geographically limited (subject to any restriction mentioned in the annexes to the directive). Thus, Article 6 is concerned with **site** conservation and protection whereas the chapter on protection of species is more narrowly focused on the species (though this will obviously have implications for sites where species occur, in particular the breeding sites and resting places of animals).

While certain plant and animal species benefit from both the chapter on conservation of natural habitats and habitats of species and the chapter on protection of species, the scope and the nature of the relevant provisions are different.

1.3. Putting Article 6 into national law: the duty of transposition

It is important to note that the provisions of Article 6 require transposition into national law (i.e. they need to be the subject of provisions of national law giving effect to their requirements). In this respect, they come within the scope of Article 23 of the directive which states that '*Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive within two years of its notification*'. The deadline for transposition was 10 June 1994 (or 1 January 1995 in the case of Austria, Sweden and Finland).

This reflects the type of Community instrument that has been used, namely a directive. A directive is binding as to the result to be achieved, but leaves a Member State some choice as to the form and methods of achieving that result. For most directives, the required result will need national legislation (see Annex I, point 1).

Depending on the Member State concerned, Article 6 needed to be transposed into national law by 10 June 1994 or 1 January 1995.

1.4. Time of application of Article 6: from which date do the obligations of Article 6 apply?

In general, a distinction needs to be made between the deadline for transposition of the provisions of Article 6 into national law and the date from which these provisions apply to individual sites.

As regards individual sites, a distinction needs to be drawn between special protection areas classified under Directive 79/409/EEC and other sites.

1.4.1. Special protection areas

The protection requirements regarding special protection areas (SPAs) are given in Article 4(4), first sentence of Directive 79/409/EEC which provides that, for those areas, *'… Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article …'.*

After the entry into force of Directive 92/43/EEC the above obligations are replaced pursuant to Article 7 of Directive 92/43/EEC which provides as follows:

> *'Obligations arising under Article 6(2), (3) and (4) of this directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'*

Thus, the provisions of Article 6(1) do not apply to special protection areas (SPAs). However, analogous provisions apply to SPAs by virtue of Article 4(1) and (2) of Directive 79/409/EEC. The date from which these similar provisions should, in principle, apply to SPAs is the date from which Directive 79/409/EEC became applicable in the Member States (see Annex I, point 2).

As regards the provisions of Article 6(2), (3) and (4), it is clear from the terms of Article 7 that these now apply to already classified SPAs.

However, given the wording of Article 7, a question arises as to whether the provisions of Article 4(4), first sentence of Directive 79/409/EEC remain applicable after the 'date of implementation of this directive' (10 June 1994 for the then Member States and 1 January 1995 for Austria, Finland and Sweden) until such time as a site is classified as an SPA.

In the *Santoña Marshes* case (see Annex I, point 3), the European Court of Justice established that the provisions of Article 4(4) first sentence were applicable to an unclassified site which should have been classified as an SPA from the date of implementation of Directive 79/409/EEC (i.e. 7 April 1981 for the then Member States and the date of accession for later Member States).

The underlying rationale of *Santoña Marshes* is that sites that deserve classification should be treated in the same way regardless of whether or not they are formally classified. The Commission services therefore consider that the provisions of Article 6(2), (3) and (4) are applicable to SPAs, or to sites which should be classified as SPAs, from the date of implementation of Directive 92/43/EEC.

Article 6(1) of Directive 92/43/EEC does not apply to SPAs. However, there are analogous provisions in Article 4(1) and (2) of Directive 79/409/EEC and these apply from the date of implementation of that directive. As regards the date of application of Article 6(2), (3) and (4) of Directive 92/43/EEC to SPAs, it is reasonable to conclude that all sites classified, or qualifying for classification, as SPAs are subject to these provisions from the date of implementation of Directive 92/43/EEC.

1.4.2. Sites based on Directive 92/43/EEC

Article 6(1) applies to special areas of conservation (SACs). According to Article 4(4) of the directive, SACs come into being by way of designation by the Member States. Such designation is only possible after a site has been adopted as a site of Community importance (SCI) in accordance with Article 4(2) of the directive. An SCI must be designated as an SAC *'as soon as possible and within six years at the*

most'. This means that the final deadline for SAC designation — and therefore for compliance with Article 6(1) — is 10 June 2004.

Article 4(5) of Directive 92/43/EEC provides as follows:

> '*As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).*'

Thus, in contrast to the provisions of Article 6(1) which apply only when an SCI has been designated as an SAC, the provisions of Article 6(2), (3) and (4) become applicable as soon as a site becomes an SCI and before it is designated as an SAC. Member States are also free to choose an earlier date for the implementation of Article 6(2), (3) and (4), and some national legislation already provides for such earlier implementation.

According to Article 4 of Directive 92/43/EEC, Member States ought to have submitted their national lists by 10 June 1995 and the Commission adopted the Community list by 10 June 1998. However, no Community list could be adopted by 10 June 1998 owing to delays in submission of complete national lists.

The text of Directive 92/43/EEC seems to indicate that Member States do not need to pay attention to the provisions of Article 6 before the Community list has been adopted. However, other provisions of Community law as interpreted by the European Court of Justice need to be taken into consideration.

Article 10 (ex Article 5) of the Treaty establishing the European Community provides as follows:

> '*Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.*'

The European Court of Justice has, on several occasions, held that, even in the absence of transposing measures or the implementation of specific obligations resulting from a directive, the national authorities, when interpreting national law, should take all possible measures in order to achieve the results aimed at by a directive.

Furthermore, the European Court of Justice ruled in *Santoña Marshes* that a Member State could not escape from its duty to protect a site which, according to relevant scientific criteria, deserved protection, by not classifying it as a special protection area. It is possible that this principle could be used, by analogy, in questions arising from Directive 92/43/EEC.

In the light of the foregoing, Member State authorities are advised to ensure that sites on their national list of proposed SCIs are not allowed to deteriorate before the Community list of SCIs is adopted. Where the national list remains incomplete, they are advised to also ensure the non-deterioration of sites that, according to scientific evidence based on the criteria of Annex III of Directive 92/43/EEC, should be on the national list. One practical suggestion is to make correct use of environmental impact assessment (EIA) under Directive 85/337/EEC (impact assessment) in relation to potentially damaging projects. The European Court of Justice has already confirmed the importance which should be attached to sensitive natural sites when deciding whether projects should undergo an EIA under this directive (see Annex I, point 4).

The above considerations can be summarised in the following table:

Site status	pSCI	SCI	SAC
Deadline foreseen by the directive	June 1995	June 1998	June 2004
Applicability of Article 6 provisions	Optional for 6(1), (2), (3) and (4), need for measures to avoid site deterioration	6(2), (3) and (4)	6(1), (2), (3) and (4)

Once the Community list is established, the position will become clear as to what requires site protection under the directive, and the advice on provisional site protection will no longer be applicable.

As regards sites based on Directive 92/43/EEC, it can be argued that Member States, particularly after the date for adoption of the Community list expired on 10 June 1998, have certain obligations to act in a way so as to ensure that the aims of the directive are not jeopardised. Even in the absence of a Community list, Member States' authorities are therefore advised to at least abstain from all activities that may cause a site on the national list to deteriorate. Where a complete national list has not been submitted, the same advice applies to a site which, on the basis of the scientific criteria of the directive, clearly ought to be on the national list.

2. Article 6(1)

Clarification of the concepts of conservation measures; statutory, administrative or contractual measures; and management plans.

2.1. The text

'For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.'

2.2. Scope

Article 6(1) lays down a general conservation regime which has to be established by the Member States for the special areas of conservation (SAC).

Article 6(1):

- provides for **positive** measures, involving management plans and statutory, administrative or contractual measures, which aim to achieve the general objective of the directive. In that regard, Article 6(1) is distinguished from the three other paragraphs of Article 6 which provide for preventive measures to avoid deterioration, disturbance and significant effects in the Natura 2000 sites;
- has a value of **reference** for the logic and the overall comprehension of Article 6; the structured reading and the comprehension of the three other paragraphs of Article 6 require a preliminary reading and comprehension of paragraph 1;
- establishes a general conservation regime which applies to **all** SACs of the Natura 2000 network without exception and to **all** the natural habitat types of Annex I and the species of Annex II present on the sites, except those identified as non-significant in the Natura 2000 standard data form (see Section 4.5.3);
- concerns the **SACs specifically**: Article 6(1) does not apply to the special protection areas (SPAs), unlike Article 6(2), (3) and (4). In this way, the legislator established:
  - — a regime laying down special conservation measures for the **SPAs** classified under the 'Birds' directive, according to its Article 4(1) and (2);
  - — a regime laying down conservation measures for the **SACs** designated under the 'Habitats' directive, according to its Article 6(1);
- relates to Article 2(3) which specifies that *'the measures … take account of economic, social and cultural requirements and regional and local characteristics'.*

For all the SACs, Member States are required to draw up conservation measures. These are positive and apply to all the natural habitat types of Annex I and the species of Annex II present on the sites, except those whose presence is non-significant according to the Natura 2000 standard data form.

2.3. What should be the content of the 'necessary conservation measures'?

2.3.1. The conservation concept

The conservation concept appears in the sixth recital of the directive which reads: *'Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable';* and in its eighth recital: *'whereas it is appropriate, in each area designated, to implement the necessary measures having regard to the conservation objectives pursued'.*

It is then defined in Article 1, point (a) of the directive: '*(a) conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);*'.

Member States have to adopt the conservation measures necessary to achieve the general aim of the directive as set out in its Article 2(1): '*The aim of this directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies*'. There is therefore a **result obligation.**

Article 2(2), in particular, specifies the objective of the measures to be taken under the terms of this directive: '*Measures taken ... shall be designed to maintain or to restore, at a favourable conservation status, natural habitats and species of wild fauna and flora of Community interest*'. These measures have, according to Article 2(3), to '*take account of economic, social and cultural requirements and regional and local characteristics*'.

Article 3 specifies that it is the Natura 2000 network '*composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II*' which has to ensure the objective pursued by Article 2(2).

The necessary conservation measures have therefore to aim at maintaining or restoring the favourable conservation status of the natural habitat types and the species of Community interest. They are connected with the general objective of the directive which applies to the Natura 2000 network, as defined in Article 3.

The fulfilment of the aim laid down in Article 2(1) largely depends on conservation measures that the Member States have to take in order to maintain or restore the natural habitat types and species at a favourable conservation status. These measures are implemented through the Natura 2000 network defined in Article 3(1), taking into account economic, social and cultural requirements and regional and local characteristics.

2.3.2. The conservation status

The conservation status is defined in Article 1 of the directive:

- For a **natural habitat**, Article 1(e) specifies that it is: '*the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species ...*'.
- For a **species**, Article 1(i) specifies that it is: '*the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its population ...*'.

The Member State has therefore to take into account all the influences of the environment (air, water, soil, territory) which act on the habitats and species present on the site.

The **favourable conservation status** is also defined by Article 1(e) for natural habitats and Article 1(i) for species.

- For a **natural habitat**, it occurs when:
  - '*its natural range and areas it covers within that range are stable or increasing;*
  - *the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future;*
  - *the conservation status of its typical species is favourable*'.

- For a **species**, it occurs when:
  - — *'the population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats;*
  - — *the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future;*
  - — *there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis'*.

The favourable conservation status of a natural habitat or species has to be considered across its natural range, according to Articles 1(e) and 1(i), i.e. at biogeographical and, hence, Natura 2000 network level. Since, however, the ecological coherence of the network will depend on the contribution of each individual site to it and, hence, on the conservation status of the habitat types and species it hosts, the assessment of the favourable conservation status at site level will always be necessary.

The conservation status of natural habitat types and species present on a site is assessed according to a number of criteria established by Article 1 of the directive. This assessment is done both at site and network level.

2.3.3. The ecological requirements

Article 6(1) specifies that the necessary conservation measures have to correspond *'to the ecological requirements of the natural habitat types of Annex I and the species in Annex II present on the sites'*. It is therefore in relation to the ecological requirements of the natural habitat types and the species that Member States have to determine the conservation measures.

Although the directive does not contain any definition of the 'ecological requirements', the purpose and context of Article 6(1) indicate that these involve all the ecological needs of abiotic and biotic factors necessary to ensure the favourable conservation status of the habitat types and species, including their relations with the environment (air, water, soil, vegetation, etc.).

These requirements rest on scientific knowledge and can only be defined on a case-by-case basis, according to the natural habitat types of Annex I, the species of Annex II, as well as the sites which host them. Such knowledge is essential to make it possible to draw up the conservation measures, on a case-by-case basis.

The ecological requirements can vary from one species to another but also for the same species from one site to another.

Thus, for the bats included in Annex II of the directive, the ecological requirements differ between the period of hibernation (when they rest in underground environments, in hollow shafts or in dwellings) and the active period, from spring onwards (during which they leave their winter quarters and resume their activities of insect hunting).

For the Annex II amphibian *Triturus cristatus*, the ecological requirements vary during its life cycle. The species hibernates in the ground (cavities, fissures), then lays its eggs in spring and at the beginning of the summer in ponds. It then leaves the aquatic environment and lives on land during the summer and autumn. For the same species, the ecological requirements can therefore vary according to the sites (aquatic or land).

The identification of the ecological requirements of the natural habitat types of Annex I and the species of Annex II present on the sites is the **responsibility of the Member States.** The latter may wish to exchange their knowledge in this field, with the support of the European Commission and the European Environment Agency — European Topic Centre for Nature Conservation.

The conservation measures have to correspond to the ecological requirements of the natural habitat types in Annex I and of the species in Annex II present on the site. The ecological requirements of those natural habitat types and species involve all the ecological needs necessary to ensure their favourable conservation status. They can only be defined on a case-by-case basis and on the basis of scientific knowledge.

2.4. What form can the necessary conservation measures take?

The conservation measures can take at least two forms: the form of '*appropriate statutory, administrative or contractual measures…'* and '*if need be',* the form of '*appropriate management plans'.*

2.4.1. Management plans

The necessary conservation measures can involve '*if need be, appropriate management plans specifically designed for the sites or integrated into other development plans'.* Such management plans should address all foreseen activities, unforeseen new activities being dealt with by Article 6(3) and (4).

The words 'if need be' indicate that management plans may not always be necessary. If management plans are chosen by a Member State, it will often make sense to establish them before concluding the other measures mentioned in Article 6(1), particularly the contractual measures. Contractual measures will often involve a relationship between the competent authorities and individual landowners and will be limited to individual land-holdings which are normally smaller than the site. In such circumstances, a management plan focused on the site will provide a wider framework, and its contents will provide a useful starting point for the specific details of contractual measures.

The management plans must be '*appropriate and specifically designed for the sites*', therefore be targeted at the sites of the Natura 2000 network, **or '***integrated into other development plans*'. The latter provision is in conformity with the principle of integration of the environment in the other Community policies. This integration has to contribute to the coherence of the network mentioned in Article 3(1). In any case, it may be necessary to apply Article 6(3) to those aspects of the management plan which are not connected to conservation management (see commentary on Article 6(3) under Section 4.3.3).

While no indication of the specific contents of management plans can be given, Annex II at the end of this document provides a number of important considerations that can be made in view of the preparation of such plans. Furthermore, Annex IIa provides an indicative list of LIFE-Nature projects which have produced management plans or other statutory, administrative or contractual measures (see below) aiming at site conservation.

Member States can establish management plans which superimpose themselves on the other categories of measures. They are not always necessary but, if they are used, they should take into account the characteristics specific to each site and all foreseen activities. They may be stand-alone documents or incorporated into other development plans when those exist.

2.4.2. Statutory, administrative or contractual measures

The phrase *'if need be'* refers only to the management plans and not to the statutory, administrative or contractual measures. Thus, even if a Member State considers that a management plan is unnecessary, it will nonetheless have to take such measures.

The division into these three categories of measures has to be considered in a broad sense. A variety of measures may be considered as appropriate to achieve the aim of the directive. In principle, this involves measures having a **positive effect** but, in some exceptional cases, it can also involve measures requiring **no action**. On the other hand, these measures are not necessarily new measures, since existing measures can be considered sufficient if they are appropriate.

Among measures involving positive action, *agri-environmental* or *sylvi-environmental* measures serve as a good example to illustrate how socioeconomic requirements can be taken into account according to Article 2(3).

1. *Agri-environmental measures:* for certain man-made, semi-natural Annex I habitat types (meadows, pastures) and Annex II species hosted in these habitats, agreements with farmers within the new rural development regulation ([9]) will be in most cases a sufficient contractual measure aiming at maintaining a favourable conservation status of habitat types and species.
2. *Sylvi-environmental measures:* appropriate measures might be an initiative by a forest company within the framework of a certain certification scheme provided that this initiative ensures that favourable conservation status is maintained.

In this perspective, all suitable EU funds (e.g. LIFE, rural development and regional funds) should be considered as a means for implementing these measures.

The choice between statutory, administrative or contractual measures, or even of the management plans, is left to the Member States. This is in conformity with the principle of subsidiarity. However, Member States must choose at least one of the three categories, i.e. statutory, administrative, contractual.

There is no hierarchy between these three categories. Thus Member States have the choice to use, on a Natura 2000 site, just one category of measures (e.g. only contractual measures) or combined measures (e.g. combination of statutory and contractual measures according to the conservation issues of the natural habitat types in Annex I and the species in Annex II present on the site). Moreover, in addition to the selected obligatory measures, Member States can establish and implement management plans.

The three categories of measures are qualified as 'appropriate'. This qualifier is not defined in the directive. However, in the case of Article 6(1), the statutory, administrative or contractual measures are embraced within the concept of conservation measures. The qualifier 'appropriate' has no other objective than to recall that whatever the type of measure chosen by the Member States, there is an obligation to respect the general objectives of the directive.

Thus, if a Member State chooses the contractual measures, it always has the obligation to establish in a permanent way the necessary conservation measures which correspond to *'the ecological requirements*

([9]) Council Regulation (EC) No 1257/1999 of 17 May 1999, OJ L 160, 26.6.1999, p. 80.

of the habitats of Annex I and the species of Annex II present on the sites' and respect the general aim of the directive defined in Article 2(1).

For SACs, Member States are required to use the appropriate statutory, administrative or contractual measures. These measures shall take into account socioeconomic requirements according to Article 2(3). They have to (a) correspond to the ecological requirements of habitats of Annex I and species of Annex II present on the sites and (b) fulfil the general objective of the directive to maintain or restore at a favourable conservation status the natural habitats and the species of fauna and flora of Community interest.



3. Article 6(2)

Clarification of the concepts of *deterioration; disturbance; and significant effect*

3.1. The text

'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbances of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this directive.'

3.2. Scope

The article takes as a starting point the **prevention principle**: *'Member States shall take appropriate steps **to avoid**, in the special areas of conservation, the deterioration... as well as disturbances...'.*

These measures go beyond the simple management measures necessary to ensure conservation since these are already covered by Article 6(1). The words *'avoid'* and *'could be significant'* stress the anticipatory nature of the measures to be taken. It is not acceptable to await until deterioration or disturbances occur before taking measures (see under Section 4.4.2 the interpretation of *'likely to'* in Article 6(3)).

This article should be interpreted as requiring Member States to take all the appropriate actions which it may reasonably be expected to take, to ensure that no significant deterioration or disturbance occurs.

The scope of this article is broader than that of Article 6(3) and (4) which apply only to plans and projects requiring an authorisation. It is also applicable to the performance of activities which do not necessarily require prior authorisation, like agriculture or fishing.

Article 6(2):

- applies **permanently** in the special areas of conservation (SACs). It can concern past, present or future activities or events (for instance, in the case of a toxic spill affecting a wetland, this article would mean that all preventive measures should have been taken to avoid the spillage, even if its location is distant from the wetland). If an already existing activity in a SAC causes deterioration of natural habitats or disturbance of species for which the area has been designated, it must be covered by the necessary conservation measures foreseen in Article 6(1). This may require, if appropriate, that the negative impact is brought to an end either by stopping the activity or by taking mitigating measures. This can include economic compensation.

- **is not limited to intentional acts**, but could also cover any chance events that could occur (fire, flood, etc.), as long as they are predictable. In case of catastrophes this concerns only the obligation to take (relative) precautionary measures to decrease the risk of such catastrophes as long as they could jeopardise the aim of the directive.

The legislator envisaged certain **limits** to the responsibility of the Member States:

- **Spatial limit**. Measures aim only at species and habitats located *'in the SACs'*. On the other hand, measures may need to be implemented **outside** the SAC, i.e. if external events may have an impact on the species and the habitats inside the SAC. Indeed, the article does not specify that measures have to be **taken** in the SAC but to **avoid** in the SAC.

- **Limit of habitats and species concerned**. The appropriate measures concern only habitats and species *'for which the areas have been designated'*. In particular, the habitats and species concerned by the measures to be taken are those identified in the Natura 2000 standard data forms (see Sections 2.2 and 4.5.3). The aim is not therefore to take general conservation measures, but rather to take measures focused on the species and habitats which justified the selection of the special area of conservation. The disturbances and/or deterioration will thus be determined by the information which has been communicated by the Member States and which has been used to ensure the coherence of the network for the species and habitats concerned.

Member States are required to take preventive measures to avoid deterioration and disturbances connected with a predictable event. These measures apply only to the species and habitats for which the sites have been designated, and should also be implemented, if necessary, outside the sites.

3.3. Does implementation differ for deterioration and disturbance?

In terms of **disturbance of species**, Article 6.2 specifies that appropriate steps have to be taken to avoid it '*in so far as such disturbance could be significant* ***in relation to the objectives*** *of this directive*'.

The disturbance in question has to be relevant to (have an impact on) the conservation status of the species in relation to the objectives of the directive. It is therefore in relation to these **objectives** that the Member State has to determine whether or not disturbance is significant.

In terms of **deterioration of habitats** however, the effect in relation to the objectives of the directive is not mentioned in the text of the directive. It is simply stated that the deterioration of habitats must be avoided. The purpose of all the measures taken under this directive has to correspond to the objectives of the directive and to respect the principle of proportionality. The deterioration of habitats is therefore also to be assessed against the objectives of the directive. Indeed, it seems difficult to assess deterioration in absolute terms without reference to measurable limits. As presented below, connecting deterioration to the objectives of the directive makes it possible to use Article 1 of the directive to interpret the limits of what one can regard as deterioration.

Disturbance and deterioration should be assessed against the objectives of the directive.

3.4. Which conditions should trigger measures by the Member States?

There exists an apparent difference between the limit of acceptability for the deterioration of a habitat or the disturbance of a species.

- In the case of **disturbance**, the latter has to be **significant** (a certain degree of disturbance is tolerated). In addition, it is not necessary to prove that there will be a real significant effect, but the likelihood alone (*'could be'*) is enough to justify corrective measures. This can be considered consistent with the prevention and precautionary principles.
- In the case of **deterioration**, the legislator did not explicitly give this margin. This does not exclude however some room for manoeuvre in determining what can be described as deterioration (see below).

Deterioration is a physical degradation of a habitat. It can be directly assessed through a series of indicators (see below), for example, a reduction in the area or characteristics of the habitat.

On the other hand, disturbances do not directly affect the physical conditions. However, if they are significant, they may trigger changes in physical parameters, which have the same result as deterioration. If disturbances are significant enough to trigger changes in this way, they can be assessed in the same way as deterioration, using indicators of conservation status (see below).

Disturbances are assessed in the same way as deterioration as long as they trigger change in indicators of the conservation status of protected species in such a way as to affect the conservation status of the species concerned.

3.5. When should measures in relation to disturbance and deterioration be taken?

First, it should be stressed that measures must be **appropriate**. This means that they should fulfil the main objective of the directive in contributing to the conservation status of the habitats or species concerned while taking account of *'economic, social and cultural requirements and regional and local characteristics'*.

The inter-linkage of the recitals and articles of the directive provides the context for considering the appropriate measures to be taken by the Member States (see Section 2.3).

As mentioned in the previous paragraph 3.4, disturbance and deterioration should be assessed against the conservation concept, bearing in mind that according to Article 3(1) the network is composed of **sites** and shall enable the natural habitats types and the species' habitats concerned to be maintained at **favourable conservation status** in their natural range.

The favourable conservation status, as defined in Article 1 of the directive, can serve as a term of reference to fix the limit of acceptable disturbance and deterioration with respect to the objectives of the directive and to determine if the appropriate measures are properly implemented (see below).

The conservation status of a habitat or species in a site will be assessed according to the contribution of this site to the ecological coherence of the network, either:

- against its initial status at the time of transmission of site-related information provided in the Natura 2000 standard data forms (see Section 4.5.3) if this conservation status is favourable; or
- against an aim of improving the conservation status announced at the time of the setting-up of the network. Indeed, if a Member State is obliged to propose the classification of habitats in an unfavourable conservation status, it is only logical to assume that it will set a restoration target for these habitats so as to ensure their sustainability. When Community funds are granted for the improvement of the conservation status of a habitat or species in a site, it is this improved status that will be taken into consideration.

On a particular site the conservation status should reflect the dynamic nature of the habitats and species concerned. In that regard, the importance of **surveillance** of the conservation status of habitats and species, as required by Article 11 of the directive, should be stressed.

Deterioration or disturbance is assessed against the conservation status of species and habitats concerned. At a site level, the maintenance of the favourable conservation status has to be evaluated against the initial conditions provided in the Natura 2000 standard data forms when the site was proposed for selection or designation, according to the contribution of the site to the ecological coherence of the network. This notion should be interpreted in a dynamic way according to the evolution of the conservation status of the habitat or of the species.

3.6. Indicators of disturbance and deterioration

The conditions which govern the concepts of disturbance and deterioration are well defined, but they should be assessed by the Member State, on the one hand, against the general conservation status of the species or the habitats concerned (at biogeographical level) and, on the other hand, against the local conditions (at site level). As a general rule, on a particular site, disturbance or deterioration is assessed on a case-by-case basis, using indicators (see below), with respect to the significance of their change in value. This is measured against (a) the conservation status of the natural habitat or species concerned, and (b) the contribution of the site to the coherence of the Natura 2000 network.

3.6.1. Deterioration of habitats

Deterioration is a physical degradation affecting a habitat. The definition of the conservation status (Article 1(e) — see Section 2.3), means that the Member State has to take into consideration all the influences on the environment hosting the habitats (space, water, air, soils). If these influences result in making the conservation status of the habitat less favourable than it was before, the deterioration can be considered to have occurred.

To assess this deterioration against the objectives of the directive, one can refer to the definition of the **favourable conservation status of a natural habitat** set out in Article 1(e), on the basis of the following factors:

- *'The **natural range** and **areas** it covers within that range are **stable or increasing**'.*

Any event which contributes to the reduction of the areas covered by a natural habitat for which this site has been designated can be regarded as deterioration. For example, the importance of reduction of the area of the habitat has to be assessed in relation to the total surface occupied in the site according to the conservation status of the habitat concerned;

- *'The **specific structure and functions of the area necessary for its long-term maintenance exist** and are likely to continue to exist in the foreseeable future'.*

Any impairment of the factors necessary for the long-term maintenance of the habitats can be regarded as deterioration.

The functions necessary for the long-term maintenance depend of course on the habitat concerned (it would be useful to have common indicators enabling to assess these elements for each habitat type). Member States have to know these requirements (by means of studies, data collection, etc.) since Article 6(1) provides that they have to take measures *'which correspond to the ecological requirements of the habitats in Annex I and species in Annex II'.*

- *'The **conservation status of its typical species** is favourable as defined in (i)' (see Section 2.3 for the definition of item (i) of Article 1).*

Habitat deterioration occurs in a site when the area covered by the habitat in this site is reduced or the specific structure and functions necessary for the long-term maintenance or the good conservation status of the typical species which are associated with this habitat are reduced in comparison to their initial status. This assessment is made according to the contribution of the site to the coherence of the network.

3.6.2. Disturbance of species

Contrary to deterioration, disturbance does not directly affect the physical conditions of a site; it concerns the species and it is often limited in time (noise, source of light, etc.). The intensity, duration and frequency of repetition of disturbance are therefore important parameters.

In order to be significant a disturbance must affect the conservation status. The conservation status of a species is defined in Article 1(i) (see Section 2.3).

In order to assess whether a disturbance is significant in relation to the objectives of the directive, reference can be made to the definition of the **favourable conservation status of a species** given in Article 1(i), on the basis of the following factors.

- *'**Population dynamics data** on the species concerned indicate that it is maintaining itself on a long-term basis as a viable element of its natural habitats'.*

Any event which contributes to the long-term decline of the population of the species on the site can be regarded as a significant disturbance.

- *'The **natural range** of the species is **neither being reduced** nor is likely to be reduced for the foreseeable future'*

Any event contributing to the reduction or to the risk of reduction of the range of the species within the site can be regarded as a significant disturbance.

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

Any event which contributes to the reduction of the size of the habitat of the species within the site can be regarded as a significant disturbance.

Disturbance of a species occurs on a site when the population dynamics data for this site show that the species could no longer constitute a viable element of it in comparison to the initial situation. This assessment is done according to the contribution of the site to the coherence of the network.

4. Article 6(3)

Clarification of the concepts of *plan or project; significant effect; appropriate assessment; site's conservation objectives; competent authorities; opinion of the public; integrity of the site*

4.1. The text

'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.'

4.2. Scope

As regards **purpose and context**, the role of the third and fourth paragraphs of Article 6 needs to be considered in relation to that of the first (or, in the case of SPAs, with that of the first and second paragraphs of Article 4 of Directive 79/409/EEC) and second paragraphs of Article 6. In particular, it is important to remember that, even if it is determined that an initiative or activity does not fall within the scope of Article 6(3), it will still be necessary to make it compatible with the other aforementioned provisions.

It may be noted that ecologically positive or ecologically compatible activities may already be accommodated within Article 6(1) and (2) — for example, traditional farming practices which sustain particular habitat types and species. The provisions of Article 6(3) and (4) constitute a form of development regime, setting out the circumstances within which plans and projects with negative effects may or may not be allowed. The provisions thus ensure that negative economic and other non-ecological requirements can be balanced against conservation objectives.

Article 6(3) and (4) define a **step-wise procedure** for considering plans and projects ([10]).

(a) The first part of this procedure consists of an assessment stage and is governed by Article 6(3), first sentence.

(b) The second part of the procedure, governed by Article 6(3), second sentence, relates to the decision of the competent national authorities.

(c) The third part of the procedure (governed by Article 6(4)) comes into play if, despite a negative assessment, it is proposed not to reject a plan or project but to give it further consideration.

The applicability of the procedure and the extent to which it applies depend on several factors, and in the sequence of steps, each step is influenced by the previous step.

As regards **geographical scope**, the provisions of Article 6(3) are not restricted to plans and projects which exclusively occur in or cover a protected site; they also target developments situated outside the site but likely to have a significant effect on it.

Article 6(3) and (4) set out the circumstances within which plans and projects with negative effects may or may not be allowed. Activities not falling within the scope of Article 6(3) will still have to be compatible with the provisions of Article 6(1) — or, in the case of SPAs, Article 4(1) and (2) of Directive 79/409/EEC — and 6(2) of Directive 92/43/EEC.

4.3. What is meant by 'plan or project not directly connected with or necessary to the management of the site'?

In as much as Directive 92/43/EEC does not define 'plan' or 'project', due consideration must be given to general principles of interpretation, in particular the principle that an individual provision of Community law must be interpreted on the basis of its wording and of its purpose and the context in which it occurs.

([10]) A simplified flow chart of this procedure is presented in Annex III at the end of this document.

There are two arguments for giving a broad interpretation to 'plan' or 'project'.

- Firstly, the directive does not circumscribe the scope of either 'plan' or a 'project' by reference to particular categories of either. Instead, the key limiting factor is whether or not they are likely to have a significant effect on a site (see Annex I, point 5).
- Secondly, a corollary of the continued applicability of Article 6(2) to activities excluded from the scope of Article 6(3) and (4) is that, the more narrowly 'plan' and 'project' are defined, the more potentially restricted is the means to balance a conservation interest against a damaging non-conservation interest. This may produce disproportionate or inconsistent results.

4.3.1. Project

Support for a broad definition of 'project' is reinforced, by analogy, if we refer to **Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment** (as amended by Directive 97/11/EC) ([11]). That directive operates in a similar context, setting rules for the assessment of environmentally significant projects. Article 1(2) of Directive 85/337/EEC provides that 'project' means:

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

As can be seen, this is a very broad definition (see Annex I, point 6), which is not limited to physical construction. For example, a significant intensification of agriculture which threatens to damage or destroy the semi-natural character of a site may be covered.

4.3.2. Plan

The word 'plan' has a potentially very broad meaning ([12]). This point has already been noted in an Advocate-General opinion (see Annex I, point 7).

Of obvious relevance are **land-use plans**. Some have direct legal effects for the use of land, others only indirect effects. For instance, regional or geographically extensive spatial plans are often not applied directly but form the basis for more detailed plans or serve as a framework for development consents, which then have direct legal effects. Both types of land-use plans should be considered covered by Article 6(3) to the extent that they are likely to have relevant significant effects on a Natura 2000 site.

Sectoral plans can also be considered as within the scope of Article 6(3), again in so far as they are likely to have a significant effect on a Natura 2000 site. Examples might include transport network plans, waste management plans and water management plans.

However, a distinction needs to be made with 'plans' which are in the nature of policy statements, i.e. policy documents which show the general political will or intention of a ministry or lower authority. An example might be a general plan for sustainable development across a Member State's territory or a region. It does not seem appropriate to treat these as 'plans' for the purpose of Article 6(3), particularly if any initiatives deriving from such policy statements must pass through the intermediary of a land-use or sectoral plan. However, where the link between the content of such an initiative and likely significant effects on a Natura 2000 site is very clear and direct, Article 6(3) should be applied.

([11]) OJ L 175, 5.7.1985, p. 40 and OJ L 73, 14.3.1997, p. 5 respectively.

([12]) The Commission has proposed a directive on the environmental assessment of plans and programmes (COM(96) 511 final, amended proposal COM(1999) 73) which may be of assistance in considering the term 'plan'. In that context, the terms 'plans' and 'programmes' can be used alternatively.

Where one or more specific projects are included in a plan in a general way but not in terms of project details, the assessment made at plan level does not exempt the specific projects from the assessment requirements of Article 6(3) in relation to details not covered by the plan assessment.

4.3.3. Not directly connected with or necessary to the management ...

From the context and purpose of Article 6, it is apparent that the term 'management' is to be treated as referring to the 'conservation' management of a site, i.e. the term 'management' is to be seen in the sense in which it is used in Article 6(1).

In making provision for conservation management plans, Article 6(1) of Directive 92/43/EEC envisages flexibility for Member States as regards the form such plans can take. The plans can either be specifically designed for the sites or 'integrated into other development plans'. Thus it is possible to have a 'pure' conservation management plan or a 'mixed' plan with conservation as well as other objectives.

The words '*not directly connected with or necessary to ...*' ensure that a non-conservation component of a plan or project which includes conservation management amongst its objectives may still require assessment.

For example, commercial timber harvesting may form part of a conservation management plan for a woodland designated as a special area of conservation. In as much as the commercial dimension is not necessary to the site's conservation management, it may need to be considered for assessment.

There may be circumstances where a plan or project directly connected with or necessary for the management of one site may affect another site.

For example, in order to improve the flooding regime of one site, it may be proposed to build a barrier in another site, with a possible significant adverse effect on the latter. In such a case, the plan or project should be the subject of an assessment as regards the affected site.

The term 'project' should be given a broad interpretation to include both construction works and other interventions in the natural environment. The term 'plan' also has a broad meaning, including land-use plans and sectoral plans or programmes but leaving out general policy statements. Plans and projects related to conservation management of the site, either individually or as components of other plans and projects, should generally be excluded from the provisions of Article 6(3).

4.4. How to determine whether a plan or project is 'likely to have a significant effect thereon, either individually or in combination with other plans or projects'

This phrase encapsulates a cause-and-effect relationship. On the one hand, it is necessary to explore what sorts of effects are covered (*'significant effect'*), and then to explore what sorts of causes are likely to create such effects (*'likely to have ... either individually or in combination'*).

Determining whether a plan or project is likely to have a significant effect will have practical and legal consequences. Therefore, when a plan or project is proposed, it is important that, firstly, this key issue is considered, and that, secondly, the consideration is capable of standing up to scientific and expert scrutiny.

Proposals that are considered as not likely to have significant effects can be processed without reference to the succeeding steps of Article 6(3) and (4). However, Member States are advised that the reasons for reaching such a conclusion should be justified, and that it is good and prudent practice to record them.

4.4.1. Significant effect

The notion of what is a 'significant' effect cannot be treated in an arbitrary way. In the first place, the directive uses the term in an objective context (i.e. it does not qualify it with discretionary formulae). In the second place, a consistency of approach to what is 'significant' is necessary to ensure that Natura 2000 functions as a coherent network.

While there is a need for objectivity in interpreting the scope of the term 'significant', clearly such objectivity cannot be divorced from the specific features and environmental conditions of the protected site concerned by the plan or project. In this regard, the conservation objectives of a site as well as prior or baseline information about it can be very important in more precisely identifying conservation sensitivities. Some of this information will be present in the data that accompanies the site selection process under Article 4 of Directive 92/43/EEC (see Section 4.5.3). Member States may also have available detailed site conservation management plans which describe variations in sensitivity within a site.

Against this background, it is clear that what may be significant in relation to one site may not be in relation to another (see Annex I, point 8).

For example, a loss of a hundred square metres of habitat may be significant in relation to a small rare orchid site, while a similar loss in a large steppic site may be insignificant.

The notion of what is 'significant' needs to be interpreted objectively. At the same time, the significance of effects should be determined in relation to the specific features and environmental conditions of the protected site concerned by the plan or project, taking particular account of the site's conservation objectives.

4.4.2. Likely to have ...

The safeguards set out in Article 6(3) and (4) are triggered not by a **certainty** but by a **likelihood** of significant effects. Thus, in line with the precautionary principle, it is unacceptable to fail to undertake an assessment on the basis that significant effects are not certain.

It is again useful to refer to Directive 85/337/EEC, since the formula 'likely to have a significant effect' is almost identical to the basic formula used to create the assessment duty of Member States under the earlier directive ([13]). Directive 85/337/EEC and amending Directive 97/11/EEC are also of assistance in setting out a range of factors which may contribute to a likelihood of a significant effect.

([13]) See Article 2(1) of Directive 85/337/EEC.

Any proposal which is deemed to require an assessment under Directive 85/337/EEC on the grounds, *inter alia*, that it is likely to significantly affect a Natura 2000 site can be judged to also come under the assessment requirement of Article 6(3).

Directive 85/337/EEC in its Article 2(1) refers in particular to the factors of nature, size and location of the project. Amending directive 97/11/EEC in its Annex III presents a more detailed set of factors comprising, *inter alia*: the size of a project; the production of waste; pollution and nuisances; the risk of accidents; existing land use; the relative abundance, quality and regenerative capacity of natural resources in the area; the absorption capacity of the natural environment, with particular attention to natural areas and sites classified or protected under Directives 79/409/EEC and 92/43/EEC; the extent of the potential impact; the magnitude and complexity of the impact; the probability of the impact; the duration, frequency and reversibility of the impact.

A likelihood of significant effects may arise not only from plans or projects located **within** a protected site but also from plans or projects located **outside** a protected site. For example, a wetland may be damaged by a drainage project located some distance outside the wetland's boundaries. For this reason, it is important that Member States, both in their legislation and in their practice, allow for the Article 6(3) safeguards being applied to development pressures which are external to a Natura 2000 site but which are likely to have significant effects within it.

The procedure of Article 6(3) and (4) is triggered not by a certainty but by a likelihood of significant effects, arising not only from plans or projects located within but also outside a protected site.

4.4.3. ... either individually or in combination with other plans or projects

A series of individually modest impacts may in combination produce a significant impact. Article 6(3) tries to address this by taking into account the combination of effects from other plans or projects. It remains to be determined what other plans and projects are covered. In this regard, Article 6(3) does not explicitly define which other plans and projects are within the scope of the combination provision.

It is important to note that the underlying intention of this combination provision is to take account of cumulative impacts, and these will often only occur over time. In that context, one can consider plans or projects which are **completed; approved but uncompleted**; or **not yet proposed**:

- In addition to the effects of those plans or projects which are the main subject of the assessment, it may be appropriate to consider the effects of already completed plans and projects in this 'second level' of assessment. Although already completed plans and projects are excluded from the assessment requirements of Article 6(3), it is important that some account is still taken of such plans and projects in the assessment, if they have continuing effects on the site and point to a pattern of progressive loss of site integrity.

  Such already completed plans and projects may also raise issues under Article 6(1) and (2) of Directive 92/43/EEC if their continued effects give rise to a need for remedial or countervailing conservation measures or measures to avoid habitat deterioration or species disturbance.

- Plans and projects which have been approved in the past and which have not been implemented or completed should be included in the combination provision.
- On grounds of legal certainty, it would seem appropriate to restrict the combination provision to other plans or projects which have been **actually proposed**. At the same time, it must be evident that, in considering a proposed plan or project, Member States do not create a presumption in favour of other as yet unproposed plans or projects in the future.

For example, if a residential development is considered not to give rise to a significant effect and is therefore approved, the approval should not create a presumption in favour of further residential developments in the future.

When determining likely significant effects, the combination of other plans or projects should also be considered to take account of cumulative impacts. It would seem appropriate to restrict the combination provision to other plans or projects which have been actually proposed.

4.5. What is meant by 'appropriate assessment of its implications for the site in view of the site's conservation objectives'?

The 'appropriate assessment' raises questions concerning form and content.

4.5.1. Form of the assessment

As pointed out above, the trigger for an assessment under Directive 85/337/EEC is almost identical to the trigger for an assessment under Directive 92/43/EEC, being essentially related to the likelihood of significant effects.

- The European Court of Justice has emphasised that, in relation to the transposition of Directive 85/337/EEC (and by implication its application), it is necessary to take into account sensitivity of location (see Annex I, point 9). For a project likely to have a significant effect on a site protected by Article 3, it will therefore often be appropriate to undertake an assessment that fulfils the requirements of Directive 85/337/EEC.

  Where an assessment for the purposes of Article 6(3) takes the form of an assessment under Directive 85/337/EEC, this will provide obvious assurances in terms of records and transparency.

- Where an assessment for the purposes of Article 6(3) does not take the form of an assessment under Directive 85/337/EEC, questions arise as to what may then be considered 'appropriate' in terms of form.

  In the first place, an assessment should be **recorded**. A corollary of the argument that the assessment should be recorded is the argument that it should be **reasoned**. Article 6(3) and (4) requires decision-makers to take decisions in the light of particular information relating to the environment. If the record of the assessment does not disclose the reasoned basis for the subsequent decision (i.e. if the record is a simple unreasoned positive or negative view of a plan or project), the assessment does not fulfil its purpose and cannot be considered 'appropriate'.

Finally, **timing** is also important. The assessment is a step preceding and providing a basis for other steps — in particular, an approval or refusal of a plan or project. The assessment should therefore be considered as only comprising what is in the record of the assessment pre-dating these further steps. Of course, where a plan or project undergoes redesign before a decision is taken on it, it is quite in order to revise the assessment as part of an iterative process. However, it should not be open to authorities to add retrospectively to an assessment once the succeeding step in the sequence of steps set out in Article 6(3) and (4) has been taken.

In some cases, an assessment under Directive 85/337/EEC (as amended by Directive 97/11/EC) could accommodate an assessment under Article 6(3). The latter should anyhow be recorded and provide a basis for other steps; in particular it should be sufficiently reasoned to allow the right decision to be taken.

4.5.2. Content of the assessment

As regards content, an Article 6(3) assessment is narrower in scope than an assessment under Directive 85/337/EEC, being confined to implications for the site in view of the site's conservation objectives.

However, the ecological impacts of the plan or project may not be properly assessed in many cases without an assessment of the other environmental components (i.e. soil, water, landscape, etc) set out in Article 3 of Directive 85/337/EEC.

Furthermore, even allowing for an exclusively conservation focus, the assessment in its methodology can usefully draw on the methodology envisaged by Directive 85/337/EEC. In particular, Directive 85/337/EEC envisages that an assessment may contain information on several points, including a description of the project, a description of the aspects of the environment likely to be affected by the project and a description of the project's likely significant effects ([14]).

It is worth noting that, although, for purposes of Article 6(3), an assessment does not, strictly speaking, need to look beyond the plan or project proposed to address alternative solutions and mitigation measures, there may be a range of benefits from doing so.

In particular, an examination of possible **alternative solutions and mitigation measures** may make it possible to ascertain that, in the light of such solutions or mitigation measures, the plan or project will not adversely affect the integrity of the site.

As regards **mitigation measures**, these are measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion.

Mitigation measures are an integral part of the specifications of a plan or project. They may be proposed by the plan or project proponent and/or required by the competent national authorities. For example, they may cover:

- the dates and the timetable of implementation (e.g., not to operate during the breeding season of a particular species);

([14]) That directive makes reference to 'direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent, positive and negative effects' — see footnote 1 of Annex III.4 of the directive, which is identical to footnote 1 of Annex IV.4 of Directive 97/11/EC.

- the type of tools and operation to be carried out (e.g., to use a specific dredge at a distance agreed upon from the shore in order not to affect a fragile habitat);
- the strictly inaccessible areas inside a site (e.g., hibernation burrows of an animal species).

Mitigation measures are distinguishable from compensatory measures *sensu stricto* (see Section 5.4). Of course, well-implemented mitigation measures limit the extent of the necessary compensatory measures by reducing the damaging effects which require compensation.

Even where a broad assessment does not lead to the conclusion that the plan or project will not adversely affect the integrity of a site, the provisions of Article 6(4) suggest the practical value of such a broad exercise.

As regards **alternative solutions**, once it is proposed to consider approving a damaging plan or project, these become relevant (for more details, see under Section 5.3.1). Moreover, a reference to such solutions may also be needed to satisfy the independent requirements of Directive 85/337/EEC.

All these aspects above may be considered as ideally forming part of an iterative process seeking to improve the siting and design of a plan or project at the earliest stages.

Finally, the 'in combination' reference in Article 6(3) (see Section 4.4.3) has two implications in terms of the content of an assessment.

- Firstly, it means that the content of an assessment should address the potential for 'in combination' effects to arise from a specific plan or project under consideration in an approval procedure and other plans or projects not under consideration in the same approval procedure.
- Secondly, it means that the contents of the assessments of different plans or projects under consideration at the same time should include references to and take account of each other in so far as the different plans and projects give rise to 'in combination' effects.

An Article 6(3) assessment should focus on the implications for the site in view of the site's conservation objectives. It could in its methodology usefully draw on the methodology envisaged by Directive 85/337/EEC. In particular, an examination of possible mitigation measures and alternative solutions may make it possible to ascertain that, in the light of such solutions or mitigation measures, the plan or project will not adversely affect the site. 'In combination' effects need also to be addressed in an assessment.

4.5.3. How are 'the site's conservation objectives' established?

Article 4(1) requires Member States to propose a list 'indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host'. According to its second paragraph, the information on each site shall include a map of the site, its name, location, extent and the data resulting from the application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission ([15]).

The format requires that all Annex I habitat types present on a site and all Annex II species occurring at the site should be mentioned in the appropriate place in the data form. This information forms the basis for a Member State establishing 'the site's conservation objectives', for example through a man-

([15]) Standard data form, established by Commission Decision 97/266/EC of 18 December 1996 (OJ L 107, 24.4.1997, p. 1).

agement plan. The reason for a site's inclusion in the network is evidently the protection of those habitats and species. Sometimes, there may be competition between different habitat types and species, and it may, of course, be appropriate to prioritise when establishing the site's conservation objectives (for example, by giving precedence to a priority habitat type as against a competing non-priority habitat type).

Where the presence of the Annex I habitat type or Annex II species is deemed to be 'non-significant' for purposes of the format, these should not be considered as included in 'the site's conservation objectives'. The Member States are also invited to present information on other important species of flora and fauna than those listed in Annex II (point 3.3). This information has no relevance either for the determination of a site's conservation objectives.

The information provided according to the standard data form established by the Commission forms the basis for a Member State's establishment of the site's conservation objectives.

4.6. Decision-making

4.6.1. The 'competent national authorities'

It is clear that the word 'national' in this expression has been used in contrast with the word 'Community' or 'international'. Thus, the term refers not only to authorities within the central administration but also to regional, provincial or municipal authorities, which have to give an authorisation or consent to a plan or project.

A court can constitute a competent authority if it has the discretion to make a decision on the substance of a proposed plan or project for purposes of Article 6(3).

Competent national authorities are those entitled to give an authorisation or consent to a plan or project.

4.6.2. When is it appropriate to obtain the opinion of the general public?

Directive 92/43/EEC does not indicate when it is appropriate to obtain the opinion of the general public. However, consultation of the public is an essential feature of Directive 85/337/EEC. Clearly therefore, where the assessment required by Article 6(3) takes the form of an assessment under Directive 85/337/EEC, public consultation is necessary.

In this context, it is worth mentioning the possible longer-term implications of the Aarhus Convention ([16]) which emphasises the importance of public consultation in relation to environmental decision-making.

Public consultation should be considered in the light of the provisions of Directive 85/337/EEC and the Aarhus Convention.

([16]) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. This Convention was concluded in Aarhus, Denmark in June 1998. The European Community is one of the signatories.

4.6.3. The concept of the 'integrity of the site'

It is clear from the context and from the purpose of the directive that the 'integrity of the site' relates to the site's conservation objectives (see Section 4.5.3 above). For example, it is possible that a plan or project will adversely affect the integrity of a site only in a visual sense or only habitat types or species other than those listed in Annex I or Annex II. In such cases, the effects do not amount to an adverse effect for purposes of Article 6(3), provided that the coherence of the network is not affected.

On the other hand, the expression 'integrity of the site' shows that focus is here on the specific site. Thus, it is not allowed to destroy a site or part of it on the basis that the conservation status of the habitat types and species it hosts will anyway remain favourable within the European territory of the Member State.

As regards the connotation or meaning of 'integrity', this can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation.

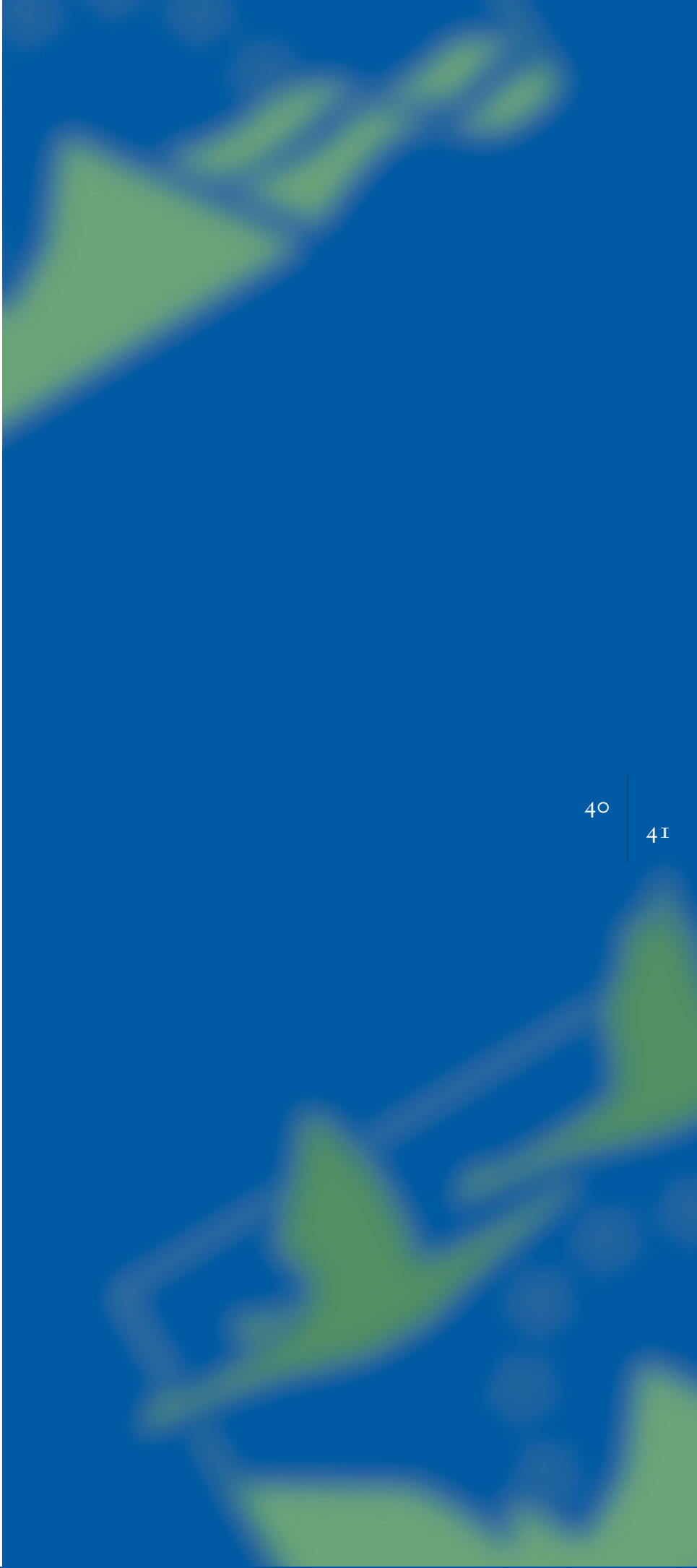
The 'integrity of the site' has been usefully defined as '*the coherence of the site's ecological structure and function, across its whole area, or the habitats, complex of habitats and/or populations of species for which the site is or will be classified*' ([17]).

A site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity for self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management support is required.

When looking at the 'integrity of the site', it is therefore important to take into account a range of factors, including the possibility of effects manifesting themselves in the short, medium and long-term.

The integrity of the site involves its ecological functions. The decision as to whether it is adversely affected should focus on and be limited to the site's conservation objectives.

([17]) PPG 9, UK Department of the Environment, October 1994.



5. Article 6(4)

Clarification of the concepts of *alternative solutions; imperative reasons of overriding public interest; compensatory measures; overall coherence; opinion of the Commission*

5.1. The text

'If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest'.

5.2. Scope

This provision forms part of the procedure of the assessment and possible authorisation, by the competent national authorities, of plans and projects likely to affect the special area of conservation (SAC). Two fundamental considerations arise.

- On the one hand, it addresses specific situations (exceptions) with regard to the general rule of Article 6(3) according to which authorisation can only be granted to plans or projects not affecting the integrity of the sites concerned.
- On the other hand, its concrete application has to be done in respect of the various steps provided for and in the sequential order established.

The preliminary assessment of the impacts of a plan or project on the site, provided for in Article 6(3), enables the competent national authorities to arrive at conclusions regarding the consequences of the initiative envisaged in relation to the integrity of the site concerned. If these conclusions are positive, in the sense that there is a high degree of certainty that the initiative in question will not affect this site, the competent authorities can give their consent on the plan or project. In case of doubt, the precautionary principle should be applied and procedures under Article 6(4) followed, as in the case of negative conclusions.

Being a derogation from Article 6(3) this provision has to be **interpreted in a restrictive way**, so that its application is limited to circumstances where all the conditions required are satisfied. In this regard, it falls on whoever wants to make use of this exception to prove, as a prerequisite, that the aforementioned conditions indeed exist in each particular case.

The provisions of Article 6(4) apply when the results of the preliminary assessment under Article 6(3) are negative or uncertain. The sequential order of its steps has to be followed.

5.3. Initial considerations

5.3.1. Examining alternative solutions

The **first step** of the competent authorities is to examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question. Such solutions should normally already have been identified within the framework of the initial assessment carried out under Article 6(3). They could involve alternative locations (routes in case of linear developments), different scales or designs of development, or alternative processes. The 'zero-option' should be considered too.

In conformity with the principle of subsidiarity, it rests with the competent national authorities to make the necessary comparisons between these alternative solutions. It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.

It rests with the competent national authorities to assess alternative solutions. This assessment should be made against the site's conservation objectives.

5.3.2. Examining imperative reasons of overriding public interest

In the absence of alternative solutions — or in the presence of solutions having even more negative environmental effects on the site concerned, with regard to the abovementioned conservation aims of the directive — the **second step** of the competent authorities is to examine the existence of imperative reasons of overriding public interest, including those of a social or economic nature, which require the realisation of the plan or project in question.

The concept of '*imperative reason of overriding public interest*' is not defined in the directive. However, Article 6(4) second subparagraph mentions human health, public safety and beneficial consequences of primary importance for the environment as examples of such imperative reasons of overriding public interests. As regards the '*other imperative reasons of overriding public interest*' of social or economic nature, it is clear from the wording that only public interests, promoted either by public or private bodies, can be balanced against the conservation aims of the directive. Thus, projects that lie **entirely** in the interest of companies or individuals would not be considered to be covered.

So far the European Court of Justice has not given clear indications for the interpretation of this specific concept. It may therefore be helpful to refer to other fields of Community law, where similar concepts appear.

The 'imperative requirement' concept was worked out by the Court of Justice as an exception to the principle of free movement of goods. Among these imperative requirements which can justify national measures restricting freedom of movement, the Court recognised public health and environment protection, as well as the pursuit of legitimate goals of economic and social policy.

In addition, Community law also knows the concept of 'service of general economic interest', evoked in Article 86(2) (ex 90(2)) of the Treaty, within the framework of the exception to the rules of competition envisaged for companies responsible for the management of such services. In a communication on services of general interest in Europe ([18]), the Commission, taking account of case law on the matter, gave the following definition of services of general economic interest: '*they describe activities of commercial service fulfilling missions of general interest, and subject consequently by the Member States to specific obligations of public service* ([19]). *It is the case in particular of services in transport, energy, communication networks*'.

Having regard to the **structure of the provision**, in the specific cases, the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the site affected by those initiatives and the abovementioned imperative reasons weighs in favour of the latter. This should be determined along the following considerations.

(a) The public interest must be **overriding:** it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the directive (see, for example, its fourth recital stating '*Community's natural heritage')* (see Annex I, point 10).

(b) In this context, it also seems reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short-term economic interests or other interests which would only

([18]) COM(96) 443, of the 11.9.1996.

([19]) The public service obligations, in their turn, are characterised for the respect of some essential principles of operation, such as continuity, equal access, universality and transparency, but can vary from one Member State to the other, according to different situations, such as geographical or technical constraints, political and administrative organisation, history and traditions.

yield short-term benefits for society would not appear to be sufficient to outweigh the long-term conservation interests protected by the directive.

It is reasonable to consider that the 'imperative reasons of overriding public interest, including those of a social and economic nature' refer to situations where plans or projects envisaged prove to be indispensable:
— within the framework of actions or policies aiming to protect fundamental values for citizens' lives (health, safety, environment);
— within the framework of fundamental policies for the State and society;
— within the framework of carrying out activities of an economic or social nature, fulfilling specific obligations of public service.

5.4. Adopting compensatory measures

5.4.1. What is meant by 'compensatory measures' and when should they be considered?

The term '*compensatory measures*' is not defined in the 'Habitats' directive. Experience would suggest the following distinction.

- Mitigation measures in the broader sense, which aim to minimise or even cancel the negative impacts on the site itself (see Section 4.5).
- Compensatory measures *sensu stricto*: independent of the project, they are intended to compensate for the effects on a habitat affected negatively by the plan or project. For example, general tree-planting to soften a landscape impact does not compensate for the destruction of a wooded habitat with quite specific characteristics.

Measures required for the 'normal' implementation of the 'Habitats' or 'Birds' directives cannot be considered compensatory for a damaging project. For example, the implementation of a management plan or the proposal/designation of a new area, already inventoried as of Community importance, constitute 'normal' measures for a Member State. Compensatory measures should be additional to proper implementation.

The compensatory measures should be considered only after having precisely ascertained a negative impact on the integrity of a Natura 2000 site. Proposing compensatory measures from the beginning could not exempt from the need to respect beforehand the steps described in Article 6, in particular the study of alternatives and the comparative assessment of the interest of the project/plan in relation to the natural value of the site.

The compensatory measures constitute measures specific to a project or plan, additional to the normal practices of implementation of the 'Nature' directives. They aim to offset the negative impact of a project and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned. The compensatory measures constitute the 'last resort'. They are used only when the other safeguards provided for by the directive are ineffectual and the decision has been taken to consider, nevertheless, a project/plan having a negative effect on the Natura 2000 site.

5.4.2. Content of compensatory measures

The compensatory measures *sensu stricto* have to ensure the maintenance of the contribution of a site to the conservation at a favourable status of one or several natural habitats '*within the biogeographical region concerned*'. It results from the fact that:

- a site should not be irreversibly affected by a project before the compensation is indeed in place. For example, a wetland should normally not be drained before a new wetland, with equivalent biological characteristics, is available for inclusion in the Natura 2000 network;
- compensation must be additional in relation to the Natura 2000 network to which the Member State should have contributed in conformity with the directives.

In terms of the **'Birds' directive**, compensation cannot be the designation of an inventoried area which should have already been classified by the Member State. One could on the other hand accept, as a compensation, work to improve the biological value of an area (to be designated) or of a SPA (designated) so that the carrying capacity or the food potential are increased by a quantity corresponding to the loss on the site affected by the project. *A fortiori*, the re-creation of a habitat favourable to the bird species concerned is acceptable provided the created site is available at the time when the affected site loses its natural value.

In terms of the '*Habitats' directive*, the compensation could, similarly, consist of the re-creation of a comparable habitat, the biological improvement of a substandard habitat or even the addition to Natura 2000 of an existing site the proposal of which under the directive had not been deemed essential at the time of the drawing up of the biogeographical list.

In the latter case, one could argue that overall, the project will result in a loss for this habitat type at Member State level. However, at Community level, a new site will benefit from the protection provided for in Article 6, thus contributing to the objectives of the directive.

The compensatory measures can consist of:
— recreating a habitat on a new or enlarged site, to be incorporated into Natura 2000;
— improving a habitat on part of the site or on another Natura 2000 site, proportional to the loss due to the project;
— in exceptional cases, proposing a new site under the 'Habitats' directive.

The result has normally to be operational at the time when the damage is effective on the site concerned with the project unless it can be proved that this simultaneity is not necessary to ensure the contribution of this site to the Natura 2000 network.

5.4.3. 'Overall coherence' of the Natura 2000 network

The expression '*overall coherence*' appears in Article 6(4) in the context where a plan or project is allowed to be carried out for imperative reasons of overriding public interest and the Member State has to take measures to compensate for the loss.

It also appears in Article 3(1) which states that Natura 2000 is '*a coherent European ecological network of special areas of conservation*' and in Article 3(3) which stipulates that '*where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10.*'

Article 10, which deals more generally with land-use planning and development policy, stipulates that

> *'Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 200 network, to encourage the features of the landscape which are of major importance for wild fauna and flora.*
>
> *Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species.'*

The word 'ecological' is used both in Article 3 and Article 10 to explain the character of the coherence. It is obvious that the expression '*overall coherence*' in Article 6(4) is used in the same meaning.

Article 6(4) requires to 'protect' the overall coherence of Natura 2000. Thus, the directive presumes that the 'original' network has been coherent. If the derogation regime is used, the situation must be corrected so that the coherence is fully restored.

- Under the **'Habitats' directive** the selection of a site for the Natura 2000 network rests on:
  - — the taking into account of habitat and species in proportions (surfaces, populations) described in the standard data form;
  - — the inclusion of the site in a biogeographical region within which it is selected;
  - — the selection criteria established by the 'Habitats' Committee and used by the European Topic Centre — Nature Conservation to advise the Commission to retain a site on the Community list.
- The **'Birds' directive** does not provide for biogeographical regions, or selection at Community level. By analogy, one could consider that **the overall coherence of the network** is ensured if: 46 47
  - — compensation is ensured along the same migration path;
  - — the compensation site(s) are accessible with certainty by the birds usually occurring on the site affected by the project.

In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: (a) address, in comparable proportions, the habitats and species negatively affected; (b) concern the same biogeographical region in the same Member State; and (c) provide functions comparable to those which had justified the selection criteria of the original site.

The distance between the original site and the place of the compensatory measures is not therefore an obstacle, as long as it does not affect the functionality of the site and the reasons for its initial selection.

5.4.4. Who bears the cost of the compensation measures?

It appears logical that, in line with the 'polluter pays' principle, the promoter of a project bears the cost of the compensatory measures. It may include it in the total budget submitted to the public authorities in the event of co-financing. In this connection, the European funds could, for example, co-finance the compensatory measures for a transport infrastructure retained under the TEN (trans-European network).

A subsidy granted by a public authority for measures taken in order to compensate for damage to a Natura 2000 site can be considered as a **State aid** (within the meaning of Article 87 (ex 92) of the Treaty), should it be granted to an undertaking established in a Natura 2000 site, designated before or after the establishment of the undertaking. However, in the case of an undertaking acting as a contractor for a public authority to build an infrastructure, the subsidy would not be considered as a State aid as long as it is granted in exchange of works carried out.

The Member State is bound to compensatory measures as from the entry into force of Article 6. Their financing can fall within its competence.

5.4.5. Communication to the Commission of the compensatory measures

The competent national authorities have to communicate to the Commission the compensatory measures adopted. The provision in question specifies neither the form, nor the purpose of this communication. However, in order to facilitate that process the Commission services have prepared a standard format ([20]) for supplying information to the Commission according to the provisions of Article 6(4)1 or 6(4)2. In any case, it is not the Commission's role either to suggest compensatory measures, or to validate them scientifically.

This communication should enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. While the national authorities are only specifically obliged to communicate the compensatory measures adopted, the communication of certain elements relating to the studied alternative solutions and to the imperative reasons for overriding public interest which required the realisation of the plan or project can also prove necessary, insofar as these elements affected the choice of the compensatory measures.

The communication of compensatory measures must enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. However, it is not the Commission's role to suggest compensatory measures.

5.5. What happens with sites hosting priority habitats and/or species?

The second subparagraph of Article 6(4) provides for a special treatment whenever the plan or project concerns a site hosting priority habitats and/or species. The realisation of plans or projects likely to adversely affect these sites could be justified only if the evoked imperative reasons of overriding public interest concern human health and public safety or overriding beneficial consequences for the environment, or if, before granting approval to the plan or project, the Commission expresses an opinion on the initiative envisaged.

In other words, damage to the sites would only be accepted as overruling the fulfilment of the objectives of the directive when the specific imperative reasons mentioned above occur or, alternatively, after the additional procedural safeguard of an independent appraisal by the Commission.

This provision raises a number of questions relating to:

- the identification of sites concerned;

([20]) This format is presented in Annex IV of this document.

- the interpretation of the concepts of human health, public safety and the primary beneficial consequences for the environment;
- the procedure for the adoption of the Commission's opinion and the consequences which arise from this opinion.

5.5.1. The sites concerned

Article 6(4), second subparagraph, applies when the realisation of the plan or project is likely to affect a site hosting priority habitats and/or species. In this regard, it would be reasonable to consider that a plan or project:

(a) not affecting, in any manner, a priority habitat/species; or

(b) affecting a habitat/species which has not been taken into account in the selection of a site ('non-significant presence' in the standard data form)

should not de facto justify that a site should be subject to this second subparagraph.

Article 6(4), second subparagraph may be understood as applying to all sites hosting priority habitats and/or species, when these habitats and species are affected.

5.5.2. The concepts of 'human health', 'public safety' and 'primary beneficial consequences for the environment'

Human health, public safety and primary beneficial consequences for the environment constitute the most important imperative reasons of overriding public interest. However, like the concept of 'imperative reasons of overriding public interest' these three categories are not defined expressly.

48 49

Community law refers to public health and public safety reasons as ones which can justify the adoption of restrictive national measures to the free movement of goods, workers and services as well as to the right of establishment. In addition, the protection of persons' health is one of the fundamental objectives of Community policy in the field of the environment. In the same view, the primary beneficial consequences for the environment constitute a category which must be included in the aforementioned fundamental objectives of environmental policy.

Within the framework of the principle of subsidiarity, it rests with the competent national authorities to check whether such a situation occurs. Of course, any situation of this kind is likely to be examined by the Commission within the framework of its activity of control on the correct application of Community law.

As regards the concept of 'public safety', it is useful to refer to the judgement of the Court of Justice of 28 February 1991 in Case C-57/89, *Commission* v *Germany* (*'Leybucht Dykes'*). That decision preceded the adoption of Directive 92/43/EEC and hence Article 6. However, the decision retains relevance, not least because the Court's approach influenced the drafting of Article 6. At issue were construction works to reinforce dykes on the North Sea at Leybucht. These works involved a reduction in the area of an SPA. As a matter of general principle, the Court stated that the grounds justifying such a reduction must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In the specific case, the Court confirmed that **the danger of flooding and the protection of the coast** constituted sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum.

The national authorities can authorise the realisation of the plan or project only if the proof of the existence of the aforesaid reasons of overriding public interest is given and within the limits within which the plan or project in question proves necessary for the fulfilment of the public interest in question.

5.5.3. Adoption of the Commission's opinion — its consequences

In the case of imperative reason of overriding public interest other than human health, safety and environmental benefits, the prior opinion of the Commission is necessary. Article 6(4), second subparagraph, does not specify a procedure or the specific contents of such an opinion ([21]). One must therefore refer once again to the economy and to the aims pursued by the provision in question. The opinion has to cover the assessment of the ecological values which are likely to be affected by the plan or project, the relevance of the invoked imperative reasons and the balance of these two opposed interests, as well as an evaluation of the compensation measures. That assessment involves both a scientific and economic appraisal as well as an examination of the necessity and proportionality of the realisation of the plan or project with regard to the invoked imperative reason.

From its nature, the opinion is not an act having binding legal effects. The national authorities can move away from it and decide to implement the plan or project, even if the opinion is adverse. In the latter case however, one can reasonably expect that the decision will address the Commission's arguments and explain why its opinion has not been followed. In any case the Commission can assess whether the implementation of the plan or project is in conformity with the requirements of Community law and, if necessary, initiate appropriate legal action.

The Commission, in delivering its opinion, should check the balance between the ecological values affected and the invoked imperative reasons, and evaluate the compensation measures. The opinion is not binding but in a case of non-conformity with Community law, legal action may be taken.

([21]) The relevant standard format (Annex IV) also covers the request for a Commission opinion according to the provisions of Article 6(4)2.



Annexes

Annex I

Court case references

(1) The need for a strict transposition of Article 6 has already been signalled in a case brought before the European Court of Justice (Opinion of Advocate General Fennelly in Case C-256/98, *Commission* v *France*, delivered on 16 September 1999).

(2) See the decision of the European Court of Justice in Case C-355/90, *Commission* v *Spain* [1993] ECR I-4221 ('*Santoña Marshes*') and its decision of 18 March 1999 in Case C-166/97, *Commission* v *France (Seine Estuary)*.

(3) As above.

(4) Case C-392/96, *Commission* v *Ireland*, judgment of ECJ of 21 September 1999.

(5) This point is also underlined by Advocate General Fennelly of the European Court of Justice in the case above under (1).

(6) The relevant case law of the European Court of Justice further emphasises that the concept of 'project' is to be broadly interpreted — see in particular judgment of 24 October 1996 in Case C-72/95, *Kraaijeveld*.

(7) As above under (1).

(8) To see what in practice may be considered 'significant', it is helpful to refer to the case law of the European Court of Justice, in particular Case C-355/90, *Commission* v *Spain* [1993] ECR I-4221 ('*Santoña Marshes*'). Although that case was not decided by reference to Article 6(3) and (4) of Directive 92/43/EEC (being decided by reference to the preceding protection regime for SPAs under Directive 79/409/EEC), it serves to indicate some of the types of activity which may be considered as having significant effects on a protected site.

(9) The Court has stated that '*Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of (Directive 85/337/EEC) such as fauna and flora … are sensitive to the slightest alteration.*' (Case C-392/96, *Commission* v *Ireland*, judgment of ECJ of 21 September 1999).

(10) See also the emphasis the ECJ placed on the common responsibilities of the Member States in the context of the 'Birds' directive in Cases C-252/85 and C-262/85 (Respectively: *Commission* v *France* [1988] ECR 2243 and *Commission* v *Italy* [1987] ECR 3073).

Annex II

Considerations on management plans

While the appropriate management plans are not always necessary, at both the Galway seminar ([22]) and the Bath Conference ([23]), participants stressed that the management plans could constitute an effective means to fulfil the obligations provided for by the 'Habitats' directive.

The following extract from the conclusions of the Galway seminar sets out a number of considerations which may be helpful in view of the preparation of management plans:

1. Methodology

- Is a management plan for the site really needed? Explain why
- Who will initiate the plan? Who will be responsible for the plan?
- What is important about the site (both natural value and socioeconomic context)?
- What are its main threats?
- What do we want to achieve?
- How do we want to achieve it, according to what precise time schedule?
- How much will it cost? Will it optimise the benefits for nature conservation?

2. Objectives

The objectives of the management plan for the site have to correspond to the ecological requirements of the natural habitats and species significantly present on it in order to ensure their favourable conservation status. They must be as clear as possible, realistic, quantified and manageable. Use clear language with concrete formulation, to be understandable by everybody.

- What is the favourable conservation status for each habitat type and species present on the site?
- How does it contribute to the integrity of the site and the coherence of the network?
- Is it assessed in a dynamic way according to the evolution of the conservation status of the habitats or species concerned?

3. Consultation and implementation

It is an essential part of the process to establish a management plan needing a multidisciplinary and professional approach.

- Have you identified all the local actors?
- Have you involved them according to a bottom-up approach?
- When do you involve them?

An illustration of the consultation method is the *document d'objectifs* in France where all interest groups are invited to participate under the responsibility of the competent authorities (*préfet de région*).

([22]) Organised by the Irish authorities from 9 to 11 October 1996 in Galway, Ireland on SAC Site Management.

([23]) Organised by the Commission and the UK presidency from 28 to 30 June 1998 in Bath, UK, on Natura 2000 and People.

4. Monitoring and evaluation

These issues are one of the most important parts of the plan, especially for determining whether you have been successful with your plan. As with the objectives of the management plan, monitoring has to be clearly and accurately defined, including an analysis of financial matters.

Annex II *A*

Examples of LIFE-Nature projects ([24]) that have involved management plans or statutory, administrative or contractual measures

For each project, its relevant aspects are indicated below:

Belgique-België

- *Protection through acquisition and management of the last calcareous mires in Belgium (B4-3200/95/435)*

  The provincial authority has secured the bulk of this very valuable site by leasing it from the owners.

- *Integral Coastal Conservation Initiative (B4-3200/96/483)*

  Preparation of management plans for both the coastal (dune) and the marine habitats (offshore).

Deutschland

- *Protecting great bustard habitats in Brandenburg (B4-3200/92/14529)*

  Contractual arrangements with farmers were concluded, involving land purchase and leasing, or management agreements.

- *Preservation and re-establishment of the Trebeltal fen* and *Restoration and conservation of riverine fens in Mecklenburg-Vorpommern (B4-3200/94/731* and *B4-3200/95/260)*

  Elaboration and implementation of a management plan to restore riverine and fen habitats, through close cooperation with conservation and water authorities.

- *Transnational programme for the conservation of bats in western-central Europe (B4-3200/95/842)*

  Contractual arrangements with landowners and public authorities, and establishment of a management plan.

- *Conservation and development of nature of the Federseelandscape (B4-3200/96/489)*

  Rural land consolidation procedure, supported through agri-environment measures.

([24]) Further information can be found on Internet at: http://europa.eu.int/comm/life/nature/databas.htm

Ελλαδα - Greece

- *Management and protection of the threatened biotopes of western Crete with ecotopes and priority species (B4-3200/95/850)*

  Preparation of management plans with direct involvement of local authorities.

- *The Mediterranean monk seal in Greece: Conservation in action (B4-3200/96/500)*

  Drawing up management plans in permanent consultation with the various stakeholders.

España

- *First, second and third phases of the action programme for the conservation of the brown bear and its habitat in the Cantabrian mountains (B4-3200/92/15185 & 94/736 & 95/523)*

  Agreements with hunters for the management of hunting areas in a way that is compatible with bear conservation

- *First and second phases of the creation of a network of flora micro-reserves and purchase of land of significant botanical interest in the Valencia region (B4-3200/93/766 & 95/521)*

  Agreements with the land-owners and implementation of management plans for the microreserves (160 sites)

- *First and second phases of the conservation programme for three threatened vertebrate species in the Pyrenees (sub-project Spain) (B4-3200/93/772, 95/277, 95/524)*

  Agreements with hunters for the maintenance of reserve areas for the Gypaetus barbatus, and compensation payments to avoid timber cutting in forest within the brown bear distribution area.

- *Conservation of the little bustard, great bustard and lesser kestrel in the SPAs of Extremadura (B4-3200/96/507)*

  Agreement with farmers for the improvement of the steppe habitat.

France

- *Protection programme for bogs in France (B4-3200/95/518)*

  Preparation of a manual for the management of bog habitats.

- *Experimental drawing up of management plans for future French Natura 2000 sites (B4-3200/95/519)*

  Testing of management plans on 35 sites and drafting of a methodological guide for preparing management plans for Natura 2000 sites.

Ireland

- *Development of management plans and emergency actions aimed at candidate SACs (B4-3200/95/837)*

  Developing management plans for potential SACs

Österreich

- *Bear protection programme for Austria (B4-3200/95/847)*

  Elaboration of a management plan in cooperation with all authorities and interest groups concerned and a strong public participation input.

- *Wetland management in the Upper Waldviertel. (B4-3200/96/539)*

  Developing management plans for numerous small wetland sites (bogs, ponds, small river-areas), and partly implementing them in close contact with the affected landowners and users.

Portugal

- *Second phase of the project for conservation of the stepparian bird fauna of Castro Verde (B4-3200/95/510)*

- *New technology applied to nature conservation in Guadiana valley (B4-3200/95/511)*

  Both projects involved the preparation and implementation of management plans for areas that after the end of the projects were integrated into SPAs.

Suomi-Finland

- *Protection of biodiversity, and particularly of flying squirrel habitats, in the Nuuksio area (B4-3200/95/508)*

  Preparation of a management plan for recreation and conservation in privately owned areas.

- *Saimaa ringed seal management plan for Lake Pihlajavesi (B4-3200/95/505)*

  Land use plans focusing on seal conservation.

Sverige

- *Protection and restoration of Stora Alvaret on Öland Island, south-east Sweden (B4-3200/96/547)*

- *Preservation of the hermit beetle, Osmoderma eremita (B4-3200/97/288)*

  Use of agri-environmental schemes for the long-term management of the sites.

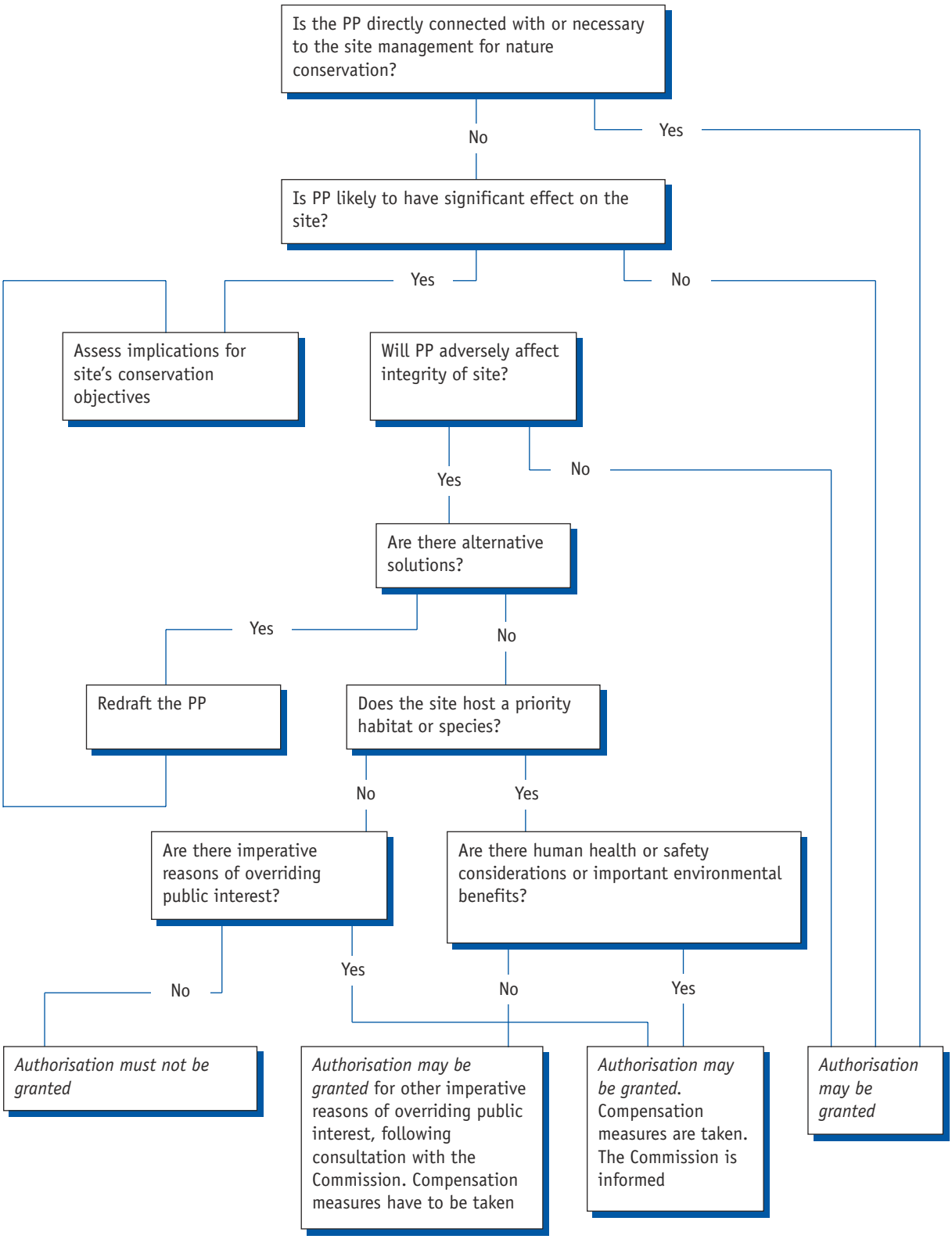
United Kingdom

- *Conservation management of priority upland habitats through grazing: guidance on management of upland Natura 2000 sites (B4-3200/95/854)*

  Development of a practical manual for grazing management planning.

Annex III

Consideration of plans and projects affecting Natura 2000 sites



Annex IV

Form for submission of information to the European Commission according to Article 6(4)

Member State: Date:

Information to the European Commission
according to Article 6 of the 'Habitats' directive
(Directive 92/43/EEC)

Documentation sent for: ☐ information (Article 6(4)1) ☐ opinion (Article 6(4)2)

Competent national authority:

Address:

Contact person:

Tel., fax, e-mail:

1. Plan or project

Name and code of Natura 2000 site affected:

This site is:

☐ an SPA under the 'Birds' directive

☐ a proposed SCI under the 'Habitats' directive

☐ hosting a priority habitat/species

Summary of the plan or project having an effect on the site:

2. Negative effects

Summary of the assessment of the negative effects on the site:

NB: This summary should focus on the adverse effect expected on the habitats and species for which the site has been proposed for the Natura 2000 network, include the appropriate maps and describe the already decided mitigation measures.

3. Alternative solutions

Summary of alternative solutions studied by the Member State:

Reasons why the competent national authorities have concluded that there is absence of alternative solutions:

4. Imperative reasons

Reason to nevertheless carry out this plan or project:

- ☐ Imperative reasons of overriding public interest, including those of a social or economic nature (in the absence of priority habitat/species)
- ☐ human health
- ☐ public safety
- ☐ beneficial consequences of primary importance for the environment
- ☐ other imperative reasons of overriding public interest

Short description of the reason:

5. Compensation measures

Foreseen compensatory measures and timetable:

Annex V

Member State nature protection authorities ([25])

Belgique-België

- Ms Els MARTENS
  AMINAL — Afdeling Natuur
  Koning Albert II laan 20,
  bus 8
  Ferraris-gebouw, 4de verdieping, lokaal 4G43
  B-1000 Brussel

- Mr Patrick DE WOLF
  DGRNE
  Av. Prince de Liège 15, B-5100 JAMBES

Danmark

- Mr Olaf G. CHRISTIANI
  Ministry of the Environment and Energy,
  The National Forest and Nature Agency
  Haraldsgade 53, DK-2100 COPENHAGEN

- Ms Tine NIELSEN SKAFTE
  The National Forest and Nature Agency
  Haraldsgade 53, DK-2100 COPENHAGEN

Deutschland

- Dr Ursula VON GLISCYNSKI
  Ministry for the Environment, Nature
  Conservation and Nuclear Safety, Referat NI 2
  Allee 90, D-53048 BONN

- Mr Detlef SZYMANSKI
  Hessisches Ministerium des Innern und für
  Landwirtschaft, Forsten und Naturschutz
  Hölderlinstr. 1-3,
  D-65187 WIESBADEN

Ελλάδα-Greece

- Mrs Stavroula SPYROPOULOU
  Ministry of Environment, Physical Planning
  and Public Works, Environmental Planning
  Division, Nature Management Section
  36 Trikalon str, GR-11526 ATHENS

- Mr Panagiotis DROUGAS
  General Secretariat for Forests and the Natural
  Environment, Department of Aesthetic
  Forests, National Parks and Game
  Management
  Ippokratous str. 3-5, GR-10164 ATHENS

España

- Mr Jesus SERRADA HIERRO
  Dirección General de Conservación de la
  Naturaleza MIMAM
  c/Gran Via de San Francisco, 4. 4a,
  E-28005 MADRID

- Mr Miguel AYMERICH DESPOINTES
  Dirección General de Conservación de la
  Naturaleza, MIMAM
  c/Gran Via de San Francisco, 4. 4a,
  E-28005 MADRID

France

- Mr Jean-Marc MICHEL
  Ministère de l'Environnement, Direction de la
  Nature et des Paysages
  20, avenue de Ségur, F-75302 PARIS 07 SP

([25]) List of delegates to the 'Habitats' Committee, established under Directive 92/43/EEC. An updated list can be found on the Internet at: http://europa.eu.int/comm/life/nature/databas.htm

- Mr Henri JAFFEUX
  Ministère de l'Environnement, Direction de la Nature et des Paysages
  20, avenue de Ségur, F-75302 PARIS 07 SP

Ireland

- Dr Alan CRAIG
  National Parks and Wildlife, Dúchas, Dept of Arts, Heritage, Gaeltacht and the Islands
  Ely Court 7, Ely Place, DUBLIN 2, Ireland

- Mr Peadar CAFFREY
  National Parks and Wildlife, Dúchas, Dept. of Arts, Heritage, Gaeltacht and the Islands
  Ely Court 7, Ely Place, DUBLIN 2, Ireland

Italy

- Mrs Patrizia DE ANGELIS
  Ministero dell'Ambiente, Servizio Conservazione della Natura
  Via Assisi, 163, I-00187 ROMA

- Mr Alberto ZOCCHI
  Ministero dell'Ambiente, Servizio Conservazione della Natura
  Via Assisi, 163, I-00181 ROMA

Luxembourg

- Mr Claude ORIGER
  Ministère de l'Environnement
  18, Montée de la Pétrusse,
  L-2918 LUXEMBOURG

- Mrs Marie-Paule KREMER
  Ministère de l'Environnement
  18, Montée de la Pétrusse,
  L-2918 LUXEMBOURG

Nederland

- Mr Garry POST
  Ministry of Agriculture, Nature, Management and Fisheries, Department for Nature Management
  73 Bezuidenhoutseweg, PO Box 20401,
  2500 EK DEN HAAG, Nederland

Österreich

- Herr Mag. Christian PLÖSSNIG
  Amt der Tiroler Landesregierung, Abt. Umweltschutz
  Eduard Wallnöfer Platz 1,
  A-6020 INNSBRUCK

- D. I. Günter LIEBEL
  Bundesministerium für Umwelt, Jugend und Familie, Abt. II/5
  Stubenbastei 5, A-1010 WIEN

Portugal

- Mr José Manuel MARQUES
  Instituto de Conservação da Natureza
  Rua da Lapa, 73, P-1200-701 LISBOA

Suomi-Finland

- Mr Esko JAAKKOLA
  Ministry of the Environment, Land Use Department
  PO Box 380, SF-00131 HELSINKI

Sverige

- Ms Nilla THOMSON
  Ministry of Environment,
  S-10333 STOCKHOLM

- Mr Jan TERSTAD
  Swedish Environmental Protection Agency
  Blekholmsterrassen 36,
  S-10648 STOCKHOLM

United Kingdom

- Mr M. PRITCHARD
  Head of European Wildlife Division,
  Department of the Environment Transport
  and the Regions
  Tollgate House, Houlton Street,
  BRISTOL, BS2 9DJ, United Kingdom

- Mr Trevor SALMON
  Department of the Environment, Transport
  and the Regions, European Wildlife Division
  Tollgate House, Houlton Street,
  BRISTOL, BS2 9DJ, United Kingdom

European Commission

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Jean De Lannoy
Avenue du Roi 202/Koningslaan 202
B-1190 Bruxelles/Brussel
Tél. (32-2) 538 43 08
Fax (32-2) 538 08 41
E-mail: jean.de.lannoy@infoboard.be
URL: http://www.jean-de-lannoy.be

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De Europese Boekhandel
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B-1040 Bruxelles/Brussel
Tél. (32-2) 295 26 39
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E-mail: mail@libeurop.be
URL: http://www.libeurop.be

Moniteur belge/Belgisch Staatsblad
Rue de Louvain 40-42/Leuvenseweg 40-42
B-1000 Bruxelles/Brussel
Tél. (32-2) 552 22 11
Fax (32-2) 511 01 84

DANMARK

J. H. Schultz Information A/S
Herstedvang 12
DK-2620 Albertslund
Tlf. (45) 43 63 23 00
Fax (45) 43 63 19 69
E-mail: schultz@schultz.dk
URL: http://www.schultz.dk

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Via Duca di Calabria, 1/1
Casella postale 552
I-50125 Firenze
Tel. (39) 055 64 83 1
Fax (39) 055 64 12 57
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URL: http://www.licosa.com

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Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC

CLARIFICATION OF THE CONCEPTS OF: *ALTERNATIVE SOLUTIONS*, *IMPERATIVE REASONS OF OVERRIDING PUBLIC INTEREST*, *COMPENSATORY MEASURES*, *OVERALL COHERENCE*, *OPINION OF THE COMMISSION*.

January 2007

This guidance document should be read in conjunction with the booklet published by the European Commission in 2000 and entitled "Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC". The current document intends to further develop and replace the section on Article 6(4) of this earlier publication leaflet. The document reflects the views of Commission services only and it is not of a binding nature.

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1.1. The text of Article 6.4 of the Habitats Directive

"If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest".

1.2. Scope

1.2.1. Substantial Scope

This provision forms part of the procedure of assessment and possible authorisation, by the competent national authorities, of plans and projects likely to affect a Special Area of Conservation (SAC), a Special Protected Area (SPA) or a Site of Community Importance (SCI)[1]. Two fundamental considerations arise:

- On the one hand, it addresses exceptions with regard to the general rule of Article 6(3) according to which authorisation can only be granted to plans or projects not affecting the integrity of the site(s) concerned.

- On the other hand, its concrete application has to be done in the respect of the various steps provided for and in the sequential order[2] established by the Directive.

The preliminary assessment of the impacts of a plan or project on the site, provided for in Article 6(3), enables the competent national authorities to arrive at conclusions regarding the consequences of the initiative envisaged in relation to the integrity of the site concerned. If these conclusions are positive, in the sense that no reasonable scientific doubt remains as to the absence of effects in the site, the competent authorities can give their consent on the plan or project. In case of doubt, or negative conclusions, the precautionary and preventive principles should be applied and procedures under art. 6(4) followed. Furthermore, taking into account the precautionary principle and applying a preventive approach might also lead to the decision not to proceed with the plan or project.

[1] Article 6(2), 6(3) and 6(4) only applies to sites which are placed on the list of sites selected as sites of Community importance (SCI). Thus, these provisions do not apply to sites eligible for identification as sites of Community importance on the national lists transmitted to the Commission (pSCI). The protection regime for the pSCI is defined in case C-117/03 (Judgement of the Court of 13 January 2005, Dragaggi) and in case C-244/05 (Judgement of the Court of 14 September 2006, Bund Naturschutz).

[2] In its Opinion for the case C-239/04 the Advocate General (paragraphs 44-46) seems to consider that there is no a sequential order between the examination of alternative solutions and imperative reasons of overriding public interest.

To this effect, the Court has already held, in case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging*[3] and confirmed in C-6/04 *Commission v United Kingdom of Great Britain and Northern Ireland*[4], that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional upon there being a probability, or a risk, that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk is considered to exist if it cannot be excluded, on the basis of objective information, that the plan or project will have a significant effect on the site concerned.

The above mentioned approach is also reflected in the Judgement of the Court of 26 October 2006 in the case C-239/04[5] regarding the construction of a motorway in Portugal, where it is mentioned that any reasonable scientific doubt as to the absence of adverse effects on the integrity of the site must be removed before the project is authorised.

The decision to go ahead with a plan or project must meet the requirements of Article 6(4). In particular, it must be documented that:

1 The alternative put forward for approval, is the least damaging for habitats, for species and for the integrity of the Natura 2000 site, regardless of economic considerations, and that no other feasible alternative, exists that would not affect the integrity of the site.

2 There are imperative reasons of overriding public interest, including 'those of a social or economic nature'.

Being an exception to Article 6(3), this provision can only be applied to circumstances where all the conditions required by the Directive are fully satisfied. In this regard, it falls on whoever wants to make use of this exception to prove, as a prerequisite, that the aforementioned conditions do indeed exist in each particular case.

3 Once the lack of suitable alternatives and the acceptance of imperative reasons of overriding public interest are fully ascertained and documented, all compensatory measures that are needed to ensure the protection of the overall coherence of the Natura 2000 network have to be taken. Therefore, compensatory measures should be considered only when the application of other safeguards, such as mitigation measures, is not sufficient. The compensatory measures adopted must **always** be communicated to the Commission.

The provisions of Art. 6(4) apply when the results of the preliminary assessment under Art. 6(3) are negative or uncertain. That is:
1. The plan or project will adversely affect the integrity of the site
2. Doubts remain as to the absence of adverse effects on the integrity of the site linked to the plan or project concerned
"The sequential order of its steps has to be followed".

[3] Judgement of the Court of 7 September 2004 in case C-127/02, paragraphs 57 and 61.

[4] Judgement of the Court of 20 October 2005 in case C-6/04, paragraph 54.

[5] Judgement of the Court of 26 October 2006, Commission/Portugal (case C-239/04, paragraph 24).

1.2.2. Temporal scope

The judgement delivered by the Court of Justice in relation to the case C-209/04 states the principles with regard to the temporal applicability of Article 6(3) and consequently Article 6(4) of the Habitats Directive. In order to determine whether projects must be subject to an environmental assessment in accordance with Article 6(3), the Court uses a formal criterion: the date of the application for the authorisation for a project. Thus, if the application for authorisation was formally lodged before the expiry of the time-limit for transposition of the Directive or before the accession to the EU, the project is not subject to the requirements laid down in Article 6(3) and (4). However, if the application for authorisation was formally lodged after the expiry of the time-limit for transposition of the Directive or after the accession to the EU, the project is subject to the requirements laid down in Article 6(3) and (4).

1.3. Initial considerations

Ensure quality of appropriate assessment under article 6 (3)

Appropriate assessments of the implications of the plan or project for the site concerned must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives. This implies that all aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field.

Assessment procedures of plans or projects likely to affect Natura 2000 sites should guarantee full consideration of all elements contributing to the site integrity and to the overall coherence of the network, both in the definition of the baseline conditions and in the stages leading to identification of potential impacts, mitigation measures and residual impacts. These determine what has to be compensated, both in quality and quantity.

Regardless of whether the provisions of Article 6(3) are delivered following existing environmental impact assessment procedures or other specific methods, it must be ensured that:

- Article 6(3) assessment results allow full traceability of the decisions eventually made, including the selection of alternatives and any imperative reasons of overriding public interest.
- The assessment should include all elements contributing to the site's integrity and to the overall coherence of the network as defined in the site's conservation objectives and Standard Data Form, and be based on best available scientific knowledge in the field. The information required should be updated and could include the following issues:
    - Structure and function, and the respective role of the site's ecological assets
    - Area, representativity and conservation status of the priority and non-priority habitats in the site

- Population size, degree of isolation, ecotype, genetic pool, age class structure, and conservation status of species under Annex II of the Habitats Directive or Annex I of the Birds Directive present in the site
- Role of the site within the biographical region and in the coherence of the Natura 2000 network
- Any other ecological assets and functions identified in the site

- It should include a comprehensive identification of all the potential impacts of the plan or project likely to be significant on the site, taking into account cumulative impacts and other impacts likely to arise as a result of the combined action of the plan or project under assessment and other plans or projects.
- The assessment under Article 6(3) applies the best available techniques and methods, to estimate the extent of the effects of the plan or project on the biological integrity of the site(s) likely to be damaged.
- The assessment provides for the incorporation of the most effective mitigation measures into the plan or project concerned, in order to avoid, reduce or even cancel the negative impacts on the site.
- The characterisation of the biological integrity and the impact assessment should be based on the best possible indicators specific to the Natura 2000 assets which must also be useful to monitor the plan or project implementation.

To meet the requirements of Article 6(3) assessment, it seems most appropriate that the Natura 2000 authorities set up the specific formal requirements regarding the type of information and criteria to follow when carrying out the appropriate assessment. Dissemination and training to the relevant parties (E.g. authorities at a different level of government, consultants and plan or project developers) it is highly recommended.

1.3.1. Examining alternative solutions

In line with the need to prevent undesired impairment to the Natura 2000 network, the thorough revision and/or withdrawal of a proposed plan or project should be considered when significant negative effects on the integrity of a site have been identified. This should be observed especially in the case of effects on priority habitats and/or species protected under the Habitats Directive or globally endangered bird species listed in Annex I of the Birds Directive. The competent authorities have to analyse and demonstrate first the need of the plan or project concerned. Thus, the zero option should be considered at this stage.

Subsequently, the competent authorities should examine the possibility of resorting to alternative solutions which better respect the integrity of the site in question[6]. All feasible alternatives, in particular, their relative performance with regard to the conservation objectives of the Natura 2000 site, the site's integrity and its contribution to the overall coherence of the Natura 2000 Network have to be analyzed. Such solutions should normally already have been identified within the framework of the initial assessment carried out under Article 6(3). They could involve alternative locations or routes, different scales or designs of development, or alternative processes.

[6] In its Opinion for the case C-239/04, the Advocate General (paragraph 44) considers that "among the alternatives short-listed "*the choice does not inevitably have to be determined by which alternative least adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest."*

In conformity with the principle of subsidiarity, it rests with the competent national authorities to asses the relative impact of these alternatives solutions on the site concerned. It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. In this phase, therefore, other assessment criteria, such as economic criteria, cannot be seen as overruling ecological criteria.

It rests with the competent national authorities to assess alternative solutions. This assessment should be made against the site's conservation objectives.

1.3.2. Examining imperative reasons of overriding public interest

In the absence of alternative solutions - or in the presence of solutions having even more negative environmental effects on the site concerned, with regard to the above-mentioned conservation aims of the Directive - the competent authorities have to examine the existence of imperative reasons of overriding public interest, including those of a social or economic nature, which require the realisation of the plan or project in question.

The concept of *"imperative reason of overriding public interest"* is not defined in the Directive. However, Article 6 (4) second subparagraph mentions human health, public safety and beneficial consequences of primary importance for the environment as examples of such imperative reasons of overriding public interests. As regards the *"other imperative reasons of overriding public interest"* of social or economic nature, it is clear from the wording that only public interests, irrespective of whether they are promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects developed by private bodies can only be considered where such public interests are served and demonstrated.

So far the European Court of Justice has not given clear indications for the interpretation of this specific concept. It may therefore be helpful to refer to other fields of Community law, where similar concepts appear.

The "imperative requirement" concept was worked out by the Court of Justice as an exception to the principle of free movement of goods. Among the imperative requirements which can justify national measures restricting freedom of movement, the Court recognised public health and environmental protection, as well as the pursuit of legitimate goals of economic and social policy.

In addition, Community law also recognises the concept of "service of general economic interest", evoked in Article 86(2) (ex 90(2)) of the Treaty, within the framework of the exception to the rules of competition envisaged for companies responsible for the management of such services. In a communication on services of general interest in Europe[7], the Commission, taking account of case law on the matter, gave the following definition of services of general economic interest: "*they describe activities of commercial service fulfilling missions of general interest, and subject consequently by the Member States to specific*

[7] COM (96) 443, of the 11.09.1996.

obligations of public service[8]*. It is the case in particular of services in transport, energy, communication networks*".

Having regard to the *structure of the provision*, in the specific cases, the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the site affected by those initiatives and the above-mentioned imperative reasons weighs in favour of the latter. This should be determined according to the following considerations:

a) the public interest must be **overriding**: it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive (see e.g. its 4th recital stating *"Community's natural heritage"*) (see Annex I point 10).

b) in this context, it seems also reasonable to assume that the public interest can only be overriding if it is a **long-term interest**; short term economic interests or other interests which would only yield short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive.

It is reasonable to consider that the "imperative reasons of overriding public interest, including those of social and economic nature" refer to situations where plans or projects envisaged prove to be indispensable:
- within the framework of actions or policies aiming to protect fundamental values for the citizens' life (health, safety, environment);
- within the framework of fundamental policies for the State and the Society;
- within the framework of carrying out activities of economic or social nature, fulfilling specific obligations of public service.

In order to provide readers with a more precise indication of what might legitimately considered as potential imperative reasons of overriding public interest, some **examples** have been extracted from the Opinions delivered by the Commission in the framework of Article 6(4) and are related to the reasoning given by Member States.

Intersection of the Peene Valley (Germany) by the planned A 20 motorway (Germany)
A 20 motorway is part of the trans-European road network. An east-west link has to be created in Mecklenburg-Western Pomerania in order to link it with central regions of the Community.
Mecklenburg-Western Pomerania suffers from an exceptionally high unemployment. For several years its unemployment rate has been almost the double of that in the old Länder. The gross national product created in Mecklenburg-Western Pomerania, as compared to the percentage of the population, is significantly lower than the average gross national product.

[8]The public service obligations, in their turn, are characterised for the respect of some essential principles of operation, such as continuity, the equal access, universality and transparency, but can vary from one Member State to the other, according to different situations, such as geographical or technical constraints, political and administrative organisation, history and traditions.

Project Mainport Rotterdam" Development Plan (The Netherlands)
Portuary and industrial activity in the Rotterdam area is one of the main pillars of Dutch economy. The harbour of Rotterdam is an essential multimodal crossroads in the TEN-T Network and is therefore of Community importance. Expected growth in global container handling and chemical industrial activity will lead to increased demand for space which will have to be met if the competitive position of the Rotterdam harbour in the Hamburg – Le Havre range has to be maintained.
The development of the Rotterdam port, also brings into focus the question of promoting modal-shift particularly in relation to freight transport. It is clear that shifting freight from road to water will have considerable benefits in terms of reduced green-house gas emissions, reduced atmospheric pollution and reduced congestion. These benefits should be recognised in assessing questions of public interest.

Extension of the site of Daimler Chrysler Aerospace Airbus Gmbh in Hamburg-Finkenwerder (Germany)
Outstanding importance for the region of Hamburg and northern Germany and the European aerospace industry. Project will contribute to the technological advance and foster the European co-operation in the aviation business. Positive effect on the economic and social situation of the bordering regions and positive impact on the competitiveness of the European aeronautic industry. Important number of highly qualified new jobs, needed to counterbalance the considerable loss of jobs in the industrial sector of the region.

High speed line (TGV East) (France)
Lack of options for linking the existing lines. The European TGV East project was viewed favourably in the Council of Ministers of the European Community on 1990 and was chosen as a priority project by the European Council in 1994, having benefited from Union decisions regarding the priority of infrastructure projects to be implemented.

Operational master plan ("Rahmenbetriebsplan") of the Prosper Haniel Colliery (Germany)
Due to its geological and infrastructure qualities the Prosper Haniel coal mine and the continuation of its mining activities contribute to achieving the general objectives of the German long term energy policy at the federal and regional level, and in particular the interest of supply security and to maintain the leading position of European mining and coal energy technologies. The closure of the Prosper Haniel mine would have unacceptable direct and indirect economic and social consequences at the regional level with a direct loss of jobs in coal mining and in up-stream industries and downstream services.

La Breña II Reservoir Project (Spain)
Provide enough water for human consumption, industrial uses and agriculture, which cannot be available in the current situation of the River Guadalquivir basin.

For further examples and information concerning the Opinions delivered by the Commission: http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/index_en.htm

1.4. Adopting compensatory measures

1.4.1. What is meant by "compensatory measures" and when should they be considered?

In the context of article 6 of the Habitats Directive, mitigation measures must be clearly distinguished from compensatory measures.

The term *"compensatory measures"* is not defined in the 'Habitats' Directive. Experience would suggest the following distinction:

- mitigation measures in the broader sense, are those measures which aim to minimise, or even cancel, the negative impacts on a site that are likely to arise as a result of the implementation of a plan or project. These measures are an integral part of the specifications of a plan or project (see section 4.5 of the leaflet "Managing Natura 2000 sites. The provisions of Article 6 of the Habitats Directive"), and

- compensatory measures *sensu stricto*: are independent of the project (including any associated mitigation measures). They are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained.

For instance, an extension of underground coal mining activities of the colliery into areas which so far had not been exploited will cause large scale ground subsidence, accompanied by flooding and increase of ground water levels with considerable impacts on all ecosystems in the area. To compensate for the negative effects of the project, land will be selected following ecological criteria for the creation of non-priority habitat types (beech and oak forests) by re-afforestation or transformation/improvement of existing forests. It is also considered the creation and improvement of alluvial forests and restoration or optimisation of riverbeds to compensate for the loss of priority habitat type (Residual alluvial forests - *Alnion glutinoso-incanae*) and non-priority habitat type (water courses of plain to montane levels with floating vegetation). The measure will contribute also to compensate the negative impact of the project on the species *Lampetra planeri.*

Compensatory measures should be additional to the actions that are normal practice under the Habitats and Birds Directives or obligations laid down in EC law. For example, the implementation of a management plan, or the proposal/designation of a new area, already inventoried as of Community importance, constitute "normal" measures for a Member State. Thus, compensatory measures should go beyond the normal/standard measures required for the protection and management of Natura 2000 sites.

Another example of compensation can be given in the case of a harbour extension leading to the destruction of a roosting site for birds and the diminution of low depth inter-tidal mudflats and reedbeds. The recreation of a high tide roosting site and of shallow beaches associated to mudflats as well as habitat restoration of reedbeds and wet meadows through hydraulic works, environmental measures for the agricultural use of reedbeds and meadows, and management of hunting pressure, would compensate for the negative impact caused by the project.

Consequently, compensatory measures are not a means to allow the implementation of plans or projects while escaping the obligations of Article 6. They should be considered only after having ascertained a negative impact on the integrity of a Natura 2000 site. Specifically, the logic and rationale of the assessment process requires that if a negative impact is foreseen then an evaluation of alternatives should be carried out as well as an appreciation of the interest of the plan/project in relation to the natural value of the site. Once it is decided that the project/plan should proceed, then it is appropriate to move to a consideration of compensation measures. This approach has also been confirmed in the opinion given by the advocate general in the case C 239-/04 (paragraph 35).

The compensatory measures constitute measures specific to a project or plan, additional to the normal practices of implementation of the "Nature" Directives. They aim to offset the negative impact of a project and to provide compensation corresponding precisely to the negative effects on the species or habitat concerned. The compensatory measures constitute the "last resort". They are used only when the other safeguards provided for by the directive are ineffectual and the decision has been taken to consider, nevertheless, a project/plan having a negative effect on the Natura 2000 site.

1.4.2. "Overall coherence" of the Natura 2000 network

The expression *"overall coherence"* appears in Art. 6(4) in the context where a plan or project is allowed to be carried out for imperative reasons of overriding public interest and the Member State has to take measures to compensate for the loss.

It also appears in Art. 3(1) which states that Natura 2000 is *"a coherent European ecological network of special areas of conservation that shall enable the natural habitats types and species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range"*. Hence, two different criteria are considered, on the one hand the targeted species and habitats in terms of quantity and quality, and on the other hand the role of the site in ensuring the adequate geographical distribution in relation to the range.

Art. 3(3) stipulates that *"where they consider it necessary, Member States shall endeavour to improve the ecological coherence of Natura 2000 by maintaining, and where appropriate developing, features of the landscape which are of major importance for wild fauna and flora, as referred to in Article 10."*

Art. 10, which deals more generally with land use planning and development policy, stipulates that

> *"Member States shall endeavour, where they consider it necessary, in their land-use planning and development policies and, in particular, with a view to improving the ecological coherence of the Natura 2000 network, to encourage the features of the landscape which are of major importance for wild fauna and flora.*
>
> *Such features are those which, by virtue of their linear and continuous structure (such as rivers with their banks or their function as stepping stones (such as ponds or small woods), are essential for the migration, dispersal and genetic exchange of wild species."*

The word “ecological” is used both in Art. 3 and Art. 10 to explain the character of the coherence. It is obvious that the expression *“overall coherence”* in Art. 6(4) is used in the same meaning.

Having said this, it is clear that the importance of a site to the coherence of the network is a function of the conservation objectives of the site, the number and status of the habitats and species found within the site, as well as the role the site plays in ensuring an adequate geographical distribution in relation to the range of species and habitats of species concerned.

Art. 6(4) requires to “protect” the overall coherence of Natura 2000. Thus, the Directive presumes that the “original” network has been coherent. If the exception regime is used, the situation must be corrected so that the coherence is fully restored.

With regard to a plan or project, the compensatory measures defined to protect the overall coherence of Natura 2000 network will have to address the criteria mentioned above. This would mean that compensation should refer to the site's conservation objectives and to the habitats and species negatively affected in comparable proportions in terms of number and status. At the same time the role played by the site concerned in relation to the bio-geographical distribution has to be replaced adequately.

At this stage it would be useful to recall that under the Habitats Directive the selection of a site for the Natura 2000 Network rests on:

- the taking into account of the habitat(s) and species in proportions (surface areas, populations) described in the standard data form;
- the inclusion of the site in a biogeographical region within which it is located;
- the selection criteria established by the ‘Habitats’ Committee and used by the European Topic Centre on Biological Diversity to advise the Commission to retain a site on the Community list.

Competent authorities should be looking at these criteria when designing the compensatory measures for a project, and should ensure that they provide the properties and functions comparable to those which had justified the selection of the original site.

The *‘Birds’ Directive* does not provide for bio-geographical regions, or selection at Community level. However by analogy, it could be considered that *the overall coherence of the network* is ensured if:

- compensation fulfils the same purposes that motivated the site's designation in accordance with Article 4(1) and 4(2) of the Birds Directive;
- compensation fulfils the same function along the same migration path;
- the compensation site(s) are accessible with certainty by the birds usually occurring on the site affected by the project.

For instance, if an SPA which has a specific function to provide resting areas for migratory bird species in their way towards the north is negatively affected by a project, the compensatory measures proposed should focus on the specific function played by the site. Therefore, compensating with measures that could recreate the necessary conditions for resting of the same species in an area out of the migratory path or within the migratory path but far away would not be sufficient to ensure the overall coherence of the network. In this case, compensation should provide for suitable resting areas for the targeted species correctly located in the migratory path so that they will be realistically accessible to the birds which would have used the original site affected by the project.

In order to ensure the overall coherence of Natura 2000, the compensatory measures proposed for a project should therefore: a) address, in comparable proportions, the habitats and species negatively affected; b) provide functions comparable to those which had justified the selection criteria of the original site, particularly regarding the adequate geographical distribution. Thus, it would not be enough that the compensatory measures concern the same biogeographical region in the same Member State.

The distance between the original site and the place of the compensatory measures is not necessarily an obstacle as long as it does not affect the functionality of the site, its role in the geographical distribution and the reasons for its initial selection.

1.4.3. Objective and general contents of compensatory measures

The compensatory measures *sensu stricto* have to ensure the maintenance of the contribution of a site to the conservation at a favourable status of natural habitats types and habitats of species "*within the biogeographical region concerned"*. In short, ensure the maintenance of the overall coherence of the Natura 2000 Network. It results from this:

- that, as a general principle, a site should not be irreversibly affected by a project before the compensation is indeed in place. However, there may be situations where it will not be possible to fill this condition. For example, the recreation of a forest habitat would take many years to ensure the same functions as an original one negatively affected by a project. Therefore, best efforts should be made to assure compensation is in place beforehand and in the case this is not fully achievable, the competent authorities should consider extra compensation for the interim losses that would occur in the meantime.

- that the compensation must be additional in relation to the Natura 2000 network to which the Member State should have contributed in conformity with the Directives.

Member States should pay particular attention when the negative effects of a plan or project are produced in rare natural habitats types or in natural habitats that need a long period of time to provide the same ecological functionality. Under these circumstances, the zero option should be seriously considered.

While designations of new Natura 2000 sites can be part of a compensation package under Article 6(4), the designations on their own are insufficient without the accompanying measures.

In terms of the *'Birds' Directive*, this could include, as a compensation, work to improve the biological value of an area, which is either designated or will be designated, so that the carrying capacity or the food potential are increased by a quantity corresponding to the loss on the site affected by the project. *A fortiori*, the re-creation of a habitat favourable to the bird species concerned is acceptable provided the created site is available at the time when the affected site loses its natural value.

In terms of the '*Habitats' Directive*, the compensation could, similarly, consist of the re-creation of a comparable habitat or the biological improvement of a substandard habitat within an existing designated site, or even the addition to the Natura 2000 Network of a new site of comparable quality to the original site. In the latter case, one could argue that overall, the project will result in a loss for this habitat type at Member State level. However, at Community level, a new site will benefit from the protection provided for in Article 6, thus contributing to the objectives of the directive.

Compensatory measures appropriate or necessary to adverse effects on Natura 2000 site can consist of:

- Restoration or enhancement in existing sites: restoring the habitat to ensure the maintenance of its conservation value and compliance with the conservation objectives of the site or improving the remaining habitat in proportion to the loss due to the plan or project on a Natura 2000 site;
- Habitat Recreation: recreating a habitat on a new or enlarged site, to be incorporated into Natura 2000;
- As described above and in association with other works, proposing a new site under the Habitats and Birds Directive.

The range of compensatory measures found in current practice within the EU in the frame of the Habitats Directive also includes:

- Species reintroduction.
- Species recovery and reinforcement, including reinforcement of prey species.
- Land purchase.
- Rights acquisition.
- Reserve creation (including strong restrictions in land use).
- Incentives for certain economic activities that sustain key ecological functions.
- Reduction of (other) threats, usually upon species, either through action on a single source or though co-ordinated action on all threat factors (E.g. resulting from space-crowded effects).

In principle, the result of implementing compensation has normally to be operational at the time when the damage is effective on the site concerned. Under certain circumstances where this can not be fully fulfilled, overcompensation would be required for the interim losses.

The option of habitat banking as compensatory measure under Article 6(4) is of very limited value due to the tight criteria mentioned in relation to the need for compensation to ensure the protection of the coherence of the network *(Section 1.4.2)*.

Nevertheless, there could be a potential use of the concept of habitat banking in a constraint regime linked to Article 6(1). For instance, where a development is foreseen it might be appropriate to consider and implement within the management plan designed for the site or integrated into other development plans, the necessary compensatory measures that would be required in the context of such development and consequently before any decision is made by the competent authorities.

1.4.4. What to include in the programme of compensation measures?

The compensatory measures under Article 6(4) must address all issues, whether technical and/or legal or financial, necessary to accomplish the objective of offsetting the negatives effects of a plan or project and preserving the overall coherence of the Natura 2000 network. The following provides an overview of the issues to include in the programme of compensatory measures.

- Tight coordination and cooperation between Natura 2000 authorities, assessment authorities and the proponent of the compensatory programme (i.e. plan or project proponent and external consultants involved).
- Clear objectives and target values according to the conservation objectives of the site.
- Analysis of the technical feasibility of the measures in relation to their conservation objectives.
- Analysis of the legal and/or financial feasibility of the measures according to the timing required.
- Explanation of the time-frame in which the achievement of the conservation objectives is expected.
- Timetable for implementation and their co-ordination with the schedule for the plan or project implementation.
- Public information and/or consultation stages.
- Specific monitoring and reporting schedules based on progress indicators according to the conservation objectives.
- The appropriate budget programme approved during the suitable period to guarantee the success of the measures.

1.5. Criteria for designing compensatory measures

1.5.1. Targeted compensation

Compensatory measures under the Habitats Directive must be established according to reference conditions that are defined after the characterisation of the biological integrity of the site likely to be lost or deteriorated, and according to the likely significant negative effects that would remain after mitigation. Biological integrity can be defined as all those factors that contribute to the maintenance of the ecosystem including structural and functional assets. In the framework of the Habitats Directive, the biological integrity of a site is linked to the conservation objectives for which the site was designated as part of the Natura 2000 network.

Targeted compensation requires that an appropriate Article 6(3) assessment has been correctly undertaken in line with the provisions mentioned in the previous chapter.

Once the biological integrity likely to be damaged and the actual extent of the damage have been identified, the measures in the compensation programme must address specifically those effects, so that the elements of integrity contributing to the overall coherence of the Natura 2000 network are preserved in the long term. Thus, these measures should be the most appropriate to the type of impact predicted and should be focused on objectives and targets clearly addressing the Natura 2000 elements affected. This requires that measures clearly refer to the structural and functional aspects of the site integrity, and the related types of habitat and species populations that are affected.

This entails that the compensatory programme must necessarily consist of ecological measures, for example in the form of habitat restoration or enhancement, population reinforcement and/or any other actions that may be suitable for the purpose. Therefore, payments to members or towards special funds, regardless of whether these are ultimately directed to nature conservation projects are not suitable under the Habitats Directive. In addition, any secondary or indirect measure that might be proposed to enhance the performance of the core measures or the outcome of the compensation scheme, must have a clear relationship to the objectives and targets of the compensatory scheme.

As an example, in designing compensation, clear objectives must be established:

- Identify the total numbers of species affected
- Identify the principle species affected and the broad proportion of the total population(s) that these occur in;
- Identify the principle function(s) of the habitats that will be adversely affected that the species depend on e.g. feeding, roosting, etc;
- Identify the likely populations of species and the habitat functions at favourable conservation status;
- Identify the measures needed to offset the damage to the habitat functions and species affected so that they are restored to a state that reflects the favourable conservation status of the area affected.

Any uncertainty over the precise nature and/or magnitude of the adverse effects should be thoroughly tested. Where appropriate, a precautionary approach should be adopted and the assessment of adverse effect based on a worse-case scenario.

1.5.2. Effective compensation

The feasibility and effectiveness of compensatory measures are critical to the administration of Article 6(4) of the Habitats Directive in agreement to the precautionary principle and good practice. In ensuring effectiveness, technical feasibility must go hand in hand with the appropriate extent, timing and location of the compensatory measures.

Compensatory measures must be feasible and operational in reinstating the ecological conditions needed to ensure the overall coherence of the Natura 2000 network (i.e. the ecological structure and functions impaired and the habitats and species involved). The estimated timescale and any maintenance action required to enhance performance should be known and/or foreseen right from the start in view of the implementation of the measures. This must be based on the best scientific knowledge available, complemented with specific investigations for the precise location where the compensatory measures will be implemented. Measures for which there is no reasonable guarantee of success should not be considered

under Article 6(4), and the likely success of the compensation scheme should influence the final approval of the plan or project in compliance with the preventive principle.

In addition, the most effective option, which allow for the greatest chances of success must be chosen when it comes deciding between different possibilities for compensation.

The programme of compensatory measures needs to include detailed monitoring during implementation to ensure effectiveness in the long term. Being in the framework of the Natura 2000 network, such monitoring should be co-ordinated with, and eventually integrated into, that foreseen under Article 11 of the Habitats Directive.

Measures showing in practice a low level of effectiveness in contributing to the objectives should be modified accordingly.

1.5.3. Technical feasibility

According to current knowledge, it is highly unlikely that the ecological structure and function as well as the related habitats and species populations can be reinstated up to the status they had before the damage by a plan or project. To overcome the intrinsic difficulties standing in the way of full success for the reinstatement of ecological conditions, compensatory measures must be designed:

- Following scientific criteria and evaluation in accordance with best scientific knowledge,

- and taking into account specific requirements of the ecological features to be reinstated (e.g. soil, humidity, exposure, genetic pool, existing threats and other conditions critical to the success of reinstatement).

The critical aspects to technical feasibility will determine the suitability of the location of compensatory measures (spatial feasibility), the appropriate timing and their required extent.

In addition, the choice of particular measures and their design must respect the existing guidance for each particular practice, habitat creation, habitat restoration, population reinforcement, species reintroduction, or any other measure considered in the compensatory programme.

1.5.4. Extent of compensation

The extent required for the compensatory measures to be effective has a direct relationship to the quantitative and qualitative aspects inherent to the elements of integrity (i.e. including structure and functionality and their role in the overall coherence of the Natura 2000 network) likely to be impaired and to the estimated effectiveness of the measures.

Consequently, compensation ratios are best set on a case-by-case basis and must be initially determined in the light of the information managed during Article 6(3) assessment and ensuring the minimum requirements to meet ecological functionality. The ratios may then be redefined according to the results observed when monitoring the effectiveness, and the final decision on the proportion of compensation must be justified.

There is wide acknowledgement that ratios should be generally well above 1:1. Thus, compensation ratios of 1:1 or below should only be considered when it is demonstrated that with such an extent, the measures will be 100% effective in reinstating structure and functionality within a short period of time (e.g. without compromising the preservation of the habitats or the populations of key species likely to be affected by the plan or project).

1.5.5. Location of compensatory measures

Compensatory measures should be located to accomplish the highest effectiveness in maintaining the overall coherence of the Natura 2000 network. This entails a set of pre-conditions that any compensatory measure should meet:

- The area selected for compensation must be within the same biogeographic region (for sites designated under the Habitats Directive) or within the same range, migration route or wintering area for bird species (i.e. sites designated under the Birds Directive) in the Member State concerned. Further on, the area should provide functions comparable to those which had justified the selection criteria of the original site, particularly regarding the adequate geographical distribution.
- The area selected for compensation must have -or must be able to develop- the specific features attached to the ecological structure and functions, and required by the habitats and species populations. This relates to qualitative aspects like the uniqueness of the assets impaired and demands the consideration of local ecological conditions.
- Compensatory measures must not jeopardize the preservation of the integrity of any other Natura 2000 site contributing to the overall coherence of the network. When carried out in existing Natura 2000 site(s), the measures must be consistent with the conservation objectives of the site(s) and must not be understood as a means to undertake the overall management required for the site(s).

In addition, there is general agreement that the local conditions necessary to reinstate the ecological assets at stake are found as close as possible to the area affected by the plan or project. Therefore, locating compensation within or nearby the Natura 2000 site concerned in a location showing suitable conditions for the measures to be successful seems the most preferred option. However, this is not always possible and it is necessary to set a range of priorities to be applied when searching locations that meet the requirements of the Habitats Directive:

1) Compensation within the Natura 2000 site provided the necessary elements to ensure ecological coherence and network functionality exist within the site.

2) Compensation outside the Natura 2000 site concerned, but within a common topographical or landscape unit, provided the same contribution to the ecological structure and/or network function is feasible. The new location can be another site designated as Natura 2000 or a non-designated location. In the latter case, the area must be designated as Natura 2000 site itself and be subject to all the requirements of the 'nature' directives.

3) Compensation outside the Natura 2000 site, in a different topographical or landscape unit. The new location can be another site designated as Natura 2000. If compensation takes place on a non-designated location, the area must be designated as Natura 2000 site itself and be subject to all the requirements of the 'nature' directives.

New designations as part of compensation measures shall be submitted to the Commission before those are implemented and before the realisation of the project but after its authorisation. The new designations should be made available to the Commission through the established channels and procedures as in the process of adoption of the SCI lists and SPA designations *(business as usual)*.

Best cooperation and coordination shall be ensured by Member States when dealing with the location of compensatory measures in the frame of transboundary projects.

1.5.6. Timing of compensation

Timing the compensatory measures demands a case-by-case approach, where the schedule adopted must ensure the continuity of the ecological processes essential for maintaining the biological structure and functions that contribute to the overall coherence of the Natura 2000 network. This requires a tight coordination between the implementation of the plan or project and the implementation of the measures, and relies on issues such as the time required for habitats to develop and/or for species populations to recover or establish in a given area. In addition, other factors and processes must also be considered:

- A site must not be irreversibly affected before compensation is in place.
- The result of compensation should be effective at the time the damage occurs on the site concerned. Under certain circumstances where this can not be fully achieved, overcompensation would be required for the interim losses.
- Time lags might only be admissible when it is ascertained that they would not compromise the objective of 'no net losses' to the overall coherence of the Natura 2000 network.
- Time lags must not be permitted, for example, if they lead to population losses for any species protected in the site under Annex II of Directive 92/43/EEC or Annex I of Directive 79/409/EEC, requiring particularly attention when it entails priority species.
- It may be possible to scale down in time compensatory measures according to whether the significant negative effects would presumably arise in the short, medium or long term.

The application of specific measures to outweigh interim losses that would occur until the conservation objectives are met may be advisable. All necessary provisions, technical, legal or financial, necessary to implement the compensatory measures must be completed before the plan or project implementation starts, so as to prevent any unforeseen delays that may hinder the effectiveness of the measures.

1.5.7. Long term implementation

Compensatory measures require that a sound legal and financial basis for long-term implementation and for their protection, monitoring and maintenance be secured in advance of impacts upon habitats and/or species occur. This could involve:

- Making effective a temporary protection, even if the SCI/SPA status is only granted later.

– Devising binding enforcement tools at the national level aimed to ensure the full implementation and effectiveness of compensation (e.g. linked to liability under EIA directive, if applicable, or to the Environmental Liability Directive when in force; subsidising plan or project approval to the robustness of the relevant provisions for implementation of compensatory measures).

– Devising the necessary legal means in case land or rights purchase is deemed essential for the effective implementation of the measures according to good practice (e.g. typified procedures for compulsory purchase on grounds of nature conservation).

– Establishing monitoring programmes for the whole life of the project, including objectives, responsible bodies and resources needs, indicators, and requirements on reporting to the Commission. This could be best performed by independent bodies specifically set up for the purpose and in close coordination and cooperation with the Natura 2000 authorities.

1.6. Who bears the cost of the compensation measures?

It appears logical that, in line with the 'polluter pays' principle, the promoter of a project bears the cost of the compensatory measures. It may include it in the total budget submitted to the public authorities in the event of co-financing. In this connection, the European funds could, for example, co-finance the compensatory measures for a transport infrastructure retained under the TEN (Trans European Network). In particular, financial assistance from the European Regional Development Fund (ERDF) is possible for compensatory measures associated to projects that are being financed with this fund and provided it is given according to the objectives, rules and procedures applicable to this fund.

A subsidy granted by a public authority for measures taken in order to compensate for damage to a Natura 2000 site can be considered as a *State Aid* (within the meaning of Art. 87 (ex 92) of the Treaty), should it be granted to an undertaking established in a Natura 2000 site, designated before or after the establishment of the undertaking. However, in the case of an undertaking acting as a contractor for a public authority to build an infrastructure, the subsidy would not be considered as a state aid as long as it is granted in exchange of works carried out.

The Member State is bound to compensatory measures as from the entry into force of Article 6. Their financing can fall within its competence.

1.7. Information to the Commission of the compensatory measures

The competent national authorities have to inform the Commission of the compensatory measures adopted. The provision in question specifies neither the form, nor the purpose of this communication. However, in order to facilitate the process the Commission services have prepared a standard format[9] for supplying information to the Commission according to the

[9] This format is presented in Annex IV of this document.

provisions of Art. 6(4). In any case, it is not the Commission's role either to suggest compensatory measures, or to validate them scientifically.

The information should enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. While the national authorities are only specifically obliged to communicate the compensatory measures adopted, the communication of certain elements relating to the studied alternative solutions and to the imperative reasons for overriding public interest which required the realisation of the plan or project can also prove necessary, insofar as these elements affected the choice of the compensatory measures.

The information about compensatory measures must enable the Commission to appreciate the manner in which the conservation objectives of the site in question are pursued in the particular case. However, it is not the Commission's role to suggest compensatory measures.

When in the planning process must the Commission be informed about compensatory measures and who is responsible for this information?

In order to allow the Commission to request additional information on the measures taken or to take actions in case it considers that the legal requirements of the directive were not correctly applied, compensatory measures should be submitted to the Commission **before** they are implemented and indeed before the realisation of the plan or project concerned but after its authorisation. It is therefore advised that compensatory measures should be submitted to the Commission as soon as they have been adopted in the planning process in order to allow the Commission, within its competence of guardian of the treaty, to assess whether the provisions of the Directive are being correctly applied.

As responsible bodies for the preservation of the overall coherence of, and for updating the information on, the Natura 2000 network, the authorities responsible for Natura 2000 in each Member State must play an important role in this process, and the information would be submitted through the national authority via the Permanent Representations of each Member State as with the process for the adoption of site lists.

1.8. What happens with sites hosting priority habitats and/or species?

The second subparagraph of Art. 6(4) provides for a special treatment whenever the plan or project concerns a site hosting priority habitats and/or species and is likely to affect these priority habitats and/or species. The realisation of plans or projects likely to adversely affect these sites could be justified only if the evoked imperative reasons of overriding public interest concern human health and public safety or overriding beneficial consequences for the environment, or if, before granting approval to the plan or project, the Commission expresses an opinion on the initiative envisaged.

In other words, damage to the sites would only be accepted as overruling the fulfilment of the objectives of the directive when the specific imperative reasons mentioned above occur or, alternatively, after the additional procedural safeguard of an independent appraisal by the Commission.
This provision raises a number of questions relating to:

- the identification of sites concerned;
- the interpretation of the concepts of human health, public safety and the primary beneficial consequences for the environment;
- the procedure for the adoption of Commission's opinion and the consequences which arise from this opinion.

1.8.1. The sites concerned

Article 6(4), second subparagraph, applies when the realisation of the plan or project is likely to affect a site hosting priority habitats and/or species. In this regard, it would be reasonable to consider that a plan or project:

a) not affecting, in any manner, a priority habitat/species; or

b) affecting a habitat/species which has not been taken into account in the selection of a site ("non-significant presence" in the Standard Data Form)

should not de facto justify that a site should be subject to this second subparagraph.

Since the Birds Directive does not rank any species as priority, compensatory measures aiming to offset effects on SPAs' bird populations would never require the Commissions' opinion.

Art. 6(4), second subparagraph may be understood as applying to all sites hosting priority habitats and/or species, when these habitats and species are affected.

1.8.2. The concepts of "human health", "public safety" and "primary beneficial consequences for the environment"

Human health, public safety and primary beneficial consequences for the environment constitute the most important imperative reasons of overriding public interest. However, like the concept of "imperative reasons of overriding public interest" these three categories are not defined expressly.

Community law refers to public health and public safety reasons as reasons which can justify the adoption of restrictive national measures to the free movement of goods, workers, services as well as to the right of establishment. In addition, the protection of persons' health is one of the fundamental objectives of the Community policy in the field of the environment. In the same view, the primary beneficial consequences for the environment constitute a category which must be included in the aforementioned fundamental objectives of the environmental policy.

Within the framework of the principle of subsidiarity, it rests with the competent national authorities to check whether such a situation occurs. Of course, any situation of this kind is likely to be examined by the Commission within the framework of its activity of control on the correct application of Community law.

As regards the concept of "public safety", it is useful to refer to the judgement of the Court of Justice of 28 February 1991 in Case C-57/89, Commission v Germany ("*Leybucht Dykes")*. That decision preceded the adoption of Directive 92/43/EEC and hence Article 6. However, the decision retains relevance, not least because the Court's approach influenced the drafting of Article 6. At issue were construction works to reinforce dykes on the North Sea at Leybucht. These works involved a reduction in the area of an SPA. As a matter of general principle, the Court stated that the grounds justifying such a reduction must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In the specific case, the Court confirmed that the danger of flooding and the protection of the coast constituted sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum.

The national authorities can authorise the realisation of the plan or project only if the proof of the existence of the afore mentioned reasons of overriding public interest is given and within the limits within which the plan or project in question proves necessary for the fulfilment of the public interest in question.

1.8.3. The adoption of Commission's opinion - its consequences

As confirmed by the Judgement of the Court of 14 September 2006 in case C-244/05, the Commission would only deliver an opinion under Article 6(4) when dealing with sites which are placed on the list of sites selected as sites of Community importance (SCI).

In the case of imperative reasons of overriding public interest other that human health, safety and environmental benefits, the prior opinion of the Commission is necessary. Article 6(4), second subparagraph, does not specify a procedure or the specific contents of such an opinion[10]. One must therefore refer once again to the economy and to the aims pursued by the provision in question. The opinion has to cover the assessment of the ecological values which are likely to be affected by the plan or project, the relevance of the invoked imperative reasons and the balance of these two opposed interests, as well as an evaluation of the compensation measures. That assessment involves both a scientific and economic appraisal as well as an examination of the necessity and proportionality of the realisation of the plan or project with regard to the invoked imperative reason.

From its nature, the opinion is not an act having binding legal effects. The national authorities can move away from it and decide to implement the plan or project, even if the opinion is adverse. In the latter case however, one can reasonably expect that the decision will address Commission's arguments and explain why its opinion has not been followed. In any case the Commission can assess whether the implementation of the plan or project is in conformity with the requirements of Community law and, if necessary, initiate the appropriate legal action. While the Directive does not include any specific deadline regarding the adoption of the Commission's opinion, Commission services will make all necessary efforts to carry out the assessments and to draw the appropriate conclusions as speedily as possible.

[10] The relevant standard format (Annex IV) covers also the request for a Commission opinion according to the provisions of Art. 6(4)2.

The Commission, in delivering its opinion, should check the balance between the ecological values affected and the invoked imperative reasons, and evaluate the compensation measures. The opinion is not binding but in case of non-conformity with Community law, legal action may be taken.

ANNEX

Form for submission of information to the European Commission according to Art. 6(4)

Member State*:* Date*:*

Information to the European Commission
according to Article 6 of the Habitats Directive
(Dir. 92/43/EEC)

Documentation sent for/ □ information/ □ opinion/

(art. 6(4).1) (art. 6(4).2)

Competent national authority*:*

Address*:*

Contact person*:*

Tel., fax, e-mail:

1. PLAN OR PROJECT

Name and code of Natura 2000 site affected*:*

This site is:

□ a SPA under the Birds directive directive

□ a proposed SCI under the Habitats

□ hosting a priority habitat/species

Summary of the plan or project having an effect on the site:

2. NEGATIVE EFFECTS

Summary of the assessment of the negative effects on the site*:*

N.B.: this summary should focus on the adverse effect expected on the habitats and species for which the site has been proposed for the Natura 2000 network, include the appropriate maps and describe the already decided mitigation measures.

3. ALTERNATIVE SOLUTIONS

Summary of alternative solutions studied by the Member State *:*

Reasons why the competent national authorities have concluded that there is absence of alternative solutions

4. IMPERATIVE REASONS

Reason to nevertheless carry out this plan or project*:*

- ☐ Imperative reasons of overriding public interest, including those of a social or economic nature (in the absence of priority habitat/species)
- ☐ human health
- ☐ public safety
- ☐ beneficial consequences of primary importance for the environment
- ☐ other imperative reasons of overriding public interest

Short description of the reason:

5. COMPENSATION MEASURES

Foreseen compensatory measures and timetable*:*

NATURA 2000

GUIDANCE DOCUMENT

The implementation of the Birds and Habitats Directives in estuaries and coastal zones

with particular attention to port development and dredging



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It has greatly benefitted from discussions with and information supplied by experts from Member States and key stakeholder groups, within the framework of the EC Estuaries and Ports Working Group.

GUIDELINES ON THE IMPLEMENTATION OF THE BIRDS AND HABITATS DIRECTIVES IN ESTUARIES AND COASTAL ZONES

with particular attention to port development and dredging



January 2011

NATURA 2000

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EXECUTIVE SUMMARY

This document provides sector specific guidance on the implementation of the Birds and Habitats Directives in estuaries and coastal zones. The guidance has benefitted from discussions held in the context of a specific working group with representatives from Member States, stakeholder organisations and environmental NGOs.

Its development followed a request of the ports and maritime services sector. Ports, especially in Western Europe, are often situated in or near estuaries. These are dynamic and highly productive ecosystems and in many cases designated Natura 2000 sites. Estuaries provide the necessary shelter and suitable conditions for maritime access to ports.

Ports fulfil a strategic role in the development and realisation of global trade and they periodically need to expand. Previously not subject to many environmental requirements, the application and interpretation of environmental legislation, including the EU nature directives, has presented new challenges to the sector which, in recent years, has sometimes resulted in delays in port development projects.

Ports play an essential role in economic development and seek legal certainty as a prerequisite for new development projects. The European Port's policy, as formulated by the European Commission, has recommended reviewing legal constraints that may hinder development projects ('fast track procedure'). The present guidance document provides a number of recommendations and elements of good practice to enhance port development and management in or near Natura 2000 sites.

Some key recommendations are:

- The design of plans or projects should always be based on mutually beneficial strategies with a view to achieving dual goals of both Natura 2000 conservation objectives and socio-economic objectives, according to the 'working with nature' concept.
- Damage prevention or avoidance measures should always be preferred to compensation measures.
- Pre-assessments to evaluate the potential for impact of a plan or project on Natura 2000 sites should always be foreseen. This is necessary in order to decide whether a plan or project is likely to have significant effects on a Natura 2000 site and whether an 'appropriate assessment' in the sense of Article 6(3) of the Habitats Directive is required.
- Thorough and timely stakeholder consultation is always recommended in order to prevent the raising of objections during the project permitting process.
- Maintenance of ports and navigational access should be dealt with in the context of integrated management plans for the entire waterway or the affected Natura 2000 site. Capital dredging operations should be designed as a part of sustainable dredging and sediment management schemes.
- In case of any remaining minor scientific uncertainty with regard to the effects of a plan or project or the related mitigation or compensatory measures, the measures should include a pre-defined and validated scheme to monitor the actual impacts and a framework to adapt the mitigation and compensation measures to the actual impacts.

Introduction

Estuaries and coastal zones are among the most productive ecosystems in the world, with both high ecological and economic values. They are of prime importance for wildlife, especially migrating and breeding birds and of major value in terms of their rich natural resources (e.g. as nursery grounds for commercially important fish). In addition, they also offer a wide variety of ecosystem services such as shoreline stabilization, nutrient regulation, carbon sequestration, detoxification of polluted waters and supply of food and energy resources (Millennium Ecosystem Assessment, 2005).

As a result they provide a wide range of economic benefits to many sectors, including fishermen, industrial complexes and amenity services such as tourism and recreation. Estuaries are also often ideal locations for ports, harbours and shipyards as they provide the necessary shelter for ships as well as access further inland along major rivers.

Estuaries and coastal zones are however also amongst the most dynamic and complex ecosystems in the world. They are made up of a wide range of different habitats, which exist in an ever-changing mosaic structure. Typical habitats that make up an estuary include sand banks, mudflats and sand flats, salt marshes and at their coastal edge sand dunes, coastal lagoons, shallow inlets and bays, reefs, islets and small islands, sandy beaches, sea cliffs.

Most of these habitat types are protected under Directive 92/43/EEC on the conservation of natural habitats and wild flora and fauna (commonly referred to as 'the Habitats Directive'). Shorebirds are dependent on estuaries and coastal zones during their migrations from breeding to wintering grounds. Furthermore, numerous bird species breed in estuarine and coastal habitats. As a result, many estuaries and coastal areas are also protected under Directive 2009/147/EC on the conservation of birds (commonly referred to as 'the Birds Directive').

Over a long history and even more so today, many of Europe’s ports are logistic hubs handling cargo from all over the world. The importance and demand for maritime transport has increased significantly in the last 30 years and is likely to continue to do so in the future. The European Commission supports this transport network through its ports policy, and through the promotion of the “Motorways of the Sea” and Short Sea Shipping.

As stated in the Communication on a European Ports Policy[1], more than 1 200 merchant ports cover some 100 000 km of European coasts. They are key points of modal transfer and are of vital interest to handle 90% of Europe's international trade. In support of the EU’s general transport policy[2], they handle 40% of the volume of tonne-kilometres carried out in intra-Community trade. The European Commission has recognized this fact through its Communication on ‘An Integrated Maritime Policy for the European Union’ which states that seaports and shipping allow Europe to benefit from the rapid growth in international trade and to play a leading role in the global economy[3].

Maritime ports, especially those connected with or situated far inland in estuaries connected with navigable inland waterways and railways, can also play a significant role in reducing CO_2 emissions, but will also have to face the effects of climate change.

[1] COM(2007) 616
[2] COM(2006) 314.
[3] (EC, 2007)

Inevitably there will be occasions where port and fairway developments and maintenance and Natura 2000 designation overlap and at times fail to coincide. The Habitats and Birds Directives do not, a priori, preclude the possibilities for further development and use of estuaries and coastal zones within or around Natura 2000 sites. Instead they lay down stepwise procedures to ensure that any such developments are done in a way that is compatible with the protection of species and habitats of European importance for which the sites have been designated. In the case of projects of overriding public interest, and in the absence of alternative solutions, the Directive provides a mechanism that can allow damaging developments, provided that compensation and adaptation ensures that the overall coherence of the Natura 2000 Network is not compromised.

The pressure on coastal zones and estuaries has encouraged a shift towards more integrated and efficient spatial planning. This, combined with early stakeholder dialogue, has proven over the years to be an effective way to promote sustainable development in line with the EU environmental legislation (including for nature protection, water and the marine environment), the European port policy and the European Integrated Maritime Policy.

Purpose of this document

The European Commission has already published several guidance documents to support Member States in implementing the Birds and Habitats directives in the protection of Natura 2000 (see annex 1); this guidance also helps citizens and stakeholders in better understanding key provisions of the Directives. However, there is a need for further clarifications, explanations and even prospective views on the application of the EU nature legislation to port development and the management of estuaries and coastal zones, especially in light of their importance as access-routes for seagoing ships.

The aim of the present guidance document is to explain the protection regime, defined under Article 6 of the Habitats Directive that applies to Natura 2000 sites in the specific context of estuaries and coastal zones. The primary focus is on clarifying, explaining and elaborating on the implementation of EU nature legislation for Natura 2000 sites located in estuaries and overlapping with, fairway channels and coastal zones, with particular attention to port-related activities, including dredging and industry (e.g. shipyards).

Other environmental legislation such as the Water Framework Directive (2000/60/EC), the Marine Strategy Framework Directive (2008/56), the directive 2001/42/EC on strategic environmental assessments (SEA) or the directive 85/337/EEC on environmental impact assessments are beyond the scope of this document and therefore not addressed in detail in this document. Aspects related to urbanisation, agriculture or other developments in the same areas or related to pressures resulting from inland waterborne transport are not considered in this work, but these activities will also need to be considered in management plans for estuarine Natura 2000 sites and in integrated coastal zone management as well as when assessing cumulative effects of different activities.

The present guidelines have benefited from discussions within a specific working group on estuaries, coastal zones and ports established by the European Commission (DG ENV and DG TREN). This group included stakeholders from different sectors and met six times during 2007-2009. In addition to the guidelines, a supporting technical document with technical and scientific background information has been prepared.

The Technical Supporting Document includes general information on the study approach, the literature used and the results of the exchange of information between the Working Group and the consultancy firm that was in charge of the overall coordination. The Technical Supporting Document can be downloaded from the public Circa Platform: http://circa.europa.eu/Public/irc/env/estuary/home.

The present guidelines are intended to be faithful to the text of the relevant Directives and the wider principles underpinning EU law on the environment and port-related activities. They are not legislative in character, they do not provide any new rules but give further clarification, building on existing guidelines. The guidelines reflect the views of the Commission services on the implementation of the directives in estuaries and coastal zones.

They are not of a binding nature. It should be stressed that any interpretation of EU legislation rests exclusively with the EU Court of Justice. The guidelines are intended to respect the existing case law and may need to be adapted in light of any emerging new jurisprudence of the Court.

The present guidelines have the ambition to reconcile the needs for port development and for environmental protection. The target audiences and users of these guidelines are local, regional and national or federal competent authorities, port and waterway authorities, operators, industries, dredging companies and associations, maritime service industry, Environmental NGOs, Conservation agencies and Natura2000 site managers.

1. POLICY BACKGROUND

1.1. Estuaries, coastal zones and the EU Nature legislation,

In response to the rapid global decline in biodiversity, the European Union has set itself the goal, at the European Summit in Gothenburg in 2001, "to halt the decline of biodiversity in the EU by 2010"[4] and to "restore habitats and natural systems"[5]. This commitment is now firmly embedded in all aspects of EU policy. 'Nature and biodiversity' is one of four priority areas for action under the 6th Environment Action Programme (6th EAP)[6], which sets out the framework for environmental policy-making in the EU for the period 2002-2012. The 6th EAP also advocates, in accordance with the Treaty, the full integration of environmental protection requirements, including those related to biodiversity conservation, into all other EU policies and actions.

Together, the "Birds" and "Habitats" Directives are the cornerstones of EU biodiversity policy. They enable EU Member States to work together, within the same strong legislative framework, to protect Europe's most valuable species and habitats across their entire natural range within the EU, irrespective of political or administrative boundaries.

Both directives require Member States to designate specific terrestrial and marine sites, which together constitute the Natura 2000 network. This network consists of Special Protected Areas (SPAs) -protecting bird species and Special Areas of Conservation (SACs) - protecting habitats and other species of EU conservation concern. The aim of the Natura 2000 network is to assure the long-term survival of Europe's most threatened species and habitats. Other provisions of the directives include a strict system of species protection, as well as monitoring and reporting schemes.

Article 6 of the Habitats Directive plays a crucial role in the management and sustainable use of the sites that make up the Natura 2000 network. In the spirit of integration, it provides a series of procedural safeguards to ensure that economic development goes hand in hand with nature conservation. It is the responsibility of the Member States to transpose the directives into their respective national legislation and to put in place appropriate mechanisms to implement the provisions in practice.

Article 6 of the Habitats Directive includes three types of measures:

1. Positive conservation measures for the Special Areas of Conservation (SACs) as foreseen by article 6.1 involving e.g. management plans and statutory, administrative or contractual measures[7],
2. Preventive measures for all sites as foreseen under article 6.2 to avoid the deterioration of natural habitats (as well as significant disturbance of species) and under article 6.3, to assess the effects of new plans and projects,
3. Procedural safeguards, including a derogation and compensation regime, under article 6.4 for authorising plans or project that are likely to have adverse effects on Natura 2000 sites.

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[4] Presidency Conclusions, Göteborg European Council 15 and 16 June 2001
[5] COM (2001) 264 final
[6] Decision No 1600/2002/EC, OJ L 242, 10.9.2002, p.1
[7] For SPAs, obligations of article 4.1 & 4.2 of the birds directive will apply and there are considered as positive measures also.

Article 6 of the "Habitats" Directive 92/43/EEC

1. *For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.*

2. *Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.*

3. *Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives....competent authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site....*

4. *If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected....where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety....*

Coastal and estuarine habitats protected under the Habitats Directive cover a total area of more than 45,000 km² of the EU territory (see Table 1, only the marine and intertidal part, excluding dune systems or other related fresh wetlands).

These protected habitats also provide resting areas for birds and seals, spawning areas for fishes, feeding areas for mammals as well as specific plant habitats. Estuarine and coastal ecosystems can also include other protected habitats of Community interest, such as Grey Dunes (habitat code 2130).

Table 1*: Area of coastal and estuarine habitats protected under EU Nature legislation (according to the Natura 2000 Database – November 2009)*

Coastal and estuarine Natura 2000 habitats of relevance to the present document	**Total area in the EU-27 territory (2009)**
Estuaries – habitat code: 1130 (306 sites)	643.704,44 ha
Coastal lagoons*– habitat code: 1150 (644 sites)	503.263,71 ha
Large shallow inlets and bays – habitat code: 1160 (373 sites)	1.250.743,52 ha
Sandbank which are slightly covered by sea water all the time – habitat code: 1110 (517 sites)	2.436.613,35 ha
Mudflats and sand flats not covered by seawater at low tide – habitat code 1140 (422 sites)	809.204,53 ha
Total	5.643.529,55 ha

The following EU environmental directives on environmental assessments are also directly relevant to development plans and projects in estuaries and coastal zones (see chapter 3.3.3):

- Directive 2001/42/EC on the evaluation of the effects of certain plans and programmes on the environment (commonly referred to as the '**SEA' Directive**)[8] The purpose of the SEA Directive 2001/42/EC is to ensure that the environmental consequences of ***certain plans and programmes*** are identified, assessed and taken into account during their preparation and before their adoption.

[8] OJ L 197, 21.7.2001, p. 30–37 – see http://ec.europa.eu/environment/eia/home.htm

- Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended in 1997 (97/11/EC), 2003 (2003/35/EC) and 2009 (2009/31/EC) – (commonly referred to as the '**EIA' Directive**[9].) While the SEA process operates at the level of public plans and programmes, Environmental Impact Assessments (EIA) operate at the level of ***individual public and private projects***.

Estuaries and coastal water bodies are also of interest under the **Water Framework Directive 2000/60/EC** (WFD). The WFD establishes a framework for the protection of all surface waters (rivers, lakes, transitional and coastal) and groundwater at EU level and aims to achieve a good ecological status (or a good ecological potential for heavily modified water bodies) and a good chemical status by 2015.

Estuaries and coastal waters are identified as transitional or coastal water bodies. According to the WFD their deterioration should be prevented and their aquatic ecosystem status protected and enhanced. There is frequently a geographical overlap between Natura 2000 sites and WFD water bodies in estuarine and coastal ecosystems. Although the principal aim of the WFD and the Nature directives is to protect ecosystems, their objectives, measures and tools are not entirely complementary. Attention should be given to the synergies between the nature Directives and the WFD where they both apply.

Under the Water Framework Directive, a Common Implementation Strategy (CIS) was developed in order to address the challenges in a co-operative and coordinated way and a series of guidance documents have been produced (see annex 1). It is important to remember that Article 4(2) of the WFD states that if the conservation objectives of the Habitats Directive are more stringent than the requirements of the WFD then those of the former will apply. The same is also true of the converse. Detailed information and guidelines on the implementation of the WFD can be found on the following website: http://ec.europa.eu/environment/water/water-framework/index_en.html

The Marine Strategy Framework Directive (MSFD, 2008/56/EC) provides a more comprehensive view and deals also with ecosystem services in marine areas. It establishes a framework for the protection and restoration of marine ecosystems. According to this directive, Member States must take the necessary measures to achieve or maintain a good environmental status (GES) in the marine environment by the year 2020. The geographical scope of the MSFD overlaps with the WFD in coastal waters. The MSFD environmental status only applies in the latter insofar as particular aspects of the environmental status of the marine environment are not already addressed through that Directive (e.g. litter, noise, cetaceans). The MSFD, however, does not apply to transitional waters such as estuaries.

The two more recent directives complement the nature directives by putting increased emphasis on the role of ecosystems. As mentioned above, estuaries are ecosystems with very dynamic characteristics: they are subject to daily and seasonal changes as well as hydro-morphological evolution. Their biodiversity parameters and typical species will also evolve over time. Although concern for biodiversity is a common denominator, it is not difficult to imagine that, while habitats change in response to morphological evolution, some habitats may even disappear or change significantly. Especially in estuaries it is important to recognize the dynamic nature of this environment.

[9] OJ L 156, 25.6.2003, p. 17, OJ L 140, 5.6.2009, p. 114 – see http://ec.europa.eu/environment/eia/home.htm

1.2. The Integrated Maritime Policy and the European Ports Policy

The economic importance of the European coastline was underlined in the Commission's Communication on an Integrated Maritime Policy[10]; Maritime regions account for some 40% of the EU's GDP and population. Shipbuilding and shipping, ports and fisheries remain key maritime activities, but offshore energy and coastal and maritime tourism generate massive revenues. According to the European Maritime Policy, the capacity development of ports and coastal fairway channels must mirror the growth of Europe's domestic and international trade and occur in a way that is compatible with related EU policy objectives, in particular its environmental and competitiveness goals.

The Communication on a European Ports Policy[11] aims at a performant European port system able to cope with the future challenges of European transport needs. One of the objectives of the action plan under this Communication is to increase the carrying capacity of ports in order to allow a further increase of maritime and fluvial transport. There are more than 1200 merchant ports in Europe, comprising key points of modal transfer and of vital economic interest as they handle 90% of Europe's international trade. Even if these figures will fluctuate due to economic ups and downs, the long term trends remain one of continued growth; at the same time waterborne transport features low CO_2 emission rates, compared to other transport modes (mainly road but also railways).

During the consultation phase, prior to the adoption of the Communication on a European Ports Policy, the issue of environmental concerns in ports emerged. Port stakeholders expressed fears about legal uncertainty in relation to the implications for their activities arising from the Birds and Habitats Directives. On the other hand: in order to generate a license for growth, ports are increasingly embracing a more sustainable development approach.

Many ports and navigation channels are located in estuaries and coastal zones that host environmentally sensitive areas with high ecological value. The need to designate Natura 2000 sites in estuaries and coastal zones and the need to increase the carrying capacity of ports in order to meet the European transport needs is proving to be a challenge to many Member States; this has resulted in local disputes and several EU Court of Justice decisions and jurisprudence. However, in response to this challenge some Member States have already developed approaches to facilitate port development in line with the requirements of the Habitats Directive.

In its Communication on a European Ports Policy the Commission recognized the challenges in combining port infrastructures and environmental Directives. Consequently, the Commission services have responded to the request by port industry to provide guidelines on the interpretation of both nature Directives. This constitutes the policy background to the present guidelines, which have the ambition to reconcile the need for port development with EU environmental protection standards.

[10] European Commission, (2007), An Integrated Maritime Policy for the European Union, COM (2007) 575
[11] European Commission, (2007), Communication on European Ports Policy, COM (2007) 616, 18.10.2007

2. ISSUES OF CONCERN

2.1. Pressures on estuaries and coastal zones

Human activities in coastal and estuarine areas include navigation, dredging, aggregate and sand extraction, fisheries, aquaculture, industry (including oil and gas extraction, wind farms development), drainage of sewage and waste water, water extraction (e.g. for power stations and industry), safety (including sea defence and flood protection), recreation including bird watching and hunting, urbanisation, cover for cables, pipes and tunnels, military activities and research activities.

All these activities taken individually or in combination can potentially generate significant effects on the nature conservation objectives of estuaries and coastal zones. Impacts directly related to waterways and port related activities are illustrated below.

1. Dredging operations

Capital and maintenance dredging and the relocation of dredged material affects the hydrodynamic regime and geomorphology of the estuary: Natural sedimentation takes place in estuaries depending on the hydraulic forces in the basin and the amount of sediment available. Sediment is either supplied from erosion in the catchment area or from the marine environment or both. Beyond a certain point, a sort of balance is reached and the estuary begins to release sediment, rather than retain it. Any factor influencing the hydrodynamic regime and/or the geomorphology may modify the balance and the flux of sediments and lead to modifications in the localisation of habitats composing estuarine and coastal ecosystems (e.g. mudflats or sandbanks).

Capital dredging needs special attention because it may reverse the trend of estuarine infilling and affect the equilibrium state of the estuary. This occurs because deepening an estuary may permit a salt wedge intrusion to travel further upstream, increase shoreline wave action, change tidal range and tidal currents, and suspended sediment load and sedimentation. Additionally, the hydrodynamic changes and their effect on sediment erosion, deposition and transport may cause secondary geomorphological changes away from the dredging location, including the potential erosion of mudflats and salt marshes.

Maintenance dredging is the periodic or continuous activity necessary to maintain the navigable depth in an estuary or on the open coast. The effects of maintenance and capital dredging on a site can be similar. The critical difference is that whilst capital dredging imposes the major change, maintenance dredging prevents the system from returning to its original state, albeit in smaller stages. This means that there will be ongoing issues that will need to be addressed if habitats and species are to be maintained at favourable conservation status. Some of these impacts can be rectified by modifying dredging practices and by using sediment feeding techniques, but they are not universally applicable.

There are also circumstances where dredged materials can be put to beneficial uses such as increasing sediment supplies to beaches, although care needs to be taken to avoid smothering of important sub-tidal communities. This illustrates the need for careful assessment of hydrodynamic effects in estuaries and coastal waters. Careful design of dredging and relocation of dredged material is an integral part of sediment management schemes.

2. Maintenance activities

Maintenance activities other than maintenance dredging, such as the maintenance or replacement or installation of navigation marks, piles, lights, vessel traffic schemes and moorings, the extension of slipways and jetties and the maintenance of soft sea walls, flood defences and wave screens may have adverse effects on conservation objectives in estuaries and coastal zones.

3. Commercial shipping operations

Commercial shipping operations within ports can be divided into two broad categories, vessel operation and movements and cargo operations. The movement of ships through estuarine and coastal waters may potentially affect the characteristics of a habitat both through the generation of waves and propeller-induced turbidity in the water column. The effects of vessel movement can either be harmful, e.g. intertidal erosion of estuaries and/or putting sediments back into suspension, or beneficial, e.g. aeration of the water column.

Noise (above and under water) associated with shipping has the potential to cause disturbance to protected marine animals. The anchoring of vessels (outside an anchoring area) may disturb or damage animals and plants on the seabed (e.g. shellfish beds, soft corals, sea grasses). Ship emissions into the air, waste handling and ballast water treatment can have an impact on nearby coastal habitats.

Cargo handling of dry bulk cargos may cause dust emissions and air pollution (nitrogen, sulphur). Handling of liquid bulks may require discharge through pipelines, which provides a potential risk for leaks, emissions and spillages. Accidental release of cargoes into the marine environment may have important environmental effects. The spread of invasive alien species imported via ballast water or otherwise by vessels can also have a negative influence on protected areas. Last but not least vessel movement poses a risk of disasters (oil or cargo spilling).

Operational aspects of commercial shipping (waste handling, ballast water management, air pollution…) are subject to national or international rules and regulations (such as the ballast water treaty of the International Maritime Organization and MARPOL protocols annex 1-6). In addition there is a voluntary port authorities initiative to promote “Green shipping” by developing an Environmental index. This index is focusing mainly on air pollution coming from sea going vessels.

4. Port reclamation and land use

The port itself may have impacts on Natura2000 because it leads to the building of new infrastructures (terminals, rail, pipeline, roads, new industries and large areas for logistic companies) that may affect nearby Natura 2000 sites. In certain areas the available space is insufficient and ports may need to reclaim land from the sea. Land reclamation in Natura 2000, be it on land or on sea, will in most cases, require nature compensation schemes.

5. Industrial complexes

Port areas often include industrial complexes such as refineries, energy plants, dry and wet bulk hubs and container terminals. The cumulative effects of industrial operations, shipping and traffic can lead to adverse ecological effects on nearby Natura 2000 sites. Environmental issues such air quality, noise and waste are regulated by specific legislation and policies which is not, however, covered by the present guidelines. The use of the best available

technologies is often mandatory and can as such limit environmental pressure on protected sites as well.

2.2 Main concerns of the port sector with regard to the implementation of the Birds- and Habitats directives

One of the key issues for port sector development is the capability to plan new projects well ahead and securely. Delays in the planned dates for terminal extension have been experienced in various European ports during recent years. The European Sea Ports Organisation (ESPO) attributes these delays to a number of different causes, ranging from internal politics within the port, environmental objections, investigations into market share implications, funding difficulties, court cases, etc.(ESPO, 2007).

ESPO has already published in 2007 its Code of Practice on the Birds and Habitats Directives (ESPO, 2007), which contains a number of recommendations to port authorities faced with the legal implications of the provisions of the Birds and Habitats Directives in their wider port development areas. The last chapter of the Code of Practice presents a list of topics for which further guidance from the European Commission was invited.

The following are some concerns presented from a port authority point of view when it comes to the development and operation of ports near or in a protected estuarine or coastal zone. With the exception of the issue of cost sharing among relevant stakeholders, most of these concerns are being addressed in the present guidance document.

1. How could a proactive approach and integral planning lead to more legal certainty?
2. How can early agreements between all stakeholders be reached through wide public consultation and involvement of interested parties in project design?
3. How can costs be shared amongst all relevant stakeholders who can benefit from integrating socio-economic development objectives with nature conservation objectives in Natura 2000 areas?
4. How can compensation requirements be avoided through the systematic application of efficient mitigation measures, in a way that negative effects can be avoided beforehand?
5. How can the cooperation between project developers, environmental agencies and NGOs be enhanced with a view to promoting flexible approaches and mutual benefit situations?

Another important issue for port and waterway operators is how to handle maintenance activities such as dredging within or adjacent to Natura 2000 sites. Whereas extensive guidelines in relation to Article 6 of the Habitats Directive already exist for new plans and projects, ongoing activities have so far been less covered. Chapter 3.3.4 will therefore provide further guidance on this issue.

For port developers it is also important to know how much detail is actually necessary to sufficiently assess the potential effects of new plans or projects in order to comply with the requirements of the Birds and Habitats directives. Guidance on how to deal with uncertainties is an important issue in this regard. ESPO produced a checklist that is useful as a self guidance document (se Annex 3).

2.3 Climate change: A particular issue of concern for estuaries and coastal zones

Coastal zones and floodplains are among the most vulnerable areas to climate change as they are vulnerable to sea level rise combined with increased risks of storms, intense rainfall and flash floods leading to widespread damage to built-up areas and infrastructure.

Flood protection measures such as dyke construction, land reclamation and other types of sea defences may lead to the "coastal squeeze" phenomenon whereby less and less space is available for natural coastal processes to accommodate eroding forces or adjust to changes such as sea-level rise. "Coastal squeeze" occurs especially in low-lying and inter-tidal areas, which would naturally adjust to the changes in sea level, storms and tides, but cannot do so due to the construction of inflexible barriers such as roads, dykes, urbanisation, port and industrial infrastructure.

Innovative measures to prevent coastal squeeze should be taken in estuaries and coastal zones. Natural squeeze with similar effects occurs where the coast abuts rising ground and there is nowhere for eroded habitats to be displaced onto because the land is rising.

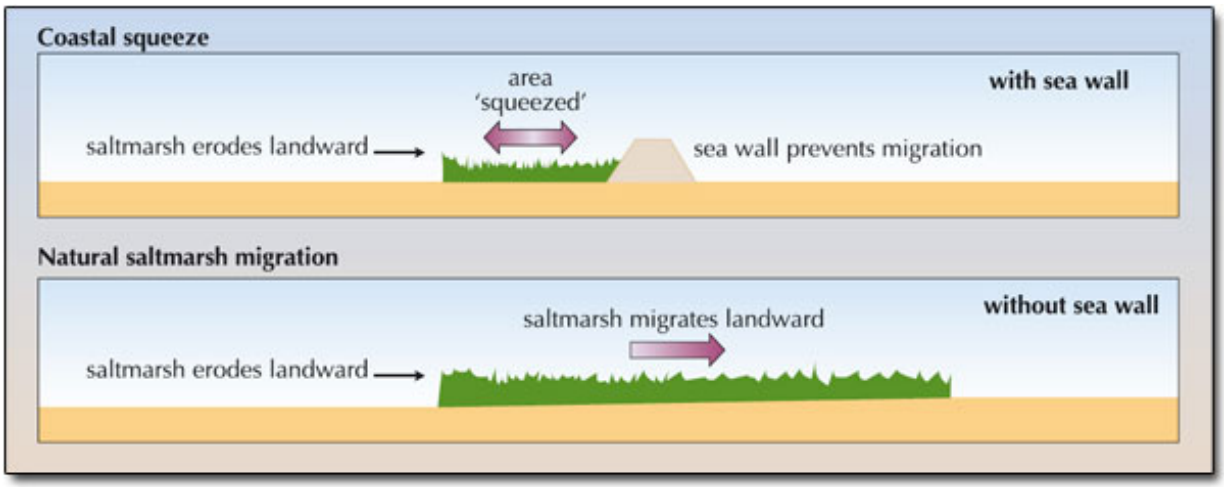


Figure 1: Coastal Squeeze is created when habitat migration (in response to sea-level rise) is prevented by tidal/flood defences (Environment Agency, UK, 2005).

Climate change will heavily affect Europe's natural environment and nearly all sections of society and the economy. Sea-level rise will reduce the sheltering effect of breakwaters and quay walls, but also periods of decreased precipitation in the river catchment areas can lead to lower rates of freshwater run-off and higher sedimentation rates within the estuary. As a result low river water levels during dry summer periods can hamper inner shipping to inland ports as well.

Sea level rise induced by climate change obviously leads to changing tidal characteristics like higher tidal amplitude and resulting current velocities. This may lead to a further increase of tidal pumping, an effect that can further reduce valuable shallow water areas and cause unwanted sedimentation even leading to a loss of biodiversity and last but not least increase the need for dredging. But the main problem with sea level rise is that there may not be sufficient sediment to allow mudflats and sandflats to keep pace with sea level rise. In such cases this is likely to lead to an increase in sub-tidal habitats. There may be a problem in a very small number of European ports from sub-tidal sedimentation but there is a greater problem with possible sediment export and increased erosion because of insufficient accommodation space to allow rollover to take place.

3. GUIDELINES

The present guidelines are intended to provide national competent authorities, port and waterway authorities and operators as well as environmental NGOs with a practical set of recommendations on the implementation of the Birds and Habitats Directives in estuaries and coastal zones with special attention to port development and dredging operations. The following main aspects have been covered: Conservation objectives in dynamic environments, integrated planning, new developments and adaptive strategies. The application of these guidelines should lead to more efficient planning and development approaches and support "fast-track procedures" for port expansion, according to the Communication on strategic goals and recommendations for the EU's maritime transport policy until 2018, COM (2009) 8.

Practice has shown that early cooperation among interested and affected parties is often a prerequisite for successful planning and elimination of delays. Estuaries and coastal zones are very complex and dynamic environments that attract interest from a wide range of sectors. They generally have an exceptionally rich nature conservation and socio-economic interest. This makes the planning of development projects a complex process but one that can nevertheless be carried out in a balanced, cost-effective, timely and integrated manner. A key objective is, provided all parties are aware of the obligations imposed on them under law, the basic understanding of how estuaries function as ecosystems.

3.1. Conservation objectives in dynamic environments

3.1.1. Understanding and managing estuaries and coastal zones as complex and dynamic ecosystems

Before setting conservation objectives in dynamic environments such as estuaries and coastal zones, it is important to understand how such complex ecosystems function, how they evolve "morphologically" and how they may be influenced by anthropological pressures and climate change. The balance between the different components (physical, chemical, biological and hydro morphological) of the estuarine and coastal ecosystems is very complex and can be easily affected by human activities such as port related activities, agriculture or flood alleviation measures. Both ecological and economic values of such ecosystems will have to be maintained in order to satisfy societal needs.

An Ecosystem approach, as outlined in the Marine Strategy Framework Directive[12], is well adapted to the management of complex systems such as estuaries and coastal zones. The ecosystem approach considers the ecosystem as an ecological entity with typical structure, processes and functions that interact with the surrounding environment. The ecosystem approach brings the analysis to a higher spatial level than just the habitats/ water body approach. Climate change will have potential impacts on the biodiversity and hydromorphology of estuarine and coastal areas, as well as on human activities such as port development and operation.

[12] 2008/56/EC (Official Journal of the EU of 25.6.2008): General provisions, article 1.3: ecosystem-based approach to the management of human activities, ensuring that the collective pressure of such activities is kept within levels compatible with the achievement of conservation objectives, good ecological and good environmental status, and that the capacity of estuarine, coastal and marine ecosystems to respond to human-induces changes is not compromised, while enabling the sustainable use of marine goods and (ecosystem) services by present and future generations.

Guidelines for planning and decision-making based on ecosystem knowledge

- The physical processes and morphological evolution of the specific estuaries and coastal zones should be investigated in detail. A best available and sound scientific knowledge on these elements should be established by the competent authorities as a basis for the establishment of nature conservation objectives for such ecosystems.
- Before setting conservation objectives in estuaries and coastal zones designated as Natura 2000 sites, the presence, geographic distribution and actual conservation status of all habitats and species protected under the nature directives, as well as the potential threats to which those elements are exposed, should be established in detail.
- Integrated management plans for estuaries should be established and implemented as an important instrument to conserve and protect critical processes, areas and species whilst providing space for sustainable economic development. Where possible these management plans should be part of the overall river basin management plan.
- Nature conservation objectives and socio-economic development objectives should be considered together for the establishment of integrated management plans for Natura 2000 sites. An ecosystem-approach should be applied which enables the sustainable use of goods and services that fully respects the site's conservation objectives.
- When an estuary or a coastal zone evolves, the presence or absence of species and habitats will also evolve. Therefore, the conservation objectives and measures for Natura 2000 sites should take into account the system-specific dynamics and evolutionary trends. There is also a need to take account of the difference between natural trends and those driven by human influences, namely coastal squeeze and morphological changes imposed by channel deepening.
- Where uncertainties or lack of knowledge on physical, morphological or biological processes still exist, these should be minimized as far as possible by additional research; where uncertainty remains adaptive monitoring programmes should be foreseen. New evidence and scientific information should be fed back into the management plan and where necessary lead to an appropriate adaptation of the management measures and monitoring schemes.
- Possible adaptation measures to climate change should also be considered when developing conservation objectives. In particular, regional sediment unbalance should be addressed. Shortage of sediment may lead to further erosion, e.g. from marshes, Wadden Sea areas (1110, 1130, and 1140), sandbanks, beaches and dunes.
- Proactive and strategic approaches to coastal management should be developed, giving priority to increasing coastal safety and ecosystem resilience and to maintaining a good sediment balance in the coastal and estuarine systems.
- Where possible, nature areas should be expanded proactively rather than reacting to catastrophic or climate change impacts. Dispersal corridors for species should be foreseen as an important adaptation tool.
- Where changes in sedimentation rates lead to loss of important habitats such as shallow waters, adapted sediment management schemes should be considered as an instrument to achieving conservation objectives.

3.1.2. Protecting habitats and species of Community interest

On the North-East Atlantic coast, estuaries are subject to the tide. River estuaries are coastal inlets where, unlike 'large shallow inlets and bays' there is generally a substantial freshwater influence. The mixing of fresh water and seawater and the reduced current flows in the shelter of the estuary lead to deposition of fine sediments, often forming extensive intertidal sand and mud flats. Estuarine ecosystems are characterized by subtidal and intertidal habitats (slikke) including salt marshes (schorre). Baltic, Mediterranean and Black sea river mouths are considered as being estuary subtypes with brackish water and nearly no tide.

Estuaries and coastal zones are dynamic systems consisting at the same time of several habitat types and habitats of species. Sand banks (1110[13]), sand flats and mudflats (1140), reefs (1170) and salt marshes (1310 to 1330) may also be a component part of habitat 1130 Estuaries. They also include corridors for migratory species (as fishes) and resting areas for many birds. Estuaries and coastal zones are sometimes related to coastal lagoons (1150*) or to large shallow inlets and bays (1160).

Channels and/or shipping lanes, where present, form an integral part of the habitat type 'Estuaries' in all geographical conditions; they play a role in the hydrological functioning of estuaries and nearby coastal zones, including the circulation of water and the deposition of sediments.

An estuary is generally to be considered as a complex of different habitats. Other adjacent coastal areas must be considered when setting conservation objectives for estuaries or coastal zones. For the definition of habitats, further guidance is provided by the Interpretation Manual of European Union Habitats. The manual was revised in 2007 for some habitats (e.g. marine habitats 1110, 1170 and 1180). Some national guidance documents also exist. However, for the habitat-type estuaries-1130, different definitions/interpretation exist, depending on the Member States.

Several key parameters determine the biological functioning within estuaries and coastal zones. The presence or absence of species (angiosperms, benthic invertebrate fauna, fish fauna, birds and mammals…) depend on the system's behaviour and its ecological food web. They are influenced by physical parameters such as turbidity and salinity. Significant changes in the physical elements of estuaries and coastal zones, such as port and waterway development projects, can possibly affect the survival of specific species in the food chain.

Regarding specific aquatic habitats targeted by the Habitats Directive, the chemical, biological and hydromorphological elements covered by good ecological status according to the Water Framework Directive (WFD) already contribute towards the achievement of the objectives of the nature directives. Some of the typical species of Annex 1 habitats are used as indicators for the assessment of ecological status under the WFD (angiosperms, benthic fauna, fish).

The conservation status of species and habitats protected under the nature directives may not entirely rely on the good ecological quality of water bodies as defined under the WFD, even if this is certainly a key contribution. The local conservation status of species may rely on other specific elements that have to be defined on a case by case basis.

[13] Habitat code according to the Habitats Directive

Additional measures to those foreseen by the WFD but possibly required under the birds or habitats directive could be for example: quiet resting areas for seals or feeding zones on intertidal habitats for otter or for birds at low tide or even the creation of suitable nesting sites for birds. Main challenge should be to look for an approach generating mutual benefits and to harmonize goals, objectives, and measures from both WFD and Natura2000 at an early stage.

Guidelines on the designation Natura 2000 sites and integration with the WFD

- An estuary or coastal zone forms an ecological unit with the surrounding terrestrial and subtidal coastal habitat types. In terms of nature conservation, these different habitat types should not be treated separately, and this reality should be taken into account when defining the site boundaries.
- Navigation channels and/or shipping lanes remain an integral part of designated Natura 2000 sites and should be covered by the management plans.
- Member States and local authorities should coordinate the setting of conservation objectives and the implementation and monitoring of measures under the Nature and Water Framework Directives. Where possible integrated WFD and Natura 2000 management plans should be established.

3.1.3. Setting conservation objectives for the estuarine and coastal habitats

The development of conservation objectives for estuaries and coastal areas is a real challenge as these areas are very complex and dynamic ecosystems. The final responsibility for developing appropriate conservation objectives, priorities and instruments that are adapted to national, regional and local contexts always lies with the Member States.

The following questions may arise in this context:
- How are conservation objectives set at national/ local level?
- How can Natura 2000 management plans follow an ecosystem approach and yet assist in quantifying conservation objectives and establishing conservation measures for habitats and species?
- How can socio-economic objectives be integrated within the Natura 2000 conservation objectives and management plans?

Conservation objectives and conservation measures have to be established both at the national and at the site level. According to Article 2.1 of the Habitats Directive, the aim of the Directive is to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the entire "European territory of the Member States to which the Treaty applies".

According to Article 4.4 of the Habitats Directive, the Member States must designate the sites of Community importance as special areas of conservation, "establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed."

According to Article 6.1., Member States must establish conservation measures for each particular special area of conservation. Specific site level conservation objectives take into account the priorities established according to Article 4.4. They will help to determine specific site-related conservation measures.

Conservation objectives at Member state level and site level have a complementary nature because Natura 2000 is a network where each site will have a specific function in the overall coherence of the system. It means that conservation objectives at site level will also contribute to achieving conservation objectives at the national level.

When determining the specific conservation measures at the site level, Article 2.3 of the Habitats Directive allows "*to take account of economic, social and cultural requirements and regional and local characteristics*". This consideration cannot , however, jeopardize the overall objective of the Natura 2000 network which is *'to enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range*". All the sites will have a specific contribution to this objective, but the contributions of all sites are not necessarily equivalent.

Three kinds of obligations can be described for the SACs: proactive conservation measures as foreseen by article 6.1, preventive measures as foreseen by article 6.2 to avoid the deterioration of natural habitats and specific measures for assessing and authorising new plans and projects as foreseen by article 6.3 & 6.4. The conservation objectives for a specific site have to consider all these obligations. The special conservation measures under Article 4 of Birds Directive require equivalent measures to Article 6(1) Habitats Directive for Special Protection Areas. The provisions under Article 6.2, 6.3 and 6.4 also apply to Special Protection Areas under the Birds Directive.

Guidelines for setting conservation objectives

- Once a site of Community importance has been adopted in accordance with the procedure laid down in Article 4(2) of the Habitats Directive, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed (Article 4.4 of the Habitats Directive).
- When considering conservation objectives, the national competent authorities should consider the dynamic nature of estuaries and coastal waters and the related natural range of fluctuations of protected species and habitats types.
- Consideration of conservation objectives should have full regard to the morphological, chemical and biological processes. The ecological functions of estuaries und coastal waters should be recognised, such as hydrological functions, function as spawning area, nursery or seasonal habitats for migratory species.
- Conservation objectives and measures for a Natura 2000 site should be based on the assessment of the local conservation status of protected habitats and species, the relative importance of the site for the coherence of Natura 2000 and for the maintenance or restoration, at a favourable conservation status of such habitats and species. They should also reflect the threats of degradation or destruction to which the site is exposed. The effects of a plan or project on the integrity of the site must be assessed (art. 6.3) in the light of the site's conservation objectives.
- The conservation status at the date of designation of the site should be used as a reference value for evaluating its deterioration (art. 6.2). In this context, gains made as a result of restorative measures taken or other improvements e.g. bird population increases, due to pressure elsewhere or response to climate change, as well as

losses caused by natural developments or climate change also need consideration. The site's Standard Data Form (SDF) remains an important reference document with this regard.

- Port and waterway authorities should be consulted in the early processes of the development and implementation of conservation measures for those Natura 2000 sites situated near ports or connected with navigational access. When establishing conservation measures for a particular site, economic, social and cultural requirements and regional and local characteristics such as the actual situation in ports and the expected future economic developments should be taken into account while not jeopardizing the contribution of the respective site to achieving the overall objective of the Natura 2000 network and the coherence of the Natura 2000 network.
- Conservation objectives should not be static; on the contrary, they need to be adapted to the actual evolution of the conservation status of species and habitats and to the evolution of other ecological factors in a complex and dynamic environment.
- Monitoring schemes should be established to monitor short and long term evolution, such as morphological dynamics and sediment circulation/ re-distribution. On the basis of measured trends the conservation objectives and management measures can be revisited where and when necessary (applying the principles of adaptive management).

3.2. Integrated planning

3.2.1. Management plans

Management plans are recommended for Natura 2000 sites but not mandatory under the Habitats Directive. They appear to be an appropriate solution to reflect transparent conservation objectives and develop measures to preserve or enhance the natural values in line with the system's processes. A management plan creates opportunities to reconcile sustainable economic development, safety issues, accessibility with nature conservation objectives. It offers the possibility to integrate recurring and routine maintenance activities with conservation objectives.

Management plans also provide an appropriate tool for reconciling recurring and routine activities, such as maintenance dredging, with environmental protection and for engaging port authorities and other stakeholders in the management of Natura 2000 sites.

If maintenance activities are directly connected with the management of the site and as such integrated into a Natura 2000 management plan they will be designed in such a way that they are not likely to have adverse effects on the integrity of the site or compromise its conservation objectives. In this case, such activities can be authorised without appropriate assessment according to Article 6(3) of the Habitats Directive.

The integration of Strategic port plans, WFD river basin management plans and Natura 2000 management plans may offer opportunities for reducing administrative burden, delays and legal uncertainties.

Guidelines for Natura2000 management plans:

- Integrated management plans should be established for Natura 2000 sites, in particular for sites that are adjacent to port operations or other industrial activities.
- Port and waterway authorities should be actively involved in the setting up of management plans for Natura 2000 sites near ports and related waterways.
- Strategic port plans, WFD river basin management plans and Natura 2000 management plans should be coordinated and where possible integrated, so as to fully benefit of potential win-win situations.
- Recurring maintenance activities necessary to facilitate port operations and navigational access should be integrated into the management plans and designed in a way that they are not detrimental to the conservation objectives of the site.

3.2.2. Spatial planning

Spatial planning and integrated management, based on prospective and proactive approaches, can help achieve implementation of conservation measures on the sites and greater legal certainty for port development projects. Integrated planning is a way to look for synergies and complementarity ; it provides a tool to promote social responsibility and sustainable development. It should help to avoid paradoxes, conflicts, and ultimately competition for space. Anticipating frictions will save time and avoid procedural 'battles'.

The European Commission Recommendation 2002/413/EC on Integrated Coastal Zone Management (ICZM) paves the way for better strategic planning. Integrated Coastal Zone Management shall implement an « *environmentally sustainable, economically equitable, socially responsible, and culturally sensitive management of coastal zones, which maintains the integrity of this important resource while considering local traditional activities and customs that do not present a threat to sensitive natural areas and to the maintenance status of the wild species of the coastal fauna and flora* » (Janssen, 2005).

The strategic approach proposed by ICZM emphasizes the protection of the coastal environment (based on an ecosystem approach preserving its integrity and functioning) but also the threat posed by climate change or unsustainable economic activities and employment options. ICZM Recommendation proposes some principles as the "use of a combination of instruments designed to facilitate coherence between sectoral policy objectives and coherence between planning and management".

Similarly, the Marine Strategy Framework Directive 2008/56 (MSFD) requires Member States to adopt by 2016 programmes of measures, which can include "spatial and temporal distribution controls: management measures that influence where and when an activity is allowed to occur" (Annex VI). It thereby provides a regulatory basis for maritime spatial planning for marine waters under the scope of the MSFD.

Integrated spatial planning offers opportunities for anticipating difficulties and adverse environmental impacts and avoiding potential conflicts and delays in project development. Resolving problems at a spatial level means that individual projects will have to face fewer difficulties for consent if the project leaders and the permitting authority can rely on those overarching plans during a decision making process based on a pre- or appropriate assessments that have been carried out at the spatial level.

Spatial and integrated planning is not in contradiction with the concept of fast track procedures proposed by the European Commission[14] as anticipation may solve problems encountered later on. Better planning needs some additional time, but as a consequence, it allows the avoidance of conflicts during the authorization procedures and finally it contributes to eliminating "uncertainties" and causes for delays.

Land-use plans and sectoral plans, including flood risk management plans are of obvious relevance. Some have direct legal effects for the use of land, others only indirect effects. For instance, regional or geographically extensive spatial plans are often not applied directly but form the basis for more detailed plans or serve as a framework for development consents, which then have direct legal effects. Integrated strategic plans are designed to ensure in advance that the baseline conditions exist to undertake integrated projects. Such plans should be submitted to strategic environmental assessments and appropriate assessments in the framework of Article 6.3 of the Habitat Directive.

Land use planning is an integrative process, in which different claims of utilization are subject to an evaluation process. Appropriate assessments according to Article 6(3) of the Habitats Directive critically evaluate the potential impacts of the plan on Natura 2000 sites and identify possible amendments to policies or proposals so that adverse effects on Natura 2000 sites can be avoided. One of the key benefits of the appropriate assessment at plan level is that it requires decisions to be made on the content of the plan that will help avoid possible significant negative effects on Natura 2000 sites and therefore also possible conflicts and delays at the project level. In this sense, the provisions of Article 6 are not only a legal requirement but also a valuable tool in strategic planning.

The resilience of estuarine and coastal ecosystems can be strengthened by proactive nature development measures. Such measures can also be implemented on land owned by port or waterway authorities and which are dedicated to future port or waterway development but not currently in use for such a purpose or land owned by other parties (government, nature conservation organizations or private landowners). Integrated management plans for Natura 2000 estuaries offer a framework for dealing with the management and protection to be applied to such areas.

Finally, it is important to emphasize that involvement of the public and NGOs through a participatory approach is fundamental for a successful planning process. Transparency and a qualitative approach should facilitate public involvement and appropriation, even if this will not necessarily prevent the risk of contentious actions.

Guidelines for spatial planning

- Land use planning should be based on a solid and well substantiated knowledge base that includes all necessary information, both on nature conservation objectives and on ports and port-related development objectives. Economic need for additional capacity on waterways and in ports is a crucial issue that should be clearly demonstrated through middle/long term strategic planning and the use of existing capacities should be optimised (including improved coordination of infrastructures and capacities between different European ports).
- Spatial planning should be carried out at the appropriate level (competent national, regional or local authorities, port authorities…).

[14] European Commission, (2009), Strategic goals and recommendations for the EU's maritime transport policy until 2018, Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions, 13 p.

- Integrated spatial planning, submitted to strategic environmental assessment should be applied wherever possible as a way for anticipating difficulties and adverse environmental impacts and avoiding potential conflicts and delays in project development.
- For better integration of nature and port policies, strategic planning should be developed for the most accurate ecological unit (e.g. estuary, river basins,…).
- Spatial planning should make a clear distinction between the strategic level and the project level. Assessments at the strategic plan level can be simplified when the consideration of mere project-related details is avoided.
- Integrated spatial plans should find the right balance between economic and nature conservation objectives. They should be considered as instruments of reconciliation and integration of business and biodiversity goals.
- The national, regional and local competent authorities responsible for Natura 2000 site selection and management should work in close cooperation with the authorities in charge of spatial planning. All relevant stakeholders including port and waterway authorities, terminal operators, environmental NGOs and other public stakeholders should be involved from an early planning phase, with the objective of reconciling social and economic interests with nature conservation objectives in or nearby Natura 2000 sites.
- Port authorities and waterway administrations should be involved in all relevant planning exercises (including Natura 2000 management plans) as strategic planning will help to secure synchronized investments, to solve cross border issues, to identify less damaging alternative solutions and, where justified, imperative reasons of overriding public interest and to promote pro-active nature development.
- If a strategic plan or programme does not contain enough details to undertake a full appropriate assessment according to Article 6(3) of the Habitats Directive, the environmental report prepared for the Strategic Environmental Assessment (SEA) should help pave the way to make, at project level, an appropriate assessment and, if needed, to help prepare a derogation procedure following Article 6.4 of the Habitats Directive. In this case the SEA should already identify projects likely to have significant negative effects on Natura 2000 sites and which would need to be subject to an appropriate Art. 6(3) assessment during the project authorisation process.
- Cumulative effects of projects should best be identified and assessed already during the elaboration of spatial plans.
- Port and waterway authorities should aim for efficient land use by optimising space allocation of port industrial activities and making optimal use of different transport modes such as shipping, inland navigation and rail.
- Port and waterways authorities should consider the possibility of proactive nature development measures aimed at improving the resilience of estuarine ecosystem. The creation of temporary nature areas should be considered where land dedicated to port development is temporarily not used for such purpose. The management and protection of such land should then be dealt with in the context of integrated management plans.

3.2.3. Benefiting from partnerships and public participation

Guidelines for public participation:

- Developers of new projects should pre-assess the effects of the development and consult the competent nature conservation authorities on whether the plan is likely to have significant negative effects on the integrity of Natura 2000 site or its conservation objectives. Planning authorities should start consultation with competent authorities and non-governmental organisations (NGOs) early in the plan-making process.
- Given the complexity of environmental and zoning law, structured consultations and communication processes between various competent authorities, stakeholders and NGOs are recommended. Transport and environment administrations should be in regular communication and cooperate to ensure that the process runs efficiently at both plan and project levels. Port and waterway authorities, operators or users as well as environmental NGOs should be represented in implementation processes, including in transboundary conditions.
- Special consideration needs to be given to plans and projects that will have an impact across national borders. Neighbouring countries should inform each other and cooperate early on in the planning process.

3.3. Project development and maintenance activities

A widespread misunderstanding is that the EU nature directives are based on a “no-unless” approach. This is an interpretation based on the view that environmental policy objectives always take precedence over economic policy objectives. This approach is in contradiction with sustainable development principles, which balances environmental benefits and societal and economic requirements (see article 2.3 of the Habitat Directive). Early integral planning and the development of integrated projects are crucial, as they will promote a “yes, if” approach and pave the way for win-win solutions.

In the field of waterways and ports, the EU TEN-T status or other national priorities should help projects to qualify as being of overriding public interest. Nevertheless, if a plan or a project is being authorised on the basis of imperative reasons of overriding public interest (IROPI), then the Habitats Directive demands a justification of the arguments for IROPI.

Alternative solutions with less or no adverse effects must always be considered in sufficient detail beforehand and a plan or project with significant adverse effects on a Natura 2000 can only be authorised in the absence of such alternative solutions. Permitting procedures may cause legal uncertainty since permits may need to be reviewed, updated or eventually also be terminated. However a correct application of the provisions of the Habitats Directive and the integration of nature conservation objectives from a very early planning phase will reduce uncertainty.

The following guidelines propose recommendations on the concept of integrated projects, the correct use of the appropriate assessments and “significant impact” issues, the use of adaptive management and the assessment of compensation needed as a last resort.

3.3.1. Integrated projects and working with nature

In 2008, PIANC, the world association for waterborne transport infrastructure[15], published a position paper entitled "*Working with Nature*". It calls for an important shift in thinking in the approach to navigation development projects to help deliver mutually beneficial solutions. It promotes a proactive, integrated approach which focuses on:

- achieving the project objectives in an ecosystem context rather than assessing the consequences of a predefined project design;
- identifying mutually beneficial solutions rather than simply minimising ecological harm.
- "*Working with Nature*" thus considers the project objectives firstly from the perspective of the natural system rather than from the perspective of technical design. It is an approach which needs to be applied early in a project when greater flexibility is still possible. A proactive approach such as "*Working with Nature*" should not only be applied at project level but also to the development of strategic plans and programmes (see integrated planning).

If the design concept for a project has progressed before environmental issues are considered, the environmental impact assessment necessarily becomes an exercise of mitigation or damage limitation, potentially resulting in sub-optimal solutions and missed opportunities. "*Working with Nature*" is about more than avoiding or mitigating the environmental impacts of a pre-defined design. Rather, it sets out to identify ways of achieving the project objectives while working with natural processes and delivering environmental protection, restoration or enhancement outcomes.

A similar approach has also been tested within flood alleviation projects in the Netherlands and developed within the Interreg SAND project. It was called "*Integral Design*" and was based on different plans, which are integrated in a way that maximizes the benefits for all whilst delivering the overall objective in a cost-effective and efficient approach.

This general approach can be strongly recommended as it is in coherence with the principle that environmental damage should as a priority be avoided or rectified at the source. It is in line with the Habitats Directive. Appropriate assessment, however, still needs to be applied (article 6.3) if significant effect on a Natura 2000 site cannot be excluded. As a general rule prevention or avoidance measures are to be preferred to compensation.

Guidelines for working with nature:

- Project design should aim to be based on win-win strategies with a view to achieving dual goals of both Natura 2000 conservation objectives and socio-economic objectives.
- Projects should be 'designed' using the 'working with nature' concept. This means that the relevant Natura 2000 conservation objectives should be considered together with the technical project objectives from an early stage in project design and development.
- As a general rule, damage prevention or avoidance measures should always be preferred to compensation measures.

[15] http://www.pianc.org

3.3.2. How to handle 'appropriate assessment' and 'likely significant impact'?

The European Commission has already published guidance documents to assist Member States and operators to understand and apply Article 6 of the Habitats Directive (see annex 1). The present guidelines specify recommendations for waterways and port-related activities.

Ecology and biodiversity depend on local conditions (variability and complexity of abiotic and biotic factors), as well as on evolution in space and time. The words “appropriate” or “significant” are not normative concepts and assessments have to consider local conditions (case-by-case basis). As highlighted by Stojanovic & al. (2006), the “fact that each port is unique in terms of its geography, hydrography and commercial profile means that a “one-size-fits-all” strategy of prescribed environmental management response may not be appropriate even though there are many issues in common”.

The same can be said for the management of estuaries, as ecosystem features are depending among others on the geographical location of the estuary. Therefore a site-specific analysis is always necessary. An "appropriate" assessment means that it is an assessment which takes into account all local factors and conservation objectives. It also has to be based on the best available scientific evidence.

3.3.3. The relationship between SEA, EIA and Appropriate Assessments (AA)

There are many similarities between the procedures for SEA and EIA, and the Appropriate Assessments carried out for plans or projects affecting Natura 2000 sites under the Habitats Directive. But this does not mean they are one and the same, as there are also some important distinctions. Therefore, an SEA or an EIA cannot replace, or be a substitute for, an Appropriate Assessment as neither procedure overrides the other.

They may of course run alongside each other or information pertaining to the Appropriate Assessment may form part of the EIA/SEA process but, in such cases, the Appropriate Assessment should be clearly distinguishable and identifiable in the SEA’s Environmental Report or in the EIA’s Environmental documentation, or should be reported on separately so that its findings can be differentiated from those of the general EIA or SEA.

One of the key distinctions between SEAs/ EIAs and Habitats Directive’s Appropriate Assessments, apart from the fact that they measure different aspects of the natural environment and have different criteria for determining ‘significance’, is how the outcome of the Assessment is followed. In this regard, the assessments under the SEA and EIA lay down essentially procedural requirements and do not establish obligatory environmental standards; on the contrary, the assessment under the Habitats Directive lays down obligations of substance, mainly because it introduces an environmental standard, i.e. the conservation objective of a Natura 2000 site and the need to preserve its integrity.

In other words, if the Appropriate Assessment can not ascertain that the plan or project will not adversely affect the integrity of a Natura 2000 site, the authority cannot agree to the plan or project as it stands unless, in exceptional cases, they invoke special procedures for plans or projects for which there are no less damaging alternative solutions and which are deemed to be of overriding public interest.

The SEAs/ EIAs on the other hand are designed to make the planning authorities fully aware of the environmental implications of the proposed plan or project so that these *are taken into account* in their final decision. The considerations above are summarised in the table in Annex 4.

Guidelines for assessments:

- The significance of the effects of a plan or a project is strongly dependent on the site's characteristics and conservation objectives (which will be outlined in the Standard Data Form, Special Area of Conservation designation acts, conservation priorities, management plan…).
- When a port or related waterway development project is proposed, in a first step a pre-assessment must be carried out. If this pre-assessment demonstrates that there will be no likely significant effect on Natura 2000 sites, the competent authority may remove the obligation of going through an appropriate assessment of its implications for the site in view of the site's conservation objectives, according to Article 6(3) of the Habitats Directive. The assessment of the risk of significant effects must be made on the basis of scientific criteria and in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project. Factors such as the extent, the magnitude, the complexity, the probability, the duration, the frequency and the possible reversibility of the impact should be considered. This exercise should be done by the competent authorities.
- If it cannot be excluded, on the basis of objective information, that a project will have a significant effect on a Natura 2000 site, either individually or in combination with other plans or projects then the project is to be subject to a proper Article 6(3) assessment.
- Following a thorough appropriate assessment that includes collecting all relevant data, and subject to the reversibility of actions, minor remaining uncertainties should however not block or restrain projects indefinitely. This needs to be judged on a case by case basis. In case of uncertainty on particular mechanisms of complex estuarine or coastal ecosystems port and waterway developers should assess the nature of the remaining uncertainties and manage them through targeted monitoring and adaptive strategies. Monitoring schemes should be designed in a way that they signal any unexpected developments at a stage where effective corrective measures can still be taken.
- The absence of adverse effects is sometimes related to predicted effects not exceeding specified threshold values; the monitoring of effects relative to the threshold is then important. The threshold values should always be justified on the basis of scientific criteria.
- In the context of an appropriate assessment, information should be provided on the full characteristics of the project or plan which may affect the site, the total range or area that will be affected, the characteristics of other projects or plans which may cause cumulative impacts with the project, any planned or existing nature conservation initiatives likely to affect the status of the site in the future, the relationship (e.g. distances…) between the project or plan and the Natura 2000 site, the requirements (e.g. EIA/SEA) of the authorisation body or agency.
- Information on the protected site should include: the conservation objectives of the Natura 2000 site, the conservation status and other key attributes of Annex I habitats or Annex II species on the site, the physical and chemical characteristics of the site that may be affected by the project, the dynamics of the habitats, species and their

ecology, aspects of the site that are sensitive to change, key structural and functional relationships that create and maintain the site's integrity, other conservation issues relevant to the site, including likely future natural changes taking place and the degree to which those changes need to be managed to deliver the site's conservation objectives.

- Measures to eliminate or reduce significant effects (mitigation) should be foreseen during the project design phase. If necessary, they can be completed during the appropriate assessment (design revision, complementary mitigation). The project can then possibly reach a level where it will have no adverse effects on the integrity of the site.

3.3.4. Compensation schemes and their follow-up

Important notice: The Commission has issued guidelines directly related to the provisions of Article 6.4 of the Habitats Directive which should be read in conjunction with the following section (see Annex 1 for references).

Guidelines for compensation:

- In instances where damaging developments are, in the absence of alternative solutions, to be allowed to proceed there will be a need for compensation measures to fully offset any loss or damage to the site. These should be precisely adapted to the type of impact predicted and should be focused on the coherence of the Natura 2000 network and the particular elements affected at site level. This requires that measures refer to the structural and functional aspects of the site integrity, the related types of habitat and species populations that are affected and the contribution of these elements to the overall coherence of the Natura 2000 network.
- Compensatory measures must be feasible and operational in protecting the overall coherence of the Natura 2000 network. The estimated timescale and any maintenance action required to enhance performance should be specified as early as possible in the project. Once the compensation scheme is agreed, the permits granted and a monitoring programme in place, unforeseen uncertainties should in principle not significantly hamper the core of a plan or project. Such possible new uncertainties should, however, trigger targeted investigations and if necessary extended monitoring and adaptive or corrective measures.
- 'Losses' should be quantified with respect to key habitats and species: according to current knowledge and expert judgement. Compensation measures must be designed on the basis of best scientific knowledge and should accomplish the ecological functions necessary to support the affected species and habitats.
- Environmental damage/ environmental benefit from compensation ratio should be assessed: there is wide acknowledgement that compensation/ damage ratios should be generally well above 1:1. Thus, compensation ratios of 1:1 or below should only be considered when it is demonstrated that such measures will be 100% effective in restoring good structure and functionality within a short period of time.
- Appropriate compensation sites should be selected by considering the following:
  (a) Compensation within the Natura 2000 site if the necessary elements to ensure ecological coherence and network functionality exist within the site.
  (b) Compensation outside the Natura 2000 site if the same contribution to the ecological network is feasible. The new location can be another site designated as

Natura 2000 or a non-designated location. In the latter case, the area has to be designated as a Natura 2000 site itself.

- The compensatory measures must ensure the continuity of the ecological processes essential for maintaining the overall coherence of the Natura 2000 network. The compensation scheme should be 'effective' at the time the negative effects occur on the site concerned. Early implementation is of the essence. The application of specific mitigation measures to overcome possible interim losses may be necessary.
- All necessary provisions, technical, legal or financial, necessary to implement the compensatory measures should be completed before implementation of the plan or project starts, so as to prevent any unforeseen delays that may hinder the effectiveness of the measures.
- Financing, monitoring and reporting: Compensatory measures imply that a sound legal and financial basis for long-term implementation, protection, monitoring and maintenance be secured in advance.

3.3.5. Addressing dredging and maintenance activities

In the case of ports situated in or near estuaries, it is common that the navigational access runs through designated Natura 2000 sites. For most ports dredging is a necessity to keep the waterways and shipping lanes accessible. Potential conflicts with the obligation to preserve the integrity of a Natura 2000 site may come up. Nevertheless, maintenance dredging activities such as continuous or periodic maintenance dredging can usually be designed in a way that they do not adversely affect the integrity of Natura 2000 sites or their conservation objectives.

There are possibilities to deal with dredged materials in an estuary-friendly way. If appropriate sediment placement strategies are applied (e.g. in case of relocation of sediments in a part of an estuary where there is a lack of sediments) dredging operations can even have positive effects on the conservation status of estuaries. Recent knowledge and best practices have shown that a well-thought out relocation plan can help rebuild valuable morphological structures inside estuaries with interesting environmental benefits.

The development of innovative dredging concepts accompanied by strict monitoring schemes can contribute to achieving both navigation objectives and Natura 2000 conservation objectives. In the context of finding appropriate solutions for sustainable maintenance dredging the concept of a sustainable dredging and sediment management scheme is favoured. Such schemes will help avoiding problems, conflicts and delays and, where possible, maximising potential positive effects on the conservation status of estuaries and coastal zones.

The use of sustainable dredging and sediment management practices will further mitigate the potential impact of maintenance operations in the navigation channels. This will not, however, automatically obviate the need for assessment under Article 6(3) of the Habitats Directive. Sustainable dredging strategies should provide the necessary background information for the competent authority to make a judgement on the likelihood of possible adverse effects on a Natura 2000 site.

As a recurring activity, maintenance dredging and relocation of sediments can be used in the context of a sustainable dredging and sediment management scheme for both achieving navigation objectives and contributing to Natura 2000 conservation objectives.

The following six steps are essential in the preparation and implementation of sustainable dredging and sediment management schemes:

- Understanding of the physical setting (morphology, hydrology, salinity, etc) of the area concerned.
- Collecting the necessary information on the dredging operation in order to assess the environmental impact in detail.
- Proceeding with the assessment of the impacts of the dredging operation on the natural environment (on estuarine morphology and hydrodynamics, on sensitive habitats and species, in the short and the long term).
- Selecting optimal practices, describing all possible solutions for mitigating adverse effects and, as a last resort, examining possible compensatory measures that would be undertaken if not all significant adverse effects can be avoided through the application of mitigation measures.
- Implementing a monitoring programme determining the achievement of environmental objectives.
- Ensuring stakeholder participation all along the process in order to avoid complaints and delaying of the procedure.

The assessment of dredging operations and disposal of dredged material in marine environments is regulated under international conventions such as the London Convention, OSPAR, HELCOM, the Barcelona and Bucharest Conventions.

Guidelines for capital dredging

- Capital dredging operations should be designed as part of sustainable dredging and sediment management schemes. Where significant effects on a Natura 2000 site cannot be excluded, also in combination with other plans or projects, they must be subject to an appropriate assessment according to Article 6(3) of the Habitats Directive.
- The application of smart dredging and relocation strategies should help mitigate adverse effects and where possible restore or develop valuable morphological structures and, thus, generate ecological benefits ("working with nature").
- Dredging and sediment relocation strategies should be designed in a way that their potential positive effects are maximized. They should be underpinned by effective monitoring schemes.

Guidelines for recurring maintenance activities including maintenance dredging:

- Recurring maintenance activities should be designed and performed in a way to ensure that they do not adversely affect the integrity of Natura 2000 sites or their conservation objectives. Where possible, their potential positive effects on the conservation status of estuaries and coastal zones should be maximised through the application of sustainable sediment management strategies.
- Recurring maintenance activities where applicable should be included in integrated Natura 2000 management plans, equivalent management plans or river basin management plans to make sure that they are being assessed and reviewed in a structured manner in the overall context of the conservation of the sites.
- Maintenance operations in or near a Natura 2000 site should be specifically designed for each estuary or coastal zone and underpinned by a monitoring scheme that

enables the detection and timely correction of unforeseen adverse effects on conservation objectives.

- If, having regard in particular to the regularity or nature of maintenance operations or the conditions under which they are carried out, such operations can be regarded as constituting a single operation, in particular where they are designed to maintain a navigable channel at a certain depth by means of regular dredging necessary for that purpose, those maintenance works can be considered to be one and the same project for the purposes of the Habitats directive.

  In that case, if such a project has been authorised before the expiry of the time-limit for transposing the directive, it will not be subject to the prior assessment of the implications of the project for the site concerned. Nevertheless, in a Natura 2000 site, the carrying out of maintenance works will be subject to a general obligation of protection under Article 6(2) of the Habitats Directive consisting in avoiding deterioration of natural habitats and species' habitats and significant disturbance that affects the species for which the site has been designated[16].

- Maintenance operations, at the time of each intervention in the navigable channel, may sometimes need to be regarded as constituting distinct projects for example because of changing techniques, conditions or regularity under which they are carried out. In such a case each of those projects must, to the extent that they are likely to have a significant effect on the site concerned, undergo an assessment of their implications pursuant to Article 6(3) of the Habitats Directive.

- As the provisions of Article 6(2) always remain applicable, the Member States should review whether ongoing operations are likely to give rise to deterioration of habitats, or habitats of species and, where necessary, take appropriate steps to avoid such deterioration.

3.4. Dealing with uncertainties: adaptive management

In carrying out appropriate assessments for plans or projects in the sense of Article 6(3) of the Habitats Directive, it may be necessary to take recourse to the precautionary principle. The focus of the assessment should be on objectively demonstrating, with supporting evidence, including undertaking the necessary studies, and based on best available scientific knowledge, that there will be no adverse effects on the integrity of the Natura 2000 site. However adaptive management also helps to address situations when, because of science limits or uncertainty about the functioning of complex and dynamic ecosystems, it is not possible for the competent authorities to fully ascertain the absence of adverse effects.

When the absence of significant adverse effects of a plan or a project on a Natura 2000 site cannot be ascertained, the derogation scheme under article 6.4 of the Habitats Directive foresees that the plan or project can only be authorised in the absence of alternative solutions, if the plan or project is justified by imperative reasons of overriding public interest and if the necessary compensatory measures are undertaken to protect the overall coherence of the Natura 2000 network. If a plan or project falls under these provisions (which is likely for most port development projects), then it is essential that the different aspects are clarified at a very early stage in the plan or project development, as they are key elements for its design, financing, and, last but not least, permitting procedure.

[16] See also judgement of the Court of Justice of the European Union of 14 January 2010 in Case C-226/08 (Stadt Papenburg v Bundesrepublik Deutschland).

An adaptive approach for the implementation of a plan or project or a compensation scheme may be particularly useful to address cases where, due to uncertainty associated with different contributory factors (location, confidence, unexpected delays), it is impossible to define all the effects of the plan or project or of a compensation scheme in sufficient details and if such uncertainty cannot be factored in through increased ratios. In such a situation, a rigorous monitoring scheme and a pre-defined validated package of appropriated corrective measures must be foreseen. Such measures must allow to adjust mitigation and/or compensatory measures to the reality of the impacts and by that way, make sure that the initially unforeseen adverse effects are being neutralized.

Extensive guidance on the concept of imperative reasons of overriding public interest and on how to examine alternative solutions has already been published in existing guidance documents (see annex 1).

Guidelines for adaptive management:

- If significant negative impacts cannot be avoided even with mitigation measures, the decision to authorise the project is ultimately driven by the existence of imperative reasons of overriding public interest and the absence of less damaging alternative solutions according to the provisions of Article 6(4) of the Habitats Directive.
- In case of any remaining scientific uncertainty with regard to the effects of mitigation or compensatory measures, the measures must include a pre-defined and validated scheme to monitor the actual impacts and a framework, such as a Natura 2000 management plan, integral plan or a programme of measures, to adapt mitigation and compensation measures to the actual impacts.

Guidelines for considering alternative solutions

- Where negative effects are predicted, a range of alternative solutions of achieving the objectives of the plan or project should be identified and these alternatives should be assessed against their likely impact upon the conservation objectives of Natura 2000 sites.
- The competent authorities should not limit their consideration of alternative solutions to those suggested by the project or plan proponents. It is the competent authority's responsibility to consider alternative solutions.
- When assessing alternative solutions all relevant agencies and other bodies should be consulted. Detailed information on the alternative solutions and their impact on affected Natura 2000 site should be provided with indication of sources. The precautionary principle should be applied when assessing alternatives.

Annex 1: European Commission Communications and guidance documents

EC guidance documents related to the Birds and Habitats Directives

- European Commission, (2000), Managing Natura 2000 sites: the provisions of Articles 6 of the habitats directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities.

  http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

- European Commission, (2002), Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of articles 6(3) and (4) of the Habitats Directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities. http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf

- European Commission (2007), Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission.

  http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

- European Commission (2007), Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, 87 pp. http://circa.europa.eu/Public/irc/env/species_protection/library?l=/commission_guidance/english/final-completepdf/_EN_1.0_&a=d

Main EC guidance documents related to the Water Framework Directive

- European Commission, (2003), Common implementation strategy for the water framework directive (2000/60/EC), Transitional and coastal waters-Typology, Reference conditions and classification systems, Guidance Document No 5, Luxembourg: Office for official publications of the European Communities, 116 pp.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/guidance_documents&vm=detailed&sb=Title

- European Commission, (2003), Common implementation strategy for the water framework directive (2000/60/EC), Identification and Designation of Heavily Modified and Artificial Water Bodies, Guidance Document No 4, Luxembourg: Office for official publications of the European Communities, pp.14.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/guidance_documents&vm=detailed&sb=Title

- European Commission (2006), Common Implementation Strategy for the Water Framework Directive. Exemptions to the environmental objectives under the Water Framework Directive allowed for new modifications or new sustainable development activities (WFD Article 4.7), policy paper.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/thematic_documents/environmental_objectives&vm=detailed&sb=Title

- European Commission (2006), WFD and Hydro-morphological pressures: Focus on hydropower, navigation and flood defence activities Recommendations for better policy integration, Policy Paper, 44pp.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/thematic_documents/hydromorphology&vm=detailed&sb=Title

- European Commission (2006), WFD and Hydro-morphological pressures, Good practice in managing the ecological impacts of hydropower schemes; flood protection works; and works designed to facilitate navigation under the Water Framework Directive, 68 pp.

  http://circa.europa.eu/Public/irc/env/wfd/library?l=/framework_directive/thematic_documents/hydromorphology&vm=detailed&sb=Title

EC Policy documents related to maritime and ports policies

- European Commission, (2006) Towards a future Maritime Policy for the Union: A European vision for the oceans and seas, Green Paper, 49pp. COM (2006) 27

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0275:FIN:EN:HTML

- European Commission, (2006), Motorways of the Sea: Shifting freight off Europe's roads, Luxembourg: Office for Official Publications of the European Communities, 6 pp.
  http://ec.europa.eu/transport/intermodality/motorways_sea/doc/2006_motorways_sea_brochure_en.pdf

- European Commission, (2007), An Integrated Maritime Policy for the European Union, 17 pp. COM (2007) 575

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0575:FIN:EN:PDF

- European Commission, (2007), Communication on European Ports Policy, 16 pp. COM (2007) 616.

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0616:FIN:EN:PDF

- European Commission, (2009), Strategic goals and recommendations for the EU's maritime transport policy until 2018, Communication from the Commission to the Council, The European Parliament, the European Economic and Social Committee and the Committee of the Regions, DG Transport and Energy, 19 p.

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0008:FIN:EN:PDF

EC guidance documents related to ICZM and coastal areas

- European Commission, (2002), Recommendation concerning the implementation of integrated coastal zone management (2002/413/EC).

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:148:0024:0027:EN:PDF

- European Commission, (2004b), Living with coastal erosion in Europe-Sediment and Space for Sustainability, EUrosion, Luxembourg: Office for official publications of the European Communities, 44 pp. http://www.eurosion.org/project/eurosion_en.pdf

Other EC guidance documents

- European Commission, (2004), Development of a Guidance Document on Strategic Environmental Assessment (SEA) and Coastal Erosion, Luxembourg: Office for official publications of the European Communities, 72 pp.

  http://ec.europa.eu/environment/iczm/pdf/coastal_erosion_fin_rep.pdf

- European Commission, (2006), Halting the loss of biodiversity by 2010-And beyond, sustaining ecosystem services for human well-being, Luxembourg: Office for official publications of the European Communities, 15 pp. COM (2006) 216.

  http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0216en01.pdf

- European Commission, (2007), Adapting to climate change in Europe-options for EU Action, Green Paper, 27 pp. COM (2007) 354.

  http://eur-lex.europa.eu/LexUriServ/site/en/com/2007/com2007_0354en01.pdf

- European Commission, (2007), Agenda for a competitive and sustainable European tourism, Communication from the Commission, COM (2007) 621final.

  http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52007DC0621:en:HTML

- European Commission, (2010), Europe, the World's No 1 tourist destination – a new political framework for tourism in Europe, Communication from the Commission, COM (2010) 352 final.

  http://ec.europa.eu/enterprise/sectors/tourism/files/communications/communication2010_en.pdf

Annex 2: Selected private initiatives involving the port sector

1. Ecoports (see www.ecoports.com)
Ecoports is a research and development project launched in 2002 and initially co-funded by the European Commission and 12 ports and port organisations. The main goal of Ecoports was to harmonise the environmental management approach of port administrations in Europe, through the establishment of an environmental management system as well as the exchange of experiences and the implementation of good practices in respect of port-related environmental issues.

2. ESPO, Environmental Codes of Practice (see www.espo.be)
In 1994, the European Sea Ports Organisation (ESPO) published its first European Environmental Code of Practice, which was intended to be an expression of the collective commitment of the port administrations to environmental improvement. It therefore made a series of recommendations on the integration of environmental protection policies into all aspects of their operations. In 2002, ESPO carried out a survey on the impact of the Birds and Habitats Directives on port development. The main findings and recommendations were published in 2007 in the ESPO Code of Practice on the Birds and Habitats Directives.

3. Paralia Nature (see www.imiparalianature.org)
The Paralia Nature project was set up in December 2000 as an informal platform for the discussion of the Habitats Directive and related issues and projects. It is intended to bring about a broad multidisciplinary cooperation between governments, ports, universities, NGOs and knowledge centres in terms of exchanging experiences and information.

4. NEW! Delta project (Interreg IIIB - North West Europe, see www.newdelta.org)
The NEW! Delta project, which was launched in July 2004, also focused on the implementation of the Birds and Habitats Directives. The project brought together 10 partners from 4 countries in North-West Europe (England, France, Belgium and The Netherlands) including port authorities, regional administrations and research institutions.

5. SedNet (5th RTD Framework Programme, see www.sednet.org)
The Sediment Network (SedNet) is a European network, whose purpose is to incorporate sediment-related issues and knowledge into European strategies to support environmental goals and to develop new tools for sediment management.

6.TIDE (Interreg IV B North Sea Programme,see www.tide-project.eu/)
The Interreg project TIDE was set up in September 2009. It aims at the integrated management of estuaries serving as shipping channels to important sea ports with strong tidal influence and considerable sediment transport rates. A partnership of port authorities, environmental agencies and Science from the Elbe, Scheldt, Humber and Weser estuaries will exchange experience and develop tools and pilot measures for an integrated estuary management.

Annex 3: ESPO checklist on good practice for balancing Natura2000 with port and waterway development and operations (December 2009)

This checklist can be seen as an example that Member States may consider to adopt in order to provide guidance and legal certainty to the activities of port and waterway developers and operators.

Spatial and integrated planning

- Existing Port and waterway activities are thoroughly assessed, considered and weighed within all relevant levels of spatial planning.
- New developments and future growth of existing ports and waterways are an integral part of the relevant spatial planning processes.
- Port and waterways activities are thoroughly considered and weighed within a balanced and integrated Natura 2000 management plan.

Planning of new port and waterway projects

- Sustainable port development is a key element of a license for growth of port related activities (optimising port-industrial use and space, improving operation of scale, efficient use of transport modes).
- Effects of sea going shipping activities in or nearby ports are subject to international regulation schemes and treaties (UNCLOS, IMO, MARPOL). Sustainable shipping is promoted through voluntary schemes (e.g. Environmental Ship Index).
- Shareholders´, public and stakeholders' opinions are considered from the beginning using a well defined stakeholder process. Agreements on all relevant issues have been reached as far as possible using the best available scientific knowledge.
- If a significant effect can not be excluded in a pre-assessment, then the further steps of Art. 6 of the HD are followed (full assessment, alternatives, mitigation, compensation - see ESPO Code of Conduct and specific EU-guidelines).
- Competent authority shall approve and underpin the results of the stakeholder process and the port development assessments and incorporate and secure those (including decisions made during the process) in the relevant integrated plans.

Maintenance dredging

- A maintenance dredging strategy has been set up taking into account hydro-morphological and ecological aspects.
- Based on latest information and a feedback-process involving all relevant stakeholders, dredging activities are – in compliance with economical and legal requirements - aiming to achieve the least impact on Natura 2000 conservation objectives possible.
- A sustainable maintenance dredging strategy or scheme is part of an integral management plan. Based on general principles in compliance with conservation objectives, dredging is flexible according to the requirements of a dynamic tidally influenced estuarine, river or costal system.

- Dredging activities have been optimized according to the following order:
  - Technical feasibility, availability of dredgers
  - Safety, nautical requirements, navigability
  - Legally binding ecological requirements (BHD, WFD, etc.)
  - Administrative regulations (e.g. management plans, site specific objectives)
  - Full integration of long-term comprehensive hydro morphologic, sediment-related and ecological criteria
  - short-term and/or local criteria
  - cost-effectiveness
  - other non-binding aspects such as agreements with stakeholders

Natura 2000 site management and maintenance measures

- The aim should be to meet feasible conservation objectives for sites in balance with long term ports and waterways development.
- Port and waterways authorities should be actively involved in the setting up of management plans from the start.
- In dealing with uncertainties (ecosystem knowledge, cause-effect relationship), research and monitoring schemes should be included as part of the management plan.

Annex 4: Comparison of procedures under AA, EIA and SEA

	AA	EIA	SEA
Which types of developments are targeted?	Any **plan** or **project** which - either individually or in combination with other plans/projects - is likely to have a significant effect on a Natura 2000 site (excluding plans or projects directly connected to the management of the site for conservation).	All **projects** listed in Annex I. For projects listed in Annex II the need for an EIA shall be determined on a case by case basis and depending on thresholds or criteria set by Member states (taking into account criteria in Annex III).	Any **Plans** and **Programmes** which are (a) prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.
Which impacts need to be assessed relevant to nature?	The Assessment should be made in view of the site's conservation objectives (which relate to the species/ habitat types ***for which the site was designated.***) The impacts should be assessed to determine whether they will not adversely affect the integrity of the site concerned, or otherwise.	Direct and indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative significant effects on ….'fauna and flora'.	Likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors.
Who carries out the Assessment?	It is the responsibility of the competent authority to ensure that the AA is carried out. In that context the developer may be required to carry out all necessary studies and to provide all necessary information to the competent authority in order to enable the latter to take a fully informed decision. In so doing the competent authority may also collect relevant information from other sources as appropriate.	The developer.	The competent planning authority.

Are the public/ Other authorities consulted?	Not obligatory but encouraged ('if appropriate').	Compulsory consultation to be done before adoption of the development proposal. Member States shall take the necessary measures to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Ditto for the public	Compulsory –consultation to be done before adoption of the plan or programme. The authorities and the public shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure. Member States must designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned.
How binding are the outcomes ?	Binding. The competent authorities can agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site.	The results of consultations and the information gathered as part of the EIA ***must be taken into consideration*** in the development consent procedure.	The environmental report, as well as the opinions expressed ***shall be taken into account*** during the preparation of the plan or programme and before its adoption or submission to the legislative procedure;

GLOSSARY

Alternative solutions: Different ways of achieving the objectives of a plan or project. The Commission services suggest that 'they could involve alternative locations, different scales or designs of development, or alternative processes (EC guidance on art. 6 (3) and (4), 2001).

Appropriate Assessment (AA): The process under Article 6(3) of the Habitats Directive by which the potential effects of a plan or project upon a Natura 2000 site are assessed in view of the site's conservation objectives in order to ascertain whether the plan or project will not adversely affect the integrity of the site.

Compensatory measures: A requirement set out in Article 6(4) where damage to a European site has been justified in the absence of alternatives and for imperative reasons of overriding public interest (IROPI). Compensatory measures must be designed to protect the overall coherence of the Natura 2000 network. This normally entails the creation of appropriate habitat as close as possible to where the damage will occur and fully functioning before the damage occurs.

Cumulative impacts: Impacts that accumulate over space and time from multiple plans/projects.

Deterioration: physical degradation affecting a habitat, or a breeding site or resting place of a species. In contrast to destruction, such degradation may occur slowly and gradually reduce the functionality of the site in terms of quality or quantity and might over a certain period of time lead to its complete loss.

Disturbance: A temporary or permanent change in environmental conditions (e.g. by noise, source of light) that may have a negative effect on a natural habitat or a species. Disturbance may be detrimental for a protected species e.g. by reducing survival chances, breeding success or reproductive ability and may give rise to additional indirect effects (e.g. increased competition for food resources).

Favourable Conservation Status: The conservation status of a natural habitat will be taken as "favourable" when: its natural range and areas it covers within that range are stable or increasing; the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future; and the conservation status of its typical species is favourable (Article 1.e of the Habitats Directive).

The conservation status of a species will be taken as "favourable" when: viable population is maintained on a long-term basis; the natural range of the species is neither being reduced nor is likely to be reduced in the future; and there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

Habitat of Community Interest: a natural habitat type in Annex I of the Habitats Directive.

Imperative Reasons of Overriding Public Interest (IROPI): A requirement set out in Article 6(4) which, in limited circumstances, permits a plan or project to go ahead even after an AA has failed to ascertain that the integrity of a Natura 2000 site will not be adversely affected.

Mitigation: Measures aimed at minimising or even cancelling the negative impact of a plan or project, during or after its completion.

Monitoring: Collection and analysis of repeated observations or measurements to evaluate changes in condition and progress toward meeting a management objective.

Natura 2000 site: sites designated to form the Natura 2000 network, which include Special Protection Areas (SPA) and Sites of Community Importance (SCI) approved by the European Commission and declared as Special Areas of Conservation (SAC) by the Member States.

Offset: Biodiversity offsets are conservation actions intended to compensate for the residual, unavoidable harm to biodiversity caused by development projects, so as to aspire to no net loss of biodiversity.

Precautionary principle: where scientific evidence is insufficient, inconclusive or uncertain and there are indications through preliminary objective scientific evaluation that there are reasonable grounds for concern that the potentially dangerous effects on the environment, human, animal or plant health may be inconsistent with the chosen level of protection, lack of scientific knowledge shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation (Rio Declaration, 1992 & EC, 2000).

Qualifying Interest: a natural habitat type listed in Annex I or a species listed in Annex II of the Habitats Directive, a species listed in Annex I of the Birds Directive or regularly occurring migratory species not listed in Annex I, for which a Natura 2000 is designated.

Site of Community Importance (SCI): it is defined in the Habitats Directive (92/43/EEC) as a site which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000, and/or to the maintenance of biological diversity within the biogeographical region or regions concerned. SCIs are proposed to the Commission by the Member States and once approved, they must be designated as Special Areas of Conservation (SACs) by the Member States.

Special Area of Conservation (SAC): site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated.

Special Protection Area (SPA): Protected area designated in accordance with the Birds Directive for species listed on Annex I of the Directive and/or regularly occurring migratory species, and included in the Natura 2000 network.

Species of Community Interest: a species listed in in Annex II and/or Annex IV or V of the Habitats Directive.

Stakeholders: People or organisations that will be affected by, or will influence a programme, project or action.

Surveillance: An extended programme of surveys systematically undertaken to provide a series of observations to ascertain the variability that might be encountered over time.

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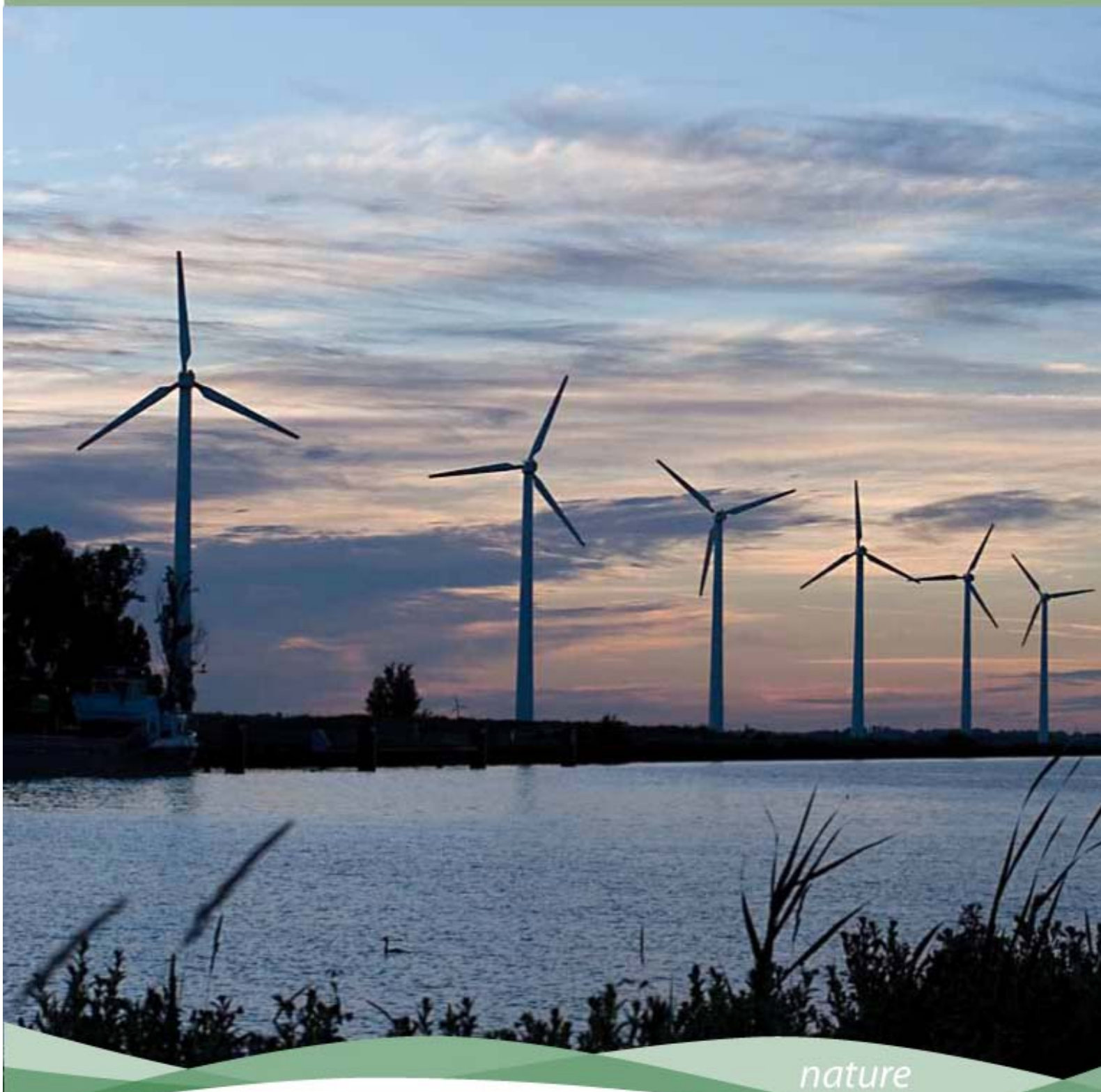
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NATURA 2000

GUIDANCE DOCUMENT

Wind energy developments and Natura 2000



nature

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PURPOSE OF THIS GUIDANCE

Background

In December 2008, the EU adopted an ambitious and far-reaching 'climate change and energy' package which, amongst others, commits the EU-27 countries to increasing the share of renewable energy to 20% of Europe's total energy production by 2020. As a clean, renewable source of electricity, wind energy is destined to make a significant contribution to achieving this 20% target.

Wind energy in Europe has been growing rapidly over the last decade. In 2008, it accounted for around 4.8% of the EU's total electricity consumption. This share is expected to at least triple by 2020. It is clear therefore that the number of wind farm installations across the EU is likely to increase radically in the short to medium term. It will be important to ensure that such a rapid expansion is sustainable in all respects and is done in accordance with EU environmental legislation, including the Habitats and Birds Directives.

Evidence to date shows that, whereas, in general, wind energy does not represent a serious threat to wildlife, poorly sited or designed wind farms can pose a potential threat to vulnerable species and habitats, including those protected under the Habitats and Birds Directives.

Purpose of this Guidance document

The purpose of this document is to provide guidance on how best to ensure that wind energy developments are compatible with the provisions of the Habitats and Birds Directives. It focusses in particular on the procedures to follow under Article 6 of the Habitats Directive when dealing with wind farm related plans and projects which could affect a Natura 2000 site and provides clarifications on certain key aspects of this approval process. The Habitats Directive does not, a priori, exclude wind farm developments in or adjacent to Natura 2000 sites. These need to be judged on a case by case basis.

As such, the document is designed principally for use by competent authorities and developers, as well as consultants, site managers and other practitioners who are involved in the planning, design, implementation or approval of wind farms plans or projects. It may also be of interest to other organisations such as NGOs and international bodies. During the course of its preparation, the document benefitted greatly from discussions with, and information supplied by, experts from Member States and key stakeholder groups, within the framework of an ad hoc group on wind energy and nature conservation.

Structure and Contents

The document is made up of 5 main sections:

- **Chapter 1** provides an overview of wind energy development in Europe and of the policy framework at EU level.

- **Chapter 2** introduces the key provisions of the EU's biodiversity policy and the Habitats and Birds Directives. It also explores the relationship between Strategic Environmental Assessments under the SEA Directive, Environmental Impact Assessments under the EIA Directive and Appropriate Assessments under the Habitats Directive.

- **Chapter 3** reviews the potential impacts wind energy developments might have on various species such as birds, bats, marine mammals, and habitat types, such as blanket bogs. The information presented here is derived from an extensive review of existing scientific literature and other recognised sources of information.

- **Chapter 4** examines the benefits of strategic planning for wind farm developments as a means to achieving a more efficient and integrated decision-making process that helps to avoid or minimise conflicts later on at the project level and, in particular, to encourage a appropriate siting of wind farms in areas of potentially low or no conflicts for wildlife. Various good practice examples are given of how this has been achieved in different parts of the EU.

- **Chapter 5** focusses specifically on the provisions of Article 6 of the Habitats Directive and offers a step-by-step guide to the procedures to follow when assessing wind farm plans or projects that might affect Natura 2000 sites in particular. It provides advice and guidance on how to carry out an Appropriate Assessment and how to ensure that there is a sufficiently sound scientific information base upon which to determine whether or not the project is likely to have an adverse effect on the integrity of a Natura 2000 site.

Limitations of the document

This guidance document is intended to be bound by, and faithful to, the text of the Birds and Habitats Directives and to the wider principles underpinning EU policy on the environment and renewable energies. It is not legislative in character, it does not make new rules but rather provides further guidance on the application of those that already exist. As such, it reflects only the views of the Commission services and is not of a legally binding nature.

It rests with the EU Court of Justice to provide definitive interpretation of a Directive. Wherever relevant, existing case law has been included when clear positions have already been taken by the Court.

The document also does not replace the Commission's existing general interpretative and methodological guidance documents on the provisions of Article 6 of the Habitats Directive[1]. Instead, it seeks to clarify specific aspects of these provisions and place them in the context of wind farm development in particular. The present guide is therefore best read in conjunction with the existing general guidance and the two Directives.

Finally, the guidance recognises that the two nature Directives are enshrined in the principle of subsidiarity and it is for Member States to determine the procedural requirements arising from the Directives. The good practice procedures and proposed methodologies described in this document are not prescriptive in their intent, rather they aim to offer useful advice, ideas and suggestions based on an extensive review of existing experiences and good practices across the EU and beyond. For further reading, references to various national guidance documents and other sources of information are provided in the annexes.

[1] "Managing Natura 2000 sites. The provisions of Article 6 of the 'Habitats' Directive 92/43/EEC". "Assessments of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC". "Guidance document on Article 6(4) of the 'Habitats Directive' 92/43/EEC".
http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm

1. WIND ENERGY DEVELOPMENTS IN THE EU

- *In December 2008, the EU adopted an ambitious and far-reaching 'climate change and energy' package which, inter alia, commits the EU-27 countries to increasing the share of renewable energy to 20% of Europe's total energy production by 2020;*
- *As a clean, renewable source of electricity, wind energy is destined to make a significant contribution to achieving this 20% target. It will also help to substantially reduce greenhouse gas and air pollutant emissions, as well as freshwater consumption associated with conventional power generation in the EU;*
- *Wind energy has grown rapidly over the last decade. In 2009, it accounted for some 4.8% of the EU's total electricity consumption. This is expected to at least triple by 2020. This could imply an annual expansion in wind farms, both onshore and offshore, of more than 10 GW per year until 2020;*
- *A minority of Member States are currently responsible for the bulk of the EU's wind power. Even accepting the variations in wind resources, the availability of other renewable energy and different national priorities, wind energy is likely to grow siginifcantly in most if not all countries;*
- *The latest EU commitments towards renewable energy create a favourable legislative environment for wind power development whilst ensuring that it is done in accordance with EU environmental legislation.*

1.1 Wind energy in Europe – 20 years of sustained growth

Thanks to recent technological advances, the wind energy sector in Europe has undergone a rapid and sustained growth over the last 20 years. In 2009, some 4.8% of the EU-27's total electricity consumption was provided by wind energy.

An important driver behind this fast growth is the need for Europe to have a secure supply of energy that is not reliant on external sources of gas and oil. A second major driver is the significant contribution wind energy can make in reducing greenhouse gas emissions. As a clean, renewable resource, wind energy is already playing - and will continue to play - an important role in mitigating against climate change, while at the same time bringing benefits in terms of reductions in air pollutant emissions and cooling water consumption associated with many conventional power generation technologies.

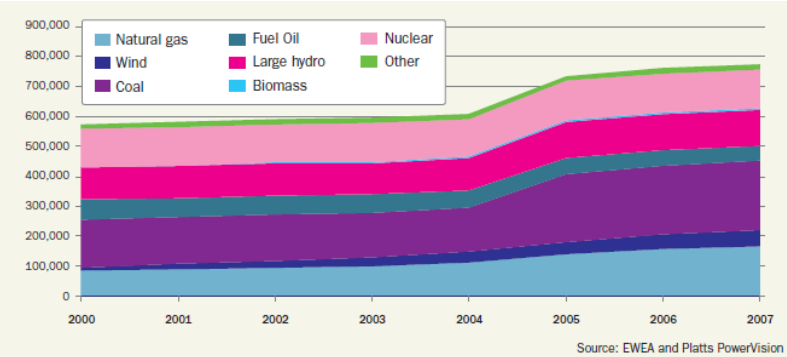


Figure 1: Installed power capacity EU 2000-2007 (MW) - EWEA 'Pure Power', March 2008

1.2 The EU Policy Framework for promoting renewable energy sources

Climate change and renewable energy are both high on the EU political agenda. The EU's renewable energy policy goes back to 1997 with the adoption of the Commission's White Paper entitled: '*Energy for the future: renewable sources of energy*'[2]. It recommended that the share of renewable energy in gross energy consumption be doubled to 12% by 2010. This was translated into law in 2001 through the adoption of Directive 2001/77/EC on the '*promotion of electricity from renewable energy sources*'[3] and Directive 2003/30/EC "*on the promotion of the use of biofuels or other renewable fuels for transport*"[4]. Directive 2003/87/EC established a trading scheme for greenhouse gas emission allowance.

In January 2008 the Commission proposed an ambitious and far reaching '*Climate Change and Energy Package*' that was agreed politically by the EU Heads of State in December 2008[5].

The package commits the EU Member States to the following targets:

- Cutting greenhouse gas emissions by at least 20% by 2020 compared to 1990 levels (rising to 30% if other developed countries make comparable efforts in the framework of a new global climate change agreement)[6];
- Increasing the use of renewable energy sources to 20% of Europe's gross final energy consumption by 2020, including a specific target of 10% renewables in transport;
- Cutting energy consumption by 20% of projected 2020 levels by improving energy efficiency[7].

As a follow up, in April 2009, Directive 2009/28/EC[8] *on the promotion of the use of energy from renewable sources* (the 'RES' Directive) was adopted which set mandatory national targets for each Member State to ensure the delivery of the overall EU target of 20% energy from renewable energy sources (see Table 1).

Under the RES Directive, each Member State is required to draw up a clear action plan to demonstrate how they intend to achieve their renewable energy targets. These *National Renewable Energy Action Plans* (NREAPs), to be adopted by 30 June 2010, contain details about national sectoral targets and support schemes, amongst others.

They should also provide an assessment of the role that different technologies will play in reaching the targets for that country and outline the measures that will be taken to increase the use of renewable energy e.g. by reducing administrative barriers and improving access conditions to electricity grids.

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[2] COM (1997) 599 final
[3] OJ L 283; 27.10.2001, p 33
[4] OJ L 123; 17.05.2003, p.42
[5] http://ec.europa.eu/environment/climat/climate_action.htm
[6] Includes a revision of the Emissions Trading System
[7] In contrast to the other targets, this target is as yet only political, i.e. not legally binding.
[8] OJ L 140; 5.6.2009, p 16

Table 1: Annex I of the RES Directive 2009/28/EC National overall share and targets for the share of energy from renewable sources in gross financial consumption of energy in 2020

	Share of energy from renewable sources in gross final consumption of energy, **2005**	Target for share of energy from renewable sources in gross final consumption of energy, **2020**
Belgium	2,2 %	13 %
Bulgaria	9,4 %	16 %
The Czech Republic	6,1 %	13 %
Denmark	17,0 %	30 %
Germany	5,8 %	18 %
Estonia	18,0 %	25 %
Ireland	3,1 %	16 %
Greece	6,9 %	18 %
Spain	8,7 %	20 %
France	10,3 %	23 %
Italy	5,2 %	17%
Cyprus	2,9 %	13%
Latvia	32,6 %	40 %
Lithuania	15,0 %	23 %
Luxembourg	0,9 %	11%
Hungary	4,3 %	13 %
Malta	0,0 %	10 %
The Netherlands	2,4 %	14 %
Austria	23,3 %	34 %
Poland	7,2 %	15 %
Portugal	20,5 %	31 %
Romania	17,8 %	24 %
Slovenia	16,0 %	25 %
The Slovak Republic	6,7 %	14 %
Finland	28,5 %	38 %
Sweden	39,8 %	49 %
United Kingdom	1,3 %	15 %

Renewable energy sources

Renewable energy sources come in a variety of forms: wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, biowaste and biogasses. They are also used in a variety of ways: to produce electricity, heating and cooling or fuel for transport.

Wind power is used specifically to generate electricity. Electricity is just one of several types of energy used in the EU. The 20% renewable energy target covers all forms of energy.

1.3 Wind power development: predictions for 2020 and beyond

It is clear that the new EU targets will require a significant change in renewable energy development over a relatively short period of time.

According to the Commission's Renewable Energies Roadmap, 34% of all electricity consumption in 2020 is expected to come from renewable sources by 2020, and around 12% could be generated by wind power alone. This would entail a threefold increase in the current share that wind power has in the EU's electricity consumption (some 4.8% in 2008).

One of the reasons why wind power is expanding so rapidly is that wind power technology has evolved significantly in the past 20 years. Turbine size onshore has increased from less than 50 KW in the 1980s to more than 3 MW today. Rotor diameter has also increased from an average of 15m to 100m or more.

Nowadays, 3 bladed upwind, variable speed, pitch regulated turbines generating between 750 -3000 KW are predominant, representing around 90% of the EU market[9]. The cost of installing wind turbines has also dropped substantially over the years[10] which has not only made wind farm developments more affordable but also more attractive to investors.

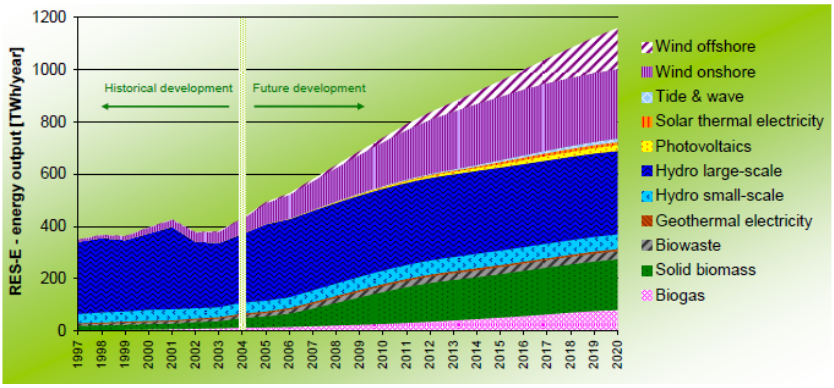


Figure 2: Renewables growth: electricity projections by 2020[11]

Overall, wind power capacity in the EU has increased more than a hundred fold in the past 12 years from 4,753 MW in 1997 to 74,767 MW in 2009 (EWEA). In 2009, over 39% of all new electricity generating capacity added to the European grid came from wind power.

In its 2nd Strategic Energy Review[12], the Commission estimates that wind power will expand even further in the short to medium term, and, according to some of the scenarios used for the impact assessment of the climate-energy package, the total capacity could exceed 161 GW by 2020. EWEA predictions are even higher, with a target of 230 GW by 2020, including 40 GW offshore.

1.4 Wind energy development in different Member States

Europe is now the world leader in wind energy technology and development. Eleven European countries had more than 1000 MW of wind power installed on their territory by the end of 2008 (Germany, Spain, Denmark, Italy, France, Portugal, Netherlands, Sweden, Ireland, Greece and UK) and five of them (Denmark, Spain, Portugal, Ireland, Germany) have more than 5% of their total electricity demand covered by wind power.

This does not mean that wind energy will play an equally important role in all countries. Wind resources differ significantly from country to country as does the availability of alternative renewable energy sources such as biomass or geothermal energy. The capability of current transmission networks and other generation plants to integrate large amounts of wind energy also varies and depends to some extent on historical developments. All these and other factors will be important in the strategic planning of wind farm development in the EU and in determining the contribution that wind energy will make in different Member States to reaching their targets under the RES Directive.

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[9] Small and very small turbines are still also used to meet specific needs, for instance as a traditional part of rural electrification eg to power isolated homes, boats and telecommunication facilities. Micro generation may become more popular in urban areas but for the moment they represent only a small share the market.

[10] The average wind turbine in Europe costs 1.23 mil/MW onshore and 2-2.2 mi/MW offshore.

[11] Commission Communication COM(2006) 848 final, 10.1.2007 'Renewable Energy Road Map'

[12] COM (2008) 738 final, 13.11.2008

1.5 Offshore wind power

In contrast to onshore wind power, offshore wind power is still in its infancy and only accounts for about 2% of the total installed wind power capacity in Europe. Most of the development so far has been in the North Sea and in the Baltic Sea, mostly in shallow waters less than 30 m deep and less than 40 km from the shore.

Compared to onshore wind farms, offshore installations are more complex and costly to put in place. The technology is subject to greater requirements given the harsher and less accessible operational environment. There are also still significant bottlenecks to overcome in the supply chain (lack of installation vessels or harbour facilities, lack of skilled work force) and in gaining access to the electricity grid.

Nevertheless, considering that the average turbine size is expected to be significantly bigger offshore (ca 5 MW), the potential for offshore wind energy to grow as technology evolves is considerable.

In its Communication of November 2008[13], entitled '*Offshore wind energy: action needed to deliver on the Energy Policy Objectives for 2020 and beyond*', the Commission estimates the potential for wind power offshore by 2020 is likely to be some 30-40 times the capacity installed at that time (some 1,1 GW by end of 2007, which had grown to 2.06 by the end of 2009).

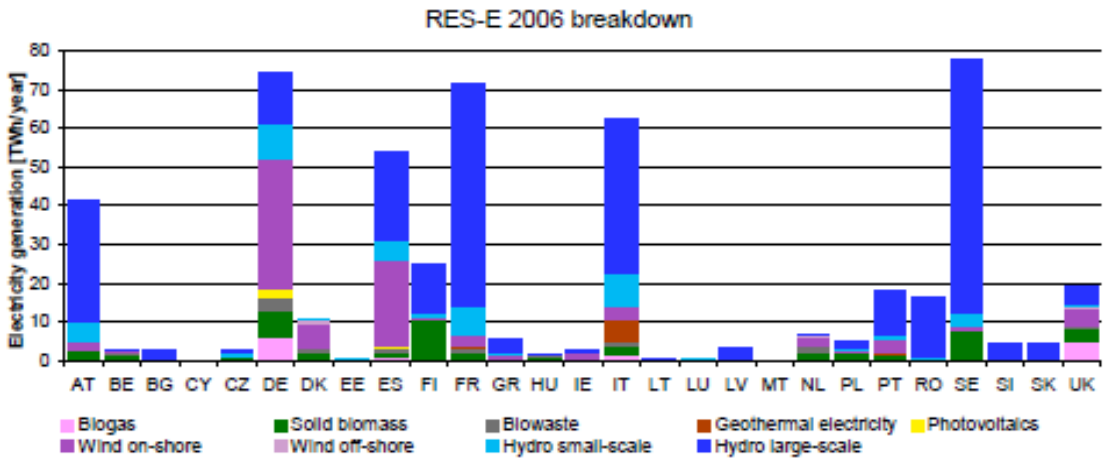


Figure 3: promotion and growth of renewable energy sources and systems across EU[14].

[13] COM (2008) 768 final

[14] From Commission's Renewable Energy progress report, COM(2009) 192 final

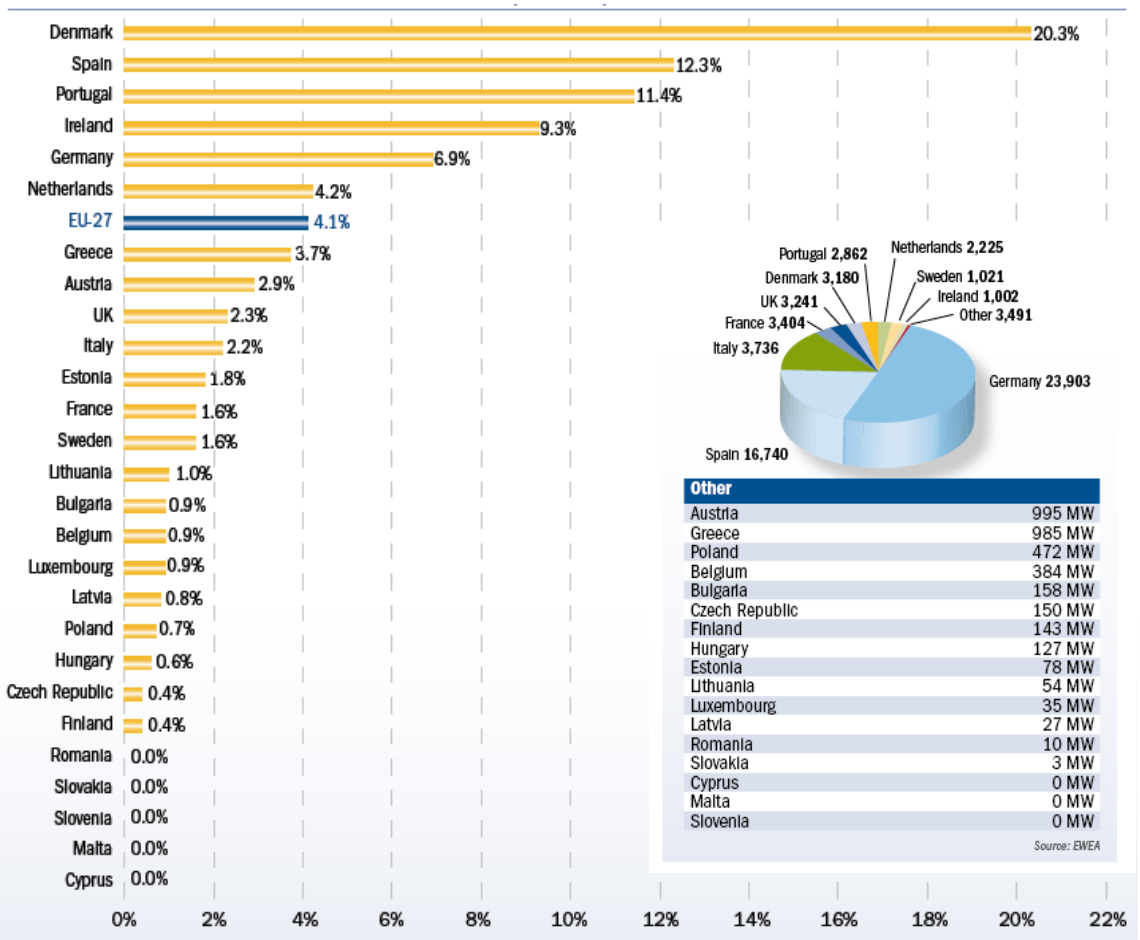


Figure 4 (above): wind power's share of electricity demand (2008)
Figure 5 (right): End 2008 Member State share of total capacity of wind power (EWEA)[15]

1.6 Balancing wind farm developments with broader societal needs

The rapid expansion of wind farm installations in the coming years will bring many benefits to society, not least in reducing greenhouse gases. In addition to the reduction of greenhouse gases, wind power helps economies to reduce energy dependency and their exposure to volatile or high fuel and carbon costs. Wind power is also a source of employment creation, technology development, social cohesion and exports.

But, like all developments, this expansion needs to be in balance with other broader social, economic and environmental concerns to ensure it grows in a sustainable manner and is publicly acceptable.

There are still a number of hurdles to overcome in order for wind energy to play a role that is commensurate to its potential. Amongst others, this means ensuring better access to the electricity grid, removing administrative barriers to the use of renewable energy over other

[15] EWEA Pure power : wind energy targets for 2020 and 2030, p26 and 23 (Dec 2009) http://www.ewea.org/fileadmin/ewea_documents/documents/publications/reports/Pure_Power_Full_Report.pdf

more traditional forms of energy, and improving the technology, especially for offshore developments.

From a social perspective, apprehensions over wind farm developments vary significantly and will need to be addressed on a case by case basis to ensure that local interests are properly considered. Typical concerns include the potential level of noise generated by wind farms, visual impacts, issues of safety, effects on the landscape, archeology, heritage, as well as possible interference with aviation or shipping navigation etc…

There is also a concern over the potential impact of poorly sited wind farms can have upon nature and wildlife which, in view of the scale of development foreseen, cannot be ignored. The EU's environmental legislation provides a common legal framework applicable across all Member States to address this concern. The mechanisms established through the EU's existing environmental legislation can ensure that wind energy is developed in a way that is both sustainable and minimises its impact on the natural environment.

These procedures and the potential impacts of wind farms on nature and wildlife are examined further in this guidance document. But it is important to bear in mind that potential conflicts with nature and wildlife are just one of a range of possible constraints that a wind farm developer may face depending on the local context. A clear distinction must therefore be made between these different constraints so that each can be analysed in its proper context and not mistakenly used as a reason for objecting to developments on other grounds.

This requires a clear understanding of the type of potential impacts of wind farms on nature and wildlife as well as the legal obligations that must be respected when planning and executing wind farm developments.

2. THE EU'S POLICY FRAMEWORK AND LEGISLATION FOR NATURE AND BIODIVERSITY

- *Like climate change and renewable energy, biodiversity conservation is a high political priority. The EU is committed to halting the decline in biodiversity in the EU and this commitment is now firmly embedded in all aspects of EU policy.*
- *The EU 'Habitats' and 'Birds' Directives are the cornerstones of the EU's biodiversity policy. They enable all Member States to work together to protect and ensure the survival of Europe's most endangered and vulnerable species and habitat types.*
- *Central to the two Directives is the creation of the Natura 2000 Network, an ecological network of sites spanning 27 EU countries. Nearly 26,000 sites are included in the Network so far, covering almost 18% of the EU's land area. There are additionally significant marine areas but this component of the Network is not yet complete.*
- *Wind farms likely to have an adverse effect on a Natura 2000 site must be subject to an Appropriate Assessment in light of the site's conservation objectives. Such developments may proceed under certain conditions where the procedural safeguards foreseen by the two nature Directives are respected.*
- *The two Directives also require that wind energy developments do not cause any significant damage or disturbance to species of Community interest (i.e. those covered by the Directives) or their key habitats in the broader countryside.*
- *New wind farm plans and projects may also be subject to the provisions of the SEA and the EIA Directives but these are distinct and different from the Appropriate Assessment undertaken under the Habitats Directive.*

2.1 Introduction

It is clear that the number of wind farm installations in the EU is likely to grow at a very significant rate in the short to medium term in some parts of Europe. Given that wind power is universally recognised as a source of clean, renewable energy and is, as such, also a major contributor in climate change mitigation, it will be important to ensure that its expansion is sustainable in all respects and is achieved without unnecessary damage to the natural environment and Europe's natural heritage.

Like any other industrial activities entailing the use of land or sea, wind energy development inevitably has an ecological footprint that still needs to be considered and addressed where relevant.

This chapter outlines the EU's key environmental laws and international commitments that need to be respected when developing wind farms in the EU. Chapter 5 provides further detailed guidance as regards developments affecting Natura 2000 sites in particular.

2.2 The EU's commitment to halting biodiversity loss

Like climate change and renewable energy, biodiversity conservation is high on the EU political agenda. It is identified as one of the key operational objectives of the Sustainable Development Strategy (SDS)[16] and the Lisbon partnership for growth and jobs.

The 6th Environment Action Programme (6th EAP)[17] sets out the framework for environmental policy-making in the EU for the period 2002-2012 and has 'nature and biodiversity' as one of four priority areas for action[18]. The detailed measures be undertaken are laid down in the European Commission's EU Biodiversity Action Plan adopted in 2006[19].

The EU Action Plan represents an important new approach for EU biodiversity policy as it is the first time that all the relevant economic sectors and policy areas are addressed in a single strategy document and apportioned a share of the responsibility in its implementation. It recognises that change will only happen if there is a concerted effort from all economic sectors to help deliver the biodiversity targets.

The EU Plan also stresses the important ecosystem services that nature provides, and upon which our economy and social wellbeing depends. Healthy ecosystems help purify the air and water, and regulate the climate. They provide basic goods such as food, fibre and wood. As such, they will have a major role to play in mitigating the effect of climate change in years to come.

The Commission plans to present a new EU biodiversity strategy by the end of 2010 on the basis of the Communication on an EU vision and target for biodiversity beyond 2010[20] and the EU Council Conclusions on biodiversity post-2010 adopted on 15 March 2010. This strategy should set a limited number of measurable sub-targets for different ecosystems, driving forces, pressures and responses, and ensure their integration into relevant internal and external EU sectoral policies. An innovative aspect of the 2020 biodiversity strategy will be the establishment of a biodiversity baseline that will enable assessment of progress towards reaching the target. The EU strategy[21] will be developed with a view to the global post-2010 biodiversity framework that is to be adopted under the United Nations Convention on Biological Diversity in October 2010.

Biodiversity and climate change

The Intergovernmental Panel on Climate Change (IPCC) predicts that average surface temperatures across the globe will rise by 2–6.4°C by 2100 compared to pre-industrial levels. The impact on biodiversity and ecosystems is hard to estimate but is expected to be very considerable. Already studies show that many species are experiencing difficulties in adapting to the changing climate and that this is exposing them to an even greater risk of extinction.

Climate change also puts at risk the valuable ecosystems upon which society depends for important goods and services, such as flood prevention or carbon storage. Healthy ecosystems are an essential component of any climate mitigation strategy but, like wildlife, they are under significant pressure from habitat loss and degradation which is largely caused by urban sprawl, intensifying land uses and inappropriate development. The ability of ecosystems to assist us in mitigating against climate change will be determined by how effectively they are protected and managed.

[16] COM (2001) 264 final; Renewed EU Sustainable Development Strategy adopted June 2006.
[17] Decision No 1600/2002/EC, OJ L 242, 10.9.2002,
[18] Others are climate change, environment and health, management of natural resources and waste
[19] COM/2006/0216 final. http://ec.europa.eu/environment/nature/biodiversity/comm2006/index_en.htm
[20] (COM(2010) 4 final, 19.1.2010)
[21] Further developments can be followed at http://ec.europa.eu/environment/nature/biodiversity/policy/index_en.htm

2.3 The Habitats and Birds Directives

The Birds and Habitats Directives are the cornerstones of the EU's biodiversity policy. They enable all 27 EU Member States to work together, within a common legislative framework, to conserve Europe's most valuable species and habitats across their entire natural range within the EU, irrespective of political or administrative boundaries.

The Directives have two main objectives:

- they protect species in their own right across the EU (through species protection provisions);
- they conserve the core areas for certain rare and endangered species (through habitat protection provisions leading to the establishment of the Natura 2000 Network)

In the case of the latter, it is important to note that the Natura 2000 Network is not a system of strict nature reserves where all human activities are excluded. Instead, the two Directives provide a common legislative framework, applicable in all EU countries, which ensures that human activities – *inter alia* wind energy activities – are undertaken in a way that does not adversely affect the integrity of Natura 2000 sites.

Article 6 of the Habitats Directive lays down procedural safeguards to be followed in the case of new developments. Its provisions are explained in greater detail in subsequent chapters. But first it is useful to understand the general purpose of the two Directives.

2.3.1 Overall objectives of the Birds and Habitats Directives

The overall objective of the Birds Directive[22] is to maintain and restore the populations of naturally occurring wild bird species present in the EU (ca 500 species) at a level which will ensure their survival over the long term. The Habitats Directive[23] has similar objectives to the Birds Directive but covers species other than birds as well as habitat types. Its aim is to ensure the conservation of a further 1000 endangered wild animals and plants as well as 230 rare and threatened habitat types which are in danger of disappearing.

It should be noted that the Habitats Directive does not cover *every* species of plant and animal in Europe (ie not all of the EU's biodiversity). Instead, it focuses on a sub-set of around 1500 species - often referred to as species of Community interest (or species of European importance) - which are so rare and threatened that they need protection in order to ensure their long-term survival within the EU.

2.3.2 A general system of strict protection for species

As regards species protection, both Directives require that Member States establish a general system of protection for all wild bird species in the EU and for species listed in Annex IV of the Habitats Directive throughout their natural range within the EU. These provisions apply both inside and outsite protected sites.

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[22] Directive 2009/147/EC of the European Parliament and of the Council (codified version of Council Directive 79/409/EEC on the conservation of wild birds, as amended) – see http://ec.europa.eu/environment/nature/legislation/index_en.htm

[23] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, consolidated version reference 01992L0043 of 01.01.2007 - see http://ec.europa.eu/environment/nature/legislation/index_en.htm

The exact terms are laid down in article 5 of the Birds Directive and Article 12 (for animals) and Article 13 (for plants) of the Habitats Directive.

As some protected species are potentially vulnerable to wind farms, these provisions may also need to be taken into account by developers and planners when considering developments outside Natura 2000. This could apply for instance if a proposed development is situated along a major migration route as it could cause significant disturbance or damage to protected birds, bats or other species during their migration.

Whatever measures are applied to meet the strict protection provisions of the two Directives, they must be proportional to the assessed impact on the conservation status of the species concerned.

Article 5 of Birds Directive

Member States should take the requisite measures to establish a general system of protection for all wild bird species throughout their natural range within the EU. In particular they should prohibit the following:

- *deliberate killing or capture by any method;*
- *deliberate destruction of, or damage to, their nests and eggs or removal of their nests;*
- *taking their eggs in the wild and keeping of eggs;*
- *deliberate disturbance of these birds particularly during the period of breeding and rearing, in so far as this would have a significant negative effect on the birds;*
- *keeping the birds in captivity and their sale.*

Article 12 and 13 Habitats Directive

Member States should take the requisite measures to protect the species listed in Annex IV throughout its natural range within Europe.

*In the case of **protected animals** this means prohibiting the:*

- *deliberate killing or capture by any method;*
- *deliberate disturbance, particularly during breeding, rearing, hibernation and migration;*
- *deliberate destruction or taking of eggs in the wild;*
- *deterioration or destruction of breeding sites or resting places;*
- *the keeping, sale and transport of specimens the from the wild.*

*In the case of **protected plants** this mean prohibiting:*

- *the deliberate picking, collecting, cutting, uprooting or destruction of such plants in the wild;*
- *the keeping, transport of sale of such species taken from the wild.*

Derogations to these species protection provisions are allowed in some circumstances (e.g. to prevent serious damage to crops, livestock, forests, fisheries and water) provided that there is no other satisfactory solution and the consequences of these derogations are not incompatible with the overall aims of the Directives.

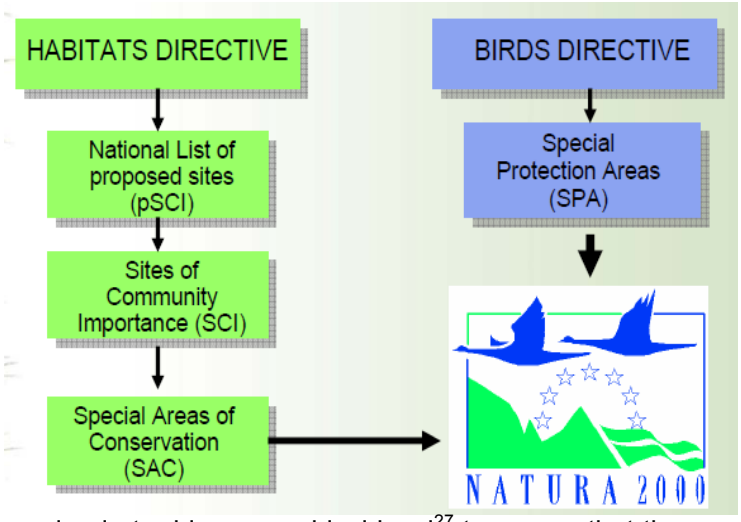
The conditions for applying derogations are set out in Article 9 of the Birds Directive and Article 16 of the Habitats Directive. With reference to wind farms, it is primarily reasons related to 'the interests of public health and public safety, or for 'other imperative reasons of public interest' (ref. Article 16(1c)) that might apply. The Commission has produced guidelines on the strict species protection provisions for animals protected under the Habitats Directive[24].

[24] Guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm

2.3.3 Habitat protection provisions: the Natura 2000 Network:

The two Nature Directives also require the protection of key sites for certain species and habitat types listed in the respective annexes. Together, these sites form part of the Natura 2000 Network which spans 27 EU countries.

- **Under the Habitats Directive**, core sites need to be protected for the habitat types listed in annex I and species in annex II[25]. The first step is for Member States to propose their national list of possible Sites of Community Importance (SCIs). It is important to note that the selection of SCIs must be done on scientific grounds only. Member States may not take economic aspects into account at this stage.[26]



  These proposed SCIs are then examined at a biogeographical level[27] to ensure that they offer sufficient coverage for the protected species and habitat types concerned before they are approved by the Commission. Member States then have six years to designate the approved SCIs as a Special Area of Conservation (SAC) by which time they must also establish the necessary conservation measures to maintain and restore the habitats and species at a favourable conservation status.

- **Under the Birds Directive**, core sites need to be classified for ca 190 species of birds listed in Annex I of the Directive. Member States must also classify sites for other regularly occurring migratory bird species not listed in Annex I, bearing in mind the need to protect their breeding, moulting and wintering areas and staging posts along their migration routes, eg wetlands of international importance. These sites are called Special Protection Areas (SPAs) and are included directly into the European Natura 2000 Network[28].

By December 2009, about 26,000 SCIs and SPAs were included in the Natura 2000 Network[29]. Together, they cover around 18% of the land area in the EU-27 with signficant additional marine areas[30]. At this stage, there were 1391 SCIs and 619 SPAs in marine waters but further sites will need to be protected to complete the marine component of the network. This should be achieved by 2012.

[25] There is considerable overlap between the species listed in annex II and those listed in annex IV but not all Annex IV species require specific site protection under Natura 2000 so they are not all listed in annex II.
[26] ECJ Ruling C-371/98, First Corporate Shipping LTD.
[27] The EU has 9 biogeographical regions, each with its own characteristic blend of vegetation, climate, topography and geology. Working at this level makes it easier to check species and habitat conservation trends under similar natural conditions, irrespective of national boundaries.
[28] In contrast to the Habitats Directive, there is no intermediary step of selecting sites according to biogeographical region in the case of SPAs. These are included directly into the Natura 2000 Network
[29] European Commission, http://ec.europa.eu/environment/nature/natura2000/barometer/index_en.htm
[30] There is sometimes considerable overlap between SPAs and SCIs so the figures are not cumulative

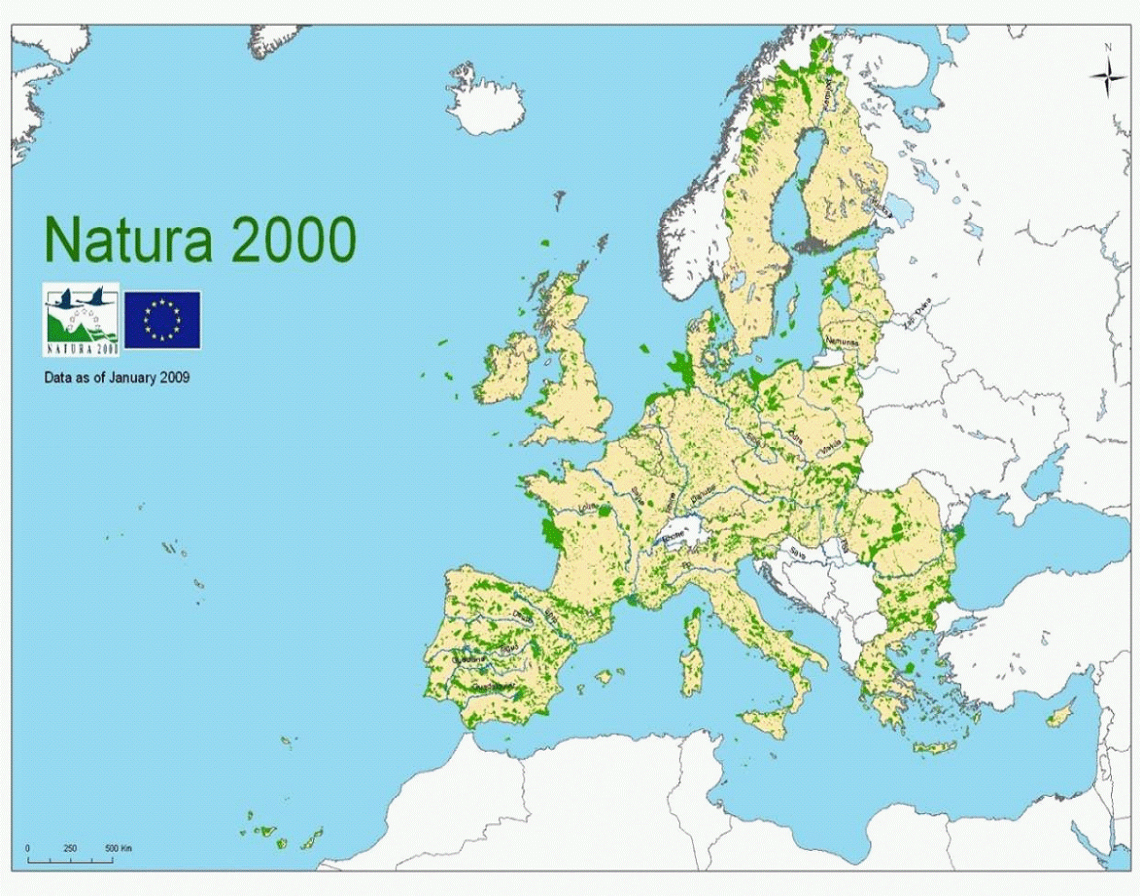


Figure 6: the European Natura 2000 Network across EU-27, status January 2009

2.3.4 Managing and conserving Natura 2000 sites

Within Natura 2000 sites, Member States must:

- take appropriate conservation measures to maintain and restore the habitats and species *for which the site has been designated* to a favourable conservation status (Article 6.1).
- avoid damaging activities that could significantly disturb these species or deteriorate the habitats of the protected species or habitat types (Article 6.2);

The competent authorities in each country should identify the conservation measures for Natura 2000 sites at the latest 6 years after the adoption of the site as Site of Community Interest (or in the case of SPA immediately upon classification). These conservation measures are to be based on the status and ecological requirements of the habitats and species for which the site is designated Natura 2000. The ultimate objective is to ensure that the species and habitat types are maintained or restored to a favourable conservation status across their natural range.[31]

[31] The concept of Favourable Conservation Status is not mentioned in the Birds Directive but there are analogous requirements, i.e. all SPAs must still be subject to special habitat conservation measures in order to ensure the survival and reproduction of the Annex I birds in their area of distribution.

What does favourable conservation status mean in practice?

The ultimate objective of the Habitats Directive is to ensure that the species and habitat types covered reach what is called a 'favourable conservation status' and that their long-term survival is deemed secure across their entire natural range within Europe.

In the case of the species covered by the Directive (ref Article 1(i)) this means that:
- *populations are maintaining themselves over the long term and are no longer showing signs of continuing decline;*
- *their natural range is not being reduced;*
- *there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.*

In the case of a habitat type, a favourable conservation status (ref Article 1(e)) is achieved when:
- *its natural range and the areas it covers within that range are stable or increasing; and*
- *the specific structure and function which are necessary for its long-term maintenance are present and are likely to continue to exist in the foreseeable future;*
- *the conservation status of typical species that live in these habitat types is favourable as well.*

To help decide which conservation measures should be undertaken on individual Natura 2000 sites, the Habitats Directive encourages the development of management plans which are specifically designed for the site in question or integrated into other development plans.

Management plans, where they exist, can be a useful source of information for developers since:
- they record the conservation needs of the habitats and species for which the site has been designated so that it is clear to all what is being conserved and why;
- they analyse the socio-economic and cultural context of the area and the interactions between different land-uses and the species and habitats present;
- they spell out the conservation objectives for the site;
- they identify practical management solutions that can help integrate conservation activities with other land-use practices.

2.3.5 New developments affecting Natura 2000 sites

Whereas Article 6(1) and (2) of the Habitats Directive concern the day-to-day management and conservation of Natura 2000 sites, Articles 6(3) and 6(4) lay down the procedure to be followed when planning new developments that might affect a Natura 2000 site[32].

This stepwise procedure is examined in detail in chapter 5 but, in essence, it requires that a plan or project having a likely significant negative effect on a Natura 2000 site undergoes an 'Appropriate Assessment' to study these effects in detail and to see how they relate to the site's conservation objectives.

Depending on the findings of the Appropriate Assessment, the competent authority agrees to the plan or project as it stands if it has ascertained that it will not adversely affect the integrity of the site concerned.

[32] This applies to SCIs, SACs and SPAs and concerns not just plans or projects inside a Natura 2000 sites but also those that are outside but could have a significant effect on the conservation of species and habitats within the site. For instance a dam constructed upstream on a river that could alter or stop the regular flooding of an important wetland for birds within an SPA further downstream.

Or if it has ascertained that there will be an adverse effect it may require one or more of the following, depending on the degree of impact:

- specific mitigation measures are introduced to remove the negative effects;
- certain conditions are respected during the construction, operational or decommissioning phases of the wind farm, again to remove the likelihood of negative effects or to reduce them to an insignificant level where they no longer affect the integrity of the site;
- feasible alternatives are explored instead.

In exceptional circumstances, a plan or project may still be allowed to go ahead under certain conditions, in spite of being assessed as having negative effects on the site provided the procedural safeguards laid down in the Habitats Directive are followed. This may be possible, for instance, if the plan or project is considered to be of overriding public interest and there are no alternatives available. In such cases, compensation measures will need to be implemented to ensure that the overall coherence of Natura 2000 is protected (see Chapter 5).

2.3.6 Improving the ecological coherence of the Natura 2000 Network

In addition to designating core sites under the Natura 2000 Network, Article 10 of the Habitats Directive also requires Member States to endeavour to improve the ecological coherence of the network across the broader countryside by maintaining and, where appropriate, developing features of the landscape which are of major importance for wild fauna and flora, such as wildlife corridors or stepping stones, which can be used during migration and dispersal[33].

2.4 The EU nature Directives and wind farm development

As regards wind farm developments, there are two aspects of the EU Directives to bear in mind in particular, depending on the location of the development:

- *In and around Natura 2000 sites:* any wind farm development that is likely to affect one or more Natura 2000 sites has to undergo a step-by-step Appropriate Assessment procedure and, where necessary, apply the relevant safeguards for the species and habitat types of Community interest (explained in detail in chapter 5)

- *Anywhere within the EU*: the two Directives also require that Member States protect species of Community interest *throughout their natural range within the EU* (cf. Article 5 of Birds Directive and Article 12 of Habitats Directive – see above). Thus any wind farm development must also take account of its potential impacts on species of Community interest (covered by the two Directives) *outside* Natura 2000 sites as well.

[33] Kettunen et al. (2007) for guidance on the maintenance of landscape features in consistency with Article 10 of the Habitats Directive and Article 3 of the Birds Directive; available via http://ec.europa.eu/environment/nature/ecosystems/docs/adaptation_fragmentation_guidelines.pdf

2.5 The SEA Directive and the EIA Directive

Two other key pieces of EU environmental legislation are directly relevant to wind farm developments:

- Directive 2001/42/EC on the evaluation of the effects of certain plans and programmes on the environment (commonly referred to as 'SEA' Directive)[34]
- Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, amended in 1997 (97/11/EC) and 2003 (2003/35/EC) – commonly referred to as the 'EIA' Directive[35].

2.5.1 The SEA Directive

The purpose of the SEA Directive 2001/42/EC is to ensure that the environmental consequences of ***certain plans and programmes*** are identified, assessed and taken into account during their preparation and before their adoption.

In this respect, Member States are required to:

- prepare an environment report which identifies and assesses the likely significant environmental effects of the plans and programmes, and of any reasonable alternatives.
- provide certain authorities and the general public with an opportunity to express their opinion on the environmental report as well as on the draft plan or programme. Consultation not only helps to ensure that the information supplied for the assessment is comprehensive and reliable but also provides more transparency in the decision making process.

Ultimately, the SEA aims to encourage a more integrated and efficient approach to territorial planning where environment, including biodiversity considerations, are taken into account much earlier on in the planning process and at a much more strategic level. This usually translates itself into fewer conflicts further down the line at the level of individual projects. It also allows for a more appropriate siting of future developments away from areas of potential conflict with nature conservation.

A Strategic Environmental Assessment is mandatory for a variety of plans and programmes (i.e. prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use) which set the framework for future development consent of projects listed in the 'EIA Directive'. An SEA should also be carried out on any plans or programmes, which, in view of the likely significant effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of the Habitats Directive.

2.5.2 Environmental Impact Assessment

While the SEA process operates at the level of public plans and programmes, Environmental Impact Assessments (EIA) operate at the level of individual public and private projects. Thus, development consent for projects[36] which are likely to have significant effects on the environment should be granted only after an assessment of the likely environmental effects of the project has been carried out.

[34] OJ L 197, 21.7.2001, p. 30–37 –http://ec.europa.eu/environment/eia/home.htm
[35] OJ L 156, 25.6.2003, p. 17 –http://ec.europa.eu/environment/eia/home.htm
[36] The EIA Directive defines 'project' as the execution of construction works or of other installations, schemes, or interventions in the natural surroundings and landscape.

The EIA Directive distinguishes between projects requiring a mandatory EIA (so-called Annex I projects) and those where Member State authorities must determine, in a procedure called "screening", if projects are likely to have significant effects, taking into account criteria in Annex III of the Directive (so-called Annex II projects). Wind power developments are listed in Annex II.3.i of the EIA Directive[37].

Environmental Impact Assessments process (EIA)

The typical EIA procedure includes the following stages:

- *Screening (Article 4 and Annex III of the EIA Directive): to determine whether an EIA is required. Screening is required for any type of project listed in Annex II (including wind farms). The screening decision of the competent national authority is made available to the public.*
- *Scoping (Article 5): is the stage of the EIA process that determines the content and extent of the matters to be covered in the environmental information to be submitted by the developer to a competent authority. The scoping stage is an important feature of an adequate EIA regime, mainly because it improves the quality of the EIA.*
- *Preparation of an Environmental Statement or report (Article 5), presenting the following necessary environmental information: description of project, description of measures to avoid or reduce significant adverse effects, data required to identify and assess the main effects on the environment, an outline of the main alternatives studied by the developer, and an indication of the reasons for the preferred choice, taking into account the environmental effects identified. This should be made publicly available.*
- *Consultation: (Articles 6, 7 & 8) The public, the environmental authorities and Member States concerned must be informed and consulted before the decision on the request for development consent is taken. The results of consultations and the information gathered must be taken into consideration in the development consent procedure.*
- *Explanation of the Decision: (Article 9), When a decision to grant or refuse a development consent has been taken, the national authorities are obliged to make available to the public specific information, such as the content of the decision and any conditions attached thereto, the main reasons and considerations on which the decision is based, including information about the public participation process, a description, where necessary, of the main mitigation and compensatory measures.*

The EIA should address direct and indirect effects on (Article 3):

- *human beings, **fauna and flora,***
- *soil, water, climate and the landscape,*
- *material assets and the cultural heritage,*
- *the interaction between the factors mentioned in the above indents.*

Both positive and negative effects should be considered.

2.5.3 The relationship between SEA, EIA and Appropriate Assessments

There are many similarities between the procedures for SEA and EIA, and the Appropriate Assessments carried out for plans or projects affecting Natura 2000 sites under the Habitats Directive. But this does not mean they are one and the same, there are some important distinctions too (see table). Therefore, **an SEA and EIA cannot replace, or be a substitute for, an Appropriate Assessment as neither procedure overrides the other**. They may of course run alongside each other or the Appropriate Assessment may form part of the EIA/SEA assessment[38] but, in such cases, the Appropriate Assessment should be

[37] The annex refers to *"installations for the harnessing of wind power for energy production (wind farms)"*.

[38] Doing an Appropriate Assessment at the level of a plan also does not remove the need to apply the Article 6(3)-(4) procedure to individual projects as well. Of course if the Appropriate Assessment of a plan results in a

clearly distinguishable and identifiable in the SEA's Environmental Report or in the EIA's Environmental documentation, or should be reported on separately so that its findings can be differentiated from those of the general EIA or SEA[39].

One of the key distinctions between SEAs/EIAs and Habitats Directive's Appropriate Assessments, apart from the fact that they measure different aspects of the natural environment and have different criteria for determining 'significance', is how the outcome of the Assessment is followed. In this regard, the assessments under the SEA and EIA lay down essentially procedural requirements and do not establish obligatory environmental standards. On the contrary, the assessment under the Habitats Directive lays down obligations of substance, mainly because it introduces an environmental standard, i.e. the conservation objectives of a Natura 2000 site and the need to preserve its integrity.

In other words, if the Appropriate Assessment determines that the plan or project will adversely affect the integrity of a Natura 2000 site, the authority cannot agree to the plan or project as it stands unless, in exceptional cases, they invoke special procedures for projects which are deemed to be of overriding public interest. The SEAs/ EIAs, on the other hand, are designed to make the planning authorities fully aware of the environmental implications of the proposed plan or project so that these *are taken into account* in their final decision.

Table 2: Comparison of procedures under AA, EIA and SEA

	AA	EIA	SEA
Which type of developments are targeted ?	Any **plan** or **project** which - either individually or in combination with other plans/projects - is likely to have an adverse effect on a Natura 2000 site (excluding plans or projects directly connected to the management of the site)	All **projects** listed in Annex I. For projects listed in Annex II the need for an EIA shall be determined on a case by case basis and depending on thresholds or criteria set by Member states (taking into account criteria in Annex III)	Any **Plans** and **Programmes** or amendments thereof which are (a) prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or (b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.
What impacts need to be asssessed relevant to nature?	The Assessment should be made in view of the site's conservation objectives (which are set in function of the species/ habitat types for which the site was designated.) The impacts (direct, indirect, cumulative..) should be assessed to determine whether or not they will adversely affect the integrity of the site concerned.	Direct and indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative significant effects on ….'fauna and flora'	Likely significant effects on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

development being zoned into areas of low or no potential conflicts with Natura 2000 sites then it is likely that fewer projects resulting from the plan will require an Appropriate Assessment at a project level.

[39] "Assessments of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC".

Who carries out the Assessment?	It is the responsibility of the competent authority to ensure that the AA is carried out. In that context the developer may be required to carry out all necessary studies and to provide all necessary information to the competent authority in order to enable the latter to take a fully informed decision. In so doing the competent authority may also collect relevant information from other sources as appropriate.	The developer	The competent planning authority
Are the public/ Other authorities consulted?	Not obligatory but encouraged 'if appropriate'	Compulsory –consultation to be done before adoption of the development proposal Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Ditto for the public.	Compulsory –consultation to be done before adoption of the plan or programme. The authorities and the public shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure Member States must designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned.
How binding are the outcomes ?	Binding. The competent authorities **can agree to the plan or project only after having ascertained that it will not** adversely affect the integrity of the site.	The results of consultations and the information gathered as part of the EIA ***must be taken into consideration*** in the development consent procedure.	The environmental report, as well as the opinions expressed ***shall be taken into account*** during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

2.6 Relevant international nature and biodiversity Conventions and Agreements

The European Union and its Member States, as well as most other European countries are contracting parties to various relevant international environmental Conventions and Agreements. Thus, European and national legal frameworks on nature and biodiversity conservation must take full account of the commitments entered into under these Conventions and Agreements as well.

These Conventions have helped to shape the legal framework for biodiversity policy and legislation within the EU and also helped define the relationship between the EU and other countries. The following outlines the most relevant in the context of renewable energies - such as wind energy - and nature conservation in Europe. Several have also adopted

specific recommendations and resolutions on wind farms and wildlife. These are listed in annex I to this guide:

- The **Convention on Biological Diversity**[40] (CBD) is a global treaty, adopted in Rio de Janeiro in June 1992. It widened the scope of biodiversity conservation from species and habitats to the sustainable use of biological resources to the benefit for mankind. To date, 189 parties have ratified the convention.

- The **Convention on the Conservation of European Wildlife and Natural Habitats**[41] ('Bern Convention') came into force in 1982. It has played a significant role in strengthening the work on biodiversity conservation in Europe. It has been signed by 45 Member States of the Council of Europe, as well as the European Community and four countries in Africa. An important objective of the convention is the creation of the **Emerald Network**[42] of Areas of Special Conservation Interest (ASCIs). This operates alongside the EU Natura 2000 Network. A recommendation on effects of wind turbines on migratory species of mammals and birds was adopted in 2002.

- The **Convention on the Conservation of Migratory Species of Wild Animals**[43] (CMS, 'Bonn Convention') aims to preserve migratory species throughout their natural range. It entered into force in 1983 and has now been signed by more than 100 parties. Several agreements signed under this Convention are relevant to the management of conflicts between migrating animals and wind farms:
  - *Agreement on the Conservation of African-Eurasian Migratory Waterbirds*[44] (AEWA) calls for coordinated action throughout the migration routes or flyways. It came into force in 1999. The agreement covers 119 countries and 235 species of waterbirds. The European Community ratified AEWA in 2005.
  - *Agreement on the Conservation of Populations of European Bats*[45] (EUROBATS) concerns the protection of all 45 species of bats found in Europe. It entered into force in 1994. Currently 32 countries have signed up. Implementation of common conservation strategies and international experience-sharing are its main activities. Under this agreement, guidelines were published in 2008[46] for the consideration of bats in wind farm projects.
  - *Agreement on the Conservation of Small Cetaceans of the Baltic and North Sea*[47] (ASCOBANS): this aims to co-ordinate measures to reduce negative impact of by-catches, habitat loss, marine pollution and acoustic disturbances among the ten parties. It was launched in 1991. A resolution on adverse effects of sound on small cetaceans, and with relevance for potential impact from wind farms, was adopted in 2006 (Annex I).
  - *Agreement on the Conservation of Cetaceans in the Black Sea, Mediterranean Sea and contiguous Atlantic area*[48] (ACCOBAMS) is a cooperative framework for the conservation of marine biodiversity in the Mediterranean and Black Seas. Its main

[40] http://www.cbd.int.
[41] http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp
[42] http://www.coe.int/t/dg4/cultureheritage/nature/EcoNetworks/Default_en.asp
[43] http://www.cms.int.
[44] http://www.unep-aewa.org
[45] http://www.eurobats.org
[46] Rodrigues et al. (2008), available via http://www.eurobats.org/publications/publication_series.htm.
[47] http://www.ascobans.org.
[48] http://www.accobams.org.

purpose is to reduce the threat to and improve knowledge about cetaceans in these seas. The agreement came into force in 2001.

- The **Convention of Wetlands of International Importance**[49] ('Ramsar Convention') is an intergovernmental treaty providing a framework for national action and international cooperation for the conservation and wise use of wetlands. It was adopted in 1971 and amended in 1982 and 1987. There are to date 158 parties and so far 1723 sites worldwide have been added to the 'Ramsar' list of wetlands of international importance. The Convention does not foresee ratification by supra-national bodies such as the European Union but all Member States of the EU are contracting parties.

- The **Convention for the Protection of the Marine Environment of the North-East Atlantic**[50] (OSPAR) guides international cooperation on a range of issues including the conservation of marine biodiversity and ecosystems, the impact of eutrophication and hazardous substances, and monitoring and assessment. It was launched in 1992, following of the merger of the previous Oslo and Paris Conventions (from 1972 and 1974). Several studies of potential impact of off-shore wind farms on the marine environment have been initiated under the auspices of this Convention.

- The **Convention on the protection of the marine environment of the Baltic Sea Area**[51] (HELCOM, 'Helsinki Convention') covers the Baltic Sea basin plus all inland waters in its catchment area. It was adopted in 1980 and revised in 1992. All countries around the Baltic Sea plus the EU are contracting parties.

- The **Convention for Protection against Pollution in the Mediterranean Sea**[52] ('Barcelona Convention') aims primarily to regulate and reduce the negative impact of all kinds of pollutants in the Mediterranean basin. It was set up in 1976 and last amended in 1995. Most countries bordering the sea have signed up to it.

[49] http://www.ramsar.org
[50] http://www.ospar.org.
[51] http://www.helcom.fi
[52] http://www.unep.ch/regionalseas/regions/med/t_barcel.htm

3. POTENTIAL IMPACTS OF WIND ENERGY DEVELOPMENTS ON NATURE AND WILDLIFE

- *Evidence to date indicates that appropriately sited and well designed wind energy developments are generally not a threat to biodiversity. However, there may be occasions where individual plans or projects can cause damage to protected wildlife and nature areas.*
- *Studies suggest that various species of birds, bats and marine animals may be particularly vulnerable. The type and degree of impact is very much dependent upon a range of factors, such as location and the type of species present. The potential impacts must therefore be examined on a case by case basis.*
- *Scientific studies and monitoring work undertaken in relation to existing and future wind farm developments are an invaluable source of information. Wind farm developers as well as planners, scientists and NGOs have a key role to play in building up the information base on the interactions between wind farms and wildlife.*
- *The benefits of such studies are manifold, not just for scientists but also for the industry itself: a better scientific knowledge base will ultimately lead to better and faster decision making.*

3.1 Positive and negative impacts: the need for a case by case approach

This chapter reviews the type of possible impacts that wind farms and their associated instrastructures could have on wildlife. The information contained therein has been sourced from a wide range of published scientific studies and reviews. Its purpose is to provide developers, relevant authorities and others with an overview of the types of potential impacts on wildlife they should pay attention to when preparing a wind farm development plan or project or when assessing the potential impacts of such plans or projects on wildlife and nature.

This does not imply that wind farm developments *in general* pose a problem for wildlife. There are clearly many cases where well designed and appropriately sited developments have no or only limited and largely insignificant impacts on biodiversity. There are also examples of where wind farms have delivered overall net benefits for biodiversity, especially in areas where the natural environment is already impoverished.

But, whilst well sited and designed wind farm developments are unlikely to pose a problem for biodiversity, this does not remove the obligation to examine, through EIA/SEAs and Appropriate Assessments, the potential effects that individual plans or projects can have and to ensure that, in the event that potentially significant impacts are detected, these are minimised or avoided altogether, especially when it could affect rare and threatened species and habitat types of Community importance.

For this to be possible, those concerned - be they developers, authorities, consultants etc - ought to be aware of the kind of threats to look out for. Since the main purpose of this guidance document is to clarify the provisions of Article 6 of the Habitats Directive in relation to wind energy development, this chapter focusses on reviewing the type of potential *negative* effects that may need to be taken into consideration as part of the Appropriate Assessment.

This does not mean that all wind farms will necessarily have such impacts - there are plenty of examples, especially in areas located away from highly sensitive wildlife zones, that show this is not the case and that with careful preparation, many potential problems can be designed out early on or effectively mitigated against (see chapter 5.5.4 for an overview of possible mitigation measures).

Wind energy developmnents can bring local biodiversity benefits

If planned properly, modern wind energy activities can not only avoid impacting on wildlife but can also on occasion actively contribute to biodiversity conservation. This is especially relevant for developments that are located in an already modified or severely impoverished natural environment as the following example illustrates:

Black Law, Scotland – Bringing Degraded Land Back into Active Management
Black Law wind farm (42 wind turbines with installed capacity of 97MW) is located on an exposed stretch of severely degraded upland moorland in South Lanarkshire, Scotland. Prior to development the site bore the scars of opencast mining and had been described as a major eyesore. As required by a stipulation of the planning conditions the developer, ScottishPower, devised and implemented a Habitat Management Plan for this brownfield site in consultation with Scottish Natural Heritage, RSPB Scotland, Lanarkshire Farmland and Wildlife Advisory Group and the University of Stirling.

The management plan covered 14.4km² in the vicinity of the turbines and involved the clearance of 4km² of non-native conifer plantation to allow the regeneration of blanket bog and typical upland vegetation. One of the mines was transformed into a shallow wetland and a 300m stretch of the Abbey Burn watercourse also restored. For the benefit of farmland birds, nestboxes were installed and 'sacrificial crops' were planted and left unharvested to provide a winter food source. Species targeted to benefit from the habitat improvement work included: otter, breeding waders, farmland birds, badger, bats, long-eared owl, black grouse, kestrel, barn owl, spotted flycatcher and merlin.

According to RSPB '*Black Law has taken a badly scarred site and vastly improved it. This will benefit a range of wildlife'*. ScottishPower '*agrees with RSPB that as long as we are careful in picking wind farm locations, perhaps not next to breeding site for golden eagle, for example or a migratory route, we should be able to accommodate their concerns*[53].

Beinn an Tuirc, Scotland – Integrating Protection and Development[54]
The discovery of a pair of Golden Eagles at the site of a planned 30MW wind farm at Beinn an Tuirc in Scotland, did not prevent construction but instead inspired a considered approach to minimising the impacts of the development. Based on environmental assessment results, a means was found that accommodated the needs of the eagles without reducing the viability of the wind farm.

Firstly, some adjustment was made to the planned turbine locations to remove them from the eagles' core territory. Due to the large distances covered by Golden Eagles it was not possible to reposition the turbines outside the pair's entire territory, so an alternative habitat was created for them away from the turbines, dubbed a 'mitigation area'. The mitigation area was created by the clearance of 4.5km2 of non-native conifer plantation to allow regeneration of the traditional upland moor vegetation such as heather, blaeberry and cotton grass. This provided an attractive environment for Red Grouse – a key prey species of Golden Eagles – which, in turn, attracted the eagle pair to the new habitat.

Thus the mitigation area served two purposes: the habitat loss instigated by the turbines' arrival was offset and, by attracting the eagles away from the turbines, the risk of collision with blades was far reduced. Monitoring shows that the mitigation area habitat is developing well, and in 2008 two Golden Eagle chicks were hatched at the site.

[53] More information : http://www.scottishpower.com/search.asp?search=Black+Law&x=10&y=7
[54] Positive planning for onshore wind , RSPB and IEEP, March 2009 (Bowyer et al. 2009).

It is widely recognised, amongst others by the wind energy sector itself, that whereas the global benefits of switching to renewable energy are relatively straight forward to assess, the local interface between a particular wind farm development and the environment tends to be more complex. The effects are very much dependent on the wildlife present as well as on the location and design of the individual wind farm developments which is why it is essential to examine each plan or project on a case by case basis.

3.2 Identifying potential impacts during different phases of wind farm development

When assessing the potential impacts of wind energy developments on nature and wildlife it is important to bear in mind that these impacts may concern not just the wind turbines themselves, but also all associated installations such as access roads, site access (e.g. for maintenance works or during constuction), anemometer masts, construction compounds, concrete foundations, temporary contractors facilities, electrical cabling (e.g. overhead wires) for access to the grid, spoils, and/or possible a sub-station, control building etc…

They can also appear during any one of the phases of the wind farm's development from the initial construction phase to the actual operation and management and, on to the re-powering or decommissioning phases. As a result, the impacts may be temporary or permanent, on-site or off-site, cumulative and may come into play at different times during the project cycle.

All these factors should also be taken into consideration during the impact assessment and, where necessary, avoidance or mitigation measures should be introduced into the planning agreements and accompanying planning permits to eliminate, or at least minimise, the effects of the proposed plan or project on wildlife.

3.3 An overview of potential impacts

The type and scale of impact is very much dependant on the species involved, their ecology and state of conservation as well as the location, size and design of the wind farm plan or project. That is why it is important to examine each development plan or project on a case by case basis. As stated before, there is an increasing body of evidence to indicate that wind farm projects that avoid, or are located away from, areas of importance for wildlife generally do not have a major impact on biodiversity. But for this to be the case the developer must be aware of highly sensitive areas in the first place and of the potential impacts to look out for.

Mitigating against potentially negative effects

The potential risks of negative impacts mentioned in this chapter can sometimes be effectively mitigated against. Mitigation involves introducing measures into the plan or project to eliminate these potential negative effects or reduce them to a level where they are no longer significant. This means that they must be directly linked to the likely impacts and based on a sound understanding of the species/ habitats concerned.

In the case of wind farm plans or projects, an obvious mitigation measure is to adjust the location of the wind farm away from areas where it can cause conflicts with species and habitat types. But mitigation measures can also involve modifications to the size, design and configuration of the wind farms or the construction of turbines and associated infrastructures. Or they can take the form of temporal adjustments during the construction and operational phases. Further details, with examples of possible mitigation measures that have been used for wind farms so far, are given in chapter 5.5.4.

The type of impacts that may occur include the following:

- *Collision risk:* Birds and bats may collide with various parts of the wind turbine, or with associated structures such as electricity cables and meteorological masts. The level of collision risk depends very much on site location and on the species present, as well as on weather and visibility factors. Species that are long-lived, have low reproductive rates and/or that are rare or are already in a vulnerable conservation state (such as eagles, vultures and various species of bats) may be particularly at risk. Evidence to date indicates that wind farms that are located away from areas harbouring concentrations of wild animals or areas that are important for wildlife have relatively low rates of mortality.

- *Disturbance and displacement*: Disturbance can lead to displacement and exclusion, and hence loss of habitat use. This risk may be relevant for birds, bats and marine mammals. The species may be displaced from areas within and surrounding wind farms due to visual, noise and vibration impacts. Disturbance may also arise from increased human activity during construction work and maintenance visits, and/or as a result of opening up access to the site for others through the construction of new access roads etc.... The scale and degree of disturbance determines the significance of the impact, as does the availability and quality of other suitable habitats nearby that can accommodate the displaced animals.

- *Barrier effect.* Wind farms, especially large establishments with tens of individual wind turbines, may force birds or mammals to change direction, both during migrations and, more locally, during regular foraging activities. Whether or not this is a problem depends on a range of factors such as the size of the wind farm, the spacing of turbines, the extent of displacement of species and their ability to compensate for increased energy expenditure as well as the degree of disruption caused to linkages between feeding, roosting and breeding sites.

- *Habitat loss or degradation.* The scale of direct habitat loss resulting from constructing a wind farm and associated infrastructure depends on the size, location and design of the project. Whilst the actual land take may be comparatively limited, the effects may be more widespread where developments interfere with hydrological patterns or geomorphological processes. The significance of loss depends on the rarity and vulnerability of the habitats affected (e.g. blanket bogs or sand dunes) and/or of their importance as a feeding, breeding or hibernating place for species, especially for species of European conservation concern. Also, the potential role of some habitats as components in corridors or stepping stones important for dispersal and migration, as well as for more local movements between e.g. feeding and nesting sites, has to be taken into account.

3.4 Potential impact of wind farms on selected species and habitats

The following sections describe the type of potential impacts that wind farms can have on specific categories of species such as birds, bats and marine mammals as well as on certain vulnerable habitat types. The information is derived from a comprehensive analysis of the latest scientific literature. Overview tables are given in Annex II-IV of those species of birds, bats and marine animals that are considered to be particularly vulnerable to wind farms. Annex V provides more detailed information on the potential or confirmed impacts on certain species.

Whilst the knowledge base on the potential impacts that particular wind farms might have on certain species (particularly birds and bats) is growing fast and there is now an important body of research available, it has to be recognised that the evidence base remains low[55], and there is still a lack of long-term studies upon which to carry out risk and impact assessments.

An important part of the information will come from the studies and monitoring work undertaken in relation to existing and future wind farm developments. Like conservation NGOs and scientists, wind farm developers and planners have a key role to play in building the knowledge base on the biodiversity impacts of wind farms and how to avoid or mitigate them. The benefits of such cooperation and information sharing are manifold, not just for scientists but also for the industry itself: a better scientific knowledge base will ultimately lead to better and faster decision making.

3.4.1 Potential impact of wind farms on birds

The potential impact of wind farms on birds is the one that has been most studied. As outlined above, if there is an impact, it is likely to fall into a number of categories:

- ***Collision fatalities***

Injuries and mortalies tend to be related mostly to collisions with rotors or with other associated infrastructures such as overhead cables. Although there is increasing evidence that collision risks are generally low in most cases, there are note-worthy exceptions which must nevetheless be considered, especially for rare species such as large-sized raptors that already under threat and where wind farm fatalities may be an additional factor.

Significant collision mortality risks are primarily related to topographical bottlenecks where migrating or local birds fly through a relatively confined area, for example mountain passes or land-bridges between water-bodies. Other susceptible locations are slopes with rising winds where the birds gain lift and near wetlands or shallow seas that attract large numbers of feeding or resting birds. Flight corridors between feeding areas, roosting sites or breeding sites are also particularly susceptible[56]. However, there is also increasing evidence among various species of active avoidance behaviour[57].

Peaks in mortality may also be seasonal, for instance during spring and autumn migration when bird concentrations tend to grow significantly. Or it may be higher during the period of pre-nuptial display flights in spring, defence of breeding territories or whilst providing food for nestlings.

Other factors that could influence collision risks include the species flight height, flight type (migration or commuting flights to and from feeding areas through a windfarm), behaviour, weather conditions, topography and the scale and design of the wind turbines. However, potential increases in collision risk, e.g. during poor visibility, fog or rain, may also be partly offset by lower flight activity in such conditions[58].

Some species are more at risk than others, and effects are likely to lie somewhere in the continuum between the extremes of *additive* - increasing overall mortality - or *compensatory*

[55] E.g. Stewart et al. (2007).
[56] E.g. EEA (2009) and references therein.
[57] E.g. Hötker (2005, 2006), Petersen et al. (2006), Masden et al. (2009).
[58] E.g. Drewitt & Langston (2006) and references therein.

- replacing other causes of mortality. However, as some of the species found to be at particular risk are long-lived with low annual recruitment and high maturation age, it can be concluded that they might be susceptible to additional mortality[59]. Although more direct evidence related to wind farms is still scarce, there are nevertheless indications that raptors may be susceptible to the additive mortlity[60].

Special consideration must also be given to populations of scarce and vulnerable species already under threat from other human-induced factors such as habitat loss[61]. This include species listed in annex I of the Birds Directive, such as species of raptors and seabirds. There is also increasing concern (but as yet insufficient evidence) for night-migrating passerines[62].

Wind farm developments and the risk of collision fatalities amongst raptors

There has been a particular concern over the potential effects of collisions between various species of raptors and inappropriately sited wind farms. For instance, significant levels of mortality have been recorded for e.g. Eurasian Griffon Vulture (*Gyps fulvus*), Egyptian Vulture (*Neophron percnopterus*) and Common Kestrel (*Falco tinnunculus*) at wind farms in Spain[63] and for White-tailed Eagle (*Haliaeetus albicilla*) in Germany and Norway and for Red Kite (*Milvus milvus*) in Germany[64].

At the same time, some of these species, such as White-tailed Sea Eagle and Red Kite, have increased in numbers in large parts of Europe during the last decades, due to the removal of historical threats and problems related to e.g. reduced exposure to toxic elements and illegal persecution. Nevetheless, considering that many of these species are long-lived, with late maturity and a low annual recruitment, any additional factors affecting the adult mortality should nevertheless still be treated seriously.

Even if current studies indicate that mortality due to wind farm fatalities is low compared to other factors and may not have affected general population trends so far, the potential collision risk still needs to be studied on a case by case basis and future risks should also take account of the potential cumulative impact of the expected large expansion of wind farm establishments during the next 10-20 years[65].

Primarily, appropriate siting of wind farms is an issue of location and avoiding key areas for raptors. This has not only to do with high densities of raptors, but also with seasonality - often with enhanced risks in spring and in relation to breeding and in autumn - as well as weather conditions and topography of the landscape. On the basis of today's knowledge and experience, whilst it is not possible to make conclusive comments, several studies have recommended in areas where rapters are present, avoiding locations on the top of hills with gentle slopes (where uplift wind conditions may be poor and make manoeuvrability more difficult for soaring raptors)[66]. But because local conditions differ widely between sites decisions should be taken only after assessments based on careful case-by-case analyses.

[59] E.g. Sæther & Bakke (2000) for general conclusions.

[60] E.g. a demographic study of Golden Eagle *Aquila chrysaetos* in the Altamont Pass Wind Resource Area in California indicated that mortality caused by collision was additive to other lethal agents (Hunt & Hunt (2006), and a population model for Egyptian Vulture (*Neophron perconpterus*) showed that population size and time to extinction decreased when wind farm mortality was added (Carrete et al. 2009).

[61] E.g. Drewitt & Langston (2008).

[62] E.g. Sterner et al. (2007), Drewit & Langston (2008) see also annex V.

[63] E.g. Barrios & Rodrígues (2004, 2007), Lekuona & Ursúa (2007), Carrete et al. (2009).

[64] Hötker et al. (2006), also Follestad et al. (2007) and Bevanger at al. (2008) for White-tailed Eagle along the coast of Norway.

[65] E.g. with reference to Red Kite and Germany (Rasran et al. 2009).

[66] E.g. de Lucas et al. (2008) for European Griffon Vulture.

Collision mortality is usually measured through carcass search but this may lead to an under-estimate, especially for small birds, because corpses may be overlooked or quickly removed by scavengers. Using models may help to get more accurate estimates, although they are very dependant on reliable field data and correct assessments of avoidance by birds[67]. Recently, collision risk per megawatt (MW) has been proposed as an indicator. In view of the increasing size of wind turbines this may turn out to be a more relevant or useful measure[68].

Monitoring and assessing offshore mortality due to collision is even more difficult than for onshore locations, due to the obvious fact that carcasses are hardly ever found. Instead, techniques such as radar, thermal animal detection systems (TADS) and acoustic detection have been tested[69]. An alternative approach to overcome this problem is to assess 'sensitivity indices' for the species concerned[70].

- ***Disturbance and displacement***

Bird disturbance, leading to displacement or exclusion, and hence loss of habitat use, is a matter which may be of concern both for onshore and offshore wind developments. Such sub-lethal effects can lead to loss of body condition which is in some respects more insidious than direct mortality for a population as a whole as there may be a delay before any population-level impact is detected[71].

Disturbance can be caused by the sight, noise or vibration of the wind turbines themselves and/or by other activities related to wind farm maintenance, involving for instance vehicle, boat or helicopter usage. Also, associated road infrastructure may make the site easier to access which can in turn increase overall disturbance. Effects are variable and dependant on the individual species, seasons and sites involved. They also depend on the importance of the site for that species and the availability of other suitable habitats in the vicinity that can accommodate the displaced birds.

Breeding birds have been considered to be less affected than feeding or roosting birds[72], although recent studies suggest that this may not always be the case[73]. Some waders for instance are site-faithful, implying that their attachment to a location may outweigh any potential response to change. Hence, the true impact may not be evident until new recruits replace the old birds[74]. But again this needs to be considered on a site by site basis.

Thus, more long-term follow-up studies are needed regarding the potential for different species to habituate and recover. The first systematic reviews indicated local population declines over time for various species (e.g. among waterfowl and waders at staging and wintering sites) and no conclusive evidence of habituation[75], while more recently published

[67] Band et al. (2007), Chamberlain et al. (2006).
[68] E.g. Drewitt & Langston (2008).
[69] E.g. Desholm et al. (2006).
[70] E.g. Garthe & Hüppop (2004), Desholm (2009).
[71] Langston & Pullan (2003).
[72] E.g. Hötker et al. (2005, 2006).
[73] E.g. Pearce-Higgins et al. (2009)
[74] E.g. Drewitt & Langston (2006)
[75] Stewart et al. (2004). In a review of studies lasting over longer than one season, there were as many cases of birds occurring closer to wind farms over the years (indication of habituation) as well as birds found further away (indication of lack of habituation or even increased tendancy to disturbance; Hötker et al. 2006).

long-term studies indicate that various species may habituate, both at onshore and offshore locations[76].

On the basis of current knowledge it is evident that disturbance leading to displacement may need to be considered in impact assessments of wind farms, depending on the species present as well as the location. Also it should be remembered that even if areas affected around single wind farms may be small in relation to the total availability of habitats for breeding, foraging, staging or wintering, the cumulative effect of a series of wind farms may be significant.

- ***Barrier effect***

There is a potential risk that wind farms located along migration routes or flyways, or, at a more local level, along regular flight routes between feeding areas and resting or breeding sites may pose a barrier to species movement. Avoidance of wind farms has been documented among a wide range of bird species, particularly waterfowl and passerines. Responses are highly species-specific. During daylight, they may occur in a distance interval of 100-3000 m, whereas at night the distances are likely to be closer[77].

Although the short-term benefit of avoidance is obvious in that the risk of injury or mortality due to collision is eliminated, detours may involve increased expenditures in terms of energy and time which might in theory, in the long-term, affect fitness related parameters such as survival and reproductive capacity. However, reviews of available literature suggest that the barrier effect has not been proven to significantly impact on the fitness of bird populations[78], although the potential for cumulative impacts, e.g. if several wind farms are located along the migration route, must not be neglected[79].

The risk of causing barrier effects may also be influenced by the design of the wind farm – for instance, its size and/or the alignment of the turbines or the spacing between them. Altering the design of the wind farm may therefore be a potentially important mitigation measure.

- ***Habitat loss and degradation***

Loss of, or damage to, bird habitats, depends on local circumstances and the scale of land-take required for the wind farm and associated infrastructures. Direct habitat loss may also be additive to disturbance exclusion.

Onshore infrastructure including turbine bases, substations and access roads etc could, if placed inappropriately, involve the direct loss of breeding or feeding habitats for certain birds[80]. Offshore, direct habitat loss may be comparatively small-scale. However, increasingly large wind farms, especially on bird feeding areas such as sandbanks in shallow waters, may give cause for concern for certain species, especially in periods of high bird concentrations during spring or autumn migrations[81].

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[76] E.g. Petersen & Fox (2007), Madsen & Boertmann (2008).
[77] E.g. Drewitt & Langston (2006) and references therein.
[78] E.g. Drewitt and Langston (2006)
[79] Masden et al. (2009).
[80] E.g. Pearce-Higgins et al. (2009).
[81] 2-5% of the total development area around Danish off-shore wind turbines (Fox et al. 2006), although indications of recent recovery (Petersen et al. 2007).

Some studies have indicated the benefits of avoiding developments within buffer zones around e.g. nesting, roosting or foraging sites[82]. Although these are often purely indicative figures they may nevertheless be of interest to developers and others as they may provide some idea, for instance, of the area that might be covered by an impact assessment or areas to pay particular attention to when preparing a development plan or project.

3.4.2 Potential impacts of wind farms on bats

The concern over the potential impacts of wind farms on bat species has increased in recent years, particularly in relation to the risk of collision with rotors or turbine towers, and barotrauma caused by rapid air-pressure reduction near moving turbine-blades[83].

Bats have a low annual reproductive output and a long life expectancy, so they may be susceptible to even small additional mortality. An overview of the kinds of impacts (except barotrauma) related to siting and operation of a wind farm is given in Table 3, and species level details are summarised in Annex IV.

A typical year in the life of bats involves a period when they are active (April – October/November) and a period when they are usually less active or in hibernation (November – March). Bats mostly commute or migrate between summer roosts and hibernation sites. Timing varies for each species according to geographical location and from one year to the next depending on weather conditions but several studies have shown that there is a peak in mortality in late summer and autumn during dispersal and migration, and that migrating species may be particularly susceptible[84]. A common assumption has been that bats use echolocation to avoid wind turbines but they may not do so for energy-saving reasons when travelling over long distances in open areas[85].

The highest collision rates have been found in wind farms near forests but bat collisions have also been reported from turbines in open areas and even at offshore wind farms. Potential siting in important hibernation areas where large numbers of bats forage before and after hibernation should be carefully evaluated, and are best avoided if it is determined that this will result in a significant negative impact.

A variety of landscape features important for concentrations of various bat species should also be considered with reference to collision risks. This should include linear landscape elements such as woods[86], hedgerows and watercourses, wetlands, marshlands and wet meadows with adjacent shallow marine or freshwater lake areas[87]. These may be used as habitat corridors for movement between feeding, breeding and roosting areas.

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[82] E.g. Bright at al. (2006, 2009), LAG-VSW 2007).

[83] E.g. Cryan & Barcley (2009). Barotrauma involves tissue damage to air-containing structures caused by rapid or excessive pressure change; pulmonary barotrauma is lung damage due to expansion of air in the lungs that is not accommodated by exhalation (Baerwald et al. 2008).

[84] Rodrigues et al. (2008) and references therein.

[85] Keeley et al,(2001).

[86] E.g. a 200 meters zone along forest edge has been recommended (Rodrigues et al. 2008); see also Mitchell-Jones & Carlin (2009) for recommendations to minimise harm; e.g. by adjustments of the location of turbines in relation to surrounding tree-lines, location of roosting sites etc.

[87] E.g. Brinkmann et al. (2006), Ahlén (2008), Rodrigues et al. (2008).

Table 3: Overview of possible impacts on bats (extract from the Eurobats guidelines for consideration of bats in wind farm projects)[88]

Possible impacts on bats related to siting		
Impact	**Summer time**	**During migration**
Loss of hunting habitats during construction of access roads, foundations etc..	*Small to medium impact, depending on the site and species present at that site.*	*Small impact.*
Loss of roost sites due to construction of access roads, foundations etc..	*Probably high or very high impact, depending on the site and species present at that site.*	*High or very high impact, e.g. loss of mating roosts.*
Possible impacts related to operating the wind farm		
Impact	**Summer time**	**During migration**
Ultrasound emission.	*Probably a limited impact.*	*Probably a limited impact.*
Loss of hunting areas because the bats avoid the area.	*Medium to high impact.*	*Probably a minor impact in spring, a medium to high impact in autumn and hibernation period*
Loss or shifting of flight corridors.	*Medium impact.*	*Small impact.*
Collision with rotors.	*Small to high impact, depending on the species*	*High to very high impact.*

Habitat loss and degradation can occur if the wind turbine is sited in or near a forest occupied by bats, as well as in more open landscapes used for foraging. Not only does the removal of trees for the installation of the wind tubine and associated structures lead to potential loss of habitat for bats but it may also create new linear features which attract bats to forage right next to the wind turbine.

Various hypotheses have been proposed for why bats may actually be attracted to wind turbines[89]. A widely accepted explanation is that insects may concentrate around wind turbines, both at onshore and offshore locations, attracted by the heat radiation from the wind turbine. In certain weather conditions bats, as well as several species of insectivorous passerine birds, may be attracted to these concentrations of insects[90].

The timing of the construction of the wind farm has also a potentially important impact for certain species of bats if it interferes, for instance, with their foraging behaviour or if it occurs at times of migration and dispersal. This requires local knowledge about bat species and an understanding of their annual life cycle[91].

[88] Rodrigues et al. (2008).
[89] E.g. Kunz et al. (2007a), Cryan & Barcley (2009).
[90] E.g. Ahlén et al. (2007, 2009).
[91] Rodrigues et al. (2008)

3.4.3 Repowering of wind farms

There is still only limited evidence about how risks related to collision fatalities may change with reference to repowering, i.e. to replace existing turbines with fewer but larger and more power-effective ones. So far, experiences both in Europe and North America indicate that repowering reduced the collision risk among birds but increased the risk for bats[92]. Increased height of the turbine tower does not seem to have any effect on birds, but the risk for bats may increase, i.e. nocturnally migrating bats may fly at a lower height than birds, and newer and larger turbines may interfere with the airspace used by bats.

3.4.4 Potential impacts of wind farms on marine animals

Marine mammals (seals and cetaceans) may be affected by offshore wind farms in several ways. Marine noise pollution has attracted much attention as it has the potential to displace animals, interfere with normal behaviour and, at very high levels, cause physical damage. During the construction phase, noise and vibration from pile driving and other works may affect the animals over a large area[93].

Monitoring of seals and harbour porpoises *Phocoena phocoena* at the Nysted and Horns Rev wind farms, Denmark, showed that pile driving temporarily expelled animals from the wind farm areas. Later in the construction phase and during operation the abundance of seals in the area was unaffected. For harbour porpoises, a substantial but short-lived effect of pile driving was observed. At Horns Rev, a slight decrease in porpoise abundance was found during construction and no effect during operation. At Nysted, a clear decrease was found during construction and operation, and this effect still persisted after two years of operation, but with indications of a slow, gradual recovery[94].

During operation, sound and vibration continue to be emitted into the water body, potentially disturbing the communication and foraging behaviour of the animals. Harbour porpoises and other cetaceans rely heavily on echolocation for navigation and foraging. Long term impacts seem to vary between different sites. The operational noise of wind farms will be clearly audible to some marine mammals, but, unlike pile-driving, the impact of this noise is expected to be small and localised[95], although it is difficult to make generalised statements on the basis of the still limited number of studies undertaken.

For various species of fish such as Atlantic salmon, operational noise may be detectable on some kilomete distance. It can have potentially lethal effects on early life stages and could risk masking intraspecific communication, although behavioural and physiological stress is expected to occur only in the very close surroundings[96].

Different mitigation measures have been proposed to reduce the potential damage caused by noise from pile driving[97] (see section 5.5.4 for details).

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[92] E.g. Hötker (2006), Barclay et al. (2007), Smallwood & Karas (2009).
[93] E.g Thomsen et al (2006), Nedwall et al (2007), Diedrichs et al (2008)
[94] E.g. Inger et al (2009) for a recent overview.
[95] Madsen et al. (2006)
[96] E.g. Keller et al. (2006), Thomsen et al. 2006).
[97] See also IUCN report 'Greening Blue Energy: Identifying and managing the biodiversity risks and opportunities of off shore renewable energy Edited by Dan Wilhelmsson *et al. http://data.iucn.org/dbtw-wpd/edocs/2010-014.pdf*

Some wind farm related effects of potential relevance for marine mammals

- Intense noise during piling-driving, drilling and dredging operations;
- Increased vessel activities during exploration, construction and maintenance operations;
- Increased turbidity and re-suspension of polluted sediments due to construction;
- The presence of structures (including artificial reef effects causing habitat alterations) and, potentially, changes to prey and food webs;
- The continual operational noise and vibrations emanating from the wind turbines;
- Electromagnetic impacts due to cabling that may impact navigation (this may be of particular concern for elasmobranchs);
- Effects on prey, such as changes to fish behaviour.

Extracted from proceedings of the ASCOBANS/ECS Workhop, April 2007 (Evans 2008)

Another possible impact of wind turbines on marine biodiversity is the so called 'reef' effect. Underwater constructions may function as artificial reefs, and the foundations may be colonised by algae and epifauna. This may alter the characteristics of local species composition and biological structure at a local level[98].

The reef effect may in certain circumstances increase diversity although some studies have also indicated a risk that they may contribute to the spread of invasive alien species[99]. However, it should be borne in mind that a change in habitat or species communities may still have an adverse effect on the conservation objectives of the site. If so it doesn't matter how much one increases the diversity the effect will still be adverse.

Temperature increase around cables has also attracted attention, with reference to the impact on benthos as well as increased risk of botulism infection. However, the impact should normally be negligible as cables are generally buried at a maximum depth of 3 metres in the seabed. Most benthic animals dwell in the upper 5-10 cm in open waters and the top 15 cm in intertidal area where temperature increase is small, provided that the burial depth of the cable is sufficient (although some animals will burrow deeper)[100].

Finally, the transmission of electricity through cables within the wind farm and to shore can create electromagnetic fields that may also interfere with short- and long-range orientation systems. Disturbance effects could be particularly pronounced in elasmobranchs (sharks and rays) that are highly sensitive to magnetic fields. However, except for a few metres around cables and other devices, field strength is well below that of the earth's geomagnetic field. Studies so far have judged the impact to be small although available results are not entirely conclusive.[101]

[98] E.g. Petersen and Malm (2006), see also Maar et al. (2009) for a specific study of the substantial impact on local dynamics following from the settling by blue mussels (*Mytilus edulis*) on wind farm foundations in the southern parts of the Baltic Sea.

[99] E.g. Inger at al. (2009). - Nevertheless and for Natura 2000 sites applies that any potential reef effect has to be analysed within an Appropriate Assessment procedure (ref. Article 6(3) of the Habitats Directive, see Chapter 5). Any potential reef effect, even if resulting in overall increase in e.g. species richness at the site, must not affect the integrety and conservation status of habitats or species for which the site has been designated.

[100] Data from studies at Nysted Offshore Wind Farm, Denmark, referenced by OSPAR (2008).

[101] E.g. Petersen & Malm (2006), Meissner & Sordyl (2006)

3.4.5 Potential impacts of wind farms on rare and vulnerable habitat types

Wind farms that are placed on or near certain rare and fragile habitat types such as blanket bogs or raised mires, wetlands, sand dunes and shallow sand banks can potentially cause the loss or deterioration of these habitats. The concern is not just over the direct loss of an area of habitat, but over potential damage caused, during construction and operation, to the habitat's structure and ecological functioning. Such damage may have a significant impact over a much larger area than the direct land-take.

Peatlands in particular can be damaged by the inappropriate siting of wind farms or their associated infrastructures, such as new or improved access roads. The damage is often caused because developments have not taken sufficient account of the underlying hydrology of the peatland. So, whilst the actual amount of peat lost may be small, the damage caused to the natural drainage system of the peat (for instance through drainage ditches etc…) may have repercussions over a much wider area and can ultimately lead to the deterioration of a more significant area of peatland and other related habitats, such as streams and other water courses located down-stream[102].

Wind farm construction on sloping peatlands and deep peat – the Derrybrien case

In October 2003, a major bog slide occurred on the southern side of Cashlaundrumlahan Mountain in Galway County on Western Ireland The cause of the bog slide was traced back to the construction works being carried out on a new wind farm on the peatland. It was found that two of the wind turbines and a proportion of the access roads which had been built across the peat had disrupted the bog's hydrology and consequently destabilised the peat layer[103].

A similar landslide occurred in August 2008, at the site of another wind farm development project in the Stacks Mountains in County Kerry, Ireland. Again, it was found that the landslide was linked to the inappropriate siting of the access roads on the peatland leading up to the wind farm.

The Derrybrien case was later taken to the European Court of Justice following an independent investigation into the construction of the wind farm. In July 2008, the European Court of Justice[104] ruled that '*Ireland has failed to take measures to ensure that checks are made to ascertain whether proposed works are liable to have significant effects on the environment in accordance with Article 2(1) of the EIA Directive'*. Wind farm developers have since been urged to carry out full scale peatland risk assessments when developing project proposals for wind farms on peatlands.

Peatlands are also an important carbon store and sink and are, as a result, an important part of Europe's climate change mitigation strategy. Wind farms sited on peatlands which hold large stocks of carbon have the potential to greatly increase overall carbon losses which would undermine the expected carbon savings associated with the wind farms as well as damage rare habitats of European importance. Impacts on the carbon sequestration processes of an 'active' or growing peatland can also occur if peat growth is arrested due for instance to hydrological changes related to the development. These changes may occur during construction or may develop over the life-span of the wind farm. The Scottish Government has developed a method to determine potential carbon losses and savings associated with wind farm developments on peatland taking into account peat removal, drainage, habitat improvement and site restoration[105].

[102] E.g. Lindsay (2007) for an overview of impacts on hydrology from wind farms developments and associated structures such as access roads. See also Fagúndez (2008) and Fraga et al. (2008) with reference to impact on blanket bog vegetation in Spain.

[103] Lindsay & Bragg (2004); for a more consice overview, see Bragg (2007).

[104] ECJ ruling C-215/06.

[105] Nayak et al. (2008); see also Grieve & Gilvear (2008) and Azkorra et al. (2008) for site-specific studies in Scotland and Spain, respectively.

Other dynamic habitat systems, such as sand dunes, wetlands or partially submerged sand banks are also vulnerable to any changes in their structure and functioning. This could be caused for instance by soil compaction, clearance of vegetation, drainage, reprofiling, etc.. which may lead to severe erosion and habitat degradation over a wider area. The scale of damage or deterioration to the habitats depends on the size of the development and on the precise location of the wind farms and their associated infrastructures.

3.5 Distinguishing between significant and insignificant effects

Identifying the species and habitats that are likely to be affected by wind farm developments is only the first step of any impact assessment. After that, it is necessary to determine whether the impact is significant or not. The legal procedure for determining 'significance' in any plans or projects specifically affecting Natura 2000 sites is described in chapter 5.

Here, some of the general principles involved in determining the level of 'significance' in the case of wildlife (irrespective of whether it is in a protected area or not) are explained in brief to help further with the general understanding of this concept.

Significance will vary depending on:

- Magnitude of impact
- Type
- Extent
- Duration
- Intensity
- Timing
- Probability
- Cumulative effects

Clearly, the assessment of significance needs to be done on a case-by-case basis, in function of the species and habitats affected. The loss of a few individuals may be insignificant for some species but may have serious consequences for others, like some populations of eagles and vultures or other threatened species.

Similarly, the displacement of animals may significantly reduce the fitness, and ultimately the survival rate of certain species, but have only a limited impact on other species, which may, for instance, have enough alternative habitats in the vicinity. Hence, population size, distribution, range, reproductive strategy and life-span will all influence the significance of the effects.

The assessment of significance should also be considered over an appropriate geographical scale. For migratory species that travel over very long distances, the impact at a specific site may have consequences for the species over a larger geographical area. Likewise, for resident species with large territories or changing habitat uses, it may still be necessary to consider potential impacts on a regional, rather than a local scale.

A common means of determining the significance of effects is through the use of key indicators (e.g. identified using the approach shown in Figure 7). Some indicators, such as amount and percentage of habitat lost, may be more significant for particularly rare habitat types or habitats with a limited distribution than for others because of their status.

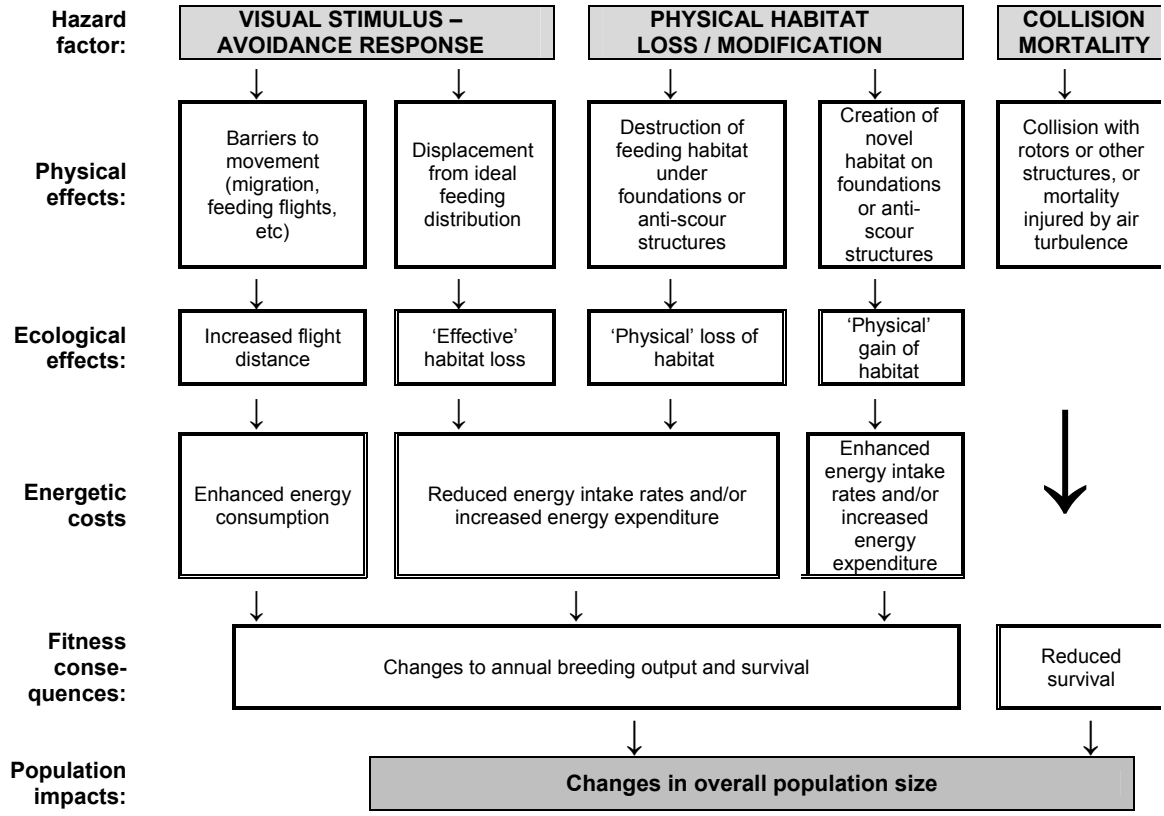


Figure 7: Flow diagram describing how three major hazard factors (shaded boxes) caused by wind farms affect birds and how they may affect survival and reproductive output, and eventually cause changes to the overall population size. The boxes with a heavy solid frame indicate potentially measurable effects, and the double framed boxes indicate processes that need to be modelled. Although the diagram focusses on birds in the offshore environment, the approach can be more widely applied. From Fox et al. (2006).

The flow chart in Figure 7 describes the interconnectivity of factors that could potentially and *significantly* influence for example a bird population. It demonstrates how *physical effects* such as barriers to movements, displacement from feeding areas, modification of habitats and mortality due to collisions cause *ecological effects* such as increased flight distances and changed access to habitats. This leads to *costs in terms of changes in energy expenditure and food intake*, potentially affecting fitness related parameters such as survival and reproductive output and thus the overall *population size*[106].

It is clear that any impact assessment should be based on the best available data. This may be data from dedicated field surveys or various types of predictive population models. In special cases such data may also be available from comprehensive, "research type" monitoring programmes.

The examples below shows how such a programme was carried out for some of the first major offshore wind farms in Denmark.

[106] The process is elaborated in more detail by Fox et al. (2006)It is presented as a ”model approach” and not used on a regular basis by the planning authorities in Denmark.

Offshore wind farm establishments in Denmark: impacts and environmental monitoring

Together with Germany and the United Kingdom, Denmark is one of the leading countries in the large-scale establishment of offshore wind farms in Europe. By the end of 2009, ten offshore wind farms were in operation; with a total of 305 turbines and a total capacity of 646 MW. 79% of the turbines are concentrated in three large establishments: two at Horns Rev in the North Sea, 15-30 km from the western coast of Jutland, and the other at Nysted in the Baltic Sea around 10 km S the town of Nysted on Lolland Island. Each covers an area of 20-35 km^2.

Screening work was initiated in 1999, the EIAs were approved in 2001 and construction started in 2002. The first two wind farms were operational by 2003. As part of this process an ambitious research and monitoring programme was launched for these two wind farms.

The studies undertaken so far have included:

- Benthic fauna and flora (with particular emphasis on the establishment of artificial hard-bottom substrates at turbines foundations).
- Distribution of fish (incl. effects of electromagnetic fields).
- Numbers and distribution of feeding and resting birds.
- Migrating birds (incl. risks for collision).
- Behaviour and reactions by marine mammals (seals and porpoises).
- Coastal morphology.

Results of the monitoring work up to the end of 2006 can be very briefly summarised as follows

- Abundance and biomass of the benthic fauna have changed, with local biomass increases of 50-150 times, primarily related to the increased habitat heterogeneity related to the introduction of hard bottom substrates onto seabeds that almost exclusively consisted of sandy sediments.
- Despite this there were no indications of attraction related to 'reef effects'. An interesting finding was that sand eels (*Ammodytes* spp.), which are sensitive to changes in the composition of sediments and an important prey for piscivorous fish as well as for birds, were not affected.
- For marine mammals, clear pile driving effects were recorded, a decrease in porpoises was recorded during construction and, so far there are indications of only a slow recovery at one of the farms. Harbour seals and grey seals on the other hand showed no general changes in behaviour;
- Very low collision rates, but clear indication of avoidance responses, were recorded for various bird species, including Eider ducks. Displacement effects, up to at least 2 km were, found for some waterbirds.

A variety of new and advanced monitoring technologies have also been tested and applied, e.g.:

- Hydroacoustic equipment for fish surveys.
- A special setup and fishing gear to study impact of electromagnetic fields.
- Acoustic monitoring of marine mammals, using stationary data-loggers, combined with remotely controlled video monitoring and tagging of animals with satellite transmitters; complemented by spatial modelling of the distribution of marine mammals on the basis of field survey data.
- Improved radar and infra-red video monitoring techniques for monitoring of bird movements.

Overall, the Danish studies have increased our knowledge of the short-term impacts on various species and marine habitats of large offshore establishments. In addition to the improved knowledge about environmental impacts, the Danish experiences have also contributed to enhanced know-how about monitoring methodologies. As such it provides a very useful example of how a scientific framework can be applied in the spatial planning of other future large-scale projects[107].

[107] The Danish Energy Authority, DONG Energy, Vattenfall and Danish Forest & Nature Agency) published an overview (until 2006) "Danish offshore wind – key environmental issues", http://ens.netboghandel.dk.

Monitoring programme for the wind farms of Beauce, France

In 2006, a four year monitoring programme was launched to analyse the impacts on birds and bats of a series of six wind farms in the Beauce Region of France. Whilst the accompanying EIAs found little or no immediate risk to wildlife (Beauce is a region dedicated to mainly intensive agriculture with resulting lower nature values), the region decided anyway to launch a four year monitoring programme to monitor any possible effects on grassland birds and bats in order to help better orientate future wind farm developments within the region.

The monitoring programme is being undertaken by a partnership of two wind farm developers, two nature conservation associations, two consultancies specialised in ecology as well as the Regional Council, the Agency reponsible for the environment and wind energy (ADEME) and the Ministry for Ecology and sustainable development (DIREN).

Together they agreed on a 4 year monitoring programme (2006-2010) to study in particular:
- any loss of habitats for, or any changes in the population structure of small grassland species (birds and bats);
- any change in the reproduction behaviour of buzzards or the way in which they use the habitats;
- fluctuations in migration patterns and the behaviour of migration birds and bats as a result of the configuration of the wind farms;
- changes in behaviour of birds in their wintering habitats and whethere they are any perturbations caused by the presence of the wind farms.

The monitoring is based on the BACI approach (Before After Control Impact) and is intended to demonstrate how to carry out a good monitoring programme to help guide the furture orientation of wind farm developments in a particular region (in this case Beauce). The final results of the study will be available at the end of 2010 but first results are already showing some useful results[108].

For instance, in the case of migrating birds, it has been found that (70-99%) circumvent the wind farms, changing direction or altitude some 500 m beforehand. Parks with dense clusters of wind farms are avoided altogether whereas birds do seem to occasionally cross those that are more open in aspect - ie where the wind turbines are in parallel lines or perpendicular to the migration route.

3.6 Cumulative effects

Cumulative effects may arise when several wind farms and their associated structures are present within an area or along a flyway corridor, or as the result of the combined impacts of wind farms and other types of activity (e.g. forestry or other industrial developments). The cumulative effect is the combined effect of all developments taken together but this does not mean that it is simply a sum of the effect of one wind farm plus the effect of a second wind farm. It may be more, it may be less.

For instance, the first wind farm may give rise to a small but acceptable level of bird mortality, which lies well within the capacity of that bird population for regeneration and hence has little effect on the overall population level. But the level of bird mortality occasioned by several wind farms taken together may exceed the capacity of the population for regeneration, in which case the bird population would go into decline. In this case, whereas the impact of the first and second projects, each on their own, is not discernable,

[108] http://volkswind.fr/documents/suivi_ornithologique_des_parcs_eoliens_en_beauce_2006_2009.pdf

the impact of both taken together could cause the bird population to collapse. This influences the planning decision for both project proposals.

The key is to determine at what point do accumulated habitat loss (including effective habitat loss due to exclusion), barrier-effect induced increases in energy costs and collision mortality, acting in concert, pose a significant impact.

It also depends on the cumulative impact of that project combined with other developments (not only wind farm projects) in a given area. The effect of a single plan or project may be insignificant but when combined with other plans or projects the cumulative effect may turn out to be significant. Habitat fragmentation may also need to be considered during the assessment of cumulative effects as this can have a deleterious impact on population structure and dynamics among a wide range of species.

4. THE IMPORTANCE OF STRATEGIC PLANNING IN WIND FARM DEVELOPMENT

- *Planning wind farm developments in a strategic manner over a broad geographical area is one of the most effective means of minimising the impacts of wind farms on nature and wildlife early on in the planning process. It not only leads to a more integrated development framework but should also reduce the risk of difficulties and delays at later stages at the level of individual projects.*
- *Evidence to date illustrates that wind power does not have to threaten wildlife but appropriate siting is critical and must be a first goal of the planning process.*
- *A recent EEA report investigated Europe's wind potential and concluded that even if all Natura 2000 and other areas designated for nature protection were theoretically excluded from wind energy development, there would still be enough wind energy available to supply 3-7 times the total estimated energy demand in 2020 and 2030.*
- *Developing wildlife sensitivity maps at the strategic planning stage enables areas to be identified where wind farm development might be considered a low, medium or high risk in terms of nature and wildlife. Several Member States have demonstrated how this can be done with success.*
- *Such wildlife sensitivity maps will also help to avoid potential conflicts with the provisions of article 5 of the Birds Directive and 12&13 of the Habitats Directive as regards the need to protect species of EU importance throughout their entire natural range within the EU (ie also outside N2000 sites).*

4.1 Strategic planning: a way to ensure more efficient, integrated decision-making

Strategic planning is a useful tool for ensuring that a rapid deployment of wind energy over a large area can be achieved whilst simultaneously protecting vulnerable wildlife from inappropriate development[109]. Strategic planning not only helps to identify the most appropriate locations and scales for expansion in function of wind energy capacity, grid access etc. but also helps to avoid and reduce the impacts on the natural environment at a very early stage in the planning process.

Evidence from Germany, Denmark, Spain and the UK illustrates that wind power does not have to threaten wildlife but appropriate siting is critical and must be a first goal of the planning development process from a conservation perspective. Despite the range of concerns, most threats can be minimised by avoiding sites with sensitive habitats and key populations of vulnerable species. Good site location will also help developers avoid costly investments in inappropriate sites.

Drawn up by public authorities, these land use or sectoral plans usually cover a broad geographical area, be it at the level of a municipality, region or country. This scale, combined with the spatial nature of the plans, enables strategic decisions to be made about the capacity and location of wind developments over a broad area.

[109] 'Positive planning for onshore wind: expanding onshore wind energy capacity while conserving nature ', report by IEEP commissioned by RSPB, March 2009 (Bowyer et al. 2009).

They also provide an opportunity to explore various alternative, and potentially less environmentally damaging, options as well as to consult early on with industry and other interested bodies.

The whole process should ideally result in a more integrated and sustainable form of spatial planning which takes on board wider societal concerns at an early stage. This in turn should provide the industry itself with a more transparent and stable framework for growth and expansion.

4.2 Marine spatial planning

Existing planning frameworks have a largely terrestrial focus. Challenges that emerge from the growing competing uses of the sea, ranging from maritime transport, fishing, aquaculture, leisure activities, off-shore energy production and other forms of sea bed exploitation must be addressed. Therefore, maritime spatial planning can be a fundamental tool for the sustainable development of marine areas and coastal regions, and for the restoration of Europe's seas to environmental health (EC 2007e).

Marine spatial planning provides a mechanism for stakeholder involvement, which is particularly important as multiple organisations have competencies in the planning and management of activities in the marine environment (WWF/Wildlife Trusts 2004).

In 2008 the European Commission launched a Communication on Maritime Spatial Planning (MSP), which focus on achieving common principles in the EU (COM(2008) 791 final). Maritime Spatial Planning is considered a key instrument for the Integrated Maritime Policy in the EU. It helps public authorities and stakeholders to coordinate their action and optimises the use of marine space to benefit economic development and the marine environment. This Communication aims to facilitate the development of MSP by Member States and encourage its implementation at national and EU level. It sets out key principles for MSP and seeks, by way of debate, to encourage the development of a common approach among Member States.

4.3 Determining suitable locations for wind farm development

A crucial first step in developing a spatial vision for wind farm development that is compatible with nature conservation interests is to determine within a given area both:

- the capacity for wind farm development - for instance in function of wind speed, access to grid, and other physical or economic constaints - and

- their suitable location in function of other land-uses and restrictions and other societal constraints, including nature conservation interests.

With the benefit of geographical Information systems (GIS) data collected on these aspects at a strategic level can be used to develop useful overlay maps which can help authorities to identify, within a given region, potentially low-risk areas – ie areas of high value for wind farm development but that also present little or no risk from a nature conservation perspective or potential high-risk areas that are best avoided or where mitigation measures and more substantial impact assessments are likely to be required.

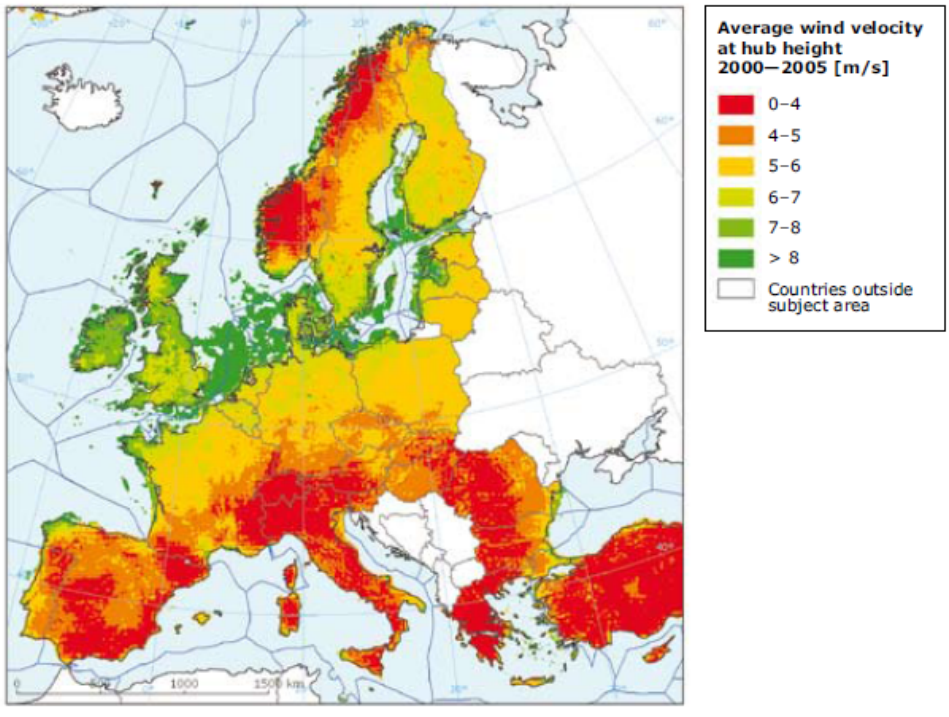
These aspects should be investigated as part of the initial development plan proposal and should also be further developed through the Strategic Environmental Assessment[110] or Appropriate Assessment, where this is required, and/or through consultation with developers and other interested parties. This will not only ensure that the final result is more integrated and acceptable to all concerned but should also reduce the risk of unforeseen difficulties and delays at later stages.

4.3.1 Europe's wind energy potential

In its recent report entitled '*Europe's onshore and offshore wind energy potential*'[111] The European Environment Agency (EEA) analysed in detail the local wind resources across the EU (based primarily on wind speed) in order to provide a Europe-wide resource assessment of onshore and offshore wind potential in a geographically explicit manner and to help Member States identify the most suitable locations for wind energy generation.

It confirms that the wind energy resources in Europe are potentially immense, but they do also vary significantly across the EU due to variations in topography and meteorology (Figures 8,9). According to the EEA report, onshore wind energy potential is concentrated in particular in agricultural and industrial areas of north-western Europe.

Likewise, the largest offshore potential can be found in low depth areas in the North Sea, the Baltic Seas and the Atlantic Ocean with some local opportunities in the areas of the Mediterranean and Black Seas.



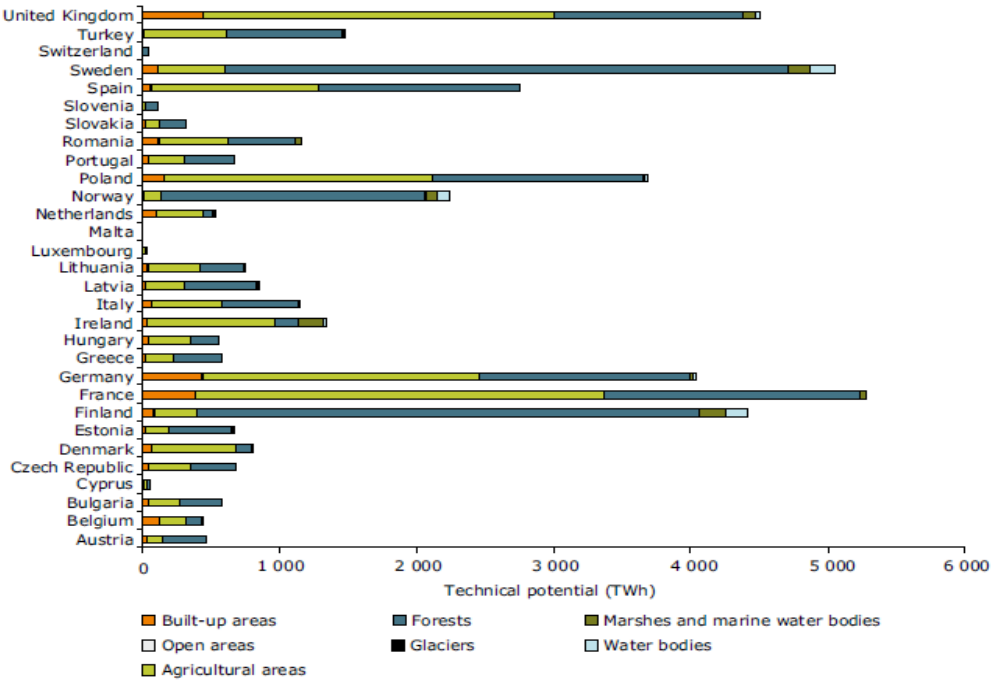
Source: EEA, 2008.

Figure 8 Wind field data after correction for orography and local roughness (based on estimated average wind speed of 80 m onshore, 120 m offshore – from EEA technical report N°6/2009 (EEA 2009).

[110] See chapters 3 and 6

[111] EEA technical report N°6/2009 of June 2009 (EEA 2009).

From a Member State perspective the unrestricted potental for onshore wind energy also highlights very significant differences between countries.



Source: EEA, 2008.

Figure 9: Unrestricted technical potential for onshore wind energy up to 2030, based on estimated 80 m average wind speeds 2000-2005 from EEA – from EEA technical report N°6/2009 (EEA 2009).

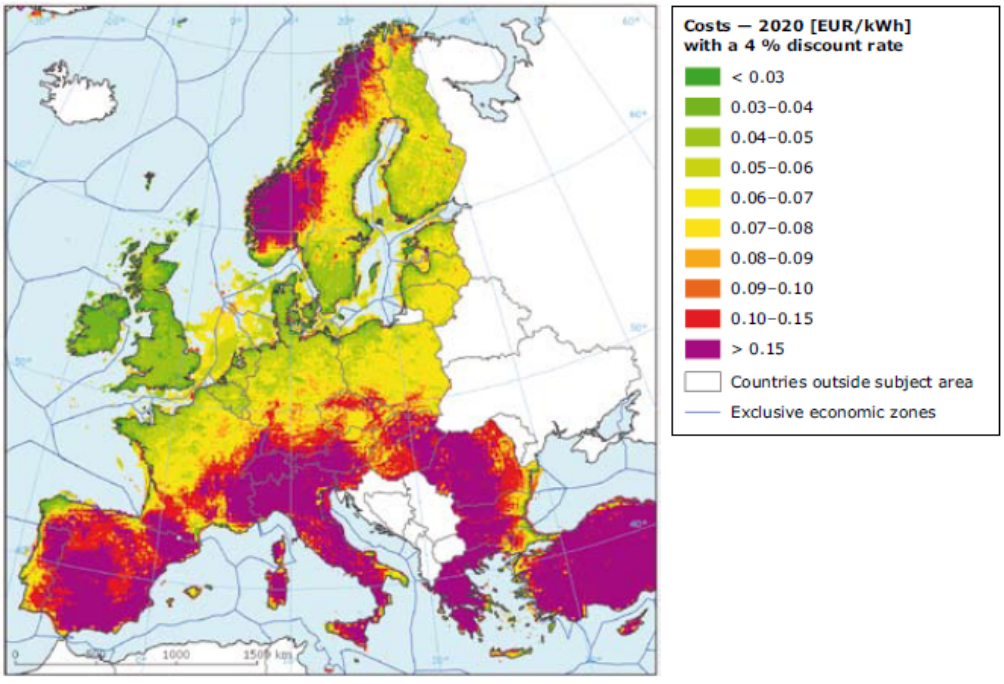


Figure 10: Generation cost for wind energy in Europe (to 2020) at 4% interest rate

However, raw unrestricted 'technical potential' is only part of the equation. There are also cost considerations and potential socio-environmental constraints to take into account. In the case of the former, the EEA has estimated the 'economically competitive potential' of wind energy development based on the forecasted costs of developing and running wind farms in 2020 and 2030 relative to projected average energy generation costs derived from the Commission's baseline scenario[112]. Again there are marked differences between different regions and countries of the EU.

The EEA also made an analysis of wind energy potential where all Natura 2000 and other protected areas are excluded from the calculations. As explained before there is no automatic presumption against wind farm development in Natura 2000 sites but such developments must respect the procedural safeguards laid down in the Habitats Directive.

The EEA's exercise illustrates that if all Natura 2000 and other areas designated for nature protection were theoretically excluded from wind energy developments, and assuming that the excluded areas are spread equally over all land cover classes, this would have only a limited impact on wind energy potential (a decrease of ca 13.7% of onshore technical potential).

To put this in perspective, the total economically competitive EU wind energy potential was estimated to be equivalent to 3-7 times the total energy demand by 2030 and 2020.

It must however be noted that the assumption that the wind potential is equally distributed between protected and non-designated areas is not necessarily appropriate. The actual effect, especially at a particular regional or national level, of a complete exclusion of wind energy development in protected areas could therefore be more or less severe than the EEA study seems to suggest. Nonetheless, the EEA study clearly demonstrates the value of undertaking such a spatial analysis as part of a strategic assessment of wind farm development.

4.3.2 Grid connections and road access

Grid connection and road access are both crucial issues for the location of wind farms. Consequently, the relationship between wind farm developments and existing grid or road infrastructures is also a key aspect of spatial planning. As both associated infrastructures are capable of having a significant impact on nature and biodiversity values, this is also best considered early on during the planning stages.

For offshore wind farms, an international perspective to grid access is strongly encouraged as it might provide more efficient and coordinated solutions, with reference to the onshore grid systems as well as underwater cables. By mapping the grid connections and capacities available, optimised locations can be determined, and the need for new grid connections and additional impact can be minimised[113].

[112] In the EEA report 'technical potential' refers to the highest potential level of wind energy generation, based on overall resource availability and the maximum likely deployment density of turbines, using existing technology or practices. 'Economically competitive potential' describes the proportion of technical potential that can be realised cost-effectively in the light of projected average energy costs in the future.

[113] COM(2008) 768 final/2; 12.12;2008

4.3.3 Wildlife sensitivity maps

Analysing the capacity and means for a region to develop wind farms is only part of the equation. A strategic development plan should also consider other land-uses and restrictions or other societal constraints at a very early stage in the planning process.

Wildlife sensitivity maps are useful tools in helping to place wind farm developments in areas that are compatible with nature conservation requirements. Sensitivity maps can be developed for selected categories of species (eg species of birds, bats, marine mammals of European importance) or for valuable wildlife in general over a pre-determined area – for instance an entire region.

When wildlife sensitivity maps are then super-imposed over the wind capacity maps for instance, areas of 'low or no risk' can be identified as well as areas of potential 'higher-risk' where particular species of conservation concern are to be found either year-round or seasonally (eg during migration). They can also highlight potential cumulative impacts of wind farm developments in a particular region and assist in establishing the likely carrying capacity of that region as regards the number of wind farm developments it can sustain.

The public resources spent for the development of these kinds of maps are likely to be more than compensated for in terms of smoother and less complicated and time-consuming site-related assessments - costs which are normally borne by the developer.

However, sensitivity maps can only provide a broad orientation of areas of potentially high-, medium- (where mitigation measures may be possible), and low risk areas (where the impact is expected to be limited or low). As such they are not a substitute for Environmental Impact Assessments (EIA) or Appropriate Assessments (AA) at project level. These may still need to be undertaken for individual wind farm development projects.

Comprehensive species surveys within the EIA or AA at individual site level will be able to determine more precisely for each site what the specific nature values and risks of impact are. In this context, the strategic level maps can already help to indicate the required level of assessment that would be needed for more detailed and stringent baseline studies at individual project level.

4.3.4 Wildlife sensitivity maps in the context of Art 12 (Habitats Directive) & Art 5 (Birds Directive)

The other significant advantage of wildlife sensitivity maps over larger scales is that they help pre-empt any potential conflicts with Articles 5 of Birds Directive and 12&13 of Habitats Directive. As explained in chapter 3, these provisions aim to ensure the protection of species of European Importance across their entire natural range in the EU, i.e. also outside Natura 2000 sites. Wind farm developers or planners must therefore be able to demonstrate that they have taken the necessary precautions to avoid compromising this species protection regime.

Distribution maps of species of EU interest can help planners and developers, for instance, to avoid areas outside Natura 2000 that are particularly important for these species, such as bottleneck migration routes for birds and bats.

In general there is a clear need for more detailed surveys and research into the spatial distribution of vulnerable species across the EU. This is best done at a supranational level so that the entire natural range of the species can be covered. Two new EU funded initiatives are currently underway (INSPIRE[114] and GMES[115]) which, although not yet fully developed, demonstrate the importance of geographical information and the value of Member States pooling their resources. In due course they should become powerful tools for developing the overlay maps mentioned above that include several variables.

Plans or projects outside the Natura 2000 sites

The establishment of the Natura 2000 Network is at the heart of both the Birds and Habitats Directives and is a fundamental to achieving the overall objective of maintaining and restoring the habitat types and key habitats of species listed in the Directives to a favourable conservation status in their natural range. But the Natura 2000 Network is only part of the equation.

Both Directives also require that Member States establish a general system of protection for all wild bird species in the EU and for species listed in Annex IV of the Habitats Directive *throughout their natural range within the EU* – ie also outside Natura 2000 sites. The specific articles that lay down the species protection provisions are Articles 12 and 13 of the Habitats Directive and Article 5 of the Birds Directive (described further in chapter 3).

As birds, bats and whales have all been found to be vulnerable to wind farms, these provisions will also need to be taken into account by developers and planners irrespective of whether their wind farm developments are to be located in a Natura 2000 site or not. In particular, information on population size and seasonal fluctuations on a local and regional level will be useful in order to be able gauge the significance of any potential impacts of a proposed wind farm plan or project in that region. This could be supplemented by data on local and regional movements and migration patterns both in the diurnal and seasonal perspectives.

The measures to be taken under these species protection provisions are not limited to the prohibition of various activities. They also include the need for preventive measures in order to anticipate threats and risks related to disturbance. For wind farms, this might include the refusal of individual projects on the grounds that their proposed location could lead to significant disturbance to migratory birds or bats, for instance a key location along a species migration route, or could lead to the destruction of breeding sites and resting places for bats or whales.

Or it could simply mean that certain safeguards or mitigation measures are introduced into the permit. This might involve, for instance, shutting down the wind farms at times when there is a high risk of disturbance (eg in Germany, one wind farm turns its turbines off for a couple of hours around dusk during August and September when there is a peak migration/dispersal period amongst local bat popualtions). Whatever measures are applied, they must be proportionate in relation to the assessed impact on the conservation status of the species concerned.

Although there is no formal obligation to carry out an Appropriate Assessment under the EU nature legislation, in contrast to what is required for Natura 2000 sites, the potential impact on species of EU importance should nevertheless be analysed during the SEA and EIA processes, keeping in mind that derogation provisions need to be interpreted narrowly and not lead to outcomes that go against the objectives of the two nature Directives. **In this respect, the development of wildlife maps could help to provide planners and developers with a useful tool to identify areas at risk.**

These issues are elaborated on in greater detail in the the Commission's guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC' [116].

[114] More information about INSPIRE available under http://www.ec-gis.org/inspire

[115] More information about GMES available under http://www.gmes.info/

[116] Guidance document on the strict protection of animal species of Community interest under the 'Habitats' Directive 92/43/EEC http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm

4.3.5 Natura 2000 maps

Wind farm plans or projects should also be overlaid on maps showing all the Natura 2000 sites within the area in question. However, it should be noted that such maps only give the boundaries of the sites included in the Natura 2000 Network. They do not show which parts within the Natura 2000 area are occupied or used by the different species and habitat types of EU importance for which it has been designated. This more detailed information if often essential for determining the risk of negative effects. It may sometimes be found within the Natura 2000 management plan for the site.

Nevertheless, the Natura 2000 map will allow planners and developers to identify at a very early stage in the process where additional planning procedures are likely to apply (for instance, under article 6 of the Habitats Directive) and whether more detailed site level mapping may be needed at project level.

Offshore, the situation is rather more complex as there is still a major gap in the designation of marine Natura 2000 sites. This is partly due to poorer scientific knowledge about species and habitats, including marine mammals in the marine environment. In this respect, it will be important to ensure that Member States designate marine protected areas under the Habitats and Birds Directives as soon as possible in order to remove legal uncertainties about the potential suitability of a given marine site for wind farms.

The Natura 2000 online viewer:

With the assistance of the European Environment Agency, the European Commission has developed a public Natura 2000 viewer which makes it possible to explore Natura 2000 sites in every part of the EU at the press of a button. Built on state of the art GIS technology, the public viewer is an interactive and user-friendly tool that allows the user to view Natura 2000 sites over different types of backgrounds (street maps, satellite imagery, bio-geographical regions, Corine Land Cover, etc.) and to quickly locate related information on species and habitats of interest such as the Natura 2000 Standard Data Forms.



The Natura 2000 v*iewer is available under* http://natura2000.eea.europa.eu/

4.4 Good practice examples of planning wind farm developments strategically to ensure appropriate siting from a conservation perspective

Experience in several countries has already shown that in practice wildlife sensitive maps are a very useful part of the strategic planning process. The examples presented below demonstrate this and help to illustrate further the different approaches for creating and using wildlife sensitivity maps. They concern both onshore and offshore plans.

Scotland: Strategic Locational Maps for onshore wind farms in respect of natural heritage

Scotland is likely to see a rapid expansion in wind energy in coming years in response to the region's ambitious target of 50% of Scotland's electricity coming from renewable energy sources by 2020. To plan for this increase in an efficient and proactive manner, the Scottish government has adopted a strategic approach to wind farm development. It requires planning authorities to develop spatial frameworks for windfarms identifying areas which are afforded significant protection, broad areas of search and other areas where criteria will apply.

To assist planning authorities in this process, Scottish Natural Heritage (the statutory body responsible for nature conservation and biodiversity) has adopted a strategic locational guidance note for onshore wind farms in March 2009 which includes a series of sensitivity maps (SNH 2009a). The aim of these is to 'guide wind development towards the locations and the technologies most easily accommodated within Scotland's landscapes and habitats without adverse impact, and which safeguards elements of the natural heritage which are nationally and internationally important'.
As such, it offers a strategic view of the sensitivities of the natural heritage across Scoland and a broad steer over which parts of the country are most suited to wind farm development.

Altogether 5 maps have been developed. Maps 1 and 2 describe sensitivity associated with landscape and recreation interests, covering designated areas and wild land issues respectively. Maps 3 and 4 describe sensitivity arising from biodiversity and earth science interests, covering designated areas and non designated habitats and species respectively. The final map, Map 5, combines these sensitivities into three broad zones representing relative levels of opportunity and constraint:

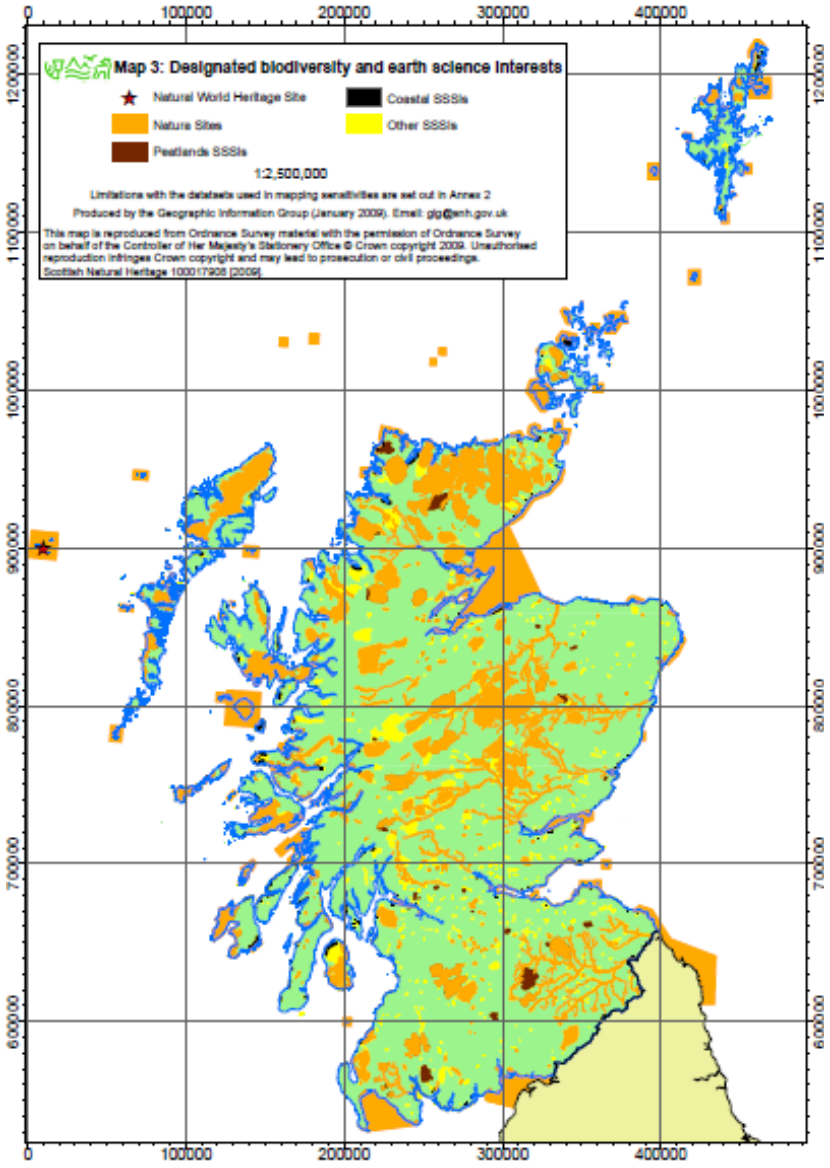
- ***Zone 1:*** *Lowest natural heritage sensitivity - identifies areas at the broad scale with least sensitivity to wind farms, with the greatest opportunity for development, within which overall a large number of developments could be acceptable in natural heritage terms, so long as they are undertaken sensitively and with due regard to cumulative impact.*
- ***Zone 2:*** *Medium natural heritage sensitivity - identifies areas with some sensitivities to wind farms. However, by careful choice of location within these areas there is often scope to accommodate development of an appropriate scale, siting and design (again having regard to cumulative effects) in a way which is acceptable in natural heritage terms.*
- ***Zone 3****: High natural heritage sensitivity (including Natura 2000 sites) - identifies areas of greatest sensitivity to wind farms, which place the greatest constraint on their development, and where, in general, proposals are unlikely to be acceptable in natural heritage terms. There may, however, be some sites in this zone where wind farm development of appropriate scale and careful design could be accommodated if potential impacts on the natural heritage are fully explored and guarded against by employing the highest standard in siting and design.*

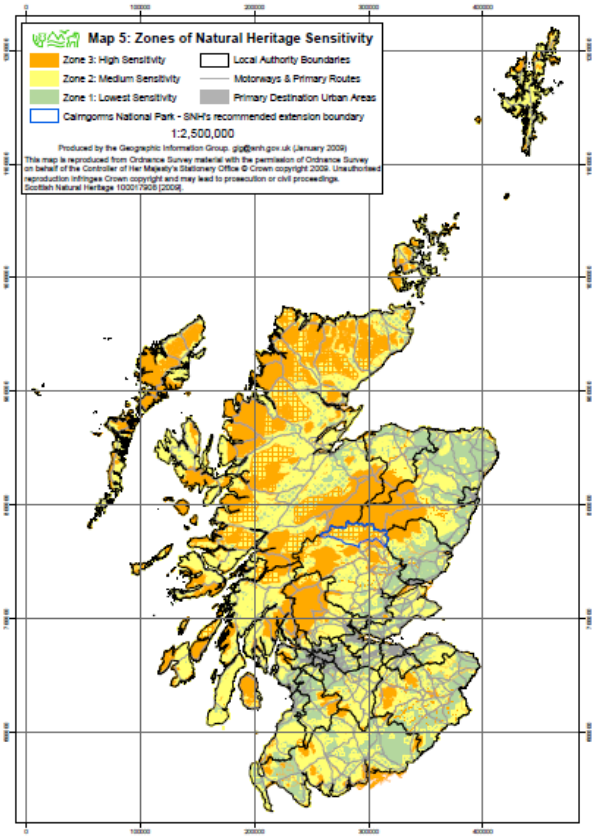
Map 4 on sensitive bird areas was developed jointly by SNH and the conservation NGO, RSPB. It focuses on species listed in annex I of the Birds Directive that are present in Scotland and provides data at 2kmx 2km resolution.

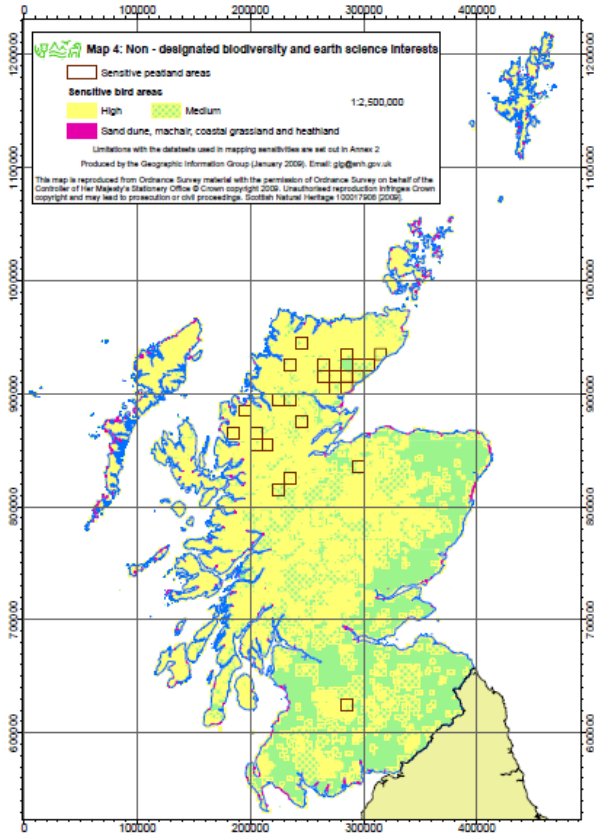
Overall the maps provide a broad overview of where there is likely to be greatest scope for wind farm development and where there are the most significant constraints, in natural heritage terms. There are however a number of caveats to bear in mind. As they are drawn at a strategic scale, they cannot be relied upon to provide guidance on the acceptability of any particular proposal in any given location. This is because the broad scale does not allow the presence of important species and habitats to be presented in detail which means that some areas may have a higher sensitivity than indicated in these overview maps.

Scotland faces particular challenges in relation to the extensive area of peatland landscapes, which are highly sensitive to hydrological disruption arising from wind farms and its ancillary developments. Notwithstanding, the maps are to be used as information tools alongside the detailed guidance but they have no status as a planning tool.

More details available on SNH website. The SNH 'Strategic Locational Guidance for Onshore Wind farms in respect of the natural Heritage' is available from http://www.snh.gov.uk/planning-and-development/renewable-energy/onshore-wind The RSPB bird sensitivity map (Bright et al 2006) and the research report is available from www.rspb.org.uk/Images/sensitivitymapreport_tcm9-157990.pdf. More recently a similar study has been done for England (Bright at al. 2009), https://www.rspb.org.uk/Images/EnglishSensitivityMap_tcm9-237359.pdf).



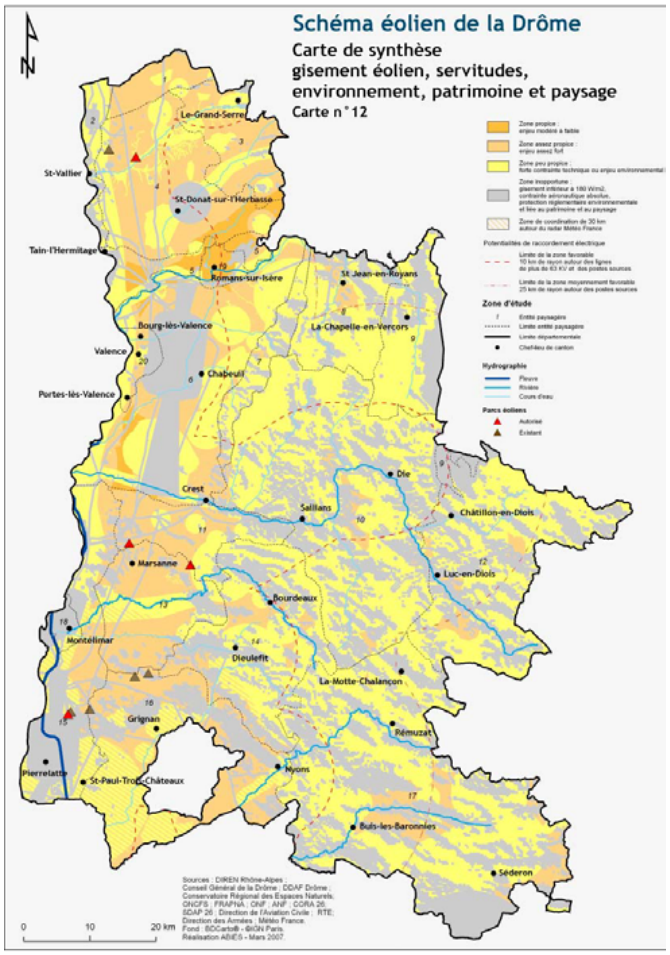

Map 5: Zones of Natural Heritage Sensitivity
Zone 3: High Sensitivity
Zone 2: Medium Sensitivity
Zone 1: Lowest Sensitivity
Cairngorms National Park - SNH's recommended extension boundary
Local Authority Boundaries
Motorways & Primary Routes
Primary Destination Urban Areas
1:2,500,000


Map 4: Non - designated biodiversity and earth science interests
Sensitive peatland areas
Sensitive bird areas
High
Medium
Sand dune, machair, coastal grassland and heathland
1:2,500,000
0
100000
200000
300000
400000
600000
700000
800000
900000
1000000
1100000
1200000

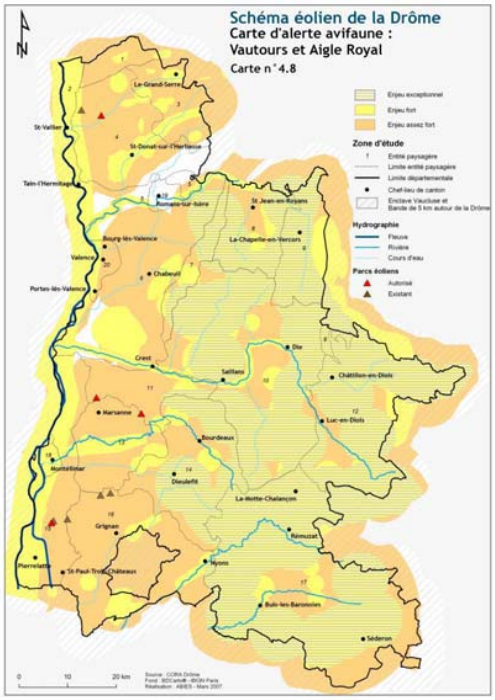
Regional spatial plan for wind energy development in Drôme Region, France

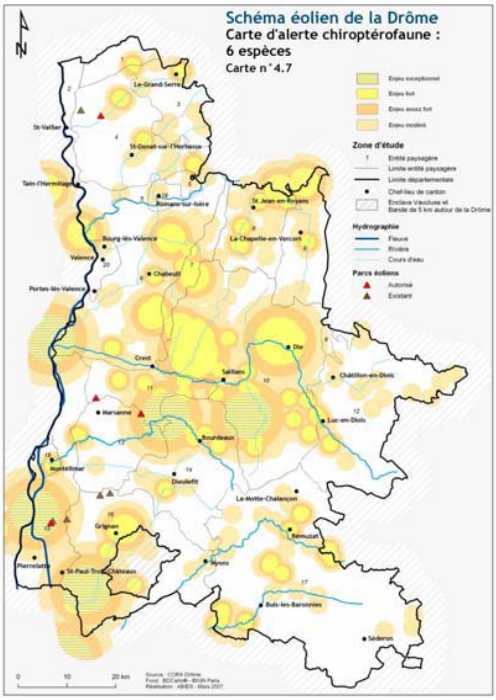
In 2005, the regional authorities of the Drome Region in France decided to develop a wind energy plan for the entire region. The aim was not only to analyse the potential benefits and constraints of wind development across the region but also to offer decision makers and wind farm developers a series of practical tools and important sources of information to help them prepare their development proposals in a way that is both cost effective and in keeping with the environment.

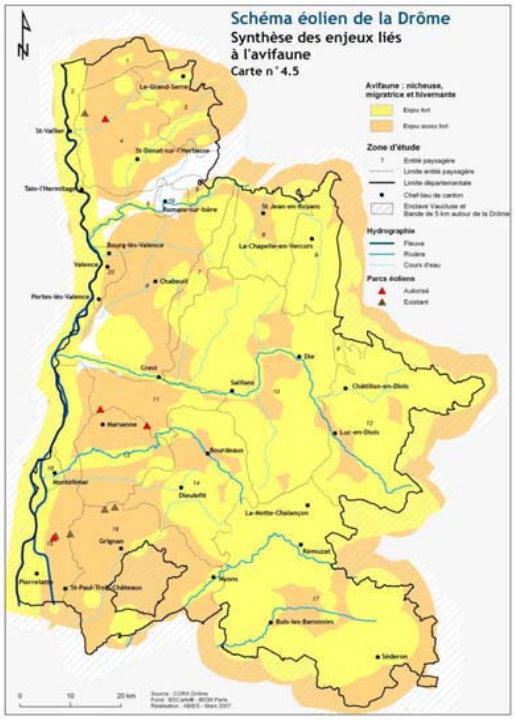
In this respect, detailed zonation maps were prepared in close consultation and dialogue with all interest groups. Each one identified different areas of high, medium or low potential in terms of wind resources, relevant public utilities and access to grid connections. A synthesis map was also prepared to demarcate areas of particular environmental sensitivity such as areas of importance for birds or bats or areas of high nature value. This synthesis map is based on, and accompanied by, more detailed wildlife sensitivity maps for certain species of particular conservation concern: bats, vulture and the golden eagle. These detailed maps are intended to provide an early warning system of potential conflicts with these important species so that wind farms can be planned in function of this knowledge.
More detailed information, including the complete report on the Drome wind energy plan is on: *http://www.drome.equipement.gouv.fr/rubrique.php3?id_rubrique=146* *Further french case studies and monitoring results on interactions between wind energy and biodiversity is available from* *http://www.eolien-biodiversite.com*

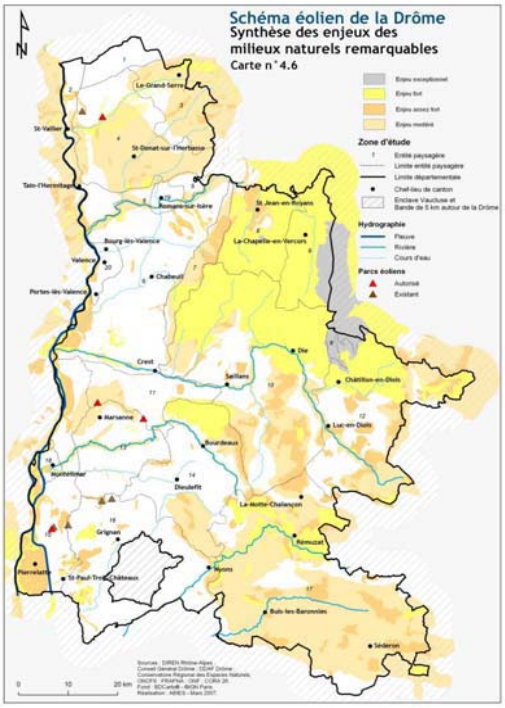


Synthesis map combining wind potential, public utilities, environmental concerns, heritage features and landscape. The zones are categorised as: areas deemed favourable for wind farm development (dark orange), areas moderately favourable but with some constraints (light orange), areas of low potential both for technical reasons and environmental reasons (yellow) and inappropriate areas eg poor wind capacity and high environmental constraints (grey areas).









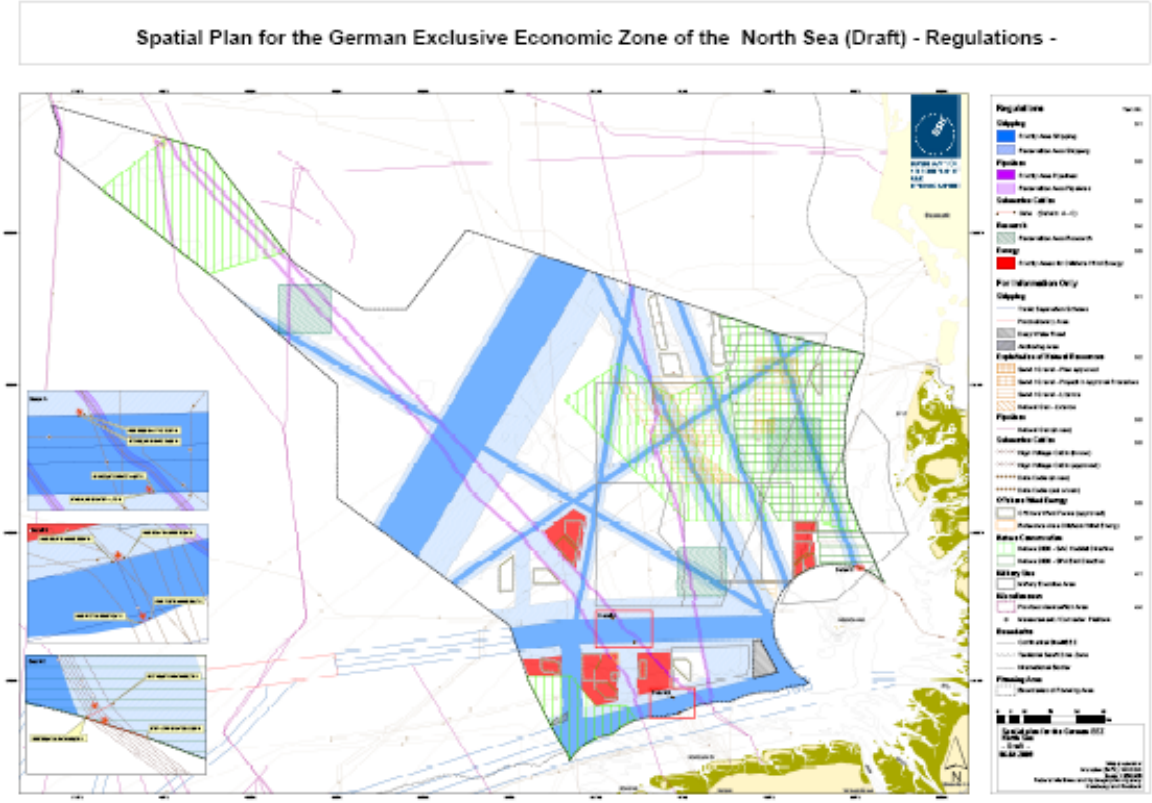
Map 1: alert map for vultures and golden eagle. May 2: alert map for bat species.
Map 3: synthesis map of areas of remarkable nature value.
Map 4: synthesis map of areas of importance for breeding, migrating and overwintering bird species

Spatial planning in the German EEZ of the North Sea.

The German EEZ of the North Sea attracts a lot of activities such as shipping, fishery, , exploitation of raw materials, energy production (especially wind energy) and marine scientific research; all of which take place within a geographically limited marine area which also harbour important bioresources and nature values.

After major efforts in terms of surveys and research to identify marine sites of high nature value and potential conflict areas with reference to other activities and developments, including wind farms, the German Cabinet approved Europe's first maritime spatial plan in September 2009. In this plan areas and zones for various activities and infrastructure have been identified, including sites designated for protection within the Natura 2000 network with reference to habitats, marine mammals and birds[117]*.*

A similar plan is in preparation for the German EEZ of the Baltic Sea.

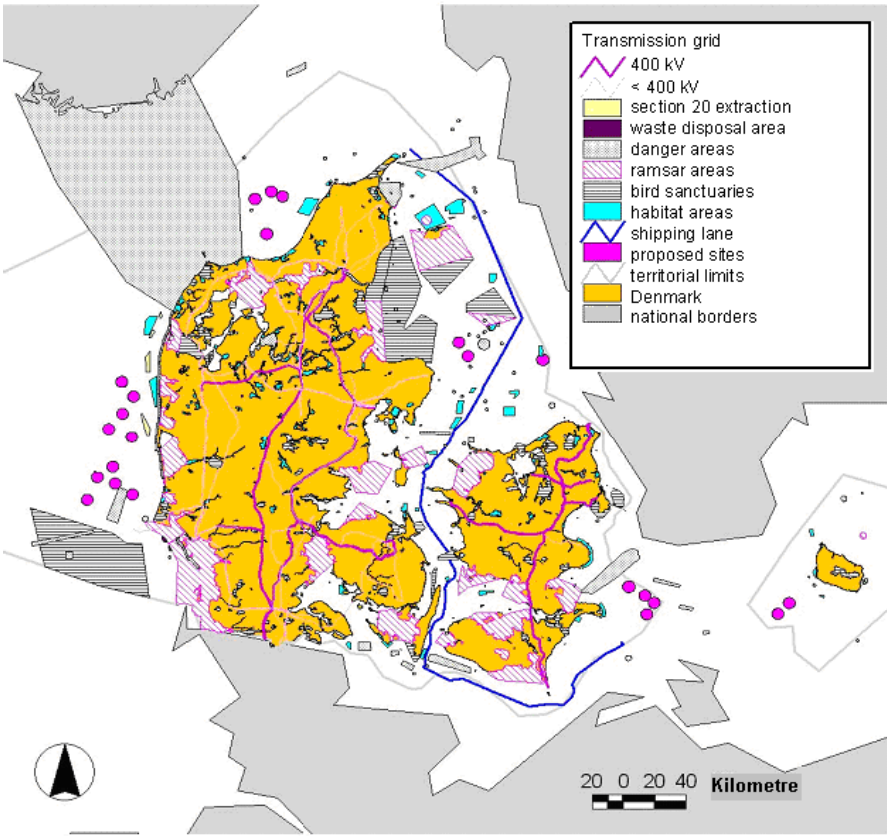


[117] http://www.bsh.de/en/Marine_uses/Spatial_Planning_in_the_German_EEZ/index.jsp for further information about the work approach (with links to maps etc).

Locational mapping of offshore wind farms in Denmark

For Denmark, an offshore wind turbine action plan from 1997 was updated in 2007, within the framework of a long-term national energy policy with the goal to have a share of renewable energy covering at least 30% of the gross energy demand by 2025[118]. For wind energy, a proposal of 23 offshore wind farm locations (within 7 larger areas) with an installed capacity of 4,600 MW in total was proposed, corresponding to a total energy production of 18 TWh or just over 8% of the total energy consumption and 50% of the electricity consumption in Denmark.

Locations have been selected within the frame-work of strategic planning approach, taking into account, inter alia, wind conditions, nature values (incl. Natura 2000 designations), visibility, and grid connections. The map below illustrates the proposal of 23 wind farm locations in the Danish EEZ, taking into account various kinds of planning constraints (incl. bird sanctuaries, Ramsar areas and habitat areas) within a strategic planning approach[119].



[118] Future Offshore Wind Power Sites – 2025, submitted by The Committee for Future Offshore Wind Power Sites under The Danish Energy Authority, April 2007; http://www.ens.dk/graphics/Publikationer/Havvindmoeller/Fremtidens_%20havvindm_UKsummery_aug07.pdf.

[119] From "Future Offshore Wind Power Sites – 2025", submitted by The Committee for Future Offshore Wind Power Sites under The Danish Energy Authority, April 2007; http://www.ens.dk/graphics/Publikationer/Havvindmoeller/Fremtidens_%20havvindm_UKsummery_aug07.pdf.

5 . STEP-BY-STEP PROCEDURE FOR WIND FARM DEVELOPMENTS AFFECTING NATURA 2000 SITES

- *Paragraphs 3 and 4 of Article 6 of the Habitats Directive set out a series of procedural and substantive safeguards that must be applied to plans and projects that are likely to have a significant effect on a Natura 2000 site.*
- *The first step is to determine whether a plan or project should undergo an Appropriate Assesment (AA). If it cannot be excluded that there will be a significant effect upon a Natura 2000 site then an Appropriate Assessment must be undertaken.*
- *The purpose of the AA is to assess the implications of the plan or project in respect of the site's conservation objectives, individually or in combination with other plans or projects. The conclusions should enable the competent authorities to ascertain whether or not the plan or project would adversely affect the integrity of the site concerned.*
- *The Appropriate Assessment should focus on the species and habitats that have justified the site's designation as a Natura 2000 site and should also consider all the elements that are essential to the functioning and the structure of that site. The appraisal of effects must be based on objective information.*
- *The outcome of the AA is legally binding. If it cannot be ascertained that there will be no adverse effects on the integrity of the Natura 2000 sites, even after the introduction of mitigation measures or conditions in the development permit, then the plan or project cannot be approved unless the conditions of Article 6 (4) are met.*

5.1 Introduction

The previous chapter outlined the benefits of strategic and proactive planning as a means of avoiding potential impacts of wind farm developments on nature and wildlife at an early stage in the planning process, for instance through the appropriate siting of wind farm developments away from areas of potential conflict with wildlife and nature.

The present chapter looks specifically at what happens when Natura 2000 sites are likely to be affected either at the planning level or at the individual project level. It provides guidance on the procedures to follow in accordance with Article 6(3)-(4) of the Habitats Directive and offers practical advice on how to apply these requirements in the case of wind farm developments in particular.

The chapter is based largely on the guidance that already exists on article 6 of the Habitats Directive. It is strongly recommended that the following three guidance documents are read in conjunction with the present document[120]:

- Managing Natura 2000 sites: the provision of Article 6 of the 'Habitats' Directive 92/43/EEC
- Assessment of plans and projects significantly affecting Natura 2000 sites: methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC.

[120] available at http://ec.europa.eu/environment/nature/natura2000/management/guidance_en.htm

- Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC: clarification of the concepts of alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, Opinion of the Commission.

Because Natura 2000 concerns Europe's most valuable and endangered habitat types and species, it is only logical that the procedures for approving such developments are sufficiently rigorous to avoid undermining the overall objectives of the Birds and Habitats Directives – that of safeguarding Europe's most vulnerable wildlife and nature.

Particular attention is therefore given to the need for decisions to be taken on the basis of sound scientific information and expertise. Delays during the decision making process are often caused by the lack of information or poor quality assessments that do not allow the competent authorities to make a clear judgement on the potential impacts of the proposed plan or project.

As explained in chapter 3, the assessments must cover not only the impacts related to the wind turbines but the whole wind farm development including associated infrastructures and installations such as access roads, site access (e.g. for maintenance works or during constuction), anemometer masts, construction compounds, concrete foundations, temporary contractors facilities, electrical cabling (e.g. overhead wires) for access to the grid, spoils, and/or possible a sub-station, control building etc.

5.2 Article 6 of the Habitats Directive : a step-by-step approach

Article 6 of the Habitats Directive is one of the most important articles in the Directive as it determines the relationship between conservation and land-use. Paragraphs (3) and (4) set out a series of procedural and substantive safeguards that must be applied to plans and projects that are likely to have a significant effect on a Natura 2000 site. The proposed development does not have to be located within the Natura 2000 site in order to trigger the need for an AA as plans and projects outwith the site may also carry the likelihood of adverse effects.

ARTICLE 6 (3) and (4) OF THE HABITATS DIRECTIVE

- *6(3). Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.*
- *6(4). If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.*
- *Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.*

This Article 6 procedure is designed to:

- Fully assess the impacts of plans or projects that are likely to have a significant negative effect on a Natura 2000 site by means of an Appropriate Assessment;
- Ascertain through the Appropriate Assessment, whether the impact will adversely affect the intergrity of the site and, if this is the case, whether the plan of project can still be approved if certain mitigation measures or planning conditions have been introduced that remove or minimise the adverse effects on the site to a non-significant level;
- Provide a mechanism for approving, in exceptional circumstances, plans or projects that have an adverse effect on a Natura 2000 site even after the introduction of mitigation measures when these plans or projects are considered to be of imperative overiding public interest but where no suitable alternative solutions exist (cf Art 6.4)

The procedures laid out in Article 6(3) and 6(4) is best carried out in stages. Every stage determines whether a further step in the process is required. For instance if, after stage one, it is concluded that there will be no significant effects on the Natura 2000 site, then the plan or project can be approved without the need for further assessment:

- **Stage one: Screening** – this initial evaluation is intended to determine whether a plan or project has to undergo an Appropriate Assessment. If it cannot be excluded, on the basis of objective information, that there will be significant negative effects upon a Natura 2000 site, then an Appropriate Assessment should be undertaken.

- **Stage two: Appropriate Assessment** – once it has been decided that an Appropriate Assessment is required, detailed information should be gathered on the site's ecological features and conservation objectives, and on the potential impacts of the plan or project on these conservation objectives. This will enable an assessment to be made on whether or not the plan or project, alone, or in combination with other plans or projects, will have an adverse impact on the integrity of the Natura 2000 site. The burden of proof is on demonstrating that there will be no adverse affects on the integrity of the site.

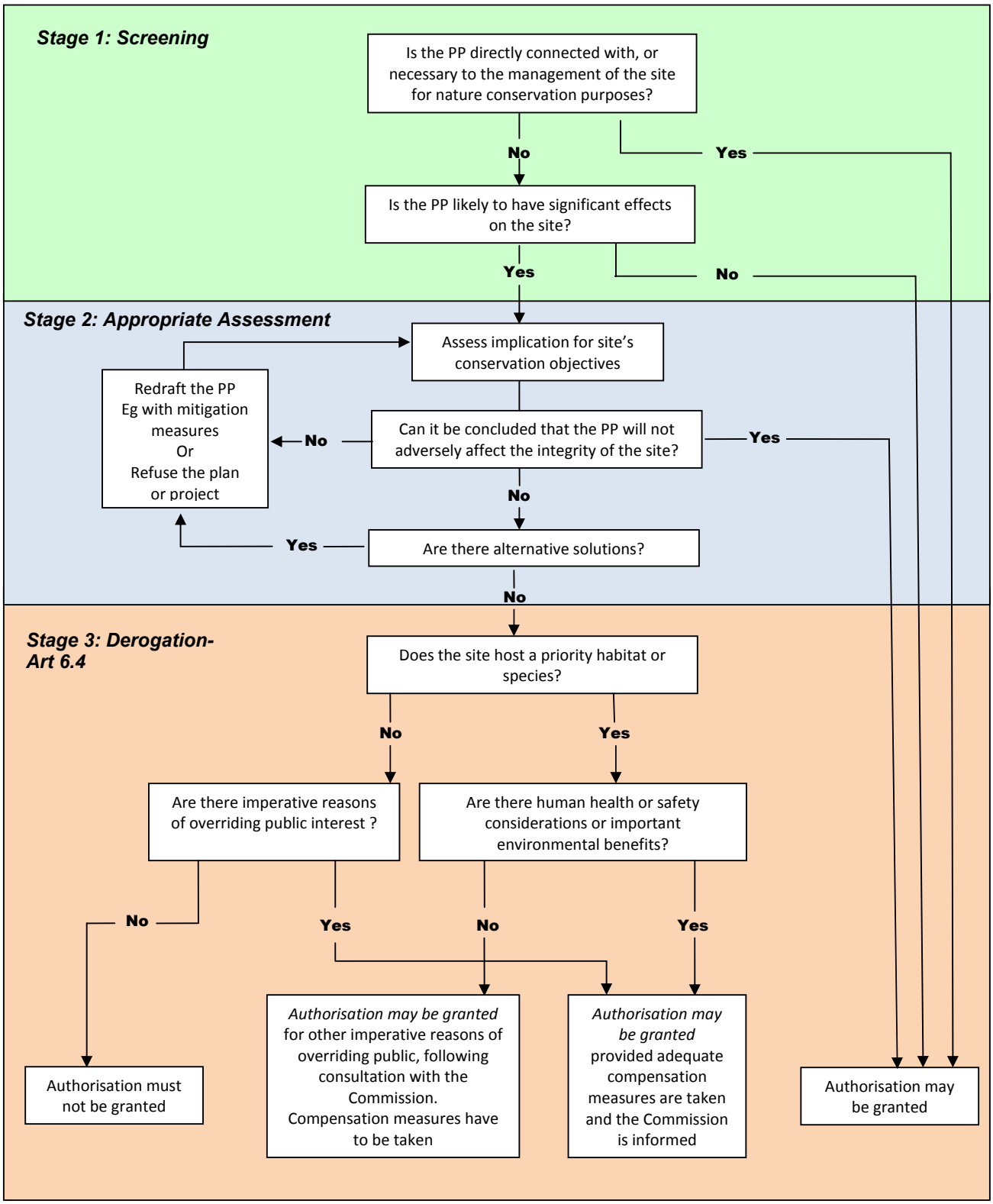
  In practice, the Appropriate Assessment is often an iterative process, allowing for improvements to the plan or project in order to avoid adverse effects on the integrity of the Natura 2000 site. Thus, depending on the assessment's findings, the authorities should consider if mitigation measures can be introduced or whether restrictions should be applied to the permit in order to avoid or reduce the effects to a non significant level.

  The authorities will also have to examine viable alternatives to the plan or project. But at the end of the day, the plan or project can only be authorised if it has been demonstrated that there is no adverse effect on the integrity of the site. If these cannot be ruled out, then the authorities must refuse its authorisation or apply the derogation test (Stage 3) under Article 6.4.

- **Stage three: derogation procedure in the absence of alternative solutions and for imperative reasons of overriding public interest:** If no alternative solutions exist and the adverse effects cannot be removed through mitigation, then, in exceptional cases, the authorities can decide if the plan or project should still be allowed to proceed on the grounds of imperative reasons of overriding public interest (IROPI). If so, then appropriate compensation measures must be identified and implemented to ensure that the overall coherence of Natura 2000 is protected.

The following flow chart (figure 11) demonstrates how these stages are applied and how decisions are reached on the authorisation or rejection of a plan or project.

Figure 11 :Flow chart of Article 6(3) and (4) procedure (based on Commission Art 6 methodological guide



It is clear from the above that this decision-making process is underpinned by the precautionary principle. The emphasis should be on objectively demonstrating, with reliable supporting evidence, that there will be no adverse effects on the Natura 2000 site. For this reason, the lack of scientific data or information on the potential risk or significance of impacts cannot be a reason to proceed with the plan or project.

Subsequent sections examine each of the stages in turn and provide advice on how they should be carried out in the context of wind farm developments in particular.

STAGE 1: SCREENING

5.3 When is an Appropriate Assessment needed ?

The first step is designed to determine whether or not an Appropriate Assessment is actually needed. If it can be determined with certainty that the plan or project is not likely to have a significant effect, either individually or in combination with other plans or projects, then the plan or project can be approved without further assessment.

If there is any doubt, then an Appropriate Assessment will need to be undertaken so that these potential effects are studied in full before a decision is taken on whether to approve the plan or project. It is ultimately for the competent authority to decide, in the light of screening, whether or not an AA is required.

Screening is required for :

- Both *plans* that serve as a framework for development consents and individual *projects*. This ensures that the potential impacts on Natura 2000 are taken into account at both the strategic planning level and at the level of each individual project[121].
- Plans or projects affecting sites classified under the *Birds Directive* and sites designated or proposed to be designated under the *Habitats Directive.* They are both part of the Natura 2000 network.[122]
- Plans or projects both *inside* and *outside* the Natura 2000 site if they are likely to have a significant effect on the Natura 2000 site. For instance, a wind farm development located outside a Natura 2000 site could still have a significant effect on certain species for which the site is designated (such as bats) because they cause the species to be displaced from their habitual breeding or foraging areas within the site.

[121] Case C-6/04: 20 October 2005

[122] **For Potential SPAs** (IBA) Article 6(3)-(4) is not applicable but Article 4(4) of the BD is applicable. Areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive. [Commission/France, Basses Corbières, C-374/98]

For potential pSCIs (eg marine sites): The MS are required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level. [Dragaggi, C-117/03. [Bund Naturschutz, C-244/05].

[122] Case C-98/03 paragraph 32: "…In its definition of measures to be subject to an assessment of the implications, the Directive does not distinguish between measures taken outside or inside a protected site."

[122] Case C-201/02 para.53: "….the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a 'development consent' within the meaning of Article 1(2) of that directive (85/337), so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations…"

5.3.1 Gathering sufficient information

The screening exercise is carried out by the authority responsible for the adoption of the plans or approval/rejection of development applications. Most often they will seek the assistance of, and base their evaluation on, the information received from, the developers, environmental authorities or contracted experts.

The collaboration of other relevant authorities, especially those responsible for nature conservation, in the screening of plans and projects may also be crucial, as they can provide useful information which should be taken into account at this stage.

To carry out the screening exercise, sufficient information should be gathered on both the wind farm plan or project and on the Natura 2000 site(s) that might be affected. In the case of the plan or project, this information should include data on the location of the wind farm and associated infrastructures in relation to Natura 2000 site(s) in the area as well as details on the scale and design of the wind farms and its associated infrastructures. It should also include details of all activities that will be undertaken during each stage of the project's cycle – i.e. during the construction, operation and decommissioning /repowering phases.

As regards the Natura 2000 site, information should be gathered on the species and habitat types for which it has been designated, their conservation state and on the overall conservation objectives of the site. Part of this information can be found in the Natura 2000 Standard Data Forms or in the site designation or management plans where available.

It is worth recalling that the initial screening undertaken here is not the same as a full-scale Appropriate Assessment – it only requires sufficient information to be able to decide if there is likely to be a significant effect or not.

Natura 2000 Standard Data Form
The Standard Data Forms which have been compiled for each site contain information about the surface area, representativity and conservation status of the habitats present in the site, as well as the global assessment of the value of the site for the conservation of the natural habitat types concerned. For the species present in the site, information is provided on their populations, status (resident, breeding, wintering, migratory) and on the site's value for the species in question.

Conservation status of habitats and species
According to the provisions of Article 17 of the Habitat Directive, the EU 25 Member States (i.e. excluding Romania and Bulgaria) reported, in 2008, on the conservation status of all the species and habitats listed in the annexes of the Habitats Directive which occur in their territory. On the basis of this, the Commission produced a consolidated report on the conservation status of each species and habitat type at a biogeographical and EU level. These reports provide useful contextual information[123]

Natura 2000 Management plans
Some sites have a Natura 2000 management plan with important elements such as the conservation objectives for the site, the species and habitats, theirs status, threats, etc, which can be useful for the screening stage and for the Appropriate Assessment.

[123] *All reports are available at: http://biodiversity.eionet.europa.eu/article17 and http://ec.europa.eu/environment/nature/knowledge /rep_habitats/index_en.htm*

Pre-screening by developers: preparing the ground for a smoother decision making process

It is strongly recommended that developers already gather information on the Natura 2000 sites before starting to design their plan or project (i.e. even before the screening stage) so that they can be aware of the possible sensitivities regarding nature and wildlife and can take these into consideration during the preparation of their development proposal. This could, for instance, influence the choice of location for the wind farm as well as its actual design so that only the most appropriate sites are taken forward.

It is also very useful, at an early pre-screening stage, for developers to hold initial discussions with their planning authority and with the statutory nature conservation authorities to learn more about the potential environmental constraints the project might face and how these might be best avoided. This could also help to identify any potential issues to watch out for or any gaps in scientific knowledge that might need further investigation before the plan or project is approved. Experience has shown time and again that good research and consultation right from the start before work begins on the development proposal helps to avoid unnecessary time and expense on unsuitable sites later on.[124]

5.3.2 Determining if there is a 'significant effect'

Every plan or project that could potentially affect a Natura 2000 site(s) should initially be considered as a candidate for Appropriate Assessment. But an Appropriate Assessment will only be required for those that are '….*likely to have a significant effect ..'*.

When doing this initial evaluation it is important to recall that the emphasis is on there being a 'likelihood' of potentially significant effects – not a certitude. This shows the precautionary nature of this initial test. If there is any doubt over whether the effects are likely to be significant or not then an Appropriate Assessment must be undertaken to ensure that these potential effects can be studied in full.

The 'likelihood' of potentially significant effects should be considered in the light of the conservation objectives, the characteristics and the specific environmental conditions of the site. Plans or projects likely to undermine the site's conservation objectives must be considered likely to have a significant effect on that site.

Likely effects
Likely effects on the site should first be identified at this stage. The biodiversity elements liable to be affected (habitats, species, ecological processes) should be determined, taking into account their sensitivity in relation to the planned activities. Risks of effects must be identified using a precautionary approach. Where preliminary scientific evaluation indicates that there are reasonable grounds for concern as to the absence of significant effects, an appropriate assessment has to be carried out.

Significant effect
The significant nature of the effects on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives. So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned. Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. In assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project (Case C-127/02 para. 46-48).

[124] European Best Practice Guidelines for wind energy development, EWEA 2002. Available from http://ec.europa.eu/energy/renewables/studies/wind_energy_en.htm

5.3.3 Looking at potential cumulative effects

The screening process also applies to plans or projects *in combination with other plans or projects*. It may be that one wind farm project alone might not have a significant effect but, if taken in combination with other plans or projects (wind farm or other developments) within the area, the cumulative effects may turn out to be significant.

Other plans or projects to be considered in this case include those that have already been completed, those that are approved by the planning authorities, or those that are currently undergoing planning approval.

The geographical scale over which these cumulative effects need to be considered will depend on the exact circumstances and scale of the plan or project being studied but should cover a sufficiently large area to capture any cumulative effects that may arise with the project under assessment, having the transboundary aspect in mind, when relevant. Again, the relevant nature conservation authorities will be able to help identify the possible plans or projects that need to be considered as part of the in-combination test.[125]

5.3.4 Recording the screening decision

Finally, as screening is a legal requirement, the reasons for the final decision as to whether or not to carry out an Appropriate Assessment should be recorded and sufficient information should be given to justify the conclusion. Given that the nature protection assessments often run in parallel with the EIA/SEA procedures, common information procedures to the public should be envisaged.

Key questions to be considered at the stage of screening:

- Identify the geographical scope of the plan or project, and its main characteristics
- Identify all Natura 2000 sites that might be affected by the plan or project.
- Identify the qualifying interests of the Natura 2000 sites concerned (i.e. the habitats and species for which the sites are designated) and the sites' conservation objectives.
- Determine which of those species and habitats could be significantly affected by the planned activities.
- Analyse other plans or projects which could, in-combination with the planned activities, give rise to a likely significant effect on Natura 2000 sites
- Analyse the possible interactions between the plan or project activities, either individually or in combination with other plans or projects, and the qualifying interests, the ecological functions and processes that support them.

[125] A possible (but still preliminary) approach to assessing the cumulative effect of onshore wind farms has been proposed by The Scottish Natural Heritage (SNH 2009b).

STAGE 2: CARRYING OUT THE APPROPRIATE ASSESSMENT

5.4. Purpose of Appropriate Assessment

The purpose of the Appropriate Assessment is to assess the implications of the plan or project in respect of the *site's conservation objectives*, individually or in combination with other plans or projects. The conclusions should enable the competent authorities to ascertain whether or not the plan or project would adversely affect the integrity of the site concerned.

The Appropriate Assessment must be undertaken before the competent authority decides whether or not to undertake or authorise the plan or project. The EU Court of Justice has confirmed that as regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, the provision does not define any particular method for carrying out such an assessment. Nonetheless, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval [126].

In summary, the term 'appropriate' essentially means that the assessment needs to be appropriate to its purpose under the Habitats and Birds Directives – ie that of conserving rare and endangered species and habitat types of European interest. 'Appropriate' also means that the assessment has to be a *reasoned* decision. If the record of the assessment does not disclose the reasoned basis for the subsequent decision, then the assessment does not fulfil its purpose and cannot be considered 'appropriate'.

In this respect, it is important to recall that, in contrast to the EIA or SEA, the outcome of the Appropriate Assessment is legally binding for the competent authority and conditions its final decision[127]. Thus, if it cannot be ascertained that there will be no adverse effects on the integrity of the Natura 2000 site, even after the introduction of mitigation measures, then the plan or project cannot be approved, unless the conditions of Article 6(4) are met.

The lack of information or data cannot be used as a reason for approving a plan or project. The EU Court of Justice confirmed this position in the Waddensea case (C-127/02) where it stated that '*such an (appropriate) assessment of the implications implies that, prior to the approval of the plan or project, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field.*'

5.5 Steps for an Appropriate Assessment of wind farm plans and projects

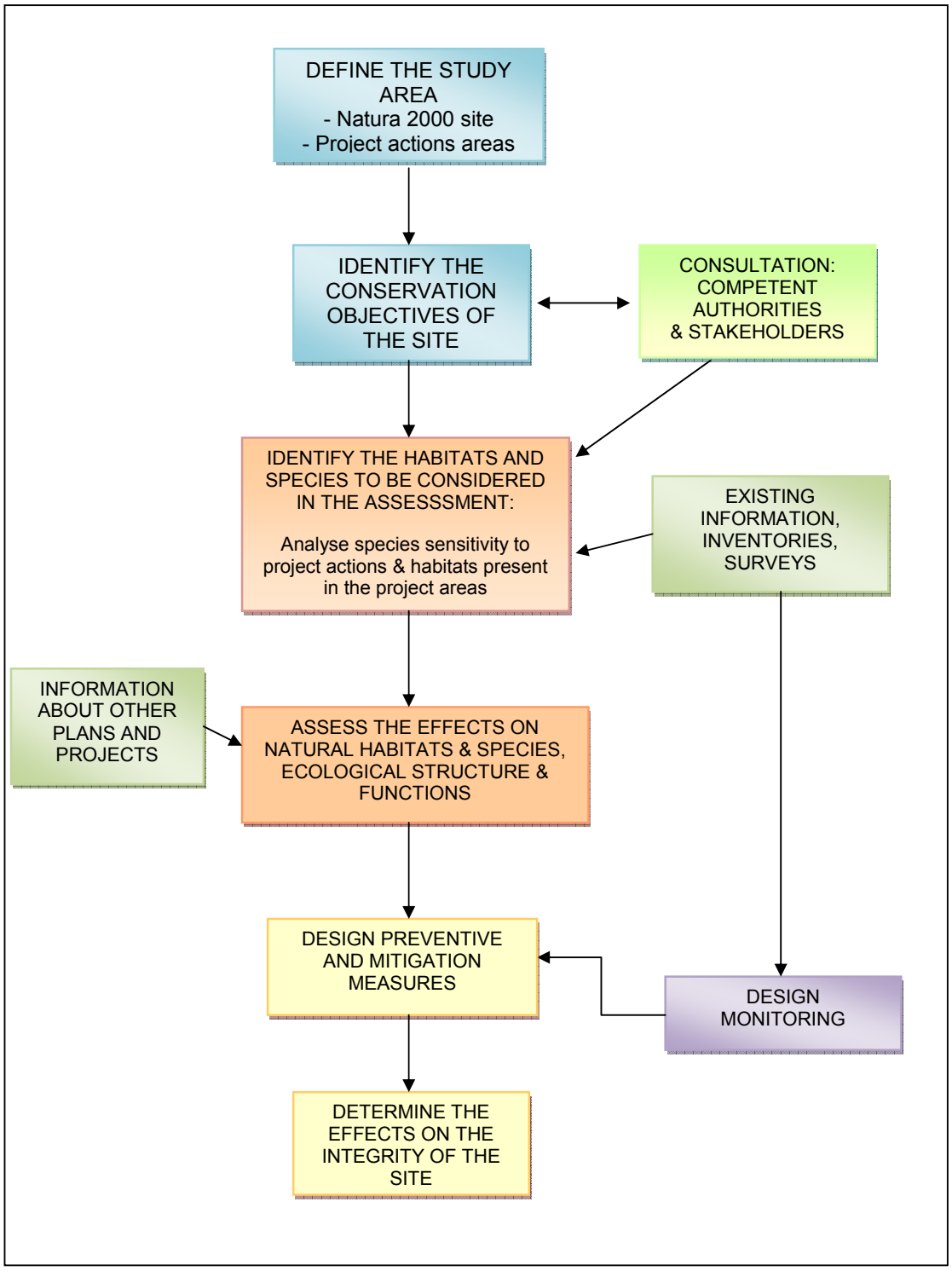
There are several basic steps to follow when carrying out an Appropriate Assessment. These are illustrated in the figure 12.

The focus of the Appropriate Assessment should be specifically on the species and/or habitat types for which the site is designated Natura 2000, and on the possible effects of the plan or project on them. This should also include any indirect effects on these species and/or habitat types, for instance on their supporting ecosystems and natural processes.

[126] C-127/02, paragraphs 52-53.

[127] See chapter 2 for details on the relationship between SEA, EIA and AA

Figure 12: Steps to be undertaken as part of the appropriate assessment



5.5.1. Setting the baseline and gathering further information

It is important to ensure that the Appropriate Assessment is well focussed and provides clear terms of reference for evaluating the potentially negative effects of the wind energy project on the Natura 2000 site(s). This means identifying more precisely what impacts the Appropriate Assessment should cover and to ensure that all necessary information is gathered to enable these impacts to be assessed correctly.

This builds on the information already gathered under the screening exercise but, this time, any gaps in knowledge should also be filled as far as possible so that the assessment can be made on sound scientific grounds. Sound baseline data is of vital importance as the Appropriate Assessment has to be able to ascertain with certainty that the proposal will not affect the integrity of the site concerned. **If there is some degree of doubt, the competent authorities may require further field work to be carried out or may refuse the project as it stands on the grounds of uncertainty over the impacts**.

At this stage it is also useful to define the study area bearing in mind that the potentially negative effects may be felt over a wider area than the immediate location of the wind turbines. It may for instance be useful to start with a 1km radius and then to adjust this to make the study area larger or smaller in function of the species and habitat types likely to be affected.

Information gathering during scoping

The **information about the plan or project** should contain details of all elements that are relevant for the assessment. They should include at least the folllowing:

- Detailed maps of precise location of the wind turbines and the associated infrastructures in relation to the Natura 2000 site(s) in the given area;
- The scale and design of the wind farm, e.g. the number and size of wind turbines, their layout and design, etc..
- Similar details for all associated infrastructures;
- Activities foreseen during construction works and their duration / timing;
- Activities foreseen during operation and management;
- Provisions for repowering and decommissioning;
- Details of any other plans or projects in the area that could, if taken in combination with this plan or project have a significant cumulative effect on the Natura 2000 site

The **information about the Natura 2000 site** should contain at least the following:

- Details on each species and habitat type for which the site is designated and ecological maps of their location within and around the site over time (eg over an annual lifecycle);
- Data on their overall usage of the site for activities such as foraging, breeding, resting, staging or hibernating;
- Data on their representativity and conservation status both within that site and within the area in general (including, inter alia, data on population size, degree of isolation; ecotype, genetic pool; age class structure..);
- Data on ecological structure and functioning of the site and its overall conservation state;
- Details of the conservation objectives of the site (incl any management plans etc);
- The role of the site within the biogeographical region[128] and the Natura 2000 network;
- Any other aspects of the site or its wildlife that is likely to have an influence on its conservation state and objectives (eg current management activities, other developments..)

[128] The lists of Sites of Community Importance (SCI) within the Natura 2000 network, are adopted by biogeographical region. For further information and links to maps go to http://ec.europa.eu/environment/nature/natura2000/db_gis/index_en.htm

Once again, in addition to requesting the developer to provide any relevant assessments, impact studies and surveys etc… that may be reasonably required of them, it is strongly recommended that the competent authorities also consult with, and seek the advice and guidance of, the relevant nature authorities, as early as possible during the scoping stage. They will be able to provide details about the Natura 2000 site and its conservation objectives. They can also provide scientific advice on the likely ecological effects that a wind energy project could have on the site.

Other bodies such as conservation NGOs, research institutions or local stakeholder groups can also be contacted to help provide further local knowledge and ecological information. Consulting these organisations already during the scoping exercise will help ensure that as complete a picture as possible is built up about the site, the species/habitats present and the potential impacts of the plan or project on these. It can also lead to a smoother decision making process if all interest groups are collaborating from the start in finding solutions that are acceptable to all.

Information gathering is necessarily an iterative process. If the first identification and analysis of effects reveals that there are important gaps in knowledge, then further surveys and monitoring work will need to be undertaken in order to complete the picture. This will ensure there is a sufficient basis of scientific knowledge to be able to make a reasoned decision.

Experience has shown that many of the delays or problems encountered during the Appropriate Assessment are caused by the fact that the information gathered for the Appropriate Assessment is incomplete or deficient. As a result, the authorities are unable to confirm that there be no adverse effects on the integrity of the site and the whole assessment process has to be put on hold whilst the missing information is being gathered.

Fictitious example of further information requirements identified during scoping.

Wind farm project with twelve turbines on edge of a woodland			
1. Possible likely significant effect	**Collision mortality**	**Disturbance and displacement**	**Habitat loss and degradation**
2. Information about species and habitats at the Natura 2000 site	Ecological data on the bat and bird species of European interest and at potential risk at the site.	Data on habitat requirements for species of European interest and at potential risk at the site.	Location of key habitats in or around the site.
3. Potential impacts to be assessed	Collision mortality rates during different parts of the species life cycle, e.g. during breeding or migration periods	Habitat usage across the site	Location of core roosting, breeding or foraging sites, and location of movement routes between these.
4. Data needed for these assessments	Field data over at least one annual cycle, for risk assessments, using modeling or sensitivity indices.	Field data on local dispersal patterns inside and around the site over at least one annual cycle.	

5.5.2. Assessing the impacts on the Natura 2000 site

The Appropriate Assessment itself involves looking at all the aspects of the plan or project that could cause a significant effect on the Natura 2000 site. In this context, each element of the project (wind turbines, other constructions etc..as well as effects during construction, maintenance and operation etc…) should be examined in turn and the potential effects of that element should be considered in relation to each of the species or habitat types of European interest for which the site has been designated Natura 2000 site. This is because each species has different conservation requirements. Also, the impacts on one species may vary from one site to another depending on its conservation state and the underlying ecological conditions of the site.

For example, a wind farm project proposes to locate 10 wind turbines in a degraded grassland away from any bird or bat interest within the Natura 2000 site but also proposes to construct an access road to the wind turbine site that will run across rare habitat types such as blanket bogs and natural forests. In such a case, the wind turbines themselves may be unlikely to cause any significant impact but the access road probably will, and so the effects of both operations should be examined in detail in light of the site's conservation objectives.

Thereafter, the effects of the different features within the plan or proposal should be looked at together, and in relation to each other, so that the interactions between them can be identified. For instance, it may be that the risk of collision mortality with the wind turbines alone is not likely to be significant but if it is taken in combination with the installation of overhead cables, which could also cause collision mortality, then the effects could become significant.

If there are several Natura 2000 sites that could be affected, as in the case of a development plan for instance, the impacts on each should also be studied seperately at first as they may have been designated for different species or habitat types and may have different conservation objectives.

Conservation objectives of Natura 2000 sites

The conservation objectives for a Natura 2000 site are determined at member state level.

The Natura 2000 Standard Data Forms (SDF), which have been compiled for each designated site, contain information about the habitats (e.g. surface area, representativity and conservation status) and the species (populations, status) and the value of the site for the habitats/species for which the site has been designated. The SDF therefore provides information regarding the qualifying interests of a Natura 2000 site and, in the absence of more detailed definition of conservation objectives for a atura 2000 site, they can be considered as such. Some countries have developed more detailed conservation objectives for their Natura 2000 sites either at a strategic level across a suite of sites, or at an individual site level. Some sites may also have management plans or management objectives that provide clear indications about the conservation objectives to be attained.

The Habitats Directive (Article 4.4) requires that once a site of Community importance (SCI) has been adopted, the Member State concerned shall designate that site as a Special Area of Conservation (SAC) as soon as possible and within six years at most and apply the necessary conservation measures for the maintenance or restoration of the habitat and species for which the site has been designed to a favourable conservation status. These measures should also be taken into account as part of the Appropriate Assessment as they show how the site's conservation objectives will be translated into practical actions.

Whilst the focus should be on the species and habitats of Community interest that have justified the site designation (the qualifying interests of the site), it should not be forgotten that these qualifying interests also interact with other species and habitats in complex ways. It is therefore important to consider all the elements that are essential to the functions and the structure of the site, its qualifying interests and its conservation objectives. Furthermore, other species can also be relevant for determining potential effects on protected habitats if they constitute typical species of the habitat in question.

The assessment should be based on the best available scientific knowledge of the following main elements as they relate to the qualifying interests of the site (EC 2007b):

- Structure and function, and the respective role of the site's ecological assets.
- Area, representativity and conservation status of priority and non-priority habitats in the site.
- Population size, degree of isolation, ecotype, genetic pool, age class structure, and conservation status of species under Annex II of the Habitats Directive, Annex I of the Birds Directive, and regularly occurring migratory species not listed in Annex I Birds Directive present in the site.
- Role of the site within the biogeographical region and in the coherence of the Natura 2000 network.Any other ecological assets and functions that are essential for meeting the site's conservation objectives.

The following boxes provide an overview of possible survey methods that have been used to identify and assess the likely effects of wind farms. These are based on a review of existing good practices and may therefore provide useful ideas and suggestions for future development proposals.

When field surveys are required a distinction should be made between those that are carried out before a decision is taken on the plan or project and those that involving longer term monitoring as a condition in the planning application – for instance to confirm the effects predicted in the AA/EIA or to monitor the effectiveness of the mitigation measures (which may be consideration so that adaptive mitigation can be applied). Baseline surverys which are necessary for the EIA/AA should be broader in scope in order to characterise the area for all species and habitats to enable a valid assessment to be made of the impacts and their significance.

Good practice methodologies for survey work on the likely effects of wind

The Appropriate Assessment will need to be based on sound scientific and objectively verifiable information. This can sometimes require additional survey work to be carred out before the plan or project is approved. The following section provides a series of possible methodologies for carrying out further surveys on the likely effects of wind farms on species of European interest. They are derived from a range of sources and are indicative of the kind of information that may need to be gathered for onshore or offshore wind farms.

There are no legal stipulations about the length or extent of the pre-construction surveys, this has to be decided case-by-case. However, some indications can be given on the basis of existing experience and knowledge. For onshore locations, a 2 year ornithological baseline survey for wind farm projects may be required[129] and for bats it should cover a full annual cycle (including maternity and hibernating seasons as well as spring and autumn migration[130]).

[129] In UK, cf DEFRA personal communication

[130] Rodrigues et al. (2008) for the elements to be included in a monitoring programme for bats.

For offshore wind farms, year around studies over a period of 1-2 years have been recommended for marine mammals[131] and a 2 year period is recommended for birds due to the general paucity of existing data in these environments.

Field surveys have also to be designed to provide data that can be used for reliable and robust statistical analyses for comparisons, for instance, between before and after construction, between sites, or between a wind farm site and a reference area with similar environmental characteristics as regards habitats or climate for instance

A non-exhaustive overview of the most common techniques used so far is given in the following table. They include a mixture of techniques based on direct visual observation (e.g. birds and bats), sampling methods (e.g. for marine fish and benthic fauna) and remote techniques such as radar and sonar. It has to be kept in mind, however, that as the understanding of the potential impacts improves, the recommended methodologies may change.

Visual observations are frequently used for studying bird abundance and distribution in zones around proposed wind farm locations in order to investigate potential displacement effects[132]. Recordings of flight movement, e.g. along frequently used migration corridors for birds or bats, is a common monitoring technique for collecting data needed for assessing collision risks and potential barrier effects. For studies of potential displacement effects by birds around onshore locations, traditional territory mapping and line transect counts are useful tools[133]. Offshore, ship-based surveys are generally better for species identification and behavioural observations, while aerial surveys have the advantage of enabling relatively rapid coverage of large sea areas.

Records of flight calls has been found to be a useful complement, both to visual observations and remote techniques, e.g. for species identification

Carcass collection is included in many monitoring programmes for onshore locations. Although the method suffers from the obvious difficulty that carcasses can be overlooked or already removed by scavengers, it may still provide useful complementary and qualitative information about species killed by collision. Preferably, the search should be done in a standardised way that makes it possible to relate the number of findings to search effort, and (if needed) with correction factors for e.g. observer efficiency and scavenging rates[134]. For offshore locations, constructions of floating bunds and/or nets to retain corpses at wind farms have been considered but in most cases found to be impractical and not yielding reliable information[135].

Sampling of fish and marine fauna: Sampling methods such as trawling for fish and epifauna, and grab sampling for infauna are can be useful in combination with various remote techniques.

Remote techniques have been found to be very useful tools for collecting the data needed for impact assessments. Radar has a wide application and can be used to record movements (elevation as well direction) by birds and bats at night and in poor visibility. It is best used in combination with visual observations and/or records of flight calls to help with species identification etc. Thermal Animal Detection Systems (TADS) is a more recent, infra-red based technology with the potential to provide information about avoidance behaviour, flock size and flock altitude by birds and bats in close proximity to the rotor blades[136]. High Definition Video Surveys is an airplane-based technique for surveys of birds in marine environments, still under development[137]. Microphones for automatic registration of flight calls may also be a useful complement to species identification as well as quantitative estimates[138]. Hand-held or automatic bat detectors are necessary tools if the occurrence of bats is a key element in the surveillance programme.

[131] E.g. Diederichs et al. (2008) and primarily with reference to Harbour Porpoise (*Phocoena phocoena*).
[132] E.g Petersen et al. (2006), see also BSH (2007) and DEFRA (2005) for detailed descriptions.
[133] Useful references in SNH (2005b).
[134] E.g. Morrison et al. (2007).
[135] E.g. Desholm et al. (2006).
[136] E.g. Desholm et al. (2006) and Hüppop et al. (2006), and references in these publications. See also Kunz et al. (2007b) for an overview of various remote techniques for surveillance of nocturnally active birds and bats.
[137] E.g. Mellor & Maher (2008).
[138] E.g. Hüppop et al. (2006).

For marine environments, a large variety of techniques can be applied. For surveys of marine mammals, click detectors and towed hydrophones have been applied. "Passive Acoustic Monitoring" (PAM) systems, like T-Pods for surveys of whales and dolphins have been on the market for many years, and more advanced technologies, such as C-pods, are under development. Visual methods such as ship-based or aircraft surveys are useful complementary methods. – Remotely Operated Video (ROV) techniques are used for monitoring sediment characteristics and marine epifauna. For sediment processes hydro-acoustical techniques such as side scan sonar can be applied.

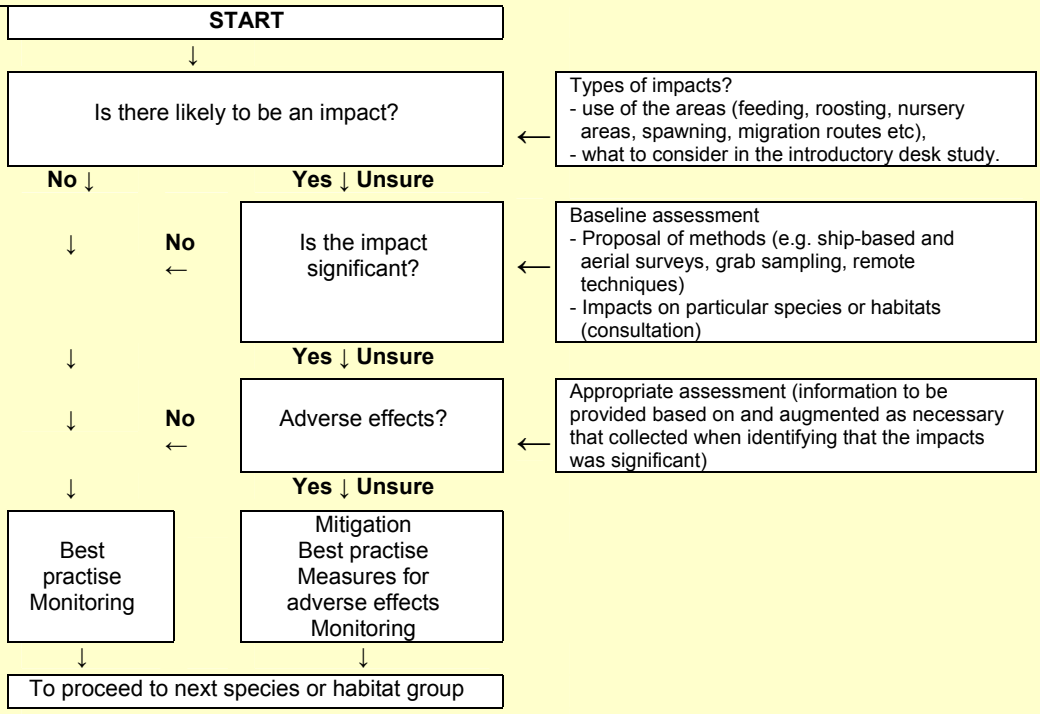
Study method	Disturbance & displacement - onshore	Disturbance & distancing - offshore	Collision	Barrier effect	Change in habitat structure
Visual observations (primarily birds) - Ship-based transect counts - Aircraft surveys - Records of flight movements - Territory mapping - Line transect counts	 X X	 X X 	 X 	 X 	
Visual obs (marine mammals) - Ship-based transect counts - Aircraft surveys		 X X			
Carcass collection (birds, bats)			X		
Bat detector	X	X	X		X
Trawling (fish, marine epifauna)		X			
Grab sampling (marine infauna)		X			X
Photo-sampling (marine epifauna)		X			X
Recording of flight calls (birds)	X	X	X	X	
Radar surveys (birds, bats)			X	X	
Microphone registration (birds)			X		
Thermal Animal Detection System (TADS) post construction.			X	X	
Beam trawl (marine fish, marine epifauna)		X			
Passive acoustic monitoring (PAM; T-pods etc; marine mammals)		X			
Towed hydrophones (marine mammals)		X			
Ship-based acoustics (marine fish)		X			
Hydro-acoustic techniques (Side scan sonar etc.; marine sediments)		X			X
Video transects, e.g. remotely operated video (ROV; marine sediments, marine epifauna)		X			X
Hydrological surveys	X				X
Noise emission from turbines	X	X			X

UK guidelines for assessing impacts on Natura 2000 sites of offshore wind farm development.

Guidelines and standards for EIAs and assessments of impacts on Natura 2000 sites, in accordance with Article 6 of the EU Habitats Directive, have been prepared by many Member States[139]. They differ in approach and degree of details, from outlines of the administrative procedures[140] to proposals of more detailed lines of action and appropriate methodology[141]. The approach proposed by the United Kingdom Department for Environment, Food and Rural Affairs[142] for assessments of impacts on marine Natura 2000 sites of offshore wind farm development has a wider application potential, also with reference to onshore locations and for other groups of species and habitats than the ones mentioned below.

The assessments are proposed to be done stepwise for various groups of species and habitats, e.g. as follows (flowchart below):
- Birds
- Marine mammals
- Fish and shellfish
- Subtidal benthos
- Intertidal benthos
- Terrestrial and coastal habitats
- Coastal and sedimentary processes

The guidance document includes proposals about relevant methodology for the various groups of species and habitats, with references to further studies and more detailed information. It is to be considered as a working document and it will be revised as the understanding of issues develops and new information becomes available.



[139] A selection of national guidelines are listed in Annex VI.
[140] E.g. the brief Swedish guidelines, "Vindkraft – tillståndsprocessen och kunskapsläget" (2007), edited by the Swedish Energy Agency.
[141] E.g. BSH (2007) for offshore wind farms in Germany, Scottish Natural Heritage (SNH 2005b) with reference to impacts birds of onshore wind farms and DEFRA (2005) for offshore wind farms in UK.
[142] DEFRA (2005).

Once all the information needed to make a reasoned assessment of impacts has been collated, the next stage of the Appropriate Assessment can begin in earnest: that of identifying the likely effects of the wind farm development proposal on the site's integrity in light of its conservation objectives.

This impact assessment has to be made in light of:
- the best scientific knowledge in the field (ECJ Waddensea ruling – see above)
- the Natura 2000 site's conservation objectives, as defined in the relevant national legislative framework and
  the potential impact on the site's integrity

Chapter 3 gives an overview of the kind of effects that are most frequently associated with wind farm developments and identifies the species or habitat types that have proven to be particularly vulnerable to this form of development. This provides a good starting point on what to look out for as it is based on current experiences and scientific studies.

But the effects of each project will be unique and must be evaluated on a case-by-case basis. According to the same ECJ Waddensea ruling (see above): *in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.*

Predicting the likely impacts can be difficult as one should have a good understanding of ecological processes and conservation requirements of particular species or habitat types types likely to be affected. It is therefore strongly recommended that the competent authorities secure the necessary expert advice and support in carrying out the impact assessment. As with all impact assessments, the Appropriate Assessment should be undertaken within a structured framework to ensure that the predictions can be made as objectively and accurately as possible.

For this purpose, impacts are often categorised into the following types:
- Direct and indirect effects;
- Short and long-term effects;
- Effects during different stages of the project (construction, operation, decommissioning..)
- Isolated and interactive effects
- Cumulative effects

For each effect identified, the *significance* of the impact will depend on:
- The magnitude of the impact
- The type of impact
- The extent
- Duration
- Intensity
- Timing
- Probability

Impacts should be predicted as precisely as possible, and the basis of these predictions should be made clear (this means also including some explanation of the degree of certainty in the prediction of effects). Wherever possible, predictions should be presented in such a way as to make them verifiable, as the outcomes of the tests can then be directly linked to a future monitoring programme (this may be one of the conditions placed in the planning permission – see below).

The impact assessment should also apply the best available techniques and methods to estimate the extent of the effects. Some of the techniques commonly used are listed in the following box.

Commonly used methods for predicting impacts:

- *Direct measurements*, for example of areas of habitat lost or affected, proportionate losses from species populations, habitats and communities.
- *Flow charts, networks and systems diagrams* to identify chains of impacts resulting from direct impacts; indirect impacts are termed secondary, tertiary, etc. impacts in line with how they are caused. Systems diagrams are more flexible than networks in illustrating interrelationships and process pathways.
- *Quantitative predictive models* to provide mathematically derived predictions based on data and assumptions about the force and direction of impacts. Models may extrapolate predictions that are consistent with past and present data (trend analysis, scenarios, analogies which transfer information from other relevant locations) and intuitive forecasting. Normative approaches to modelling work backwards from a desired outcome to assess whether the proposed project will achieve these aims.
- Population level studies: are potentially beneficial for determining population level effects of impacts to bird or bat or marine mammal species, for instance.
- *Geographical information systems (GIS)* used to produce models of spatial relationships, such as constraint overlays, or to map sensitive areas and locations of habitat loss. GIS are a combination of computerised cartography, storing map data, and a database-management system storing attributes such as land use or slope. GIS enable the variables stored to be displayed, combined, and analysed speedily.
- *Information from previous similar projects* may be useful, especially if quantitative predictions were made and have been monitored in operation.
- *Expert opinion and judgment* derived from previous experience and consultations on similar wind farms.
- *Description and correlation*: physical factors (water regime, noise) may be directly related to distribution and abundance of species. If future physical conditions can be predicted then it may be possible to predict future abundance on this basis.
- *Carrying capacity analysis* involves identifying the threshold of stress below which populations and ecosystem functions can be sustained. Carrying capacity analysis involves the identification of potentially limiting factors, and mathematical equations are developed to describe the capacity of the resource or system in terms of the threshold imposed by each limiting factor.
- *Ecosystem analysis* This approach aims to provide a broad regional perspective with a holistic framework. Three basic principles of ecosystem analysis are (i) taking the 'landscape level' view of ecosystems, (ii) use a suite of indicators including community level and ecosystem-level indices and (iii) taking into account the many interactions amongst ecological components which are involved in maintaining ecosystem function.

Adapted from: Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC; http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf.

5.5.3. Assessing whether there are no adverse effects on site integrity

Once the potential effects of the plan or project have been predicted as accurately as possible, the Appropriate Assessment can move onto the next stage which is to determinine whether the impacts will adversely affect the integrity of the Natura 2000 site, either alone or in combination with other plans or projects.

Again, it is important to bear in mind that **the focus of the assessment should be on objectively demonstrating, with supporting evidence, that there will be no adverse effects on the integrity of the Natura 2000 site,** in light of its conservation objectives. Thus, the competent authority has to be sure that there is no reasonable scientific doubt. If the adverse effects cannot be ruled out or if there is too much scientific doubt, the adverse effects have to be assumed.

It is clear from the purpose of the Directive that the 'integrity of the site' relates directly to the site's conservation objectives. Determining whether the integrity of the site is affected means determining whether the plan or project will adversely affect the:

- the coherence of the site's ecological structure and function, across its entire area, or
- the habitats, complex of habitats and/or
- populations of species for which the site is designated.

The focus is also on the specific site. Thus, it is not possible to accept a plan or project with significant adverse effects on the grounds that the conservation status of the habitat types and species it hosts will anyway remain favourable within the Member State or the EU as a whole.

Integrity of the site

Biological integrity can be defined as all those factors that contribute to the maintenance of the ecosystem, including structural and functional assets. In the framework of the Habitats Directive, the "integrity"' of the site is linked to the conservation objectives for which the site was designated as part of the Natura 2000 Network (EC 2007b). It has been usually defined as "the coherence of the site's ecological structure and function, across its whole area, that enables it to sustain the habitat, complex of habitats and/or populations of species for which the site is classified" [143] *(EC 2000b, ODPM 2005). As regards the meaning of 'integrity', this can be considered as a quality or condition of being whole or complete. In a dynamic ecological context, it can also be considered as having the sense of resilience and ability to evolve in ways that are favourable to conservation. (EC 2000b).*

A site can be described as having a high degree of integrity where the inherent potential for meeting site conservation objectives is realised, the capacity of self-repair and self-renewal under dynamic conditions is maintained, and a minimum of external management is required. When looking at the "integrity of the site", it is therefore important to take into account a range of factors, including the possibility of effects manifesting themselves in the short, medium and long-term (EC 2000b).

Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely to adversely affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2) (ECJ ruling on case C-127/02 para. 36).

[143] PPG 9, UK Department of the Environment, October 1994 quoted on page 39 of the Commission's article 6 guide on "Managing Natura 2000 sites". The concept of 'integrity of the site' is further elaborated on page 79.

To sum up, there are two possible conclusions that can be drawn from this first impact assessment:
- there is no adverse effect and the project or plan can be approved as it stands;
- there will be adverse effects or adverse effects cannot be ruled out.

The latter does not necessarily mean that the plan or project is automatically refused. The competent authority could ask the developer to redesign or relocate the wind farm or introduce mitigation measures that would avoid or eliminate the predicted adverse effects. This would then normally imply a second evaluation round in the Appropriate Assessment to ensure that the mitigation measures/safegaurds are indeed sufficient. This is discussed further in the next section.

5.5.4. Considering how to mitigate adverse effects on the Natura 2000 site

For a wind energy project, the AA is the key tool for ensuring that adverse effects on the integrity of the sites concerned are prevented or mitigated during design of the project. Mitigation involves introducing measures into the plan or project to eliminate the potential negative effects on the conservation objectives of the Natura 2000 site, or to reduce them to a level where they will no longer adversely affect the integrity of the site. As such, they should be directly linked to the likely negative effects which have been identified during the impact assessment described above. The competent authority, upon the advice of its ecological experts or the relevant nature authorities, should determine the level of mitigation required.

It can then ask the developer/planner to propose suitable mitigation measures (e.g. changes to the siting, design, scale of the wind farm and its associated instrastructures) or it can set certain conditions or restrictions in the development permit as a pre-condition for approving the plan or project (eg as regards the timing of the construction works or restrictions on the operation of the wind turbines, for instance during peak dispersal and migraiton periods).

Either way each mitigation measure should be based on sound scientific principles that will ensure they will be effective. As such they should contain:
- details of the measure proposed and an explanation of how it will avoid or reduce the adverse impacts which have been identified;
- evidence of how they will be implemented and by whom;
- a timetable for implementation relative to the plan or project (some may need to be put in place before the development can proceed);
- details of how the measure will be monitored and how the results will be fed back into the day to day operation of the wind farm (adaptive management – see below).

This will enable the competent authority to evaluate the mitigation measures as part of the Appropriate Assessment (second round) and determine whether or not they are sufficient or suitable for eliminating or removing the adverse effects which have been identified (and do not inadvertently cause other adverse effects on the species and habitat types in question). If the mitigation measures are deemed sufficient, they will become an integral part of the specification of the plan or project.

In the case of wind farm plans or projects, the most obvious mitigation measure is to adjust the location of wind farm away from areas where it can cause conflicts with the species and habitat types for which the site has been designated (e.g. foraging paths, flyways, migration routes, vulnerable areas such as breeding sites or foraging area). Evidence to date shows that the inappropropriate siting of wind farms and their associated structures is one of the most frequent and common causes of impact.

But mitigation measures can also involve modifications to the size, design and the configuration of wind farms and to the construction of turbines and associated infrastructures. Or they can introduce temporal adjustments of activities during construction and operation.

The following box provides an overview of some of the mitigations that have been used in the case of wind farm developments in particular and which may provide useful ideas or suggestions for future developments.

Possible mitigation measures that have been used or proposed for wind farms so far

The list below provides an overview of possible mitigation measures that have been proposed or applied with reference to wind farms:

***Configuration of wind farms**:*
Wind farms should be carefully planned having regard to the flight paths of birds and bats in particular. It has been proposed that grouping turbines in rows that run parallel – instead of perpendicular - to the main flight direction of certain birds can be an effective mitigation measure.[144] In addition, locating turbines in blocks to create corridors can create safety zones through which birds can pass. Adjustments of the configuration of wind farms may also be considered when old turbines are replaced by new and larger ones.

***Construction of turbines and associated infrastructures**:*
A variety of technical adjustments to wind turbines have been proposed to reduce the collision risk. This concerns in particular the turbine's height and the rotor-sweep[145].

- Resting and perching places: In the past, wind turbines sometimes provided attractive perching sites for birds. Modern turbines should be designed to remove any possible perches. If this is not possible then various kinds of anti-perching devises should be introduced, such as enclosing the nacelles, avoiding lattice constructions and eliminating guy wires to support the turbines[146]. The junction between nacelle and tower should also be well sealed, and the nacelle closed, in order to avoid offering a roost for bats.
- Design of rotor blades: On the basis of theoretical modelling of collision risks among birds, it has been proposed that fewer rotor blades and low tip speed can lower collision risk[147], but there is some conflicting evidence whether turbines with a larger rotor-swept area may have similar or even smaller avian fatality than turbines with smaller rotor-swept areas.
- Increasing rotor visibility: Birds may be unable to see rotors when they get close (motion smear) and this phenomenon may at least partly explain collision even in times of good visibility[148]. Various tests whether increasing the visibility of rotors by painting high-contrast patterns (e.g. black and white bands) may help to reduce the collision risk have so far yielded mixed results, and the same applies for on-going test with UV-painted rotor blades[149].
- Using fewer but larger turbines: There are increasing evidence that fewer but larger and more power-efficent turbines may produce fewer collision risks for large-sized birds, while there is more concern with reference to bats[150].

[144] E.g. Drewitt & Langston (2006, 2008).
[145] But the evidence for this is still anecdotal and lacks adequate data, e.g. Johnson et al. (2007), Drewitt & Langston (2008).
[146] E.g. Johnson et al. (2007).
[147] Tucker (1996a, 1996b).
[148] E.g. Drewitt & Langston (2008) and references therein.
[149] E.g. Drewitt & Langston (2006). In addition, painting rotor-blades or turbines might be questionable due to landscape and visual effects.
[150] E.g. Hötker (2006), Barclay at al. (2007), Smallwood & Karas (2009).

Associated infrastructure

- Inter-array cable installations and grid infrastructure: Where possible, inter-array cables (e.g. between turbines and substations) should be buried underground while taking into account relevant considerations e.g. to habitat sensitivity.
- Lighting of wind farms: There is broad consensus that lighting of turbines is to be avoided to reduce the risk of fatalities, for onshore as well as offshore locations. If lighting cannot be avoided, e.g. for safety or navigation purposes, flashing white strobe light has been proposed to be less attractive for birds than e.g. solid or pulsating red light[151]. But these must still be in compliance with national and international regulations on health and aviation/shipping safety.
- Reduction of the electro-magnetic fields around cables from offshore turbines: Impact recommended to be reduced by choice of cable type, burial of at least 1 m and/or conversion to higher voltage[152].
- Appropriate choice of foundations for offshore locations[153]; to the extent possible as the choice of foundation is primarily related to the geological conditions.

Measures in order to reduce risks during construction period

- Timing of construction work: Certain risks are concentrated at critical times of the year, such as reproductive or moulting periods of marine mammals and breeding or migration periods for sensitive bird species. The first option for mitigation would be to avoid these sensitive periods altogether, and plan the construction to take place at other times of the year (eg in winter for hibernating bats). Appropriate seasons (time windows) should be identified in order to reduce disturbance at potentially sensitive life stages of species.

  This may not always be possible in particular for offshore projects where time windows for construction can already be quite limited for practical/safety reasons and therefore this needs to be analysed on a case-by-case basis. Many of these issues will be site-specific. The time periods in which construction work is recommended to be avoided depends on the affected species' main periods of foraging, resting and breeding. If this is not feasible then restrictions in construction work like temporary and short-term breaks, in order to reduce the reduced risk of collision fatalities or disturbance may need to be considered.
- Noise and vibration during construction work: In respect to offshore wind farms, and in order to minimise impact from noise and vibration on both fish and mammals, it is recommended to start pile driving gently to allow individuals to move away from the noise source (i.e. soft-start). This may be combined with the use of passive acoustic monitoring and marine mammal observers to minimise the risk of animals being in the area when piling commences. Other proposed methods, including specifically engineered solutions such as bubble curtains and piling cushions, are under development. "Scrammers" and "pingers" may provide additional deterrence to marine mammals entering the construction area.

Measures in order to avoid risks during operation

Similar considerations may also be required during the operation phase and on a more long-term basis to avoid risks during critical times of the year. For bats, many of the above proposed technical modifications may be inadequate, and shutting down turbines during critical periods of limited duration is so far a primary mitigation measure to reduce the risk fatalities, e.g. during migration periods in spring and autumn (especially August-October) or during periods of calm weather when insect prey are concentrated around turbines (and energy producing capacity might be low in any case)[154].

Temporary halting of the operation or reducing rotor speed may also be considered in order to avoid fatalities e.g. during peak migration periods or main display periods by birds, or disturbance during or spawning seasons by fish.

[151] E.g. Johnson et al. (2007).

[152] A conversation from 33 kV to 135 kV reduces the induced field by a factor of 4 (but may turn out to be unpractical in many cases; DEFRA 2005).

[153] E.g. Hammar et al. (2008) for comparisons between different types of foundations.

[154] E.g. Rodrigues et al. (2008), Ahlén et al. (2007), Baerwald et al. (2009).

5.5.5. Recording the results of the Appropriate Assessment

Once these mitigation measures and possible safeguards/conditions have been identified and assessed, the competent authority will finally be in a position to determine conclusively whether the plan or project can be approved or not, and if any conditions apply. Whatever the results, they should be clearly recorded. In this respect, the Appropriate Assessment report should be sufficiently detailed to demonstrate how the final decision was reached, and on what scientific grounds the decision was made.

This is confirmed by an ECJ ruling: *The appropriate assessment should contain complete, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the site concerned*. (Commission/Italy, C-304/05).

The report should:

- describe the project or plan in sufficient detail for members of the public to understand its size, scale and objectives;
- describe the baseline conditions and conservation objectives of the Natura 2000 site;
- identify the adverse effects of the project or plan on the Natura 2000 site;
- explain how those effects will be avoided through mitigation;
- set out a timescale and identify the mechanisms through which the mitigation measures will be secured, implemented and monitored.

Following the Appropriate Assessment, and despite the application of mitigation measures, if the competent authority considers that adverse effects remain, then the project or plan may not proceed until the derogation test under Article 6.4 has been successfully completed and it has been objectively concluded that there is an absence of alternative solutions.

STAGE 3: DEROGATION PROCEDURE: ARTICLE 6.4

5.6 The derogation procedure of Article 6.4 of the Habitats Directive

5.6.1 The scheme of Article 6.4

If, on the basis of the Appropriate Assessment, it cannot be ascertained that a plan or project will not adversely affect the integrity of the site concerned, the plan/project should either be refused as it stands or the provisions of Art. 6(4) of the Habitats Directive should be applied. Article 6(4) is only applicable under the strict conditions and will only be passed in exceptional circumstances.

The requirements of Article 6(4) of the Habitats Directive establish a set of conditions, which must be met for the competent authority to authorise the plan or project where the AA shows that the integrity of a Natura 2000 site will be adversely affected by it. Being an exception to Article 6(3), the fulfilment of the conditions under which it may be applied is subject to strict interpretation.

It falls on whoever wants to make use of Article 6(4) to prove, as a prerequisite, that the following conditions do indeed exist:

- The alternative put forward for approval is the least damaging for the integrity of the Natura 2000 site in terms of its qualifying interests, and no other feasible alternative exists that would not adversely affect the integrity of any Natura 2000 site;

- There are imperative reasons of overriding public interest (IROPI);
- All necessary compensatory measures have been adopted .

The European Commission has published a Guidance Document on Article 6(4) of the Habitats Directive which provides clarification of the concepts of alternative solutions, imperative reasons of overriding pubic interest, compensatory measures, overall coherence and the opinion of the Commission required in some cases[155].

5.6.2 The absence of alternative solutions

The search for alternatives can be quite broad and should be linked to the public interest objectives of the plan or project. It could involve alternative locations, different scales or designs of development, or alternative processes. If the intention is to increase the renewable energy capacity by a certain amount, the question is then: can this be achieved in a less damaging way, for instance, by selecting a more appropriate site for wind farm development elsewhere or by resizing or scaling down the plan or project.

In practice, alternative solutions should normally already have been identified within the framework of the initial assesment under Article 6(3). They are part of the iterative process seeking to improve the siting and design of a plan or project at the earliest stages.

To fulfil the requirements of Article 6(4), the competent authority must be the ones to assess alternative solutions, once the appropriate assessment stage has concluded that it cannot be ascertained that the plan or project will not have adverse effects on the integrity of the site concerned, even after mitigation measures have been introduced. The competent authorities have also to analyse and demonstrate first the need of the plan or project concerned. Thus, the zero option should also be considered at this stage[156].

They should also make comparisons between various possible alternatives but It should be stressed that the reference parameters for such comparisons deal with aspects concerning the conservation and the maintenance of the integrity of the site and of its ecological functions. This means that the conservation objectives and status of the Natura 2000 should be weighted against any consideration of costs, delays or aspects of an alternative solution, following the procedures prescribed in Article 6(4).

The alternative solutions chosen should also in principle undergo the same screening exercise as the original plan or project and could be subject to a new Appropriate Assessment for, although the alternative is less damaging, it could still have an adverse effect on the integrity of the same or another Natura 2000 site. Usually, if the alternative is

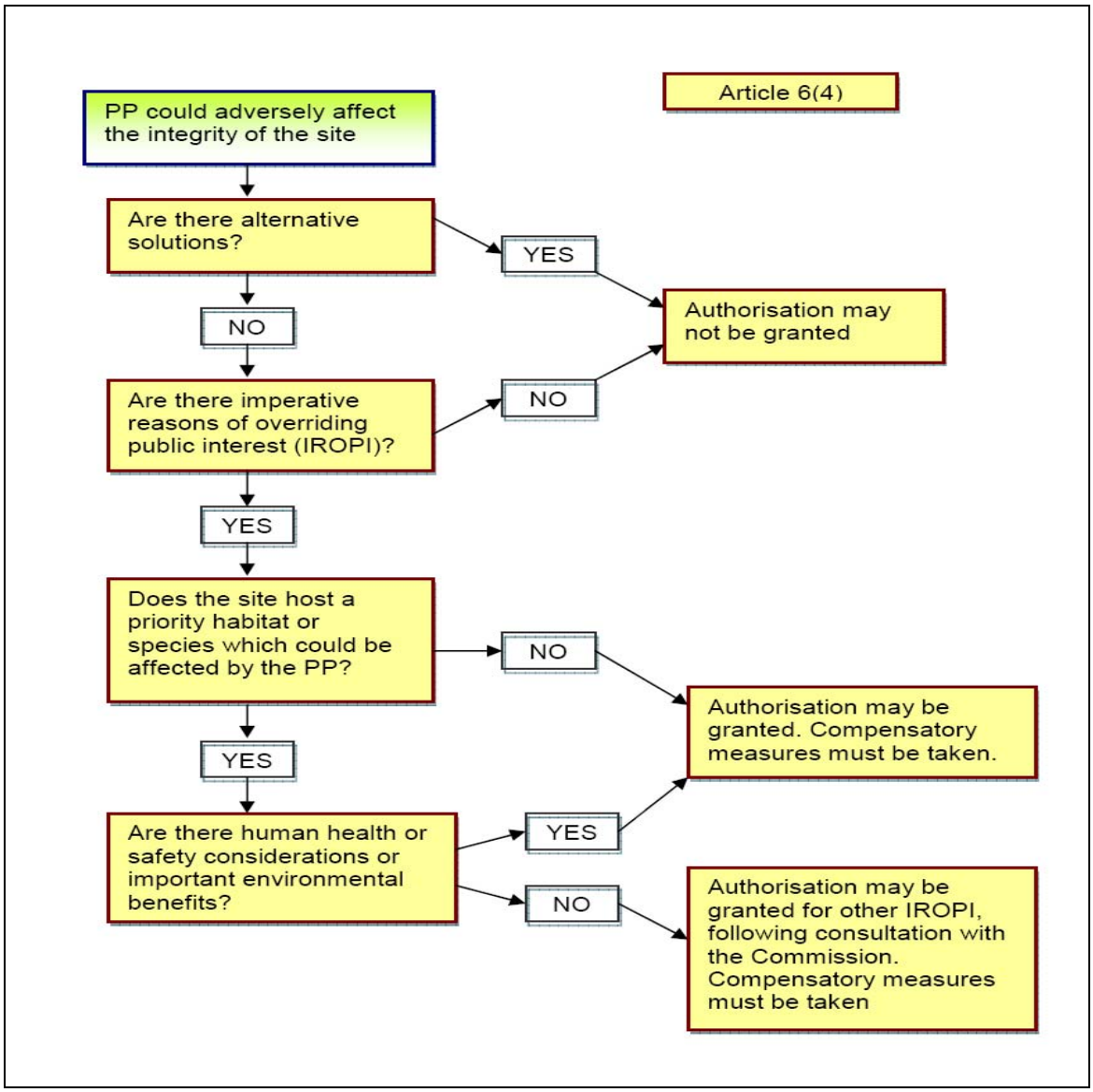
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[155] 'Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission';
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

[156] Managing Natura 2000 sites: the provisions of Articles 6 of the habitats directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities;
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf
and
'Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission';
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

similar to the original proposal, the Appropriate Assessment may be able to draw a lot of the information needed from the first Appropriate Assessment.

Figure 13 . Flow chart of the Article 6(4) conditions



5.6.3. Imperative reasons of overriding public interest (IROPI)

It is clear from the wording of Article 6(4) that only public interests, irrespective of whether they are promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects developed by private bodies can only be

considered to meet this condition of Article 6(4) where such public interests are served and demonstrated[157].

Such public interests may include human health, public safety, beneficial consequences of primary importance for the environment, and other interests of a social (e.g. employment) or economic nature.

To fulfil the requirements of Article 6(4) of the Habitats Directive, the competent national authorities have to make their approval of the plans and projects in question subject to the condition that the balance of interests between the conservation objectives of the Natura site(s) affected by those initiatives and the above-mentioned imperative reasons weighs in favour of the latter. This should be determined according to the following considerations:

a) The public interest must be **overriding**: it is therefore clear that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive (see e.g. its 4th recital stating *"Community's natural heritage"*).

b) In this context, it seems also reasonable to assume that the public interest can only be overriding if it is a long-term interest; short term economic interests or other interests which would only yield short-term benefits for the society would not appear to be sufficient to outweigh the long-term conservation interests protected by the Directive. Overriding interests, as long-term, fundamental social interests, may be properly identified beforehand by published policies, and land-use and other plans.

It is reasonable to consider that the "*imperative reasons of overriding public interest, including those of social and economic nature*" refer to situations where plans or projects envisaged prove to be indispensable:
- within the framework of actions or policies aiming to protect fundamental values for the citizens' life (health, safety, environment);
- within the framework of fundamental policies for the State and the Society;
- within the framework of carrying out activities of economic or social nature, fulfilling specific obligations of public service.

It should be noted that the conditions of overriding public interest are even stricter when it comes to the realisation of a plan or project likely to adversely affect the integrity of a Natura 2000 site that hosts qualifying *priority* habitats and/or species, where those habitats and/or species are affected.

These can only be justified if the imperative reasons of overriding public interest concern
- human health and public safety or
- overriding beneficial consequences for the environment, or,
- for other imperative reasons if, before granting approval to the plan or project, the opinion of the Commission has been given (EC 2007b).

[157] Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission;
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

5.6.4. The adoption of all necessary compensatory measures

Compensatory measures, as described in Article 6(4) of the Habitats Directive, constitute the "last resort" and are used only when the decision has been taken to proceed with a plan or project having an adverse effect on the integrity of the Natura 2000 site because no alternative solutions exist and the project has been judged to be of overriding public interest under the conditions described above.

The compensatory measures constitute measures specific to the unavoidable adverse effects of a project or plan. They aim to ensure that the overall coherence of Natura 2000 is protected, and should provide compensation corresponding precisely to the negative effects on the species or habitat concerned. There is little experience with the implementation of compensation measures under Article 6(4) of the Habitats Directive in the context of wind energy projects.

To ensure that the overall coherence of Natura 2000 is protected, the compensatory measures proposed for a plan or project should:

a) contribute to the conservation of natural habitats and species of Community Interest "within the biogeographical region concerned", in order to ensure the maintenance of the overall coherence of the Natura 2000 Network (for sites designated under the Habitats Directive), or within the same range, migration route or wintering area for bird species (i.e. sites designated under the Birds Directive) in the Member State concerned.

b) address, in comparable proportions, the habitats and species of Community Interest negatively affected;

c) provide functions comparable to those which had justified the selection of the original site, particularly regarding the adequate geographical distribution

It is considered good practice to take compensatory measures as close as possible to the affected area in order to maximise chances of protecting the overall coherence of the Natura 2000 network. Therefore, locating compensation within or nearby the Natura 2000 site concerned in a location showing suitable conditions for the measures to be successful is the most preferred option. However, this is not always possible and it is necessary to set a range of priorities to be applied when searching locations that meet the requirements of the Habitats Directive.

As a general principle, the compensatory measures should be in place and working before the work on the plan or project has begun. This is to help buffer the damaging effects of the project on the species and habitats by offering them suitable alternative locations in the compensation area.

If this is not fully achievable, the competent authorities should require extra compensation for the interim losses that would occur in the meantime. Member States should pay particular attention when the negative effects of a plan or project are produced in rare natural habitats or in natural habitats that need a long period of time to provide the same ecological functionality (EC 2007b). Under these circumstances, the likelihood of long-term success is best evaluated by peer-reviewed scientific studies of trends.

The information on the compensatory measures should be submitted to the Commission before they are implemented and indeed before the realisation of the plan or project concerned. It is therefore advised that compensatory measures should be submitted to the

Commission as soon as they have been adopted in the planning process in order to allow the Commission, within its competence of guardian of the treaty, to assess whether the provisions of the Directive are being correctly applied (EC 2007b).

The Commission will deliver an opinion when priority habitats and/or species might be adversely affected. In delivering its opinion, the Commission will check the balance between the ecological values affected and the invoked imperative reasons, and evaluate the compensation measures. The opinion is not binding but in case of non-conformity with Community law, legal action may be taken.

According to existing EC guidance[158], compensatory measures under Article 6(4) can consist of one or more of the following:

- **Restoration or enhancement** within existing Natura 2000 sites: restoring the habitat to ensure the maintenance of its conservation value and compliance with the conservation objectives of the site or improving the remaining habitat in proportion to the loss due to the plan or project on a Natura 2000 site;

- **Habitat Recreation**: recreating a habitat on a new or enlarged site, to be incorporated into Natura 2000;

- **Designation of new sites** under the Birds and Habitats Directive, in association with other works, as described above. As regards compensatory measures for designated sites under the Birds Directive (SPA), any new habitat created as compensation for damage to an SPA should be designated as an SPA once it meets its objectives in order to maintain the overall coherence of the network.

Key issues to address in designing compensatory measures include:

- Targeted objectives to address the unavoidable adverse effects and to ensure that the overall coherence of Natura 2000 is protected
- Ensuring the compensation is feasible and effective i.e. level of risk of failure;
- Assessment of technical feasibility;
- Extent of compensatory measures;
- Location in relation to damage;
- Timing in relation to damage;
- Long-term implementation.

[158] Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission;
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

ANNEX I:

Recommendations and resolutions adopted by international conventions on the potential impact of wind farms on wildlife and habitats

Different international biodiversity Conventions and Agreements have adopted measures that relate to wind farm developments.

Bern Convention on the Conservation of European Wildlife and Natural Habitats.
On behalf of the Bern Convention, BirdLife International presented in 2003 an analysis of effects on birds and guidance on environmental assessment criteria and site selection issues, based on a literature overview[159]. This initiative was followed up with a resolution "on minimising adverse effects of wind power generation on wildlife", adopted by the Convention Standing Committee in December 2004[160] . The Contracting Parties are recommended to take appropriate measures to minimise the potential adverse effects of wind turbines on wildlife, to involve the industry sector and to ensure adequate monitoring and surveillance to improve the understanding of the impact of wind farms.

Bonn Convention on the Conservation of Migratory Species of Wild Animals (CMS)
The Conference of the Parties of the Bonn Convention adopted a resolution on wind turbines and migratory species in 2002[161]. The resolution calls upon the Parties, *inter alia* to identify areas where migratory species are vulnerable to wind turbines and where wind turbines should be evaluated to protect migratory species. They should also apply and strengthen comprehensive strategic environmental impact assessments where major developments of wind turbines are planned, and take full account of the precautionary principle.

The Agreement of the Conservation of Populations of European Bats (EUROBATS)
As a follow up to the above mentioned resolution the Bonn Convention adopted a resolution on the potential impact of wind farms on bats in 2003[162]. This includes a request to the Advisory Committee to assess the evidence of the impacts, and if appropriate, to develop guidelines for assessing potential impacts. These guidelines were published in 2008[163].

The Agreement of the Conservation of Small Cetaceans of the Baltic and North Sea (ASCOBANS)
Also as part of the agreement under the Bonn Convention (CMS), a resolution was adopted on "adverse effects of sound, vessels and other forms of disturbance on small cetaceans" in 2006[164]. Parties and Range States are invited to conduct further research into the effects on small cetaceans of e.g. "extractive and other industrial industries, including windfarms", and to include physical and behavioural effects both at the individual and population levels. Parties and Range States are also invited to develop appropriate management measures, guidelines and technological adaptations to minimise adverse effects on small cetaceans; and to implement procedures to assess the effectiveness of any guidelines and management measures. A workshop on impacts and methodologies for assessing impacts of offshore wind farms on marine mammals took place in 2007

[159] Langston & Pullan (2003), Council of Europe T-PVS/Inf (2003) 12,
[160] Recommendation No. 109 (2004) of the Standing Committee
[161] Resolution No. 7.5,
[162] Resolution No. 4.7, available via http://www.eurobats.org/documents/pdf/MoP4/Record_MoP4_complete.pdf.
[163] Rodrigues et al. (2008), available via http://www.eurobats.org/publications/publication_series.htm.
[164] Resolution No. 4, available via http://www.service-board.de/ascobans_neu/files/mop5-final-4.pdf.

ANNEX II:

Bird species considered to be particularly vulnerable to wind farms [165]

XXX = Evidence on substantial risk of impact, XX = Evidence or indications of risk or impact, X = Potential risk or impact, x = small or non-significant risk or impact, but still to be considered in assessments. This is an indicative list for guidance, and any potential impacts will be site-specific.

Species / Species group	Conserva-tion status in Europe[166]	Listed in Annex I of the EU Birds Directive	Habitat displacement	Bird strike / collision	Barrier effect	Change in habitat structure	Potential positive impact
Gavia stellata (breeding)	(Depleted)	YES	X	X	X		
Gavia stellata (wintering)	(Depleted)	YES	XXX	X			
Gavia arctica	(Vulnerable)	YES	X	X			
Podiceps auritus	(Declining)	YES	X	X			
Morus bassanus	Secure	NO	X	X			
Phalacrocorax carbo	Secure	NO	X	x	x		
Phalacrocorax aristotelis	(Secure)	NO[167]				X	
Ciconia nigra	Rare	YES			x		
Ciconia ciconia	Depleted	YES		XX	X		
Cygnus cygnus	Secure	YES	X	X			
Anser fabalis (wintering)	Secure	NO	X				
Anser brachyrhynchus	Secure	NO	See foot-note[168]	X			
Anser albifrons (wintering)	Secure	NO[169]	XX	X			
Branta leucopsis	Secure	YES	X	X			
Branta bernicla	Vulnerable	NO	X	X			
Anas penelope (non-breeding season)	Secure	NO	XX		x		
Aythya ferina (flights between feeding and roosting sites in winter)	(Declining)	NO		x	X		

[165] Primarily based on information from Barrios & Rodrígues (2007), Bevanger et al. (2008), Bright et al. (2006), Carrete et al. (2009), de Lucas et al. (2007b), Devereux et al. (2008), Dirksen et al. (2007), Everaert & Stienen (2007), García de la Morena et al. (2009), Gonzáles & Margalida (2008), Hötker et al. (2005, 2006), Kruckenberg & Jaene (1999), Langston & Pullan (2003), Larsen & Madsen (2000), Lawrence et al. (2007), Lekuona & Ursúa (2007), Madsen & Boertmann (2008), Madders & Whitfield (2006), Pearce-Higgins et al. (2008, 2009), Petersen et al. (2006), Petersen & Fox (2007) and Thelander & Smallwood (2007).

[166] Ref. BirdLife International (2004).

[167] Except for *P.a. desmarestii.*

[168] Initial displacement effects, but indication of long-term habituation (e.g. Madsen & Boertmann 2008).

[169] Except for *A.a. flavirostris.*

Species / Species group	Conserva-tion status in Europe[170]	Listed in Annex I of the EU Birds Directive	Habitat displacement	Bird strike / collision	Barrier effect	Change in habitat structure	Potential positive impact
Aythya fuligula (flights between feeding and roosting sites in winter)	(Declining)	NO		x	X		
Aythya marila (flights between feeding and roosting sites in winter)	(Declining)	NO		x	X		
Somateria mollissima	Secure	NO	X	X	X	X	
Somateria mollissima (staging, wintering)	Secure	NO	X	x			
Clangula hyemalis (wintering)	(Secure)	NO	XX	X	X	X	
Melanitta nigra (breeding)	(Secure)	NO	X				
Melanitta nigra (wintering)	(Secure)	NO	XX[171]	X	X	X	
Bucephala clangula (flights between feeding and roosting sites in winter)	(Secure)	NO		x	x		
Mergus serrator	(Secure)	NO					x[172]
Pernis apivorus	(Secure)	YES			x		
Milvus migrans	(Vulnerable)	YES	X	X	X		
Milvus milvus	Declining	YES	X	XXX	x		
Haliaeetus albicilla	Rare	YES	XXX	XXX			
Gypaetus barbatus	(Vulnerable)	YES	X	X			
Gyps fulvus	Secure	YES	X	XXX[173]	X		
Neophron percnopterus	Endangered	YES	XXX	XX	XXX		
Circaetus gallicus	(Rare)	YES	X	XXX	X		
Circus aeroginosus	Secure	YES	X	x	x		
Circus cyaneus	Depleted	YES	XX	X	x		
Circus pygargus	Secure	YES	X	XX			
Accipiter gentilis	Secure	NO[174]			x		
Accipiter nisus	Secure	NO[175]		x	x		
Buteo buteo	Secure	NO	x	XX	x		
Buteo lagopus	(Secure)	NO	X				
Aquila pomarina	(Declining)	YES		XX			
Aquila heliaca	Rare	YES	X	X			
Aquila adalberti	(Endangered)	YES	XXX	x	x	XX	
Aquila chrysaetos	Rare	YES	X	XXX			
Hieraaetus fasciatus	Endangered	YES	X	X			

[170] Ref. BirdLife International (2004).
[171] Initial avoidance, recovery within 3-5 years (Petersen & Fox 2007).
[172] Indications of increased attraction to areas around wind turbines (Petersen et al. 2006).
[173] 63.1% of all bird and bat fatalities in a study in Navarra, Spain, 2000-2002 (13 wind power plants, 741 turbines, 360 fatalities in total, Lekuona & Ursúa 2007).
[174] Except for *A.g. arrigonii.*
[175] Except for *A.n. granti.*

Species / Species group	Conserva-tion status in Europe[176]	Listed in Annex I of the EU Birds Directive	Habitat displacement	Bird strike / collision	Barrier effect	Change in habitat structure	Potential positive impact
Falco naumanni	Depleted	YES		x			
Falco tinnunculus	Declining	NO	X	XX	X		
Falco columbarius	(Secure)	YES			x		
Falco subbuteo	(Secure)	NO			x		
Falco peregrinus	Secure	YES	X	X	x		
Lagopus lagopus	Secure	NO[177]	X	XX			
Tetrao tetrix	Depleted	NO[178]	X	X	X	X	
Tetrao urogallus	(Secure)	YES	X		X	X	
Alectoris rufa	(Declining)	NO	X	x			
Phasianus colchicus	(Secure)	NO	X	x			
Crex crex	Depleted	YES	X	X			
Grus grus	(Depleted)	YES	X	X	x		
Tetrax tetrax	Vulnerable	YES	XX	X	x	x	
Pluvialis apricaria	(Secure)	YES	XX	X	X		
Vanellus vanellus	Vulnerable	NO	XX	X	x		
Calidris maritima (wintering site)	(Secure)	NO	X	x	x		
Calidris alpina	(Depleted)	NO[179]	X	X			
Calidris spp.					x		
Gallinago gallinago	Declining	NO	XX	X			
Limosa limosa	Vulnerable	NO	X	x	X		
Numenius arquata	Declining	NO	XX		X		
Stercorarius parasiticus	(Secure)	NO	X	X			
Larus minutus	(Depleted)	YES					x[180]
Larus argentatus	Secure	NO		x	x		x[181]
Sterna sandvicensis	Depleted	YES		XX	x		
Sterna hirundo	Secure	YES		XX	x		
Sterna hirundo / S. paradisea		YES	X				
Sterna albifrons	(Secure)	YES		XX	x		
Uria aalge / Alca torda	(Secure)	NO[182]	XX	X		X	
Doves and pigeons (Columbidae)				x			
Cuculus canorus	Secure	NO		x			

[176] Ref. BirdLife International (2004).
[177] Except for *L.l. pyrenaicus* and *L.l helveticus*.
[178] Except for *T.t. tetrix.*
[179] Except for *C.a. schinzii.*
[180] Indications of increased attraction to areas around wind turbines (Petersen et al. 2006).
[181] Indications of increased attraction to areas around wind turbines (Petersen et al. 2006).
[182] Except for *U.a. ibericus.*

Species / Species group	Conserva-tion status in Europe[183]	Listed in Annex I of the EU Birds Directive	Habitat displacement	Bird strike / collision	Barrier effect	Change in habitat structure	Potential positive impact
Bubo bubo	(Depleted)	YES		X			
Asio otus	(Secure)	NO		x			
Caprimulgus europaeus	(Depleted)	YES	X	X			
Tachyparptis melba	Secure	NO		X			
Apus apus	(Secure)	NO		x			
Upupa epops	(Declining)	NO		x			
Passerines (several species)				X[184]	X[185]		
Chersophilus duponti	(Depleted)	YES	XX	X	XX	XX	
Alauda arvensis (winter)	(Depleted)	NO	X				
Anthus pratensis	(Secure)	NO	X				
Oenanthe oenanthe	(Decling)	NO	XX				
Acrocephalus schoenobaenus	Secure	NO					x[186]
Pyrrhocorax pyrrhocorax	Declining	YES	X	x			
Sturnus vulgaris (non-breeding)	Declining	NO	XX		x		
Granivorous farmland birds (winter)[187]	See footnote[188]	NO	x				
Emberiza schoeniclus	Secure	NO					x[189]

[183] Ref. BirdLife International (2004).
[184] Especially nocturnal migrants (e.g. Langston & Pullan 2003).
[185] Excl. starling and crows (Hötker et al. 2005, 2006).
[186] Indications of increased attraction to areas around wind turbines, presumably due positive response to habitat change around the studied wind turbines (Hötker et al. 2005, 2006).
[187] *Emberiza citriniella, E. schoeniclus, Passer montanus, Miliara calandra.*
[188] *Emberiza citriniella* and*, E. schoeniclus* are "secure", *Passer montanus* and *Miliara calandra* are "declining".
[189] Indications of increased attraction to areas around wind turbines, presumably due positive response to habitat change around the studied wind turbines (Hötker et al. 2005, 2006).

ANNEX III:

Bat behaviour in relation to wind farms [190].

Species	Listed in Annex II of the EU Habitats Directive[191]	Hunting close to habitat structures	Migration or long-distance moving	High flight (<40 m)	Low flight	Possibly disturbed by turbine ultrasounds	Attracted by light	Roosting inside nacelles	Known loss of hunting habitat	Risk of loss of hunting habitat	Known collision	Risk of collision
Rhinolophus ferrumequinum	X	X			X							
Rhinolophus hipposideros	X	X			X							
Rhinolophus euryale	X	X			X							
Rhinolophus mehelyi	X											
Rhinolophus blasii	X											
Myotis myotis	X		X	X	X						X	X
Myotis blythii	X		X	X	X							X
Myotis punicus												
Myotis daubentonii		X		X	X						X	X
Myotis emarginatus	X	X	?	X	X							
Myotis nattereri		X			X							
Myotis mystacinus		X			X							X
Myotis brandtii		X		X	X						X	X
Myotis alcathoe		X			X							
Myotis bechsteinii	X	X			X							
Myotis dasycneme	X		X	X	X						X	X
Myotis capaccini	X				X							
Nyctalus noctula			X	X		X	X	?		X	X	X
Nyctalus leisleri			X	X		X	X	?		X	X	X
Nyactalus lasiopterus			?	X		?				X	X	X
Eptesicus nilssonii				X			X				X	X
Eptesicus serotinus			?	X		X	X		(X)		X	X
Vespertilio murinus			X	X			X			X	X	X
Pipistrellus pipistrellus		X		X	X	?	X				X	X
Pipistrellus pygmaeus		X	X	X	X	?	X				X	X
Pipistrellus kuhlii		X		X	X	?	X				X	X
Pipistrellus nathusii		X	X	X	X	?	X				X	X
Hypsugo savii		X		X	X	?	X				X	X

[190] From Rodrigues et al. (2008).

[191] In addition, 'Microchiroptera, all species' are listed in Annex IV(a) of the 'Habitats Directive', i.e. in practise that obligations following from Article 12 of the directive apply for all European bat species.

Species	Listed in Annex II of the EU Habitats Directive[192]	Hunting close to habitat structures	Migration or long-distance moving	High flight (<40 m)	Low flight	Possible disturbed by turbine ultrasounds	Attracted by light	Roosting inside nacelles	Known loss of hunting habitat	Risk of loss of hunting habitat	Known collision	Risk of collision
Plecotus auritus		X		X	X						X	X
Plecotus austriacus		X		X	X						X	X
Plecotus macrobullaris		?			X							
Plecotus kolombatovici												
Barbastella barbastellus	X	X			X							
Miniopterus schreibersii	X	?	X	X	X		X				X	X
Tadarida tenotis				X		X	X				X	X
Rousettus aegipticus[193]	X											

[192] In addition, 'Microchiroptera, all species' are listed in Annex IV(a) of the 'Habitats Directive', i.e. in practise that obligations following from Article 12 of the directive apply for all European bat species.

[193] No information on *Rousettus aegiptiacus* is given by Rodrigues et al. (2008).

ANNEX IV:

Aquatic species listed in Annexes II and/or IV(a) of the 'Habitats Directive' and recommended to be especially considered with reference to adverse impact from wind farms (list is non-exhaustive[194]).

Species, species group	Annex	Reason for consideration
Seals (Phocidae)		
Halichoerus grypus	II	• Disturbance (noise etc) from offshore wind farms, primarily during construction.
Monachus monachus	II (priority), IV(a)	• Although no information about impacts has been found, risk for disturbance (noise etc) from offshore wind farms during construction phase should nevertheless by considered, in analogy with findings for other marine mammals and concern for the overall unfavourable conservation status of this species.
Phoca hispida bottnica	II	• Although not studies with reference to potential impact from wind farms, risk for disturbance (noise etc) from offshore wind farms during construction phase should nevertheless by considered, in analogy with findings for other marine mammals and concern for the conservation status of this subspecies, endemic to the Baltic Sea.
Phoca vitulina	II	• Disturbance (noise etc) from offshore wind farms, primarily during construction.
Whales, dolphins and porpoises (Cetacea)		
All species	IV(a)	• Disturbance (noise etc) from offshore wind farms, primarily during construction, and possibly also during operation, in analogy with findings for *Phocoena phocoena.*
Phocoena phocoena	II	• Disturbance (noise etc) from offshore wind farms, primarily during construction, but also conflicting evidence on impact during operation.
Tursiops truncatus	II	• Disturbance (noise etc) from offshore wind farms, primarily during construction, and possibly also during operation, in analogy with findings for *Phocoena phocoena.*
Terrestrial mammals[195]:		
Lutra lutra	II, IV(a)	• Perceived indirect impact of changes in hydrology etc related to wind farm developments in upstream located wetlands (incl. peatlands).
Fish:		
Salmo salar	II	• Perceived indirect impact of changes in hydrology etc related to wind farm developments in upstream located wetlands (incl. peatlands).
Molluscs:		
Margaritifera margaritifera	II	• Perceived indirect impact of changes in hydrology etc related to wind farm developments in upstream located wetlands (incl. peatlands).

[194] Primarily based on information from Hötker et al. (2005, 2006), Lucke at al. (2006), Rodrigues et al. (2008) and Thomsen et al. (2006) with reference to bats and marine mammals.

[195] Ref. comments from Scottish and Irish *ad hoc* group members (August 2008).

ANNEX V

Some examples of proposed or confirmed impacts of wind farm development on species and species groups

Kind of impact	Onshore	Offshore
Disturbance and displacement, birds	• For staging and wintering waterfowl there is evidence of disturbance, with ranges from zero up to around 800 m and with 600 m from the development as an often accepted 'rule of thumb'[196], but also that staging waterfowl may habituate over time[197]. • Studies in wintering farmland birds in UK indicate only minimal effects[198]. • Breeding birds may been proposed to be more tolerant than staging and wintering birds[199], but this assumption needs to be further verified on the basis of long-term studies. For single bird species, however, there is evidence of displacement effects during the breeding periods[200]. • This was further confirmed in a study in upland habitats in northern UK, where breeding densities were reduced by 15-53% within a zone 500m around the wind turbines for 7 of 12 species[201].	• Danish studies at offshore developments, 1999-2007, indicated displacement as well as recovery of single bird species using waters around wind farms for staging or wintering[202]. Initial indications of avoidance of areas up to at least 2 km were reported for e.g. Red-throated Diver (*Gavia stellata*), Common Scoter (*Melanitta nigra*) and auks (*Uria aalge* and *Alca torda*). A clear recovery was reported 3-5 years after construction for Common Scoter, while still to clarify if this was related to change in food supply or habituation. For Red-throated Diver, no indications of recovery were recorded still 5-6 years after construction works.
Disturbance and displacement, marine mammals and fish	N.A.	• For marine mammals (seals, dolphins, whales) and fish impact of noise has been a main issue for study. • Construction work, especially pile-driving, may result in short-term but long-ranged impacts[203], with audibility extending 80 km for

[196] E.g. Drewitt and Langston (2006) and references therein.
[197] E.g. Madsen & Boertmannn (2008), with reference to Pink-footed Goose (*Anser brachyrhynchos*).
[198] Devereux et al. (2008).
[199] E.g. Hötker et al (2005, 2006) on the basis of a literature overview covering 127 studies.
[200] E.g. White-tailed Eagle (*Haliaeetus albicilla*, Follestad et al. 2007) and Eurasian Golden Plover (*Pluvialis apricaria*, Pearce-Higgins et al. 2008).
[201] Pearce-Higgins et al. (2009).
[202] E.g. Petersen et al. (2006), Petersen & Fox (2007) and references therein.
[203] E.g. Nedwall et al. (2007), Diederichs et al. (2008).

		Harbour Porpoise (*Phocoena phocoena*) and Harbour Seal (*Phoca vitulina*), and potential behavioural responses up to 15-20 km. In immediate vicinity, severe injuries of ramming activities cannot be excluded[204]. • Impact during construction has been shown to more evident for porpoises than on seals. Detailed studies of the Harbour Seal populations at the Nysted and Horns Rev offshore wind farms indicated a drecrease in numbers during pile driving but no overall change in abundance during the construction phase[205]. For Harbour Porpoise, a substantial but short-lived effect of pile-driving was observed. At Horns Rev, a slight decrease in abundance occurred during the construction, but no effect under operation. At Nysted, there was a clear decrease during construction, and this effect persisted also after two years of operation, although with indications of a slow, gradual recovery [206]. • Noise during operation is generally low and mostly not exceeding variations which may be encountered during the animals' normal course of activity. Impact (if any) is local but long-lasting[207], but may differ between sites[208]. • Electro-magnetic fields induced in the vicinity of under-water cables have been an issue of concern with reference to interference with electric fields used by some fish species for prey detection, spatial orientation etc, and magnetic fields used for navigation; especially

[204] Thomsen et al. (2006).
[205] Teilmann et al. (2006).
[206] Teilmann et al. (2008).
[207] E.g. Nedwall et al. (2007), Diederichs et al. (2008).
[208] E.g. with reference to Harbour Porpoise (*Phocoena phocoena*) and comparisons between the Nysted and Horns Rev offshore wind farms in Denmark (Teilmann et al. 2008).
[209] E.g. OSPAR (2006a).
[210] E.g. Meissner & Sordyl (2006).
[211] Bochert & Zettler (2006).
[212] E.g. Keller et al. (2006), Thomsen et al. (2006).
[213] E.g. Wilhelmsson et al. (2006).
[214] E.g. Fiskeriverket (2007).

		with reference to sharks, rays and lampreys[209], although information available is not conclusive with reference to any major effects[210]. • For marine benthic animals, the static magnetic fields of sub-marine cables did not seem to have any clear influence on orientation, movement and physiology, when tested during artificial conditions, although further studies are needed to focus on a long-term perspective[211]. • For some fish species, including cod and herring, operational noise may be detectable up to 4 km distance, and up to around 1 km for some other species; with a risk of masking intraspecific communication. Behavioural and physiological stress is expected to be restricted to very close surroundings[212]. • Offshore wind farms may function as combined artificial reefs and fish aggregations devices[213], and restrictions in fishery in the immediate surroundings may have an additional positive impact on the fish stocks[214].
Collision fatalities, birds	• Collision rates are overall very low, but with the noteworthy exception of high frequency of fatalities involving raptors. Special concern has to be raised for e.g. Eurasian Griffon Vulture (*Gyps fulvus*), Egyptian Vulture (*Neophron percnopterus*), White-tailed Eagle (*Haliaeetus albicilla*), Golden Eagle (*Aquila chrysaetos*), Red Kite (*Milvus milvus*) and Common Kestrel (*Falco tinnunculus*)[215]. • Single cases with high number of fatalities at various locations in e.g. California, Spain and Norway have attracted wide-spread publicity, but risks are highly site-specific[216]. • Birds making regular foraging flights between nesting and feeding areas may face enhanced risks[217].	• For offshore locations information about collision fatalities are still limited, but direct observations and radar studies as well as modelling indicate very low risks, as has been shown e.g. for Eider (*Somateria mollissima*)[218].

[215] E.g. Barrios & Rodrígues (2004, 2007), Hötker at al. (2005, 2006), Lekuona & Ursúa (2007), Follestad et al. (2007), Thelander & Smallwood (2007) and Carrete et al. (2009).
[216] Drewitt and Langston (2008), and references therein.
[217] E.g. Everaert & Stienen (2007), with reference to a study of three species of breeding terns at coastal breeding site.
[218] E.g. Pettersson (2005), Petersen et al. (2006).

Collision fatalities, bats	• Higher mortality risks than for birds, primarily for migrating species (short and long distance) at both onshore and offshore locations[219]. • In a one-year study of operational impacts on bats in the Freiburg region in southern Germany, including standardsied seach of carcasses at 16 turbines, 50 dead bats were found, with a dominance of *Pipistrellus pipistrellus* and *Nyctalus leisleri,* while only 9 birds (of 5 species) were recorded. Most bats were found in late summer, and most fatalities were recorded in forests and none in open areas. At 2 turbines where acitvity was studied, using a thermal imaging camera, and around 25% of the bats showed evasive behaviour when approaching a rotor[220].	• Higher mortality risks than for birds, primarily for migrating species at both onshore and offshore locations[221].
Barrier effects	• From literature overviews it can be concluded that avoidance behaviour is a relatively common but still poorly understood phenomenon. E.g. most information refers to day-time observations while there is lack of data with reference to night-time, when much migration takes place[222].	• At an offshore wind farm (7 turbines) located at a frequently used flyway at Kalmarsund, SE Sweden, avoidance behaviour at a distance of 1-2 km was recorded among migrating waterbirds (primarily Eider, *Somateria mollissima*). In spring migration (but not autumn), the flight corridor was adjusted to a more easterly location. The total length of migration, and thus the energy expenditure was assessed to increase by 0.2-0.5%[223]. • Good evidence on avoidance behaviour among various species of waterbirds (incl. Eider) exists also from Danish offshore wind farms, with most bird flocks heading for the wind farm at 1.5-2 km distance, although responses were highly species-specific[224]. • No evidence of barrier effect among fish and marine mammals has been found[225]

[219] E.g. Rodrigues et al. (2008).
[220] Brinkmann et al. (2006).
[221] E.g. Rodrigues et al. (2008).
[222] Hötker (2005, 2006).
[223] Pettersson (2005).
[224] E.g. Petersen et al. (2006), Masden et al. (2009).
[225] OSPAR (2006a), with references to studies at the Horns Rev and Nysted wind farms in Denmark.

ANNEX VI:

European and national guidance documents of relevance for impact assessments with reference to wind farms

This list of already existing EC and national guidance that might be of relevance with reference to impact assessments of wind farms plans and projects is non-exhaustive. For the national documents, it is primarily based on information provided by the *ad hoc* group members. The list also includes a few guidance documents prepared by NGOs.

Europe

The documents listed below have been developed by the EC. They provide detailed guidance on how to apply the EU nature legislation.

European Commission (2000) Managing Natura 2000 sites: the provisions of Articles 6 of the habitats directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities;
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf

European Commission (2002) Assessment of plans and projects significantly affecting Natura 2000 sites. Methodological guidance on the provisions of articles 6(3) and (4) of the Habitats Directive 92/43/EEC. Luxembourg: Office for official publications of the European Communities;
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/natura_2000_assess_en.pdf

European Commission (2003) Implementation of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment;
http://ec.europa.eu/environment/eia/pdf/030923_sea_guidance.pdf

European Commission (2007) Guidance document on article 6(4) of the 'Habitats Directive'92/43/EEC. Clarification of the concepts of: alternative solutions, imperative reasons of overriding public interest, compensatory measures, overall coherence, opinion of the Commission;
http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf

European Commission (2007) Guidance document on the strict protection of animal species of Community interest under the 'Habitats Directive'92/43/EEC. Final version, February 2007.
http://ec.europa.eu/environment/nature/conservation/species/guidance/index_en.htm

Other guidance documents relevant on the supra-national level (selection)

Diederichs, A., Nehlds, G., Dähne, M., Adler, S, Koschinski, S. & Verfuss, U. (2008) Methodologies for measuring and assessing potential changes in marine mammal behaviour, abundance or distribution arising from the construction, operation and decommissioning of offshore windfarms. – Commissioned by COWRIE Ltd.;
http://www.offshorewindfarms.co.uk/Assets/Latest%20COWRIE_CHANGE_report_final.pdf

Kettunen, M., Terry, A., Tucker, G. & Jones, A. (2007) Guidance on the maintenance of landscape features of major importance for wild flora and fauna – guidance on the implementation of Article 3 of the Birds Directive (79/43/EEC) and Article 10 of the Habitats Directive (92/43/EEC). – Institute for European Environmental Policy (IEEP), Brussels;
http://ec.europa.eu/environment/nature/ecosystems/docs/adaptation_fragmentation_guidelines.pdf.

OSPAR (2008) OSPAR guidance on environmental considerations for offshore wind farm development. – OSPAR Commission Reference Number 2008-3.
http://www.ospar.org/v_measures/get_page.asp?v0=08-03e_Consolidated%20Guidance%20for%20Offshore%20Windfarms.doc&v1

Rodrigues, L., Bach, L., Duborg-Savage, M-J., Goodwin, J. & Harbusch, C. (2008) Guidelines for consideration of bats in wind farm projects. – EUROBATS Conservation Series No. 3 (English version), UNEP/EUROBATS Secretariat, Bonn;
http://www.eurobats.org/publications/publication_series.htm.

Seeley, B., Parr, J., Evans, J. & Lear, D. (2008) Establishing best practice for the documentation and dissemination of marine biological data. - Commissioned by COWRIE Ltd.
http://www.offshorewindfarms.co.uk/Assets/DATA_14_11_08_FINALREPORT.pdf

National

Belgium

Gouvernement Wallon (2002) Cadre de référence pour l'implantation d'éoliennes en région Wallonne.
http://mrw.wallonie.be/DGATLP/DGATLP/Pages/DAU/Dwnld/NoteEolienne.pdf

Everaert, J. (2008) Effecten van windturbines op de fauna in Vlaanderen: onderzoeksresultaten, discussie en aanbevelingen [Effects of wind turbines on fauna in Flanders. Study results, discussion and recommendations]. Rapporten van het Instituut voor Natuur- en Bosonderzoek, 2008(44).
http://www.inbo.be/content/page.asp?pid=en_fau_bir_windturbines

Vlaamse regering (2006). Omzendbrief EME/2006/01-RO/2006/02. Afwegingskader en randvoorwaarden voor de inplanting van windturbines. Belgisch Staatsblad 24.10.2006, p. 56705-56713.
http://www.energiesparen.be/node/912

Finland

Ministry of Environment (2005) Tuulivoimarakentaminen (Development of wind power). – The Ministry of Environment, Helsinki (available in Finnish and Swedish);
http://www.ymparisto.fi/download.asp?contentid=42234&lan=fi

France

DIREN Bourgogne (2007) Définition et cartographie des enjeux avifaunistiques vis à vis du développement de l'énergie éolienne en Bourgogne. – Direction Régionale de l'Environnement, Bourgogne, Dijon.
http://www.bourgogne.ecologie.gouv.fr/plugins/fckeditor/UserFiles/EPOB%20rapport%20carto%20final(1).pdf

Ministère de l'Ecologie, du Développement et de l'Aménagement Durables (2006) Guide de l'étude d'impact sur l'environnement des parcs éoliens;
http://www.developpement-durable.gouv.fr/IMG/pdf/guide_etude_impact_eolien_2006.pdf

Ministère de l'Ecologie, du Développement et de l'Aménagement Durables (2007) Les questions-réponses sur les zones développement de l'éolien (ZDE);
http://www.industrie.gouv.fr/energie/renou/questions-zde.htm.

Germany

BSH (2007) Standard. Untersuchung der Auswirkungen von Offshore-Windenergieanlagen auf die Meeresumwelt (StUK 3). Stand: Februar 2007. – Bundesamt für Seeschiffahrt und Hydrographie (Federal Maritime and Hydropgraphic Agency), Hamburg and Rostock;
http://www.bsh.de/de/Produkte/Buecher/Standards_Windenergie/7003.pdf

Ireland

Wind Energy Development Guidelines (2006) Guidelines for planning authorities.- Department of Environmental Heritage and Local Government, Dublin.
http://www.environ.ie/en/Publications/DevelopmentandHousing/Planning/FileDownLoad,1633,en.pdf

Italy

Di Bene, A. & Scazzoni, L. (2006, eds.) Gli impianti eolici: suggerimenti per la progettazione e la valutazione paesaggistica. – Minestori per i beni e le attività culturali and Gangemi Editore, Rome; http://www.parc.beniculturali.it/ita/paesaggio/linee_guida/inserimentopaes/min_beni_imp_eolici.pdf

Sweden

Energimyndigheten (Swedish Energy Agency) (2007) Vindkraft – tillståndsprocessen och kunskapsläget. - Energimyndigheten, Eskilstuna; http://www.energimyndigheten.se/Global/Om%20oss/Vindkraft/vind.pdf

Boverket (Swedish National Board of Building, Housing and Planning) (2009) Vindkraftshandboken - planering och prövning av vindkraftverk på land och i kustnära vattenområden. - Boverket. Karlskrona. http://www.boverket.se/Global/Webbokhandel/Dokument/2009/Vindkraftshandboken.pdf

UK

BERR (2007) Onshore wind energy planning conditions guidance note. A report for the Renewables Advisory Board and BERR. – Department for Business, Enterprise & Regulatory Reform; http://www.berr.gov.uk/files/file35240.pdf.

BERR (2007) Atlas of the UK Marine Renewable Energy Resources. – Department for Business, Enterprise & Regulatory Reform; http://www.renewables-atlas.info.

BWEA, WWF, English Nature & RSPB (2001) Wind farm development and nature conservation- A guidance document for nature conservation organisations and developers when consulting over wind farm proposals in England. – British Wind Energy Association, London; http://www.bwea.com/pdf/wfd.pdf.

DEFRA (2004) Offshore Wind Farms. Guidance note for Environmental Impact Assessment in respect of FEPA and CPA requirements. http://www.cefas.co.uk/publications/files/windfarm-guidance.pdf

DEFRA (2005) Nature conservation guidance on offshore windfarm development. A guidance note on the applications of the EC Wild Birds and Habitats Directives for developers undertaking offshore windfarm developments. Version R1.9, March 2005. http://www.defra.gov.uk/WILDLIFE-COUNTRYSIDE/ewd/windfarms/windfarmguidance.pdf.

DTI (2004) Guidance notes. Offshore wind farm consent process. – Department for Trade & Industry, London; http://www.berr.gov.uk/files/file22990.pdf.

JNCC, Natural England & Countryside Council for Wales (draft) The protection of marine European Protected Species from injury and disturbance. To be published during 2010. http://www.jncc.gov.uk/page-4226.

UK, England

Bright, J.A., Langston, R.H. & Anthony, S. (2009) Mapped and written guidance in relation to birds and onshore wind energy development in England. – RSPB Reserach Report No. 35. https://www.rspb.org.uk/Images/EnglishSensitivityMap_tcm9-237359.pdf

UK, Scotland

SNH (2005) Survey methods for use in assessing the impacts of onshore windfarms on bird communities – Scottish Natural Heritage; http://www.snh.org.uk/pdfs/strategy/renewable/bird_survey.pdf.

SNH (2009) Strategic locational guidance for onshore wind farms in respect to the natural heritage. – Policy Statement No. 02/02, update March 2009, Scottish Natural Heritage; http://www.snh.gov.uk/planning-and-development/renewable-energy/onshore-wind/

SNH (2009) Assessing the cumulative effect of onshore wind energy developments. Version 3- DRAFT - for consultation, November 2009. - Scottish Natural Heritage; http://www.snh.org.uk/pdfs/strategy/renewables/A307913.pdf

NGOs

Belgium

Natagora (2008). L'implantation d'éoliennes en région Wallonne. Natagora vzw, Association de protection de la nature en Wallonie et à Bruxelles. http://www.natagora.org/images/stories/docu/position_eoliennes_natagora.pdf

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Greece

Dimalexis A., Saravia Mullin, V., Xirouchakis S., & K. Grivas. 2009. Assessment of the impacts of wind farms on birds: Guidelines for the implementation of the appropriate ornithological assessment of proposed projects. Hellenic Ornithological Society – Birdlife in Greece. Athens. 77pp (in Greek); http://ornithologiki.gr/gr/politiki/show_article.php?artID=391&locale=gr

Dimalexis A., Kastritis, T., Manolopoulos, A., Korbeti, M., Fric, J., Saravia Mullin, V., Xirouchakis, S., and D. Bousbouras. 2010. Identification and mapping of bird sensitive areas to wind farm development in Greece. Hellenic Ornithological Society – Birdlife in Greece, Athens. 126 pp. (in Greek with English summary); http://ornithologiki.gr/gr/politiki/show_article.php?artID=391&locale=gr

Luxembourg

Biver, G. & J. Pir (2008): Abstandsempfehlungen zu besonderen Tiervorkommen bei der Planung von Windkraftanlagen. Die Seiten der Centrale ornithologique. Regulus 2008 / 12: 12-13. LNVL.

Poland

PWEA (2008) Guidelines for assessment of wind farms' impact on birds. – Polish Wind Energy association (PWEA), Polish Bird Protection Society (OTPO) & West Pomeranian Society of Practical Ecology (ZTEP), Szczecin. http://www.elektrownie-wiatrowe.org.pl/en/files/guidelines_for_assessment__of_wind_farms_impacts_on_birds.pdf

Spain

Atienza, J.C., Martín Fierro, I., Infante, O. & Vallis, J. (2008) Directrices para la evaluación del impacto de los parques eólicos en aves y murciélagos (versión 1.0). – SEO/BirdLife, Madrid: http://www.seo.org/media/docs/MANUAL%20PARQUES%20E%C3%93LICOS%20para%20web.pdf.

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http://www.seit.ee/failid/470.pdf

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[228] http://www.imcg.net/imcgnl/pdf/nl0704.pdf.

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Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC

Final version, February 2007

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FOREWORD

Why a guidance document on the protection of animal species?

Up until now, most of the attention regarding the implementation of the Habitats Directive[1] has focused on the establishment of the Natura 2000 network (of protected areas). This "1st pillar" of the Directive refers to the conservation of natural habitats and the habitats of species. However, the Directive also has a "2nd pillar", covering the protection of species. In particular, Articles 12 and 16 aim to establish and implement a strict protection regime for species within the whole territory of Member States. It has become evident that the precise content of the type of measures needed to ensure a "system of strict protection" as well as the correct application of the derogation provisions pose problems. In addition, certain technical terms used in the articles need better definition. Clearly, therefore, guidance is needed on the provisions for species protection and the specific terms used.

Purpose of the guidance document

The essential focus of this document is on the main obligations under Articles 12 and 16 of Directive 92/43/EEC, which establish a system of strict protection for the animal species listed in Annex IV(a), but allow for derogation from these provisions under defined conditions. Particular consideration is given to the definition of a "system of strict protection" specified in Article 12(1), examining it in the context of the overall objectives of the Directive. The document is mainly based on relevant Court judgments (see Annex 1), opinions given by the Commission's Legal Service on some specific questions, and input from the Working Group on Article 12. This Working Group, an ad hoc working group formed under the Habitats Committee, met eight times from June 2002 to February 2005. The Group's final report can be viewed on the Commission's website (http://ec.europa.eu/environment/nature/home.htm).

This document is intended to ensure a common understanding of the relevant provisions among national and regional authorities, conservation bodies and other structures responsible for or involved in the implementation of the Habitats Directive. It aims to assist in devising pragmatic and flexible ways of applying the provisions and making them effective and practical, while fully respecting the legal framework.

Limitations of the guidance document

This guide has been drafted by the Environment Directorate-General of the European Commission. It is intended to be bound by, and faithful to, the text of the Directive and the wider principles underpinning Community environmental law. It is not legislative in character (not making new rules but providing guidance on the application of those that exist). As such, the document reflects only the views of the Commission services and is not of a binding nature. Member States have been consulted on various drafts of this guidance document and were invited to comment on it. There are some parts of the guidance in which some Member States hold differing views on the interpretation of Article 12 and Article 16.

It should be stressed that it rests with the European Court of Justice to provide a definitive interpretation of a Directive. Therefore, the guidance provided will need to evolve in line with any emerging jurisprudence on this subject, and also with experience arising from the implementation of Articles 12 and 16 in the Member States.

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[1] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22 July 1992, p. 7).

Also, as with any directive, the interpretation needs to consider the different language versions of the texts, all of which are valid. On this specific issue, we note that some phrases in the different language versions merit careful attention. It is important when looking at the different language versions to elicit a meaning that best reflects the purpose and context of the terms under examination.

Structure of the document

The document is presented in three main chapters. The first chapter reviews species protection within the EC under the Directive and international framework. The second chapter takes a more in-depth look at the relevant legal provisions of Article 12 of the Directive, while the third chapter examines the derogation possibilities under Article 16 of the Directive.

The key points arising from the analyses are summarised (in italics) at the end of each section, in order to highlight the relevant conclusions. Full references for the Court cases quoted throughout the text are provided in an annex at the end of the document.

I. CONTEXT

I.1 Species conservation within a wider political and legal context

I.1.1 Political context

(1) Preserving, protecting and improving the environment, including biodiversity, are essential objectives of general interest pursued by the European Community, as provided for in Article 174 of the Treaty.

(2) In 2001, the EU Heads of State and Government made a commitment at the Spring Summit in Göteborg to *'halt the decline of biodiversity by 2010'*[2]. The same Göteborg Council adopted the EU Sustainable Development Strategy, which again stressed the need *'to protect and restore habitats and natural systems and halt the loss of biodiversity by 2010'.* The Sixth Environmental Action Programme (6th EAP)[3], which constitutes the EU's "environmental work plan" from 2002 to 2012 was adopted in 2002. The issue of nature and biodiversity conservation is one of the four priorities in the 6th EAP, with the focus on *'protecting, conserving, restoring and developing the functioning of natural ecosystems, natural habitats, wild flora and fauna with the aim of halting … the loss of biodiversity, including diversity of genetic resources, both in the European Union and at the global scale*' with a particular view to *'halting biodiversity decline with the aim to reach this objective by 2010'*.

(3) These EU efforts go hand in hand with the EC Biodiversity Conservation Strategy adopted in 1998, which was developed to meet the EC's obligations as a Party to the Convention on Biological Diversity (1992). Under this Strategy, four Biodiversity Action Plans were adopted in 2001 in various policy areas (natural resources, fisheries, agriculture, economic and development cooperation). With the latest Communication of May 2006 on halting the loss of Biodiversity by 2010[4], the Commission launches a new effort to pull together EU actors to meet the 2010 target and foster recovery of biodiversity.

(4) Within all these initiatives, the issue of species protection is at the forefront of debate and has an indicator role in judging the health of ecosystems. Our ability to ensure that species survive over the long term as part of our European natural heritage will show the extent to which our conservation and biodiversity policies are truly effective. The 'target date' of 2010 is very likely to accelerate progress. Accordingly, the full and proper implementation of both the Birds[5] Directive and the Habitats Directive, which seeks to *'… maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest'*, is of major importance and a test case as to how far our commitments can be achieved in practice.

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2 'The European Council agrees that biodiversity decline should be halted with the aim of reaching this objective by 2010 as set out in the Sixth Environmental Action Programme.' Presidency Conclusions, Göteborg Council, 15 and 16 June 2001. SN/200/1/01 REV1, page 8. http://ue.eu.int/newsroom/newmain.asp?lang=1.

3 Decision No 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, OJ L 242 of 10/9/2002.

4 Communication from the Commission: Halting the loss of Biodiversity by 2010 – and beyond ; Sustaining ecosystem services for human well-being; 22 May 2006, COM (2006) 216 final

5 Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ L 103, 5 April 1979, p. 1).

Summary: There are a wide range of political commitments within the EU aiming to protect nature and biodiversity, with species conservation at the forefront. With a view to meeting the objective of halting the decline of biodiversity by 2010, the full and proper implementation of both the Birds Directive and the Habitats Directive is a test case as to how far EU conservation policies are truly effective.

I.1.2 Legal context

(5) The Habitats Directive and its provisions for species protection should however be seen not only in a political context but also in the context of international conventions and other EC legal instruments.

(6) The legal instrument most closely related to the Habitats Directive is the **Birds Directive** of 1979, which shares not only common objectives (for birds in this case) and a similar conceptual structure, but also common provisions in relation to the network of protected sites (Natura 2000). Furthermore, Articles 5 to 9 of the Birds Directive contain similar provisions regarding species protection. In addition, the ECJ case law on these provisions is already quite extensive. The reasoning behind the judgments arising from the implementation of the Birds Directive is thus of great importance and can often be applied as well to Articles 12 and 16 of the Habitats Directive[6].

(7) Seen in an international context, the species protection provisions of the Habitats Directive help achieve the aims of relevant international nature conservation conventions such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora[7], the Bern Convention[8], the Bonn Convention[9] and the Convention on Biological Diversity[10].

(8) Of particular relevance here is the **Bern Convention**. The Bern Convention (signed in 1979) pre-dates the Habitats Directive and had an important influence on both its conception and drafting. The parallels between Article 6 of the Convention[11] and Article 12 of Directive 92/43/EEC are obvious. However, despite the equivalence of objectives and the similarities in wording, Directive 92/43/EEC creates a more detailed framework for site

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[6] For example, in its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017), the Court used the case law for the Birds Directive.

[7] Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 61, 3.3.1997, p. 1).

[8] Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (OJ L 38, 10.2.1982, p. 1).

[9] 82/461/EEC, Council Decision of 24 June 1982 on the conclusion of the Convention on the conservation of migratory species of wild animals (OJ L 210, 19/07/1982, p. 10).

[10] 93/626/EEC, Council Decision of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ L 309, 13/12/1993 p. 1).

[11] Article 6 of the Convention provides that *"each Contracting Party shall take appropriate and necessary legislative and administrative measures to ensure the special protection of the wild fauna species specified in Appendix II. The following will in particular be prohibited for these species:*

(a) all forms of deliberate capture and keeping and deliberate killing;

(b) the deliberate damage to or destruction of breeding or resting sites;

(c) the deliberate disturbance of wild fauna particularly during the period of breeding, rearing and hibernation, in so far as disturbance would be significant in relation to the objectives of this Convention;

(d) the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty;

(e) the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognisable part or derivative thereof, where this would contribute to the effectiveness of the provisions of this Article."

conservation and protection than does the Convention[12]. The differences between the two texts were confirmed by the Court in case C-75/01, relating to the transposition of Directive 92/43/EEC in Luxembourg. The Court considered that the national measures for transposing Article 12(1)(c) of the Directive, including a law approving the Bern Convention, were insufficient to ensure complete transposition due to the disparities between Annex II of the Bern convention and Annex IV(a) of Directive 92/43/EEC[13]. It follows that even if the Bern Convention and Directive 92/43/EEC have substantially similar objectives, this does not affect the autonomous character of the obligations under the Habitats Directive.

Summary: The species protection provisions of the Habitats Directive have to be seen in the context of international conventions and other EC legal instruments, the most closely related being the Bern Convention and the Birds Directive.

I.2 Species conservation within the overall scheme of Directive 92/43/EEC

(9) The maintenance or restoration, at favourable conservation status, of the natural habitats and species of wild fauna and flora of Community interest is the primary objective of Directive 92/43/EEC. In order to attain this objective the Directive establishes different conservation instruments. Articles 12-16 thus form part of a general framework that aims to meet, along with other provisions, the broad objective of the Directive as set out in Article 2.

I.2.1. Primary aim of the Directive: the role of Article 2

(10) The aim of the Directive is laid down in Article 2. This provision does not in itself create obligations for the Member States, but it is relevant when considering the interpretation of other provisions of the Directive.

Article 2 (Directive 92/43/EEC)

1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.

(11) It should be noted that the Court has recognised the need for any interpretation of Community legislation to take into account the aims of that legislation. According to Article 2(1) of Directive 92/43/EEC, the main aim of the Directive is to contribute towards ensuring biodiversity conservation through the conservation[14] of natural habitats and of wild fauna

[12] Two important differences should be stressed. Firstly, the Convention has a greater species coverage, since its Appendix II contains a larger number of species than Annex IV(a) of the Directive (partly due to the larger geographic area covered by the Convention). Secondly, the word "deliberate" figures in Article 6(b) but is absent from Article 12(1) (d).

[13] See the judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraphs 55-58.

[14] According to Article 1(a) of the Directive, "conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status."

and flora in the European territory of the Member States. Following Article 2(2), measures taken by Member States must aim to maintain or restore, at favourable conservation status, the natural habitats and species of wild fauna and flora of Community interest[15]. Consequently, the strict protection obligations set out in Article 12 are important instruments for the achievement and effective implementation of the main aim of the Directive.

(12) In parallel, the economic, social and cultural requirements and regional and local characteristics referred to in Article 2(3) of the Directive should not be neglected when interpreting the species protection provisions. As set out further below, Article 2(3) is applicable to various implementation aspects of Article 12 and 16 (e.g. when defining the requisite measures, especially in the case of ongoing activities, when drafting codes of conduct, when producing species conservation plans, and of course when making use of the derogations system).

(13) Since Article 2(3) requires the protection of natural habitats and species to be balanced against other requirements, one may ask if this provision comprises an independent derogation from the general requirements of the Directive. For Directive 79/409/EEC, the Court has clearly confirmed that it does not[16]. *Mutatis mutandis*, it follows that Article 2(3) of Directive 92/43/EEC does not provide an independent derogation from the obligations and requirements of the Directive. Nonetheless, the Court's pronouncements show that Article 2 is not without relevance and weight when considering the interpretation of other provisions of the Directive. In this regard, the provisions of Article 2 have value as a general orientation guide as to what the Directive requires and allows.

Summary: The strict protection obligations under Article 12 must be interpreted in terms of the overall aim of the Directive described in Article 2, to which they contribute. Article 2(3) cannot be regarded here as providing an independent derogation from the general requirements of the Directive.

I.2.2. Favourable conservation status

(14) The maintenance or restoration of "favourable conservation status" (FCS) is the overall objective for all habitat types and species of Community interest. Such species are listed in Annexes II, IV and V to the Directive. In simple terms, FCS could be described as a situation where a habitat type or species is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in future. The fact that a habitat or species is not threatened (i.e. not faced by any direct extinction risk) does not necessarily mean that it has favourable conservation status. The target of the Directive is defined in a positive way, as a 'favourable' situation to be reached and maintained, which needs to be defined based on the best available knowledge. Therefore, the obligation of a Member State

[15] Such species are listed or may be listed in Annex II, IV and V of the Habitats Directive.

[16] See judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 8. The Court noted: "In this context it is necessary to refer to Article 2 of the Directive, which requires Member States to take the requisite measures to maintain the population of all bird species at a level, or to adapt it to a level, which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, and from which it is therefore clear that the protection of birds must be balanced against other requirements, such as those of an economic nature. Therefore, although Article 2 does not constitute an autonomous derogation from the general system of protection, it none the less shows that the Directive takes into consideration, on the one hand, the necessity for effective protection of birds and, on the other hand, the requirements of public health and safety, the economy, ecology, science, farming and recreation." In Case C-262/85 (judgment of 8 July 1987, Commission v Italy, ECR p.3073) the Court rejected arguments by the Italian government that departures from the requirements of Article 7(4) could be based directly on Article 2.

is more than just avoiding extinction. All measures taken under the Directive must aim to reach or maintain a favourable conservation status.

(15) FCS for species is defined in general terms in Article 1(i) of the Habitats Directive.

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

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

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

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

(16) This definition contains the main parameters (population[17] dynamics, range, sufficient habitat, prospects of long-term viability) for defining and assessing both the current and target conservation status. It also provides a framework for more specific definitions on a species-by-species basis. All these parameters therefore need to be considered thoroughly when designing measures for a certain species. It is important to note that the assessment of conservation status not only includes an element of 'diagnosis' based on current conditions, but also an important element of 'prognosis' (foreseeable future) based on influences. Such foreseeable future influences could be specific or general threats, positive or negative, medium- to long-term impacts, etc.

(17) The concept of FCS is not limited to the Natura 2000 network or to the species protected by this network (i.e. Annex II species). It applies to the *overall situation* of all species of Community interest (Annexes II, IV and V), which needs to be assessed and surveyed[18] in order to judge whether it is favourable or not. Assessing and evaluating the conservation status of habitats and species *within* the Natura 2000 network is therefore not always enough, especially when the occurrences of habitats or species are only partly covered by the network, maybe even in some cases only to a relatively small extent.

(18) In April 2005 the Habitats Committee agreed on a harmonised framework for evaluating the conservation status of habitats and species (see document DocHab-04-03/03 rev.3 "Assessment, monitoring and reporting of conservation status – Preparing the 2001-2007 report under Article 17 of the Habitats Directive"[19]). Member States agreed to assess conservation status according to a common 3-grade assessment matrix within each of the biogeographic regions in their territory. The three grades are favourable = green, unfavourable/inadequate = amber and unfavourable/bad = red *("traffic light system")*.

(19) For assessing favourable conservation status, the meaning of the term "natural range" as used in the Habitats Directive was defined as follows:

[17] "Population" is defined here as a group of individuals of the same species living in a geographic area at the same time that are (potentially) interbreeding (i.e. sharing a common gene pool).

[18] Article 11 of the Directive requires surveillance of the conservation status of the natural habitats and species referred to in Article 2, with particular regard to priority natural habitat types and priority species.

[19] See http://forum.europa.eu.int/Public/irc/env/monnat/home (public site, no "sign in" needed) for all relevant documents

The natural range of species and habitats — a dynamic concept

The natural range describes roughly the spatial limits within which the habitat or species occurs. It is not identical to the precise localities (the area actually occupied) or territory where a habitat, species or sub-species permanently occurs. Such actual localities or territories might be patchy or disjointed for many habitats and species (i.e. habitats and species might not be evenly spread) within their natural range. If the reason for disjunction proves to be natural, i.e. caused by ecological factors, the isolated localities should not be interpreted as a continuous natural range. For example, for an alpine species the range may be the Alps and the Pyrenees, but not the lowlands between them. However, the natural range includes areas that are not permanently used: for example for migratory species, their "range" includes all the areas of land or water that a migratory species inhabits, stays in temporarily, crosses or overflies at any time during its normal migration[20].

A natural range as defined here is not static but dynamic: it can decrease and expand. A natural range can constitute one aspect for the assessment of (un)favourable conditions for a habitat or species. If the natural range is insufficient in size to allow for the long-term existence of that habitat or species, Member States are asked to define a reference value for a range that would allow for favourable conditions and work towards this, for instance by fostering expansion of the current range.

When a species or habitat spreads on its own to a new area/territory or when a species has been re-introduced into its former natural range (in accordance with the rules in Article 22 of the Habitats Directive), this territory has to be considered part of the natural range. Similarly, the restoration/re-creation or management of habitat areas, as well as certain agricultural and forestry practices, can contribute to the expansion of a habitat or a species and hence its range. However, individuals or feral populations of an animal species introduced deliberately or accidentally by man to locations where they have never occurred naturally, or where they would not have spread to naturally in the foreseeable future, should be considered to be outside their natural range and consequently not covered by the Directive. Vagrant or occasional occurrences would also not be considered as part of the natural range.

Summary: The main parameters for defining the favourable conservation status of a species are given in Article 1(i) of the Habitats Directive. Roughly speaking, this status is a situation where species populations are doing well with good prospects for the future. Member States have agreed on a harmonised framework for evaluating *conservation status in the report required by Article 17 under the Directive.*

I.2.3. Species conservation instruments

(20) The Directive lays down a set of obligations and procedures that aim to meet the broad objective set out in Article 2. Two main concepts or "pillars" can be distinguished: the conservation of natural habitats and the habitats of species through the establishment of the Natura 2000 network (Articles 3 to 10) and the protection of animal and plant species (Articles 12 to 16).

[20] See also Article 1 of the Bonn Convention.

(21) The **1st pillar,** in relation to species[21], targets the conservation of the habitats of species[22], focusing on the maintenance (including positive management measures) and restoration of these habitats by establishing protected sites. The species for which this network of protected sites (Natura 2000) is established are listed in Annex II to the Directive.

(22) Article 6 is the central provision covering positive management (Article 6(1)) and avoidance of negative influences to the network (Article 6(2)); it also deals with plans or projects likely to have a significant negative impact on certain sites (Article 6(3)-(4)). The Commission services have produced two guidance documents explaining in detail the provisions of this Article:

1. "Managing Natura 2000 sites: The provisions of Article 6 of the Habitats Directive 92/43/EEC", European Commission, 2000, ISBN 92-828-9048-1

2. "Assessment of Plans and Projects Significantly Affecting Natura 2000 sites - Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC", European Commission, 2002, ISBN 92-828-1818-7

(23) While the first document deals with the management of Natura 2000 sites in general, the second document focuses on the procedures for the nature impact assessment and its consequences under Article 6(3) and 6(4). Both documents are available at http://www.europa.eu.int/comm/environment/nature/home.htm.

(24) To enhance the effectiveness of the network, the provisions of Article 10 target the ecological coherence of the network by suggesting integrated land-use planning and the management of certain landscape features.

(25) The **2nd pillar** deals with direct influences on the species themselves as well as (in the case of animal species) their eggs, breeding sites and resting places. Provisions under this section are not restricted in geographical terms. They apply to the whole of the territory to which the Directive applies, albeit subject to very few specific geographical restrictions indicated in the annexes[23]. In contrast, the protection afforded by Article 6 is limited to the Natura 2000 network.

(26) A distinction can be made under this pillar between those provisions calling for a "system of strict protection" for Annex IV species (Articles 12 & 13) and measures to control the exploitation of species listed in Annex V (Articles 14 & 15[24]). While the "system of strict protection", as the name suggests, provides a stringent protection regime, species covered by Annex V can be exploited, although such exploitation should not jeopardise the objective of maintaining their favourable conservation status in any way.

(27) Both pillars allow for exceptions from the protection regimes. The system of protection envisaged under Articles 12-15 is qualified by the possibility of derogations under Article 16 of the Directive. Article 6(4) of the Directive addresses specific exceptions (i.e. from the protection granted by the Natura 2000 network) to the general rule of Article 6(3) that authorisation can only be granted to plans or projects not adversely affecting the

[21] The 1st pillar also deals with habitats and their typical species as listed in Annex I to the Directive.

[22] Article 1(f) states that the "*habitat of a species means an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle*".

[23] For example for *Vipera seoanni*, there is a geographical restriction which excludes the Spanish population from Annex IV and consequently from the provisions of Article 12.

[24] Article 15 contains elements that also relate to Annex IV(a) species in cases when derogations are applied.

integrity of the sites concerned. The application of Article 6(4) has to respect the various steps and the sequential order established in the Directive.

(28) So while there are certain similarities between both pillars, it should be stressed that the 1st pillar requires not only active maintenance but also restoration and improvement actions on sites, while the 2nd pillar has a more preventive character, requiring Member States to avoid and prevent a number of situations that could negatively impact a species.

(29) In consequence, it can be said that the two pillars are closely interlinked and are complementary in their approach, as their joint aim is the favourable conservation status of all habitats and species of Community interest[25].

Summary: In order to achieve its objectives, the Habitats Directive provides for two main instruments: the Natura 2000 network of protected sites and the species protection provisions. The provisions for species protection apply to the whole of a Member State's territory and concern the physical protection of specimens as well as their breeding sites and resting places. Both regimes allow for exceptions under certain conditions. Both instruments are complementary and jointly aim to ensure a favourable conservation status for all species of Community interest.

I.2.3.a) The Annexes

(30) Which "pillar" applies to which species is specified by the annexes to the Directive. The fact that a species is frequently listed in more than one annex demonstrates the close interaction between the two pillars, which share the same objective.

Purpose of Annex and number of references[26] listed (EU25)

Annex II	Animal and plant species of Community interest whose conservation requires the designation of special areas of conservation ("Natura 2000" sites"). Annex II lists a total of 869 references, of which 297 are animal and 572 plant species.
Annex IV	Animal and plant species of Community interest in need of strict protection. Annex IV lists a total of 922 references, of which 323 are animal and 599 plant species.
Annex V	Animal and plant species of Community interest whose taking in the wild and exploitation may be subject to management measures. Annex V lists a total of 77 references, of which 45 are animal and 32 plant species.

(31) In total, the Directive lists 447 animal and 695 plant species. Although different species are listed in different annexes and therefore fall under different kinds of protection measures, many species are actually listed in more than one annex. For example, plant species listed in Annex II (except bryophytes) are automatically listed in Annex IV(b) as

[25] It should be noted that Articles 12 and 16 are applicable from the date on which Directive 92/43/EEC came into force, i.e. 10 June 1994. The Member States that joined the EU after 1994 were to comply with these provisions from the date of accession.

[26] "References" mostly refers to species but also includes some grouped taxa (e.g. *Alosa spp.*) and sub-species. Refers to annexes valid for the EU-25.

well, so are covered by the habitat protection provisions *and* the strict protection system of Article 13. On the other hand, a group of other plants is listed only in Annex IV. For animal species, such an 'automatic' parallel listing does not exist. The situation with animal species is therefore more complex:

Overlap between Annexes – Animal species (EU25)

Annex	II & IV	II & V	only II	only IV	only V
% of the 447 animal references	45%	5%	17%	28%	5%

(32) How can this situation be explained? At the time of adoption, the legislator considered the level and type of threats to species as well as the best way to counteract threats based on the scientific information available at the time. While site designation and habitat management would be the appropriate approach for certain species, others might need a different regime of protection going beyond protected sites. The development of the annexes to the Habitats Directive follows the logic described below.

(33) A listing in Annex II was chosen for species for which the conservation of their (often quite specific) habitat is the principal factor determining their survival and well-being. The protection and management of sites were selected here as the appropriate instrument, which includes not only the maintenance of species habitats but also, where appropriate, their restoration. The group of species listed in Annex IV may be less suited to conservation by establishing protected areas, but instead needs "physical" protection of the actual species as well as protection of the most important parts of their habitat (i.e. their breeding sites and resting places) throughout the territory of a Member State. This is because of the specific threats they face, the measures needed to counteract them, the species' pattern of occurrence (e.g. scattered) or the type or specific character of their habitat. For the third group of species listed in Annex V, which may be exploited by human beings, this exploitation must be managed — if necessary — in order to ensure a favourable conservation status. Under Article 14 of the Directive, if Member States deem it necessary in the light of the surveillance provided for in Article 11, they have to take measures to ensure that the exploitation or taking in the wild of specimens of the species listed in Annex V is compatible with maintaining their favourable conservation status.

(34) Quite often, however, animal species do not perfectly fit into one of these groups. Usually species are subject to a combination of threats and should consequently be the target of a range of measures. This explains why most species of Community interest are actually listed in more than one annex. The most frequent combination is a listing in both Annex II and IV (see also the next chapter), which maximises the conservation effort by requiring management (maintenance and restoration) of the general habitats in protected sites (which should cover the most important populations) and the protection of the breeding sites and resting places as well as the species itself over the whole territory of a Member State.

(35) Since the development of these annexes, however, research and monitoring have developed further and the conservation status of a number of species may have changed, so that the picture today might be different from the one in the late 1980s/early 1990s when the Directive was prepared. As explained in chapter *I.2.4.b) "Appropriate and effective*

character of measures taken", several reactions are possible. If it is found, for example, that a species in need of habitat restoration or active habitat management is listed only in Annex IV but would effectively need to be listed under Annex II, Member States may voluntarily take additional measures. Alternatively, based on good scientific evidence, the annexes could be amended to include the species in Annex II. On the other hand, the surveillance under Article 11, once collated and analysed at European level, might show that a species should be deleted from one or all the annexes it is listed in because it no longer fulfils the criteria for Community interest (as defined in Article 1(g) of the Directive).

(36) The efficient use of the different species conservation instruments requires **a species-by-species approach**[27]. Such an approach looks at the conservation needs of each species as well as the instruments available for its conservation and formulates on this basis the adequate measures to be implemented. Such an approach ensures flexible implementation of the Directive while at the same time optimum achievement of its objectives. The target of favourable conservation status should always be the guiding principle for all conservation efforts by the Member States and should be addressed by all appropriate means available (see also chapter I.2.4.b).

Summary: The different annexes determine which instruments are available for which species. Most species are covered by more than one annex and therefore are subject to a combination of instruments, i.e. a combination of conservation approaches and measures. How these instruments are finally implemented should be considered on a species-by-species basis, taking account of the specific needs of each species.

I.2.3.b) The protection of animal species listed under both Annexes II and IV in Natura 2000 sites

(37) Since a large proportion (45%) of the animal taxa are listed in both Annex II and Annex IV, it is worth looking at which regime and which procedures apply to an Annex IV species within a Natura 2000 site. The Commission services consider that, within Natura 2000 sites, **a twofold regime applies** to Annex II/IV species. These species should benefit from both approaches: protection under the section on "Conservation of natural habitats and habitats of species", in particular the measures envisaged under Article 6, and the strict protection system envisaged under Article 12.

(38) This view is first of all justified by the different — and complementary — approaches followed by the two systems. Article 6 is concerned with site and habitat conservation and protection, whereas Article 12 is concerned with protecting the individuals of the listed species and their breeding sites and resting places. Furthermore, such an approach is in line with the general objective of the Habitats Directive, i.e. to contribute towards ensuring biodiversity through the maintenance or restoration, at favourable conservation status, of natural habitats and species of Community interest.

(39) It should be observed in this regard that for all Annex II species a coherent and complete network, based on an exhaustive list of sites, has to be established in accordance with the procedure and criteria set out in Annex III of the Directive. Based on a biogeographic approach, the network is established taking into account the threat status, ecology and distribution of a species. Depending on these and other scientific factors, a

[27] There might of course be cases where a whole group of species faces similar situations and has similar needs and can be treated together.

more or less complete coverage of habitats is agreed for inclusion in the network[28]. It therefore is all the more important that for species (listed in Annexes II and IV) not largely covered by the network, measures are also taken outside the network to maintain or restore their favourable conservation status. However, the fact that an Annex IV species is well covered in the Natura 2000 network does not replace the obligation to establish and effectively implement a strict protection system. It follows that, for animal species listed in Annex II and IV(a), within a site belonging to the Natura 2000 network, the simultaneous application of Articles 6 and 12 to 16 needs to be ensured.

(40) Given that these provisions contain similar elements, their simultaneous application may lead to situations where overlaps occur. This is for example the case with the protection of Natura 2000 sites under Article 6(1) and (2) and the protection of breeding sites and resting places under Article 12(1)(d). Both provisions deal with the protection of habitats of species. Breeding sites and resting places are central parts of the total habitat of a species, which has to be protected (maintained and restored) in its entirety in the Natura 2000 site. Natura 2000 therefore has a much more intensive and broader task, namely to maintain (and where needed restore) the entire habitat of a species at certain sites, while the provisions of Article 12 concentrate on preventing negative effects on the most central parts of such habitats, namely those that are essential in order to guarantee successful breeding and resting.

(41) It would be logical for measures taken under Article 6(1) (e.g. management plans) to make special reference to the protection requirements of Annex II & IV species occurring at the site. Also, where, for example, special measures are taken to avoid the deterioration of habitats or disturbance of species (Article 6(2)), these should logically respond to the requirements spelled out under Article 12(1)(a)-(d).

(42) With regard to the **simultaneous application of derogations** under Articles 6(3)-(4) and 16 to animal species listed in both Annexes II and IV, the Commission services consider that their simultaneous or parallel application is feasible in practical terms and meaningful in conservation terms.

(43) Without envisaging all possible scenarios, the Commission services consider that, if for example a project would be likely to destroy or damage the central parts of habitats within a Natura 2000 site, it can be assumed that both Article 6(3) and Article 16 come into play at the same time. It can be further assumed that the impact assessment thus triggered will cover both provisions — as they simultaneously have the same objective (although Article 12(1)(d) is more limited), i.e. the assessment under Article 16 will form part of the presumably broader (because covering the entire habitat) assessment undertaken under Article 6(3). Such a procedure should avoid any double assessment or incoherence in applying the provisions. It has to be ensured in such cases that the outcome of the impact assessment does not go against the species protection provisions. Of course, the decisions taken after the assessment will then have to take into account the requirements under both articles. Should, for example, a harmful project be allowed due to overriding public interest, compensation measures will have to be taken and reported under Article 6(4) and the project also has to be included in the Article 16 (derogation) reports.

(44) On the other hand, it may well be possible that a derogation is required under Article 16 for an activity in a Natura 2000 site even where no impact assessment under Article 6(3) is needed. This might for example be the case when a few specimens or eggs of an Annex

[28] Even where Community lists have been approved, the network still needs improvement for certain habitat types and species: so-called 'reserves' had to be included in the first Community lists of sites of Community interest to allow for completion later on.

II/IV species are to be taken for research purposes although this is unlikely to have any negative effect on the site and its population, or on the contrary will have a positive effect.

Summary: Species listed in Annex II and IV benefit from complementary, twofold protection within Natura 2000 sites. Certain overlaps in the protection of habitats (entire habitat in the Natura 2000 site, including breeding and resting sites under Article 12) exist but can and should be dealt with in a coherent manner.

I.2.4 Basic principles of species conservation

I.2.4.a) Good knowledge and surveillance of conservation status

(45) Recital 19 of the Directive states that "the improvement of scientific and technical knowledge is essential for the implementation of this Directive", while Article 18 of the Directive stresses the necessity for research. Indeed, in order to implement meaningful species conservation measures under the Directive, a good knowledge of each species (range, occurrences, biology, ecology, threats & sensitivity, conservation needs, etc.) is a *conditio sine qua non*. Member States therefore need to collect and use the best available information from all reliable sources (e.g. conservation agencies, universities, conservation NGOs, etc.) when designing their conservation strategies. In addition, as the Directive's aims are framed in an EU and not a national context, it may often be important to look for information beyond regional and national borders in order to cooperate and coordinate with other regions/Member States (this may — among other things — take place in committees and working groups at EU level or through EC co-funded projects). Harmonised, transboundary approaches are valuable for the implementation of the Directive when for example two Member States share one population of a certain species and can only assess the full situation (and consequently define effective measures) when taking the situation 'on the other side of the border' into account.

(46) Besides the factual knowledge on a species, surveillance (or monitoring[29]), meaning long-term systematic observation, is required by the Directive to track trends in conservation status. The establishment of an appropriate surveillance system to monitor the conservation status of a species of Community interest (as listed in Annex II, IV and V) is an obligation arising from Article 11 of the Directive. According to the Court, *"the surveillance obligation is fundamental to the effectiveness of the Habitats Directive and it must be transposed in a detailed, clear and precise manner"*[30]. Thus, domestic law should set out the statutory duties of the national authorities to undertake surveillance of the conservation status of natural habitats and species, in order to guarantee that this surveillance is undertaken systematically and on a permanent basis[31].

[29] Article 11 of the Directive refers to the surveillance of the conservation status of natural habitats and species. The Commission services consider that the interpretation of the term "surveillance" and its scope should take into account the relevant definitions of Article 1(e) and (i).

[30] See the judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 26 and 65.

[31] In its judgment of 20 October 2005, the Court found that *"inasmuch as it is common ground that United Kingdom domestic law does not contain any statutory duty requiring the national authorities to undertake surveillance of the conservation status of natural habitats and species, that domestic law involves an element of legal uncertainty. Hence, it is not guaranteed that surveillance of their conservation status is undertaken systematically and on a permanent basis"* (Case C-6/04, paragraph 68).

Article 11 (Directive 92/43/EEC)

Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.

(47) The scope of Article 11 is not restricted to Natura 2000 sites, but requires monitoring of the conservation status of habitats and species of Community interest, as defined in Article 1 of the Directive, throughout the territories of all Member States.

(48) The position of Article 11, which comes at the end of the section on "conservation of habitats and habitats of species", could give rise to some ambiguity. However, the Commission services consider that this provision applies to the species covered by the 2nd pillar as well. This conclusion is based on several grounds. First of all, the text of Article 11 expressly refers to the surveillance of "the conservation status of the natural habitats and species referred to in Article 2", i.e. the natural habitats and species of wild fauna and flora of Community interest. Additionally, Article 14 of the Directive, which is in the 'protection of species' section, includes a reference to the "surveillance provided for in Article 11". This clearly illustrates that the compartmentalisation between these two sections of the Directive is not absolute. Furthermore, the recitals of the Directive refer to the need to set up a system "for surveillance of the conservation status of the natural habitats and species covered by this Directive" for the implementation of the Directive.

(49) A common framework for evaluating conservation status (in three grades) and reporting on this under Article 17 of the Directive was approved by the Habitats Committee in April 2005[32]. This framework defines what information is to be reported (and consequently collected) and gives rough guidelines on how to assess conservation status, so that conclusions at European level can be drawn from the national reports. Important elements of the agreement are that the 2007 report should include a first assessment of conservation status for each species and habitat of Community interest, based on the best available information. Reports thereafter (every 6 years) should be based on the surveillance systems put in place[33]. In order to know when a species or habitat has a favourable status, this favourable situation first needs to be defined. Member States are therefore encouraged to define "favourable reference values", to be used as benchmarks in the assessment process.

(50) The status of species should be determined at biogeographical level in Member States (for overviews, national/regional strategies, targets and reporting purposes) and at population level[34] where appropriate (for defining requisite measures, management and derogations). In the case of transboundary populations and species that migrate across the frontiers of the EU, their overall natural range, including migration zones outside the EU, should be considered as well where this is feasible. Repeated or regular monitoring will give an indication as to the appropriateness and effectiveness of the conservation measures chosen.

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[32] DocHab-04-03/03 rev.3 "Assessment, monitoring and reporting of conservation status – Preparing the 2001-2007 report under Article 17 of the Habitats Directive".

[33] Member States are free to choose their means and methods of gathering data and to adapt monitoring methods to regional differences; however, a certain – voluntary – harmonisation over the medium to long term should be sought.

[34] Regarding the definition of 'population', a group of spatially separated populations of the same species which interact at some level (meta-populations) might be used as a biologically meaningful reference unit. This approach needs to be adapted to the species in question, taking account of its biology/ecology.

(51) Surveillance of the conservation status of animal species should provide valuable information and contribute to effective implementation of the Directive. Such information is also necessary for appropriately applying derogations under Article 16: in order to determine whether any actions would be detrimental to maintaining that species at a favourable conservation status, national authorities must have sufficient information available to assess the conservation status of the species, and to predict the likely effects of any proposed derogation.

(52) In addition to the surveillance of conservation status, there is an explicit obligation under Article 12(4) to establish a system to monitor the incidental capture and killing of Annex IV(a) species and, in the light of the information gathered, to take further research or conservation measures if required. Findings under this system should be incorporated in the overall lessons drawn from the surveillance of conservation status.

Summary: Good knowledge of a species (range/distribution, occurrence, biology, ecology, threats & sensitivity, conservation needs, etc.) and regular surveillance of its conservation status over time (as required in Article 11) are essential preconditions for any meaningful conservation strategy. Cooperation at EU level and transboundary cooperation might be essential for certain species. An EU framework for assessing conservation status was agreed by Member States in April 2005.

I.2.4.b) Appropriate and effective character of measures taken

(53) The Directive does not define in detail the concrete measures needed to fulfil the obligations arising from its various provisions and allows the Member States a certain margin of manoeuvre, or flexibility. The definition, adoption and implementation of such measures fall within the competence of national authorities. The Habitats Directive thus enables the Member States to implement its provisions in a **proportionate and appropriate** manner, an approach that underlies all the provisions of the Habitats Directive, including Articles 12 and 16. However, the discretionary power of Member States should respect some basic requirements.

(54) When it comes to interpreting provisions of a Directive, special attention must be given to the guiding principle laid down in Article 10 of the EC Treaty, which states that *"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."*

(55) Consequently, the maintenance or restoration of favourable conservation status has to be taken into consideration when establishing adequate measures for species protection and habitat conservation. Good scientific knowledge and surveillance of a species are preconditions for doing so. The circle is closed when the results of the surveillance of conservation status show that the measures chosen are actually appropriate and **effective** in the field.

(56) The measures taken by the Member States should adequately address the objective pursued, i.e. maintaining and restoring favourable conservation status, while also taking account of economic, social and cultural requirements and regional and local characteristics (Article 2(3)). Such measures will be proportionate where they enable the desired aim to be attained, are necessary for attainment of that aim and are appropriate in terms of the means used.

(57) In addition, it should be underlined that **a species-by-species approach** also needs to be adopted. The concrete targets to be achieved may differ significantly for each species, and can also evolve (e.g. due to better scientific knowledge). Member States should therefore always consider their implementation actions in the light of the intended objective, the species concerned and the circumstances of each case. Thus, a proportionate approach is not a static concept and becomes an important factor for the flexible implementation of species conservation. However, taking no measures at all on account of a species being in a good conservation status is not an option (see also chapter II.2.3).

(58) Flexibility and proportionality should thus not be misunderstood as concepts that reduce the obligations on Member States to act in an effective way, but need to be seen as providing room for authorities to adapt their way of implementation to the specific circumstances of each case (in conservation status terms, but also in social, economic and cultural terms). The implementation of a flexible and proportionate approach calls for the Member States to act within a clear framework of coordinated and effective measures, applied in a coherent[35] way with sufficient safeguards. According to the Court, *"Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned"*[36]. Thus, such approaches need to respect the overall objective of the Directive, namely to ensure biodiversity and to maintain or restore, at a favourable status, natural habitats and species of Community interest[37].

(59) The following paragraphs are intended to explain the link between conservation status, the use of different instruments and their appropriateness and effectiveness.

(60) In general terms, surveillance or an initial assessment of conservation status can conclude that the status of a species is either favourable or unfavourable (classified in different grades). Based on the best available information, the Member States should then define — in accordance with the provisions of the Directive — the specific conservation measures needed to maintain (a favourable) or restore (an unfavourable) conservation status for each species.

(61) At this stage, the question as to **what types of measures are obligatory** under the Directive arises depending on the annex in which a species is listed. Chapter II will deal in more detail with the concept of 'requisite measures to establish a system of strict protection' under Article 12. At this point, it will only be noted that certain measures, though important or appropriate for a species, might not be required under the provisions of the Directive depending on the annex in which a species is listed in. In relation to the species protection section, it is important to recognise that proactive habitat management measures (such as restoration of habitats/populations, improvement of habitats) are not an obligation under Article 12, even though they might well be under Article 6. For example, if proactive biotope restoration is needed for a butterfly species listed only in Annex IV(a) because its habitat has nearly disappeared and only a larger habitat would ensure long-term survival, such a measure would not be covered by Article 12. Such situations could be avoided or corrected in the medium to long term by revision of the annexes or the Directive itself.

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[35] Coherence in this context means that flexibility and proportionality cannot be applied only when this seems convenient (for example only when granting derogations) but must at the same time be applied to the requisite measures for the effective protection of species under the strict protection system, so that overall implementation is in line with the objectives of the Directive.

[36] Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 112, and judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraph 66.

[37] If the Commission considers that such an approach does not comply with the Directive, it needs to prove that this is the case (see, for example, the judgment of 6 November 2003, Commission v UK, Case C-434/01, ECR p.13239, paragraph 21).

(62) Overall, the following main scenarios can be distinguished:

1. If the measures required for a specific species are obligatory under the Directive, there are two possible scenarios:

   - The Member State implements sufficient and verifiable measures to maintain or restore FCS, which is confirmed by the surveillance results; in that case, the measures and surveillance should be continued;

   - The Member State does not implement sufficient and verifiable measures to maintain or restore FCS. This means that it is not complying with its obligations, which normally constitutes an infringement of the Directive.

2. If the measures required for a species (or parts of it) are not obligatory under the Directive (e.g. active biotope restoration or reintroduction for a species exclusively listed in Annex IV), there are two possibilities:

   - The Member State implements voluntarily sufficient and verifiable measures to maintain or restore FCS, which is confirmed by the surveillance results; in that case, the measures and surveillance should be continued;

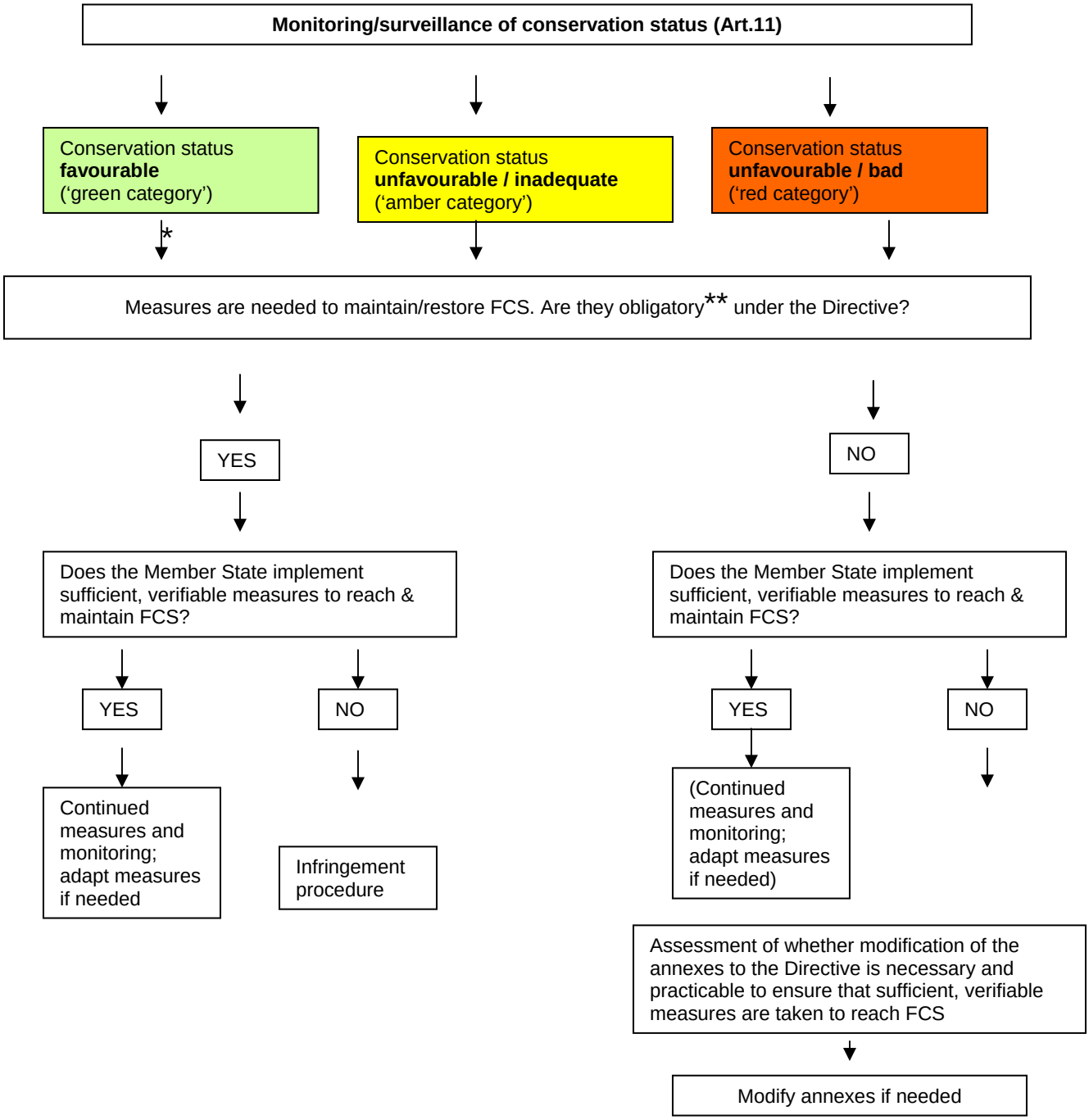
   - The Member State does not implement sufficient and verifiable measures to maintain or reach FCS. In such a case, the need for further action needs to be assessed, which might include modification of the annexes to the Directive if this is the appropriate way of ensuring FCS for a species. Modification of the annexes could involve adding a species listed only in Annex IV to Annex II or upgrading a species to priority status. If modification of the annexes is not likely to bring results, more far-reaching adaptations or additional instruments might be considered[38].

(63) This demonstrates the importance of designing appropriate and effective measures in combination with a surveillance system to monitor the conservation status of species.

Summary: Measures taken by the Member States when implementing the provisions under the Directive should always be proportionate and appropriate to the objective pursued, i.e. maintaining and restoring favourable conservation status. The measures must be appropriate and effective on the ground. There might be some cases where appropriate measures are not obligatory under the Directive. Voluntary measures or adaptation of the Directive and its annexes may be envisaged in such cases.

[38] Annexes could also be modified to remove a species as well, since surveillance could reveal a species to be widely abundant.

APPROPRIATENESS AND EFFECTIVENESS OF MEASURES TAKEN



* Where monitoring shows that a species is in a favourable status with no need for measures to maintain this situation, and consequently no longer fulfils the criteria for Community interest, modification of the annexes (in this case, removal of the species) should be envisaged.

** This refers to the situation described in chapter 1.2.4.b.

II. ARTICLE 12

Text of Article 12
1. Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting: *(a) all forms of deliberate capture or killing of specimens of these species in the wild;* *(b) deliberate disturbance of these species, particularly during the period of breeding, rearing, hibernation and migration;* *(c) deliberate destruction or taking of eggs from the wild;* *(d) deterioration or destruction of breeding sites or resting places.* *2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.* *3. The prohibition referred to in paragraph 1 (a) and (b) and paragraph 2 shall apply to all stages of life of the animals to which this Article applies.* *4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.*

(1) As a part of the second pillar of Directive 92/43/EEC, Article 12 tackles the more specific question of the protection of Annex IV(a) species. Consequently, Article 12 places the emphasis on the direct threats faced by animal species listed in Annex IV(a) rather than the broader question of the conservation of their habitats — with the exception of 12(1)(d).

(2) Annex IV(a) encompasses a wide variety of species, from large, wide-ranging vertebrates to small invertebrates with very small home ranges. Some of these animal species benefit from the provisions of the section on 'habitat conservation' but others do not. In the case of species listed only in Annex IV, Article 12 is the main provision for achieving the conservation aim in Article 2.

(3) Before addressing the provisions of Article 12 in detail, it is worth recalling some general legal considerations that have previously been developed by the ECJ.

II.1. General legal considerations

(4) Effective implementation of Article 12 of Directive 92/43/EEC requires full, clear and precise transposition by Member States. According to established case law, "*the provisions of Directives must be implemented with unquestionable binding force and with the*

specificity, precision and clarity necessary to satisfy the requirements of legal certainty"[39]. For instance, a prohibition on using pesticides where this is likely to have seriously harmful effects on the balance of nature is not as clear, precise and strict as the prohibition of the deterioration of the breeding sites or resting places of protected animals as laid down in Article 12(1)(d)[40].

(5) According to the Court, the transposition of a Directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation; a general legal context may, depending on the content of the Directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the Directive with sufficient clarity and precision[41]. Any provisions setting up a strict protection framework should specifically address the issue of Annex IV(a) species protection and meet the requirements laid down by Article 12. It should be observed that the Court[42] emphasised the importance of this question in the *Caretta caretta* case. When asked by the Court to identify, and submit the wording of, the specific provisions in force in their legal system which it believed met the requirements laid down by Article 12, "*the Greek Government merely listed a series of laws, regulations and administrative measures without referring to any specific provisions capable of meeting those requirements.*" In consequence, given the specific character of Article 12, legislative or administrative provisions of a general character, e.g. a mere repetition of the wording of Article 12 in national legislation, may not always satisfy the requirements of species protection and guarantee the effective implementation of Article 12. The formal transposition of Article 12 into national legislation may not always guarantee its effectiveness and may need to be complemented by further implementing provisions to ensure strict protection based on the particularities, specific problems and threats faced by species or groups of species.

(6) When transposing the Directive, Member States must respect the meaning of terms and concepts used by the Directive so as to ensure uniformity in its interpretation and application[43]. This also implies that national transposition measures should guarantee the full application of the Directive without modifying its terms, selectively applying its provisions or adding supplementary conditions or derogations not provided for in the Directive[44]. As the Court has observed, *"faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories… It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise"*[45].

(7) For instance, the transposition of Article 12(1)(d) prohibiting the deterioration or destruction of breeding sites and resting places that are "*clearly perceptible*" or "perfectly *known and identified as such*" or prohibiting only the deliberate deterioration or destruction

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[39] See in particular the judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraph 27), but also the following judgments: 30 May 1991, Commission v Germany, Case C-59/89, ECR p.2607, paragraphs 18 and 24; 19 May 1999, Commission v France, Case C-225/97, ECR p.3011, paragraph 37; 17 May 2001, Commission v Italy, Case C-159/99, ECR p.4007, paragraph 32.

[40] See the judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraphs 67-68.

[41] For instance: judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 21.

[42] See paragraph 29 of the judgment in Case C-103/00.

[43] For instance: judgment of 28 March 1990, Criminal proceedings against G. Vessoso and G. Zanetti, joined cases C-206 and 207/88, ECR p.1461.

[44] Judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraph 28.

[45] See for instance the judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 25-26 and the judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraphs 59-60.

of breeding sites or resting places[46] modifies the substance of Article 12(1)(d) and limits its scope of application. The same goes for the exemption of lawful acts from the application of Article 12(1)(d). This kind of transposition is therefore incompatible with Article 12(1)(d).

(8) In addition, "*mere administrative practices, which by their nature may be changed at will by the authorities, cannot be regarded as constituting proper compliance with the obligation on Member States to which a Directive is addressed, pursuant to Article 189 of the Treaty*"[47]. It has to be stressed that the existence of national case law alone, with no specific legal provision, cannot be considered as properly complying with the obligation to fully transpose a Directive.

Summary: Effective implementation of Article 12 requires full, clear and precise transposition by Member States. The provisions in their laws must be specific enough to be capable of meeting the requirements of the Directive.

The *Caretta caretta* Judgment

The judgment of 30 January 2002 in the *Caretta caretta* case (Commission versus Greece, Case C-103/00) was the first judgment on the application of Article 12 of the Habitats Directive (Directive 92/43/EEC) for a specific species. The Court had never given an interpretation on its application and scope prior to this judgment.

The loggerhead sea turtle (*Caretta caretta*) is listed in Annexes II and IV to Directive 92/43/EEC as a species of Community interest in need of strict protection. Laganas Bay on the island of Zakynthos is the most important breeding site for this turtle in the Mediterranean and has also been proposed as a Site of Community Importance for the Natura 2000 network.

In 1998, a number of non-governmental organisations exposed the deterioration in the conditions for this species of sea turtle on Zakynthos. The main problems were uncontrolled use of the island's beaches and the surrounding sea for tourism-related activities, including, among other things, the erection of illegal buildings, the use of mopeds on beaches and other activities with potential negative impacts on these turtles. The Commission called on the Greek authorities to provide information on the measures taken to protect the species on this island. Based on this information and the findings of Commission officials on missions, an infringement procedure under Article 226 of the Treaty was initiated on the grounds that Greece had failed to fulfil its obligations under Article 12(1)(b) and (d) of the Habitats Directive. In the course of the pre-litigation procedure, the Greek authorities maintained that all the appropriate measures to ensure the protection of the turtle had been taken or were in the process of being adopted and implemented.

After an updated assessment of the situation by the Commission services in 1999, it was still found to be inadequate and the case was referred to the Court of Justice. More specifically, the Commission alleged that Greece had contravened this Article, firstly by not adopting a legal framework designed to ensure the strict protection of *Caretta caretta* against any deliberate disturbance during its breeding period and against any deterioration in, or destruction of, its breeding sites and secondly by not taking any concrete, effective measures on the ground to avoid such problems.

[46] See also the Court judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 79.

[47] For example: judgment of 23 February 1988, Commission v Italy, Case 429/85, ECR p.843, paragraph 12; judgment of 11 November 1999, Commission v Italy, Case C-315/98, ECR p.8001, paragraph 10; judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraph 28.

On 30 January 2002, the Court accepted the Commission's arguments and condemned Greece for its failure to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakynthos. In particular, the Greek authorities had not taken the requisite measures to avoid disturbance of the species during its breeding period and activities that may bring about deterioration or destruction of its breeding sites.

II.2. Requisite measures for a system of strict protection

(9) Article 12 of Directive 92/43/EEC obliges Member States to take requisite measures to "establish and implement an effective system of strict protection"[48] for the animal species listed in Annex IV(a) in their natural range. This wording leads to several questions as regards the definition of certain terms.

(10) The Directive, while clearly setting out the prohibitions, does not define in detail the "requisite" measures for their implementation and for the establishment of a "system" of strict protection for each of the species concerned. The interpretation and implementation of Article 12(1)(a) to (d) should take into account the aim of the Directive as laid down in Article 2. Article 12 should not be interpreted as requiring the adoption of pro-active habitat management measures, such as for example the restoration or improvement of habitats for certain species. Thus, the Directive gives a certain margin of manoeuvre to the Member States, which are responsible for defining, adopting and implementing the requisite measures establishing a "system" of strict protection for each of the animal species listed in Annex IV(a). However, the discretionary power of Member States is subject to some limitations and should respect some basic requirements.

II.2.1. Measures to establish and effectively implement a system of strict protection

(11) The Commission considers that the full and effective application of Article 12 requires, on the one hand, the establishment of a coherent legal framework, i.e. the adoption of specific laws, regulations or administrative measures to effectively prohibit the activities indicated in Article 12(1), and, on the other hand, the application of concrete measures to enforce these provisions on the ground for the protection of Annex IV(a) species.

(12) The Court also adopted this approach in Cases C-103/00 (concerning the protection of *Caretta caretta* in Zakynthos[49]), C-518/04 (concerning the protection of *Vipera schweizeri* in Milos[50]) and C-183/05 (concerning the protection of several Annex IV species in Ireland[51]). In particular, in Case C-103/00, the Advocate General provided a detailed analysis of the significance and scope of the concept of "system of strict protection".

(13) This concept is fundamental for the application of Article 12. In the *Caretta caretta* case, the Court declared that Greece had failed to fulfil its obligations under 12(1) of Directive 92/43/EEC, since it had failed to take "*the requisite measures to establish and implement an effective system of strict protection for the sea turtle Caretta caretta on Zakynthos to avoid disturbing the species during its breeding period and to avoid activities which may deteriorate or destroy its breeding sites*." Thus, full application of Article 12

[48] See the judgment of 30 January 2002, Commission v Greece, Case C-103/00, ECR p.1147.

[49] Judgment of 30 January 2002, Commission v Greece, Case C-103/00, ECR p.1147. See also the judgment of 17 January 1991, Commission v Italy, C-157/89, ECR p.57 (in particular paragraph 14), which concerns Article 7 of Directive 79/409/EEC.

[50] Judgment of 16 March 2006, Commission v Greece, Case C-518/04, ECR p.42.

[51] Judgement of 11 January 2007, Commission v Ireland, Case C-183/05, not yet published in the ECR.

requires the establishment and implementation of a system of strict protection which effectively prohibits the activities indicated in Article 12(1).

(14) To summarise the above, an adequate system of strict protection for Annex IV(a) species consists in **a set of coherent and coordinated measures of a preventive nature**. This results directly from the term "system" and also takes account of the need to establish a link between the adopted measures and the objectives of Article 12 and the Directive in general. These measures must contribute to the aim of maintaining the species in the long term or restoring its population in its habitat and must be **effectively enforced**.

(15) Moreover, this interpretation is borne out by recitals 3[52] and 15[53] of the Directive, which refer to the encouragement of human activities and to management measures with a view to maintaining or restoring species at a favourable conservation status. Of course, the recitals themselves do not have any binding legal effect and can never override the substantive provisions of the Directive. The Court does not use the preamble to directly ground a judgment. However, the preamble is often used as an aid in interpreting the substantive provisions of secondary legislation[54].

(16) The need for coherent and coordinated measures of a preventive nature in order to implement the requirement for the strict protection of Annex IV(a) species does not necessarily imply the establishment of new structures or authorisation procedures at national level. Regarding projects that may affect an Annex IV species, **Member States can adapt existing planning procedures to meet the requirements of Article 12.** This means that assessment of the impact on species can be built into the appraisals that form part of existing decision-making processes at various levels in a Member State, including e.g. land-use planning decisions. With regard to ongoing activities, all Member States will most likely employ planning procedures, regulations or best practice codes, which could then be used as tools to implement Article 12 provisions.

Summary: The full and effective application of Article 12 requires, on the one hand, the establishment of a legal framework of coherent and coordinated measures and, on the other, the application of concrete, coherent and coordinated measures to enforce these provisions on the ground effectively.

II.2.2. Measures to ensure favourable conservation status

(17) The interpretation of Article 12 has to take into consideration the objective of Directive 92/43/EEC[55] set out in Article 2, which applies, without distinction, to all Annexes. Consequently, strict protection measures adopted under Article 12 should aim to fulfil the main objective of the Directive by contributing to the maintenance or restoration, at favourable conservation status, of Annex IV(a) species of Community interest, while taking into account economic, social and cultural requirements and regional and local characteristics.

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52 "Whereas the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities."

53 "Whereas a general system of protection is required for certain species of flora and fauna to complement Directive 79/409/EEC; whereas provision should be made for management measures for certain species, if their conservation status so warrants, including the prohibition of certain means of capture or killing, whilst providing for the possibility of derogations on certain conditions".

54 For example, judgment 28 February 1991, Commission v Germany, Case C-57/89, ECR p.883.

55 See chapter I.2.1.

(18) Furthermore, Article 12 has to be interpreted in the light of Article 1(i), which defines the favourable conservation status of a species. In addition, the measures taken by the Member States should be appropriate with a view to attaining the objective of maintaining or restoring the conservation status of a species. This implies that the measures to be taken must be decided depending on the particular circumstances of each situation and taking into account the specificity of each species. For instance, the characteristics of a species, such as its conservation status, may justify more specific or intense protection measures.

Summary: Strict protection measures adopted under Article 12 must contribute to fulfilling the main objective of the Directive, namely maintaining or restoring a favourable conservation status.

II.2.3. Measures regarding the situations described in Article 12

(19) The scope and type of measures taken to establish a system of strict protection are circumscribed by the content of the prohibitions and other obligations in Article 12 (see also chapter II.3). Consequently, the measures taken must relate to actions that threaten the species (12(1)(a)-(c), 12(2), 12(4)) or defined elements of their habitats (Article 12(1)(d)). Article 12 does not, in itself or in conjunction with Article 2, oblige Member States to take proactive habitat management measures. What is required are measures to effectively implement the prohibitions of Article 12.

(20) It is obvious that different types of measures may be required to address each specific species listed in Annex IV and each specific situation. In addition, as already stated in chapter II.1, mere repetition of the wording of Article 12 in national legislation may not always satisfy the requirements of species protection. The transposition of Article 12 into national legislation should guarantee its effective implementation. Based on the particularities, specific problems and threats faced by species or groups of species, Member States should adopt provisions specifically for their protection. It is the responsibility of national authorities to define the measures necessary to implement the prohibitions of Article 12 and to ensure the strict protection of animal species. The nature of these measures will depend on each national system.

(21) However, for some species and in some situations, the adoption and implementation of purely prohibitive measures may not be sufficient, and may not guarantee effective implementation of Article 12. In such cases, Article 12 requires the adoption and implementation of preventive measures. It is also evident from the wording of Articles 12 and 1(i), and from the objective of "maintaining" a favourable conservation status, that Member States are bound by their obligations under Article 12 even before any reduction in numbers of the species has been confirmed or the risk of this protected species disappearing has become a reality[56]. Even if a species has a favourable conservation status and is likely to have this in the foreseeable future, Member States should take preventive measures to protect the species by effectively prohibiting the activities indicated in Article 12.

(22) This view was supported in Cases C-103/00, C-518/04 and C-183/05, where the Court stressed the importance of the preventive character of the measures taken[57]. The Court rejected the Greek Government's argument that a decrease in the number of nests needed to be proved in order to demonstrate the absence of strict protection for *Caretta*

[56] See in particular paragraph 43 of the Advocate General's opinion and paragraph 31 of the *Caretta caretta* judgment, as well as paragraph 21 of the *Vipera schweizeri* judgment.

[57] This solution had already been applied in the Santoña case (judgment of 2 August 1993, Commission/Spain, Case C-355/90, ECR, p.4221, paragraph 15).

caretta. According to the Court *"the fact that it does not appear that the number of nests of that species has decreased over the last 15 years does not, of itself, call this finding into question"*, i.e. the absence of a system of strict protection for *Caretta caretta*. The same goes for arguments such as the good state of the environment or the stability of a species population. It clearly follows that the measures to be taken under Article 12 should not be purely prohibitive but should also be of a preventive nature.

(23) Such an approach is also founded on Article 174 of the EC Treaty, according to which "*Community policy on the environment shall aim at a high level of protection*", and is based on the precautionary principle and on the principle that preventive action should be taken. Preventive measures anticipate the threats and risks a species may face and are particularly important in preventing deterioration or destruction of breeding sites or resting places of Annex IV(a) species (Article 12(1)(d)). Preventive measures that at the same time ensure effective implementation of the prohibitions in Article 12 "on the ground" could include for example:

- information campaigns to raise awareness among a general or targeted public (e.g. landowners, etc.) of the protection requirements for certain species;
- action to have species protection considerations taken into account by relevant economic sectors interfering with Annex IV species (e.g. agriculture, forestry) to avoid the negative impacts of certain land-use practices. This could include training, codes of conduct, guidance documents, or the adaptation of forestry or agricultural plans and best practice or administrative procedures.
- active prevention of likely disturbances (e.g. restricting access to bat caves during sensitive periods to avoid disturbance or vandalism)
- inspections
- preparation of national conservation plans, which could set out in detail the measures mentioned above and provide practical guidance to local/regional authorities, affected interest groups, etc. in effectively implementing provisions for specific species

National Species Action Plans in Sweden

Sweden has put forward about 120 National Action Plans for threatened species that will be developed and initiated in the period 2003 – 2006. A National Action Plan (NAP) is not a legal document, but serves as guidance for authorities, organisations and landowners on important actions needed to conserve species and to review their ecology and present-day status. The NAP normally sets out the division of responsibility among relevant bodies.

The establishment of an NAP is coordinated by one of the 21 County Administration Boards. They normally do not write the plan themselves, but contract an expert (there is a guidance document on how to write NAPs and on the adoption procedure). When the Administration Board and the Swedish Environmental Protection Agency (SEPA) agree that there is a good draft available, the plan is circulated for consideration by relevant bodies and experts. Based on comments received, the plan is modified and finally adopted by the SEPA. The NAP normally includes a draft budget, provided by the SEPA and other bodies. SEPA's present annual budget (2005) for producing and implementing plans is about 6.5 million euros.

Main elements of a Swedish NAP:

- Formal decision by the Swedish EPA to adopt the NAP
- Time period, follow-up and review of the Plan
- Brief description of the species, their ecology and biology, and genetic aspects (if relevant)

- Distribution and conservation status
- Status in relation to national and international legislation and commitments
- Reasons for decline and identified threats
- Experiences from previous actions (if any)
- Vision for the future and gap analyses
- Short-term and long-term NAP objectives
- Priority measures to be taken
- Recommendations targeting municipalities, landowners and others
- Description of consequences to other species/habitats and conflicts of interests
- References
- Appendices (maps, diagrams, and a table with an overview of all agreed actions, actors, priorities, costs and finance)
- Summaries in Swedish and English

The plans, which usually cover a period of several years, are supported by yearly plans dealing with the concrete action to be undertaken. Approximately 40 NAPs have so far been established, e.g. for *Hyla arborea, Bombina bombina, Osmoderma eremita, Margaritifera margaritifera, Ursus arctos* and many others. The programme is ongoing, will probably gain a larger budget in the coming years, and is coupled with environmental objectives approved by the Swedish parliament.

Consequently, for some species, preventive measures would also form part of the "requisite measures" for the system of strict protection. They are not the same as proactive biotope management measures such as restoration or habitat improvement.

Summary: Measures to be taken under Article 12 are circumscribed by the content of the prohibitions and other obligations in Article 12. However, as national legislation should guarantee the effectiveness of Article 12, the formal transposition of Article 12 prohibitions may not be sufficient and Member States should define the measures necessary to implement the prohibitions of Article 12 and ensure the strict protection of species. In addition, for some species and in some situations, the adoption and implementation of preventive measures may be required. Preventive measures anticipate the threats and risks a species may face and are particularly important in preventing deterioration or destruction of the breeding sites or resting places of Annex IV(a) species.

II.2.4. Provisions of Article 12(1) (a)-(d) in relation to ongoing activities

(24) While the application of protection provisions can be clearly linked to development permitting procedures, for e.g. construction projects and infrastructure, ongoing activities such as **agriculture and forestry**[58], for example, pose a more complex set of issues. The majority of activities and practices in these sectors are not subject to prior approval or consent and it would be disproportionate to impose a comprehensive set of controls along these lines. It is also important to recognise the positive contribution that many traditional farming and forestry practices make to the creation and maintenance of some of Europe's most valued habitats (e.g. semi-natural grasslands such as hay meadows or species-rich *Nardus* grassland). The Directive does nevertheless apply to these sectors and Member States do therefore have to meet their obligations to protect the species concerned. This

[58] As very widespread activities, agriculture and forestry are looked at in detail in this chapter. However, while the level of statutory control over ongoing activities may vary, the principles set out in this chapter should be seen as generally applying to other ongoing activities as well (e.g. fisheries, tourism, maintenance activities, etc.)

does not necessarily mean that new structures or authorisation procedures should be introduced at national level. All Member States will most likely have planning procedures, regulations or best practice codes in place, and these tools could be adapted in order to apply Article 12 to ongoing activities. **Independently of the option chosen to apply Article 12 to ongoing activities (creation of a new mechanism or adaptation of existing mechanisms), Member States have to ensure that the strict protection requirements are adequately met.** As agriculture and forestry differ significantly on this point, they are discussed separately.

(25) As regards **agriculture**[59], a number of Member States opt for preventive measures to ensure Article 12 compliance, in part by developing **guidance and codes of conduct**. It is important to note that basic farming practice rules will include the protection of features — such as hedges, ponds, etc. — which are most likely to be the habitat of the species concerned. This approach is seen to be appropriate and effective in contributing to the protection of these species, providing a high chance of success. The range of species concerned is very wide, however, and in some cases Member States have thought it appropriate to produce more detailed species-specific guidance. The Directive nevertheless requires that such approaches and tools complement rather than replace formal legal protection, i.e. if these tools (e.g. codes of conduct, best practices) are ignored, there must be legal procedures in place in order to ensure an effective system of strict protection for animal species.

(26) In this context, it should be stressed that the occurrence of protected species in e.g. agricultural land is often the result of traditional land-use and farming practices, usually of an extensive nature. Where land-use practices are clearly supportive of the conservation status of a species under consideration, it is obvious that the continuation of such practices should be encouraged. Accidental disturbance or killing of individuals of the species concerned by such practices needs to be accepted in the interest of the population as a whole (applying proportionality to achieve the overall objective). Where however an ongoing land use (due to changes of practices, intensification, etc.) is clearly damaging to a species, leading to decreases in its population in the area, a Member State is required to find ways to avoid this.

The UK approach of integrating species protection in ongoing activities

In the UK, there are two "layers" for protecting species during ongoing activities: the first is legislative, the second comprises a range of good practice guidance available to farmers, foresters, building professionals, etc. By following good practice guidance, land managers should be able to continue their normal activities and at the same time avoid the deterioration or destruction of the breeding sites / resting places of Annex IV species. Maintaining or restoring optimum habitats for populations is seen as more important than the unintentional loss or disturbance of individuals that might occur as result of ongoing activities. By raising awareness of the possible presence of such species and by giving advice on action that land managers can take, the chances of offences against species are minimised.

[59] With respect to the relationship between agriculture and environment protection, the 2003 reform of the Common Agricultural Policy is significant in two key respects. Firstly, it has broken the link between Community subsidies and the productivity of farmland. The majority of farmers will now receive a Single Farm Payment no longer related to their productivity. The incentive for farmers to increase productivity will in future be solely determined by economic considerations set by market prices. Secondly, a condition for receiving Single Farm Payments and any other support from the CAP will be compliance with a number of environmental standards established in Community environment legislation (known as cross-compliance) and thus observance of a set of basic farming practice rules.

Government agencies in the UK consequently provide a range of practical guidance on protected species aimed at informing property managers. This ranges from simple general guidance (e.g. on newts on farmland) to comprehensive conservation handbooks (e.g. for the dormouse *Muscardinus avellarnarius*). It is disseminated via the internet or as leaflets to people managing farms, forests or even buildings that host protected species, for example information brochures such as 'Great crested newts on your farm', 'Woodland management for bats' and 'Bats in buildings'.

The guidance provides land-owners with

1. information on how to know if a listed species inhabits the property
2. a simple description of the species concerned, supported by illustrations
3. information on the biology and ecological requirements of the species
4. a simple description of the annual life cycle and relationship with the annual management practices of interest to land managers
5. advice on how to prevent damage to species and their habitats and how ongoing activities might be adjusted to favour species protection
6. information on the need for some management operations to have a licence and where to apply for it
7. examples of concrete activities that are damaging to species
8. information on the legal protection status and possible legal consequences in cases where the law might be breached
9. essential contact information on who can help and give advice
10. information on grant schemes available (Environmental Stewardship)

(27) Applying Article 12 to **forestry** is, in some respects, more complex in that it is more likely that the trees to be harvested are themselves the habitat (breeding site/resting place) of some of the species concerned. The specific characteristics of the sector, i.e. the long production cycles and consequently the need for long-term planning add to the special challenges of species conservation. In the search for sustainable forest-management practices, which are consistent with conservation requirements, a variety of approaches have been developed in different Member States to address the issue. Existing approaches vary from detailed forestry planning and prior approval of forest management plans, or general codes of practice, to the pre-notification (see Finnish example below) of felling proposals to permit environmental authorities to intervene where known populations of protected species may be involved. As in the case of agricultural practices, these preventive approaches can ensure the protection of the species concerned, provided that they are communicated effectively and are implemented with good will and sufficient resources. A particular economic incentive to follow such approaches is in fact provided by the growing prevalence of forest certification schemes, which require compliance with environmental protection requirements including biodiversity and species protection (the approaches may of course need to be adapted to conform to the protection requirements of Annex IV species). However, such approaches do not provide an absolute guarantee, except where full prior approval of forest management plans is required, and must (as indicated above) be supported by a legal protection regime as required by the Directive.

Species protection in ongoing forestry management in France

In France, ongoing forestry practices are regulated in both public and private forests. A law adopted in 2001 provides that the management of forests must be sustainable and must guarantee the preservation of biodiversity. The implementation of this law is supported by different types of management plans and codes of good practice depending on whether a

forest is private or public and depending on its size. These documents are approved by the administrative authorities and take full account of protected habitats and species. However, these documents do not stand alone: they are accompanied by awareness-raising, information and training of forest owners and managers so that they can make an active contribution to the implementation of Article 12. Coherent cooperation between the different levels (national, regional, local) is also ensured by planning, information and guidance instruments.

The French forestry plans go beyond the protection of current species occurrences and habitats: they also target the long-term viability of species populations, taking into account their conservation needs over time as well as space. Two examples illustrate this:

Certain bat species need large areas of forest to survive in the long term. A bat-sensitive forest management therefore needs to provide — over a longer-term perspective — the structures needed and other requirements for a sufficiently large habitat, while at the same time allowing for the use and renewal of the forest. Consequently, local, mostly unavoidable deterioration or destruction of bat habitats during the exploitation of single parcels of forests will — due to the overall planning, codes of good practice and safeguards applying on a broader scale to the woodland as a whole — not have any influence on the conservation status of the species in the woodland as such. This situation was confirmed in a special study carried out in the "Rambouillet" forest near Paris.

Another example is the wood-boring beetle *Rosalia alpina*, which inhabits mature broadleaf trees in mountainous forests. During its larval development, it is virtually impossible to detect the presence of the insect in a tree. It is therefore more or less unavoidable that breeding sites and resting places of the beetle will be destroyed during forest exploitation. The management of this species, as laid down in the management plan, therefore targets the long-term preservation of a network of islands with trees likely to be used by the beetle in order to guarantee the conservation status of the species.

(28) The conclusion that can be drawn is that ongoing activities should best be guided so as to avoid conflicts with the species protection provisions in the first place. Tools such as planning instruments, systems of prior consent, codes of conduct and concrete information or guidance are options here. Such measures should:

a) form part of the "requisite measures" needed under Article 12 to "establish and implement an effective system of strict protection",
b) incorporate the strict protection requirements,
c) offer flexibility, i.e. while recognising that absolute protection for all individuals of a species cannot be guaranteed, ensure that any harmful action takes full account of the conservation needs of the species/population concerned,
d) have the advantage that they potentially protect the person engaging in an activity (i.e. from prosecution) as long as the person adheres to these measures.
e) be accompanied by a legal framework for strict protection which ensures adequate enforcement by the regulatory authorities in the case of non-compliance (legal certainty aspects are met)
f) help define appropriate levels of surveillance (required under Article 11 of the Directive) and determine how these should be funded,
g) be in line with Article 2(3) by taking account of economic, social and cultural requirements.

Integrating flying squirrel protection in Finnish forestry

In June 2004 a new legislative protection system was established in Finland to enhance the protection of the breeding sites and resting places of the flying squirrel *(Pteromys volans)*. Under the Forestry Act, a forest owner must notify the regional forest authorities before cuttings take place. The notification must include a map and a short description of planned cuttings. All known breeding and resting places of the squirrel are stored in a database. If a planned cutting site matches information in the database, a formal decision is taken by the environmental authorities. The landowner, the forest company concerned and the regional forest authority are informed. The decision includes a detailed description of the site and a map indicating the location of the breeding sites and resting places. It also lays down what measures, if any, are allowed.

The experience so far shows that there are some problems, such as time-consuming procedures, diverse technical problems, and scientific problems especially in identifying the breeding and resting places, and that the system needs to be improved. On the other hand, it is already evident that the system has improved cooperation and the exchange of information and data between the forest authorities and environment authorities and that it provides landowners with more accurate and updated information on the species they have an obligation to protect. The ecological and economic effects of the system need to be assessed in the near future.

A lot of Member States have used voluntary measures, such as agro/forestry environmental measures under rural development regulation, to support the implementation of Article 12. Such measures have the potential to successfully combine the preventive approach with (voluntary) proactive habitat management.

Developing measures for species protection under rural development regulation & LIFE-nature

The occurrence of large predators protected by the Habitats Directive can sometimes lead to conflicts with farmers and foresters. A characteristic of these large predators is their mobility within very large territories, usually beyond specific Natura 2000 sites designated for them. Large predators may have an impact on ongoing activities, mainly livestock farming (e.g. sheep herding), due to predation. These protected species are widely known by farmers and the need to protect them due to their continuously decreasing numbers is also well communicated and documented. Actions to mitigate the impacts of these species on ongoing activities have been examined for many years. Several measures have been tested with support from the LIFE-nature programme[60] and put in place with support from agri-environmental projects to prevent damage, such as the installation of electric fences, the provision of sheepdogs to watch over herds, the provision of natural prey, improvement of the habitat and feeding possibilities within this habitat, etc., and/or to provide compensation for damage encountered.

Measures of this type have been included in the rural development plans of some Member States. For example, Greece's rural development plan includes the following measures:
1. acquiring and using sheep dogs in areas where wolf and bear are present;
2. installing and maintaining electric fences to protect crops and hives in areas with bears;

[60] For details on LIFE-nature and the projects funded by this programme, please go to http://ec.europa.eu/environment/life/life/nature.htm

3. cultivation of special plots of cereals or fruit trees by farmers to provide food resources for (among others) bears.
These voluntary measures aim at preventing damage from large carnivores, complementing national legislation that prohibits all kinds of actions that have a negative effect on the species, like killing, trapping, baits, etc. Similar measures are included in the rural development programmes of various French regions with populations of large predators.

These positive examples of practices that contribute to species management and protection can in some cases also entail some negative impacts for other protected species in Annex IV, which might be locally disturbed. However, looking at the overall picture, such measures contribute to the protection of Annex IV species and also to good pastoral management.

Summary: For ongoing activities, such as agriculture or forestry, the challenge is to apply the species protection provisions of Article 12 using appropriate means in order to avoid conflicts in first place. The use of tools such as planning instruments, codes of conduct and concrete information/guidance are options here and potentially can satisfy the specific conservation needs while taking into account economic, social and cultural requirements. However, these tools need to be accompanied by a legal framework for strict protection which ensures adequate enforcement by the regulatory authorities in cases of non-compliance.

II.3. The specific protection provisions under Article 12

II.3.1. Deliberate capture or killing of specimens of Annex IV(a) species

(29) Article 12(1)(a) prohibits all forms of deliberate capture or killing[61] of specimens of these species in the wild. In accordance with Article 12(3), this prohibition applies to all stages of life of the animals. According to Article 1(m), *"specimen means any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species."*

(30) This prohibition is important as it is linked with the population of a species (its size, dynamics, etc.), which constitutes one of the criteria under Article 1(i) for assessing the conservation status of a species. Killing or capture may lead to an immediate, direct (quantitative) decline in a population, or could have other more indirect (qualitative) negative effects. The prohibition covers deliberate capture or killing, not incidental capture or killing, which falls under Article 12(4).

(31) In Case C-103/00, the Court referred to the element of "intent", observing that: "*the use of mopeds on the breeding beaches was prohibited and notices indicating the presence of turtle nests on the beaches had been erected. As regards the sea area around Gerakas and Dafni, it had been classified as an absolute protection area and special notices had been erected there.*" Despite the information available to the public on the need to protect these

[61] In its judgment of 18 May 2006 (Commission v Spain, case C-221/04, ECR p.4515, paragraph 69) the Court clarified that it is clear from a reading of the different language versions that "deliberate" refers to both the capture and killing of protected animal species.

areas, the persons on the beach committed the infringements[62]. This constituted a failure of enforcement. Thus, the Court "*seems to interpret the term 'deliberate' in the sense of conscious acceptance of consequences*"[63].

(32) In Case C-221/04[64], the reasoning of the Court was more specific. In that case, the Commission brought an action before the Court because, due to the authorisation by the authorities in Castilla y León of snares in several private hunting areas, Spain had failed to comply with Article 12(1)(a) as regards the protection of the otter (*Lutra lutra*). The Court recalled the findings of the *Caretta caretta* case and stated that ***"for the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing"***[65]. This is used as a "requisite criterion" by the Court, which in the present case found that the contested permit related to fox hunting and accordingly was not in itself intended to allow the capture of otters. In addition, the Court stressed that the presence of otters in the area concerned had not been formally proven, so that it had also not been established that the Spanish authorities knew that they risked endangering otters by issuing the contested permit for fox hunting. Thus, the Court concluded that the requisite criteria for determining that the capture or killing of a specimen belonging to a protected animal species was deliberate had not been met[66].

(33) On the basis of the approach taken by the Court in cases C-103/00 and C-221/04, the following definition could be proposed: **"Deliberate" actions are to be understood as actions by a person who knows, in light of the relevant legislation that applies to the species involved, and the general information delivered to the public, that his action will most likely lead to an offence against a species, but intends this offence or, if not, consciously accepts the foreseeable results of his action.** In other words, not only a person who fully intends to capture or kill a specimen of an animal commits an offence: an offence is also committed by a person who might not intend to capture or kill a specimen but is sufficiently informed and aware of the consequences his action will most likely have and nevertheless performs the action, leading to the capturing or killing of specimens (e.g. as an unwanted but accepted side-effect), with reckless disregard of the known prohibitions (conditional intent). It goes without saying that negligence is not included in the meaning of "deliberate".

(34) Therefore, it would seem appropriate to alert the public, or other more limited categories of people (e.g. certain categories of land users) who are likely to interfere with a species in Annex IV(a), to the prohibitions that apply to listed species using appropriate means. The public relations work of the Scottish Natural Heritage in relation to bats is an example of this (see http://www.snh.org.uk, publications on bats). The beach notices in the *Caretta caretta* case constitute another.

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62 In Case C-103/00, the Court emphasised the fact that both the driving of mopeds and the presence of small craft were not isolated occurrences. In practical terms, it seems that, in the case of *Caretta caretta*, the repeated character of the violations was decisive in proving the existence of deliberate disturbance.

63 See paragraph 118 of the Advocate General's Opinion in Case C-6/04.

64 Judgment of the Court of 18 May 2006, Commission v Spain, Case C-221/04, ECR p.4515.

65 See paragraph 71 of the judgment.

66 See paragraphs 72-74 of the judgment.

Summary: Article 12(1)(a) prohibits all forms of deliberate capture or killing of specimens of Annex IV(a) species in the wild. The term "deliberate" has to be interpreted as going beyond "direct intention". A person who is reasonably expected to know that his action will most likely lead to an offence against a species, but intends the offence or, if not, at least accepts the results of his action, commits an offence. Good information and guidance by the competent authorities seem an appropriate way of implementing these provisions.

II.3.2. Deliberate disturbance of Annex IV(a) species, particularly during periods of breeding, rearing, hibernation and migration

(35) Article 12(1)(b) prohibits the deliberate disturbance of Annex IV species especially during periods of breeding, rearing, hibernation and migration, where the species are more vulnerable[67]. Under Article 12(3), moreover, this prohibition applies to all stages of life of the animal species concerned.

II.3.2.a) Disturbance

(36) Neither Article 12 nor Article 1 of Directive 92/43/EEC contains a definition of the term "disturbance". Article 6 guidelines[68] contain some useful information on the term in relation to habitats. If we apply the Commission services' guidelines to Article 12, we may observe the following:

(37) Disturbance (e.g. by noise, source of light) does not necessarily directly affect the physical integrity of a species but can nevertheless have an indirect negative effect on the species (e.g. by forcing them to use lots of energy to flee; bats, for example, when disturbed during hibernation, heat up as a consequence and take flight, so are less likely to survive the winter due to high loss of energy resources). The intensity, duration and frequency of repetition of disturbances are important parameters when assessing their impact on a species. Different species will have different sensitivities or reactions to the same type of disturbance, which has to be taken into account in any meaningful protection system. Factors causing disturbance for one species might not create disturbance for another. Also, the sensitivity of a single species might be different depending on the season or on certain periods in its life cycle (e.g. breeding period). Article 12(1)(b) takes into account this possibility by stressing that disturbances should be prohibited particularly during the sensitive periods of breeding, rearing, hibernation and migration. Again, a species-by-species approach is needed to determine in detail the meaning of "disturbance".

(38) The disturbance under Article 12(1)(b) must be deliberate (see chapter II.3.1) and not accidental. On the other hand, while "disturbance" under Article 6(2) must be significant, this is not the case in Article 12(1), where the legislator did not explicitly add this qualification. This does not exclude, however, some room for manoeuvre in determining what can be described as disturbance. It would also seem logical that for disturbance of a protected species to occur a certain negative impact likely to be detrimental must be involved.

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[67] In Case C-75/01 (judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraphs 53-54), the Court declared that Luxembourg had failed to ensure the full and complete transposition of Article 12(1)(b), since deliberate disturbance of species was not prohibited during the period of migration.

[68] "Managing Natura 2000 sites - the provisions of Article 6 of the Habitats Directive 92/43/EEC"; see, in particular, points 3.4, 3.5 and 3.6.2.

(39) In order to assess a disturbance, consideration must be given to its effect on the conservation status of the species at population level and biogeographic level in a Member State (see also chapter III.2.3.a on "Scale of assessment"). For instance, any disturbing activity that affects the survival chances, the breeding success or the reproductive ability of a protected species or leads to a reduction in the occupied area should be regarded as a "disturbance" in terms of Article 12. On the other hand, sporadic disturbances without any likely negative impact on the species, such as for example scaring away a wolf from entering a sheep enclosure in order to prevent damage, should not be considered as disturbance under Article 12. Once again, it has to be stressed that the case-by-case approach means that the competent authorities will have to reflect carefully on the level of disturbance to be considered harmful, taking into account the specific characteristics of the species concerned and the situation, as explained above.

(40) On the question of deliberate disturbance of a species during the breeding period, concerning *Caretta caretta* in Zakynthos, the Court analysed, on a case-by-case basis, the various activities on the breeding beaches with a view to establishing the causal link between these activities and the disturbance of the species. It found, first of all, that driving mopeds on a breeding beach of *Caretta caretta* was likely to disturb this species, mainly because of the noise nuisance, particularly during the egg-laying, incubation and hatching period and when the young turtles were making their way out to sea. Lastly, according to the judges, it was clear that the presence of small craft close to the breeding beaches constituted a threat to their lives and well-being.

Summary: Disturbance need not directly affect the physical integrity of a species but can nevertheless have a direct negative effect. Disturbance is detrimental for a protected species e.g. by reducing survival chances, breeding success or reproductive ability. A species-by-species approach needs to be taken as different species will react differently to potentially disturbing activities.

II.3.2.b) Periods of breeding, rearing, hibernation and migration

(41) The periods of breeding, rearing, hibernation and migration are considered as especially sensitive periods in relation to disturbance. There is, however, no definition of these terms in the Habitats Directive. Nevertheless, similar terms (e.g. "period of reproduction", "return to the breeding areas"[69]) are used in the Birds Directive, where they are defined in the context of birds. As Annex IV(a) includes a much wider range of species, which are very different ecologically, biologically and behaviourally, it is necessary to use, once more, a "species-by-species" approach when defining periods of breeding, rearing, hibernation and migration (where those periods apply at all).

(42) Period of breeding and rearing:

This period may include (where applicable) the period of courtship, mating, nest construction or selection of egg-laying or parturition[70] site, parturition or egg laying, or production of offspring where reproduction is asexual, egg development and egg hatching, and rearing of young.

(43) Period of hibernation:

[69] 'Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds' (to be found under http://www.europa.eu.int/comm/environment/nature/home.htm).

[70] Parturition – act of giving birth.

Hibernation is a period of time when an animal becomes inactive and remains in a state of sleep, a torpid or resting state, usually during winter. Usually such a state is accompanied by a lowered body temperature and slowed heartbeat and breathing. Hibernation allows an animal to survive harsh conditions by using less energy than if it were active (for example some bats, rodents, amphibians or reptiles)

(44) Period of migration:

Migration is the periodic movement of animals from one area to another as a natural part of their life cycle, usually in response to seasonal changes or changes in the food supply.

Summary: The periods of breeding, rearing, hibernation and migration are considered as especially sensitive periods in relation to disturbance. These periods can be defined only using a species-by-species approach, due to ecological, biological and behavioural differences between species.

II.3.3. Deliberate destruction or taking of eggs from the wild

(45) Under Article 12(1)(c), deliberate destruction or taking of eggs from the wild is proscribed. As it protects the eggs of species, this provision protects the species population and its viability in the long-term.

II.3.4. Deterioration or destruction of breeding sites or resting places

(46) Article 12(1)(d) is a stand-alone provision. Contrary to the other prohibitions of Article 12, it does not concern directly the species but protects important parts of their habitats, as it prohibits deterioration or destruction of breeding sites or resting places. In addition, while points (a), (b) and (c) of Article 12(1) use the term "deliberate", this is not the case as far as point (d) is concerned. This prohibition presents a number of issues that need further clarification.

II.3.4.a) Consequences of the word "deliberate" not being included in Article 12(1)(d)

(47) Under points (a), (b) and (c) of Article 12(1) only deliberate acts are prohibited and have to be avoided, whereas under point (d) a deliberate act is not required as a necessary precondition[71]. Article 12(1)(d) requires all acts resulting in deterioration or destruction of breeding sites or resting places to be prohibited irrespective of whether they are deliberate or not[72]. Apparently, the Community legislator has focused on the two important areas of breeding sites and resting places and decided that stricter measures are needed. The Court confirmed that "*by not limiting the prohibition laid down in Article 12(1)(d) of the Directive to deliberate acts, which it has done in respect of acts referred to in Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding sites or resting*

[71] It is worth mentioning that this point constitutes one of the differences between Directive 92/43/EEC and the Bern Convention. While this specific part of Article 12 lacks the word "deliberate", the term appears in the comparable wording of Article 6 of the Bern Convention.

[72] In its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraph 79), the Court observed that *"by prohibiting only the deliberate damaging or destruction of breeding sites or resting places of the species concerned, the legislation applicable in Gibraltar does not satisfy the requirements of Article 12(1)(d)".* The Court followed the same approach in its judgement of 11 January 2007 (Commission v Ireland, Case C-183/05, not yet published in the ECR, paragraph 47): *"by providing that acts which unintentionally interfere with or destroy breeding sites or resting places of wild species do not constitute an offence, section 23(7)(b) of the Wildlife Act does not satisfy the requirements of Article 12(1)(d) of Directive 92/43, which prohibits such acts, whether they are intentional or not*".

places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts"[73].

(48) In criminal law, a distinction is made between intentional/deliberate and unintentional acts. "Deliberate" also covers situations where the result is not directly intended but the person ought to have taken into account the consequences that could follow from his action. This clearly indicates that, when leaving out the word "deliberate" from subparagraph (d), the intention was to include non-deliberate acts leading to deterioration or destruction in the provision as well. This introduces a special quality to this provision: all deterioration or destruction of breeding sites or resting places is to be effectively prohibited, i.e. avoided.

(49) However, this does not mean that proactive habitat management measures are required under Article 12(1)(d) of the Directive (e.g. to actively manage a meadow for butterflies). Nonetheless, in order to protect breeding sites or resting places from deterioration, a simple prohibition in a legal text is not sufficient and must be supported by an adequate enforcement mechanism, including preventive measures. The lack of the word 'deliberate' underlines the importance of preventive action. Under a strict protection system, Member States should anticipate the threats sites may face from human action and take measures to ensure that those likely to commit an offence (intentionally or not) are aware of the prohibition in force and act accordingly.

(50) However, the deterioration of natural habitats may take place naturally (including through natural succession after cessation of a certain land use like agriculture) or be caused by unforeseeable events, so that the habitat is no longer a suitable breeding site or resting place for certain species. In this case, where no act has been committed to provoke deterioration/destruction of breeding sites or resting places but, where this has arisen through natural causes, Article 12(1)(d) cannot be applied[74].

(51) It should be stressed that, in the *Caretta caretta* case, the Court declared that the presence of buildings on a beach used by the species for breeding was liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d) of the Directive[75]. Significantly, the Court did not use the Commission's wording, which referred to "illegal" buildings. The mere fact that buildings had been built there and were liable to cause deterioration and destruction was the overriding argument for the Court. Therefore, the construction of buildings on a beach classified as "an absolute protection area" and where "special notices had been erected" is sufficient to constitute an infringement of Article 12(1)(d).

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[73] See the judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraph 55.

[74] The appropriate instrument for dealing with deterioration due to natural causes or unforeseeable events is Article 6(2) of the Habitats Directive. In its judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraph 34), the Court stated that *"in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate."*

[75] According to paragraph 38 of the judgment, "there is no doubt that the presence of buildings on a breeding beach such as the one at Dafni is liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d) of the Directive".

Summary: The word "deliberate" covers not only situations where a certain result is directly intended but also situations were the person committing an offence knows the consequences of his action but accepts them, even if not directly intended. The fact that the word "deliberate" is not used in Article 12(1)(d) underlines the importance of preventive action by Member States to avoid all likely deterioration or destruction caused by humans. Cases of deterioration or destruction resulting from natural causes (i.e. not directly the consequence of human activities, e.g. natural disasters) or caused by unforeseeable events, do not fall within the scope of Article 12(1)(d).

II.3.4.b) Identification of "breeding sites and resting places"

(52) Although Article 12(1)(d) explicitly refers to the protection of "breeding sites" and "resting places" of species listed in Annex IV(a), neither Article 12(1)(d) nor Article 1 of the Directive provide any specific definitions.

(53) In the light of the objectives of the Directive, however, breeding sites and resting places may be considered to require strict protection because they are crucial to the life cycle of animals and are very important parts of a species' entire habitat[76], needed to ensure its survival. Their protection is directly connected with the conservation status of a species. The provision in Article 12(1)(d) should therefore be understood as **aiming to safeguard the ecological functionality** of breeding sites and resting places. Thus, Article 12(1)(d) ensures that such sites and places are not damaged or destroyed by human activities so that they can continue to provide all that is required for a specific animal to rest or to breed successfully.

(54) It thus follows from Article 12(1)(d) that such breeding sites and resting places also need to be protected when they are not being used, but where there is a reasonably high probability that the species concerned will return to these sites and places. If for example a certain cave is used every year by a number of bats for hibernation (because the species has the habit of returning to the same winter roost every year), the functionality of this cave as a hibernating site should be protected in summer as well so that the bats can re-use it in winter. On the other hand, if a certain cave is used only occasionally for breeding or resting purposes, it is very likely that the site does not qualify as a breeding site or resting place.

(55) The identification of general criteria for breeding sites and resting places is difficult, because Annex IV(a) lists species from many taxa with many different life history strategies. It is not possible to provide a rigid definition of "breeding site" and "resting places" that will apply to all taxa. Any interpretation of the terms "breeding sites" and "resting places" must therefore take into account this variety and reflect different prevailing conditions. The following general definitions aim to provide guidance that will allow species-specific definitions to be prepared in the form of individual dossiers for each of the species listed under Annex IV(a) of the Directive. The definitions are based on the assumption that the sites in question can be identified and reasonably delimited. They are intended to be used as a checklist of elements to be considered when preparing individual species dossiers; meaning that not all these elements will be applicable to all species (e.g. *Canis lupus* has no clearly definable mating site). Knowledge gaps for species can be identified here. For example, the current information on *Caretta caretta* permits only breeding sites (i.e. the beaches) to be well defined, with resting places (in marine areas) not yet determined.

[76] Article 1(f) defines the "habitat of a species" only as "an environment defined by specific abiotic and biotic factors, in which the species lives at any stage of its biological cycle".

However, with improved knowledge and increased research, resting sites may be delimited in future.

(56) The two definitions below are detailed in separate sections, though in practice they will often interlink and overlap and so could be considered together.

(57) ***Breeding sites: a definition***

Breeding is defined here as: mating, giving birth to young (including egg laying) or production of offspring where reproduction is asexual. A breeding site is defined here as the areas needed to mate and to give birth in and covers also the vicinity of the nest or parturition site, where offspring are dependent on such sites. For some species, a breeding site will also include associated structures needed for territorial definition and defence. For species that reproduce asexually, a breeding site is defined as the area needed to produce offspring. Breeding sites that are used regularly, either within or between years, must be protected even when not occupied.

(58) The breeding site may thus include areas required for:

1. courtship;
2. mating;
3. nest construction or selection of egg-laying or parturition[77] site;
4. place used for the purpose of parturition or egg laying or production of offspring where reproduction is asexual;
5. place of egg development and egg hatching;
6. nest or parturition site when occupied by young dependent on that site;

(59) ***Resting places: a definition***

Resting places are defined here as the areas essential to sustain an animal or group of animals when they are not active. For species that have a sessile stage, a resting place is defined as the site of attachment. Resting places will include structures created by animals to function as resting places. Resting places that are used regularly, either within or between years, must be protected even when not occupied.

(60) Resting places essential for survival may include one or more structures and habitat features required for:

1. thermoregulatory behaviour, e.g. *Lacerta agilis*;
2. resting, sleeping or recuperation, e.g. *Nyctalus leisleri* roosts;
3. hiding, protection or refuge e.g. *Macrothele calpeiana* burrows;
4. hibernation, e.g. bat dormitories; *Muscardinus avellanarius* hides.

Examples of breeding sites and resting places

	Breeding site	**Resting place**
Triturus cristatus *(see also*	All points of the definition apply to *T. cristatus*. The pond used for mating has individual male territories within which	During the terrestrial phase of its life, *T. cristatus* makes use of refuges such as stones and logs to hide under during the day. Similar refuges are used for periods of hibernation (in cold regions) or

[77] parturition – act of giving birth

dossier in Annex III)	courtship and mating take place. Eggs are laid singly on emergent plants and mature over a period of 12 – 18 days. Young larvae emerge and swim freely. The pond is therefore the breeding site.	summer dormancy (in hot regions). During the aquatic phase of their life, adults and larvae make use of submerged and emergent vegetation as a place of refuge. *T. cristatus* does not migrate but does disperse to adjacent pools. Healthy populations of *T. cristatus* utilise a series of pools and move between them, dispersing over a suitable interconnecting terrestrial habitat. Individuals may move approx. 1 km from their natal pool. The resting places for *T. cristatus* are thus the ponds they inhabit and the adjacent terrestrial habitat that supports them during the terrestrial part of their life cycle.
Nyctalus Leisleri	Males establish mating territories in tree holes in the autumn. Mating takes place in late autumn and females delay fertilisation until the spring. Young are born in a maternity roost and are dependent on their mother until they are weaned in the summer. Male territories and maternity roosts are therefore breeding sites. This strict application of the definition omits winter hibernation roosts, which are covered by "resting places" in Article 12(1)(d)	Hibernation *N. leisleri* is principally a tree-dwelling bat that hibernates over winter. In the winter they roost in tree-holes, buildings and occasionally caves and tunnels that provide a suitable microclimate. They will also utilise artificial roost boxes. Tree roosts have been found in parkland and urban areas as well as deciduous and coniferous woodland. These roosts must be in a relatively undisturbed position as bats roused from their torpor expend valuable energy reserves that cannot be replaced in winter. Day roosts during their active period (in spring) are also essential to all bat species, requiring a relatively undisturbed site during daylight hours, again in the cracks and crevasses of old trees and buildings. Depending on their location, a colony may use several summer roosts in turn, the larger of which may be used as maternity roosts, while males will become solitary or live in small groups. Migration *N. leisleri* is known to migrate in some parts of its European range: individuals ringed in Germany have been found to winter in France and Switzerland (National report 2003). Exact migration patterns are not known. However, other populations appear more sedentary with both maternity and winter roosts located in the same location. Roosts used by *N. leisleri* to rest during the day and to hibernate in are resting

		places.
Osmoderma eremita	All points of the definition apply to *O. eremita* This saproxylic species lives for the majority of its life within the rot-filled cavities of mature deciduous trees, usually of the *Quercus* species. A high proportion of individuals do not leave the natal tree. Mating takes place inside the substrate, and eggs are deposited deep within the substrate. The development from egg to beetle takes several years. Pupae develop in the autumn; adults emerge in the late spring / early summer. A series of mature and substantially hollow deciduous trees, usually *Quercus* sp. with heart rot, being used by the species is the breeding site for *O. eremita*.	Resting place and breeding site are in effect synonymous for *O. eremita*. This saproxylic species lives for the majority of its life within the rot-filled cavities of mature deciduous trees, usually of the *Quercus* species. A high proportion of individuals do not leave the natal tree. Mating takes place inside the substrate, and eggs are deposited deep within the substrate. The development from egg to beetle takes several years. Pupae develop in the autumn; adults emerge in the late spring / early summer. A series of mature and substantially hollow deciduous trees, usually *Quercus sp*. with heart rot, being used by the species is the resting place for *O. eremita*.
Maculinia arion	Points 1 to 5 of the definition apply to *M. arion*. *M. arion* requires a site with its larval food plant (*Thymus* species) and larval host and food source, *Myrmica* ant nests, to complete its development. Eggs are laid in the bud of a *Thymus* flower where they feed and develop. At a certain stage, the larva drops from the plant and attracts an ant to pick it up and take it into the ants nest. The larva continues its development within the nest, predating ant larvae. Pupation occurs within the nest and the adults emerge in early summer. The breeding sites for *M. arion* will be a site with *Thymus* sp. plants close to the site of adult emergence and the *Myrmica* ant nest where the larvae and pupae develop.	This species has no clearly defined resting places other than those needed for larval development and pupation. These life stages are covered by the definition of breeding site on the left.

(61) The prohibition of Article 12(1)(d) can consequently be seen as an aspect of habitat conservation, albeit covering only specific parts of the biological cycle. Other parts of the habitat, e.g. feeding areas, are not covered unless they coincide with breeding sites or resting places. An example of this is the butterfly species, *Parnassius apollo*, whose breeding sites coincide with locations where adults lay eggs and caterpillars live and feed (in Finland, stands of the plant species *Sedum telephium*). Consequently, a proper implementation of Article 12(1)(d) requires a good knowledge of the ecology (biology, habitats, population size, distribution and dynamics) and behaviour of the species (life cycle, organisation, interaction within and between species).

(62) **'Narrower' or 'wider' definition of breeding sites and resting places?** Discussions in the Article 12 working group and elsewhere have shown that the "framework" definition given above provides room for different interpretations. This is also because of the great variety of species listed in Annex IV. One frequent debate concerns whether breeding sites and resting places should be delimited in a narrower or a wider sense. For example, the wood-boring beetle *Osmoderma eremita* lives for the majority of its life within the rot-filled cavity of mature deciduous trees, usually of the *Quercus* species, and a high proportion of individuals do not leave the natal tree: so what is its breeding site and resting place? Is it the single tree or is it maybe that part of the woodland with trees inhabited by *O. eremita*? There are arguments for both views. From the Commission services' point of view the 'wider' definition seems to be more meaningful here in conservation terms, as it allows the woodland as a whole to be taken into account, linking both the protection measures under Article 12 and any derogations under Article 16 to the wider unit of the woodland and focusing on the continued functionality of that site as a whole for the species under consideration. Besides the advantage of a more holistic approach to species protection, this also allows more flexibility when considering impacts on such sites. In the Commission services' view, however, this approach seems more feasible for species with relatively **small home ranges**.

(63) The species dossier on *Triturus cristatus* (see box above) assumes overlapping breeding sites and resting places, stating that "*The functional unit needed to maintain a viable T. cristatus population thus comprises a series of ponds, the majority of which will be resting places and a proportion of which will be breeding sites, as well as a proportion of other areas which will be resting places set within a suitable terrestrial habitat*." This view of an ecological / functional unit suits a species with a small home range. The 'local' population of such a species could play a role in such a definition.

(64) The situation is different for **wide-ranging species**. The particular problem posed by wide-ranging species is already recognised in Article 4(1) of the Directive. Here, it may be advisable to restrict the definition of a breeding and resting site to a locality that can be clearly delimited: e.g. the roosts for bats or the holt of an otter.

(65) In the *Caretta caretta* case, the Court did not give any definition of breeding sites and resting places for species and followed a case-by-case/species-by-species approach. In the case in question, the Court emphasised the importance of Laganas Bay, which was (easily) identified as a "*vital breeding region for the protected species Caretta caretta*"[78]. This clearly identifiable area has the physical and biological factors essential for the reproduction of the species (marine area and nesting beaches). This prudent approach of the Court seems due to the fact that it is difficult to establish a general definition of "breeding sites" and "resting places" because of the wide range of differences in the ecological characteristics of species.

Summary: Breeding sites and resting places are to be strictly protected, because they are crucial to the life cycle of animals and are vital parts of a species' entire habitat. Article 12(1)(d) should therefore be understood as aiming to safeguard the continued ecological functionality of such sites and places, ensuring that they continue to provide all the elements needed by a specific animal to rest or to breed successfully. The protection applies all year round if these sites are used on a regular basis.

[78] Paragraph 27 of the judgment.

II.3.4.c) Concept of "deterioration"

(66) Neither Article 12(1)(d) nor Article 1 of Directive 92/43/EEC contains a definition of the concept of "deterioration", although this term is also present in other provisions of the Directive (e.g. Article 6).

(67) In general, deterioration can be defined as physical degradation affecting a habitat, or a breeding site or resting place. In contrast to destruction, such degradation may occur slowly and **gradually reduce the functionality** of the site or place. Deterioration may therefore not immediately lead to a loss of functionality of a site/place, but would adversely affect functionality in terms of quality or quantity and might over a certain period of time lead to its complete loss. Because of the wide variety of species listed in Annex IV(a), the assessment of deterioration of a particular breeding site or resting place must be carried out on a case-by-case basis. Again, deterioration or destruction that is the result of natural causes (not human-caused) or unforeseeable events does not fall under the scope of Article 12(1)(d). Neither does the deterioration of a site due to natural succession as a consequence of the abandonment of certain human land-uses or the abandonment of a building.

(68) When trying to identify and avoid the causes that lead to the deterioration or even loss of breeding/resting functionality, it is important to establish a clear **cause-effect relationship** between one or more human-induced activities and the deterioration/destruction of a breeding site or resting place. Obviously, the causes for deterioration can be located inside or outside, or possibly even at some distance from, the breeding site or resting place under consideration. Such causes/activities then need to be controlled in such a way that deterioration and destruction can be avoided. Only a clear view of the causes will enable the authorities to act accordingly and avoid further or future deterioration or destruction.

(68a) In cases where the deterioration/destruction of a breeding site or resting place is due to diffuse causes, it will probably be difficult to establish a clear cause-effect relationship with a human-induced activity. For instance, where there is a gradual deterioration (eutrophication) of water bodies due to a complexity of sources in terms of time and origin, it will be difficult to establish a clear cause-effect relationship with agricultural activities. In these situations, it is very unlikely that an infringement of Article 12 can be proven, in particular if the activity complies with obligations arising from other relevant EC environmental legislation, e.g. the Nitrates Directive.

(69) Focusing on the functionality of breeding sites and resting places and the establishment of a cause-effect relationship also gives guidance on the matter of divergences between **different linguistic versions** regarding the term "deterioration". The terms used in the German, Danish, Dutch and Swedish versions of Article 12(1)(d)[79] correspond rather more to the word "damage" than "deterioration". Nonetheless, in Article 6(2) of the Directive, the German version uses a word which corresponds slightly better to "*deterioration*". Given this discrepancy between different language versions, it should be recalled that the Court has on earlier occasions stressed the necessity for uniform application and ruled out the possibility of considering one single version of a text in isolation. Hence, the Court holds that such provisions must be interpreted on the basis of the actual intention of the author and the aim pursued in the light of all language versions[80].

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[79] The German, Danish, Dutch and Swedish versions of Article 12.1(d) employ the terms *"Beschädigung", "beskadigelse", "beschadiging"* and *"skada"* (damage), respectively.

[80] See the following judgments: 12 November 1969, Stauder, case 29/69, ECR 1969 p.419, paragraph 3; judgment of 27 October 1977, Bouchereau, case 30/77, ECR 1977 p.1999, paragraph 14; judgment of 12 July

(70) In order to define the limits of what one can regard as "deterioration", a scrupulous analysis of Article 12(1)(d) as a whole is indispensable. The purpose of Article 12 is to introduce a system of strict protection for Annex IV(a) species. The explicit protection of breeding sites and resting places in addition to the protection of the species as such, without the qualification "deliberate", demonstrates the importance granted to these sites by the Directive. This specific protection against the deterioration or destruction of breeding sites and resting places is self-evidently linked with the essential function of these sites, which must continue to provide all the elements required by a specific animal (or group of animals) to breed or to rest.

(71) Examples of deterioration under Article 12(1)(d):

- (Repeated) filling in of parts of spawning grounds for the crested newt (*Triturus cristatus*), thereby reducing (in sum) its function as a breeding site.
- Deterioration in the function of parts of a hamster burrow as a breeding and resting place as a result of deep ploughing.
- Hydraulic engineering step by step in a river that is a resting and breeding site for *Acipenser sturio*, so as to gradually reduce the functionality of the site.
- Gradual negative impact on a water soldier (*Stratiotes aloides*) population, which is an egg-laying site for the green hawker (*Aeshna viridis*), due to a point-source discharge into the water body.

Summary: Deterioration can be defined as physical degradation affecting a breeding site or resting place. In contrast to destruction, such degradation might also occur slowly and gradually reduce the functionality of the site or place. If it is possible to establish a clear cause-effect relationship between one or more human-induced activities and the deterioration of a breeding site or resting place, Article 12(1)(d) applies.

II.3.4.d) Measures to ensure the continued ecological functionality of breeding sites or resting places

(72) For cases where projects or activities may have an impact on breeding sites / resting places the distinction between measures under Article 12(1)(d) and those that come under Article 16 needs to be examined. In particular, to what extent are measures that ensure the continued ecological functionality of a concrete breeding site/resting place possible, thereby ensuring compliance with Article 12 (and not requiring derogations under Article 16). The decisive question when drawing the line is: "Does or will a breeding site / resting place suffer from deterioration or destruction (even if only temporarily) due to a certain project/activity?" If the answer is "yes", Article 16 needs to be applied; if the answer is "no", it is reasonable to assume that Article 12 is complied with.

(73) What are "measures that ensure the continued ecological functionality of a breeding site/resting place" (in the following "CEF measures")?

(74) First of all, they must have the character of mitigation measures. Mitigation measures aim at minimising or even cancelling out the negative impact of an activity through a range of preventive actions. However, they may also go beyond this and include actions that actively improve or manage a certain breeding site / resting place so that it does not — at any time — suffer from reduced or lost ecological functionality. This could include e.g. enlarging the site or creating new habitats in, or in direct functional relation to, a breeding

1979, Wörsdorfer, case 9/79, ECR 1979 p.2717, paragraph 6; judgment of 7 July 1988, Moksel, Case 55/87, ECR 1988, p.3845, paragraph 15.

site or resting place, as a counterweight to the potential loss of parts or functions of the site. The ecological functionality of such measures for the species in question would of course have to be clearly demonstrated.

(75) CEF measures may be an option when an activity can affect parts of a breeding site or resting place. If the breeding site or resting place, as a result of such measures, will still remain at least the same size (or greater) and retain the same quality (or better) for the species in question, there will be no deterioration in the function, quality or integrity of the site and the activity can be undertaken with no need for a derogation under Article 16. It is crucial that the continued ecological functionality of the site is maintained or improved. Therefore, the monitoring of CEF measures is important. An interesting approach in this regard is outlined in a Dutch publication entitled "Effective protection of Annex IV species of the EU Habitats Directive: The landscape approach"[81].

(76) In accordance with the precautionary principle, if the measures proposed do not guarantee the continued ecological functionality of a site, they should not be considered under Article 12(1)(d). There must be a high degree of certainty that the measures are sufficient to avoid any deterioration or destruction. The assessment of the probability of success must be made on the basis of objective information and in the light of the characteristics and specific environmental conditions of the site concerned. In addition, the use of CEF measures has to take into account the conservation status of the species concerned. For example, in the case of rare species with an unfavourable conservation status, there must be a higher degree of certainty that the measures will work as intended than in the case of more common species with a favourable conservation status.

(77) CEF measures could be an integral part of the specifications of an activity or project; they could also form part of preventive measures under a strict protection system to comply with Article 12(1)(d). Such measures can be used only in situations where an authorisation or planning regime with formal procedures is in place, and where the competent authorities are able to assess whether the measures taken to preserve the "breeding" or "resting" functionality of a site are sufficient.

(78) Based on the definition of breeding sites and resting places (see chapter II.3.4.b), the approach outlined above seems especially relevant when dealing with animals with small home ranges, where breeding sites / resting places are delimited as "functional units" (i.e. the wider approach is used). Here, it should be stressed that a Member State must be **consistent in its definition** of breeding sites and resting places for a given species and consequently in providing for their protection across its territory.

(79) CEF measures are different from compensatory measures in the strict sense. Compensation measures are independent of an activity/project and aim to compensate for or offset specific negative effects on a species. By definition, **compensatory measures thus imply the deterioration or destruction of a breeding site or resting place** (the effect compensated for). This is not the case with CEF measures, which ensure that the continued ecological functionality of the breeding site/resting place remains fully intact (in quantitative and qualitative terms). Consequently, where there is deterioration or destruction of a breeding site or resting place, a derogation under Article 16 is always necessary. Chapter III.2.3.b deals with the use of compensation measures under Article 16.

[81] Alterra report n° 590, Wageningen, September 2002 (available in English)

Summary: Measures that ensure the continued ecological functionality of a breeding site/resting place in the case of projects/activities with a possible impact on such sites/places must have the character of mitigation measures (i.e. measures minimising or even cancelling out the negative impact), but may also include measures that actively improve or manage a certain breeding site / resting place in such a way that it does not — at any time — suffer from a reduction or loss of ecological functionality. As long as this precondition is fulfilled and such processes are controlled and monitored by the competent authorities, there is no need for recourse to Article 16.

II.3.5. Keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild

(80) For Annex IV(a) species, Article 12(2) states that: "Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented." Article 12(3) stipulates that the prohibitions in Article 12(1)(a) and (b) and Article 12(2) apply to all life stages of Annex IV(a) species.

II.3.6. Incidental capture and killing of Annex IV(a) species

(81) Article 12(4) requires the establishment of a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States have to undertake further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.

(82) It should be stressed that Article 12(4) could be of relevance in defining the requirements of both a "strict protection system" and an "appropriate surveillance system". A system of strict protection can also make provision for recording the incidental capture and killing of species (for Article 12(4)). In this context, the strict protection measures may ultimately need to include conservation measures required to offset the negative impact of incidental capture and killing.

(83) An example for the application of this provision is the monitoring of the by-catch of Cetaceans in the fisheries sector and the technical measures taken to avoid such incidents (e.g. attachment of pingers to fishing nets). Another example is the monitoring of bat deaths in wind turbines or roadkills.

III. ARTICLE 16

Text of Article 16
1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b): *(a) in the interest of protecting wild fauna and flora and conserving natural habitats;* *(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;* *(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;* *(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;* *(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.* *2. Member States shall forward to the Commission every two years a report in accordance with the format established by the Committee on the derogations applied under paragraph 1. The Commission shall give its opinion on these derogations within a maximum time limit of 12 months following receipt of the report and shall give an account to the Committee.* *3. The reports shall specify: (a) the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used; (b) the means, devices or methods authorised for the capture or killing of animal species and the reasons for their use; (c) the circumstances of when and where such derogations are granted; (d) the authority empowered to declare and check that the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons are to carry out the task; (e) the supervisory measures used and the results obtained.*

(1) The system of strict protection under Article 12 may be bypassed through derogations under Article 16 of the Directive. A number of activities that would normally be prohibited under Article 12 can be permitted by means of Article 16. In practice, consideration of the application of Article 12 will often arise in conjunction with a derogation argued for under Article 16.

(2) The possibilities in Article 16 for derogating from the restrictions and prohibitions in Articles 12, 13, 14 and 15(a) and (b) are limited. Derogations not only must be justified in relation to the overall aim of the Directive, but are subject to three specific conditions.

(3) The failure to respect any one of these conditions may render a derogation invalid. The competent national and other authorities or conservation bodies must therefore carefully examine all those general and specific requirements before granting a derogation.

(4) Before addressing the provisions of Article 16 in detail, it is worth underlining that the ECJ has already developed a quite extensive case law on derogations under Article 9 of Directive 79/409/EEC on the conservation of wild birds. Given the similarity between the derogation systems established by the two Directives, the reasoning of those judgments is of great importance and can be applied to Article 16[82].

III.1. General legal considerations

III.1.1 Obligation to ensure full, clear and precise transposition of Article 16

(5) The transposition into national law of Article 16 should guarantee the implementation of the derogations by the competent national authorities in an appropriate manner. It should be recalled that a Directive is binding as to the result to be achieved, but leaves a Member State some choice as to the form and methods of achieving that result. However, the Court has set limits to this margin of manoeuvre for Member States when they transpose a Directive. Hence, the national transposition of the derogation system under Article 16 has to comply with some basic legal principles of EC law and must meet a number of requirements.

(6) According to ECJ case law[83], *"the transposition of a Directive into domestic law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation. A general legal context may, depending on the content of the Directive, be adequate for the purpose, provided that it does indeed guarantee the full application of the Directive in a sufficiently clear and precise manner."* Mere administrative practices, which, by their nature, are alterable at will by the authorities and which are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty and the Directive[84]. Accordingly, the application of the requirements of Article 16 in practice is not a substitute for proper formal transposition.

(7) Moreover, the provisions of the Directives must be implemented with unquestionable binding force, and with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty[85]. The Court was more explicit in Case C-339/87[86], which relates to derogations under Article 9 of Directive 79/409/EEC. The Court stated that "*the criteria which the Member States must meet in order to derogate from the prohibitions laid down in the Directive must be reproduced in specific national provisions, since a faithful transposition becomes particularly important in a case where the management of the common heritage is entrusted to the Member States in their respective territories.*" In its judgment of 20 October 2005, the Court applied this case law to the Habitats Directive and observed that "*in the context of the Habitats Directive, which lays down complex and*

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[82] The third chapter of the "Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds", which examines the derogation system under Article 9 of the Birds Directive, is a useful reference for the understanding of Article 16. The document is available on the website http://www.europa.eu.int/comm/environment/nature/home.htm.

[83] See the judgment of 28 February 1991, Commission v Germany, Case 131/88, ECR p.825.

[84] For example, see the judgment of 11 November 1999, Commission v Italy, Case C-315/98, ECR p.8001, paragraph 10.

[85] See in particular the following judgments: 30 May 1991, Commission v Germany, Case C-59/89, ECR p.2607, paragraphs 18 and 24; 19 May 1999, Commission v France, Case C-225/97, ECR p.3011, paragraph 37; 17 May 2001, Commission v Italy, Case C-159/99, ECR p.4007, paragraph 32; 13 February 2003, Commission v Luxembourg, Case C-75/01, paragraph 28, ECR p.1585, paragraphs 87-88; 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 27.

[86] Judgment of 15 March 1990, Commission v Netherlands, Case C-339/87, ECR p.851, paragraph 28.

technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise"[87].

(8) Finally, when transposing Article 16, Member States must respect the meaning of terms and concepts used by the Directive with the aim of ensuring uniformity in its interpretation and application[88]. This also implies that national transposition measures should guarantee the full application of the Directive, without modifying its terms, without selectively applying its provisions and without adding supplementary conditions or derogations not provided for by the Directive[89]. For instance, in Case C-6/04[90], the Court found that a derogation authorising acts that lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, provided such acts are lawful and cannot be reasonably avoided, *"is contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16 thereof"*. In Case C-98/03[91], the Court found that German law (paragraph 43(4) of the BNatSchG 2002) was not compatible with Article 16. The German provision provided as the sole condition for derogation that animals, including their nesting or incubation sites, habitat or resting places, and plant species under particular protection must not be subject to deliberate harm. According to the Court, "*even assuming that the two derogations at issue in this case must be the subject of administrative decisions, on the issuing of which the competent authorities do in fact comply with the conditions to which Article 16 of the Directive subjects the authorisation of derogations, the fact remains that Paragraph 43(4) of the BNatSchG 2002 does not provide a legal framework consistent with the derogatory regime established by Article 16. That provision of national law does not submit the grant of the two derogations in question to all of the conditions laid down in Article 16 of the Directive*". In case C-183/05[92], the Court considered that the regime of derogations under Irish legislation (Section 23(7)(b) of the Wildlife Act) was inconsistent with Articles 12 and 16 of Directive 92/43/CEE. The Irish provision provided that acts which unintentionally interfere with or destroy breeding sites or resting places of wild species do not constitute an offence. According to the Court, not only this provisions does not satisfy the requirements of Article 12(1)(d) of Directive 92/43, which prohibits such acts, whether they are intentional or not, but it goes beyond what is provided for in Article 16 of Directive 92/43, since the latter determines, in an exhaustive manner, the conditions under which derogations may be granted.

Summary: Article 16 must be fully and formally transposed with unquestionable binding force. The criteria to be met before granting a derogation must be reproduced in specific national provisions. National transposition measures should guarantee the full application of Article 16, without modifying its terms, without selectively applying its provisions and without adding supplementary conditions or derogations not provided for by the Directive. Mere administrative practices are not sufficient.

87 Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraphs 25-26.

88 For instance see the judgment of 28 March 1990, Criminal proceedings against G. Vessoso and G. Zanetti, joined cases C-206 and 207/88, ECR p.1461.

89 Judgment of 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585, paragraph 28.

90 Judgment of 20 October 2005, Commission v UK, Case C-6/04, paragraphs 109-113.

91 Judgment of 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53, paragraphs 57-62.

92 Judgement of 11 January 2007, Commission v Ireland, Case C-183/05, not yet published in the ECR, paragraphs 47-49.

III.1.2. Appropriate overall application of derogations

(9) Primarily, the national authorities responsible for applying derogations need to take into consideration that, under the case law of the Court of Justice[93], derogations must be interpreted and implemented restrictively to avoid undermining the main provisions of a Directive. This has been also confirmed for the Habitats Directive[94]. In the case of Directive 79/409/EEC, the Court has on several occasions underlined the need for strictness when implementing Article 9 derogations. Given that Article 9 has close parallels with Article 16 in terms of content, it can be reasonably assumed that the Court would take a similarly strict approach regarding the interpretation and implementation of Article 16.

(10) For derogations under Article 9 of Directive 79/409/EEC, the Court[95] has already noted that although Article 9 authorises wide derogations from the general system of protection, its application must deal with precise requirements and specific situations.

(11) As regards measures to be taken under Article 12, the need to implement appropriate and effective measures in a sufficient and verifiable manner has been underlined. The same approach can be followed for the derogations scheme. If used correctly, this ensures that granting derogations does not go against the objective of the Directive[96]. **Applying proportionality does not overrule or marginalise any of the conditions applying to the derogation scheme but can <u>adapt</u> their application in the light of the overall objective of the Directive. As a general rule, the severity of any of the conditions or "tests" will increase with the severity of the impact of a derogation on a species/population**.

(12) Allowing a valid derogation presupposes that the competent national authorities have ensured that all the conditions applying to all the derogations granted have been met and also that the derogations in their totality do not produce effects that go against the objectives of Article 12 and the Directive as a whole. Consequently, applying a proportional approach to the use of derogations needs careful consideration and framing at national and/or biogeographic level within a Member State. The authority with the greatest territorial overview in a Member State (and, if necessary, also a view extending beyond borders in the case of transboundary populations) thus needs to guide this proportional approach, even though it may then be applied in practice at regional or local level[97].

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[93] See the following judgments of the ECJ: judgment of 8 July 1987, Commission v Italian Republic, Case 262/85, ECR p.3073; judgment 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223; judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques v Région Wallonne, Case C-10/96, ECR p.6775.

[94] Judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 111 (*"Article 16 of the Habitats Directive defines in a precise manner the circumstances in which Member States may derogate from Articles 12, 13, 14 and 15(a) and (b) thereof, so that Article 16 must be interpreted restrictively"*).

[95] See in particular: judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 7; judgment of 8 July 1987, Commission v Italy, Case 262/85, ECR p.3073, paragraph 7; judgment of 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223, paragraph 21.

[96] It should be recalled that the Court observed that *"Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16"* (judgment of 20 October 2005, Commission v UK, Case C-6/04, ECR p.9017, paragraph 112).

[97] This of course does not exclude the possibility that, depending on the organisational structure in a Member State, regional or local authorities will also be in a position to consider the effects of derogations beyond their own territories.

Summary: Derogation provisions need to be interpreted narrowly: they must deal with precise requirements and specific situations. It is up to the competent authority with the greatest territorial overview to ensure that the totality of derogations in a Member State does not lead to effects that go against the objectives of the Directive.

III.2. A carefully controlled system for granting derogations: the 3 tests

(13) Article 16 sets three preconditions, all of which must be complied with before granting a derogation: 1) the demonstration of one or more of the reasons listed in Article 16(1) (a)-(e), 2) the absence of a satisfactory alternative and 3) the assurance that a derogation is not detrimental to the maintenance of populations at a favourable conservation status. Before the second and third preconditions can be examined, precondition 1 must be met: in practical terms, there is little point examining the issue of satisfactory alternatives and impact on conservation status if the actions concerned by the derogation do not come under Article 16(1) (a)-(e).

III.2.1. Demonstration of one of the reasons under Article 16(1)(a) to (e) (Test 1)

(14) Derogations are granted because there is a specific problem or situation which needs to be tackled. Derogations must be based on at least one of the reasons listed in Article 16(1)(a), (b), (c), (d) and (e). Specific derogations not justified by any of these reasons (e.g. a provision exempting acts that lead to the killing of protected species or to the deterioration or destruction of their breeding and resting places, provided they are the result of a lawful operation that cannot be reasonably avoided) are contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16[98]. When the competent national authorities are called upon to grant a derogation, they need to explain the particular circumstances justifying the choice of a reason under Article 16(1)(a) to (e) and verify that the specific conditions are met[99].

(a) In the interest of protecting wild fauna and flora and conserving natural habitats

(15) The first reason for granting a derogation is the protection of wild flora and fauna and the conservation of natural habitats. Article 16(1)(a) specifies neither the types of fauna, flora or natural habitats covered nor the types of threats. In the light of the general objective of the Directive, vulnerable, rare, endangered or endemic species and natural habitats (as for example listed in the annexes to the Habitats Directive) are more likely to be concerned by this reason, which would effectively aim to reduce the negative impact of a given species on them. It would be unusual to prioritise the interests of a common and thriving species over the interests of a species meeting the criteria of Article 1(c) and (g) of the Directive. However, one may not exclude other species and habitats completely from consideration.

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

[98] See also the Court judgment of 20 October 2005 (Commission v UK, Case C-6/04, ECR p.9017, paragraphs 109-113).

[99] See also the Order of 19 December 2006 (Commission v Italy, Case C-503/06 R).

(16) The second reason for granting a derogation is to prevent serious damage in particular to crops, livestock, forests, fisheries, water, and other types of property. This derogation takes into account economic interests, and, as noted, the damage to be prevented has to be serious.

(17) It is worth noting that the list is not exhaustive and other damaging situations may be covered. Moreover, property interests are also covered, which is not the case in Directive 79/409/EEC (the Birds Directive)[100].

(18) With regard to Article 9 of Directive 79/409/EEC, the Court noted that: "The aim of this provision of the Directive is not to prevent the threat of minor damage. The fact that a certain degree of damage is required for this derogation from the general system of protection accords with the degree of protection sought by the Directive."[101] It follows that mere nuisance and normal business risk are not covered."

(19) As this provision is intended to *prevent* serious damage, it is not necessary that the serious damage itself has already occurred; it is sufficient that such serious damage is likely to occur.

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

(20) The third reason for granting a derogation covers "imperative reasons of overriding public interest." This concept is not defined in the Directive but the paragraph mentions public interest reasons such as public health, public safety, reasons of social or economic nature, reasons with beneficial consequences of primary importance for the environment, and also covers other reasons not mentioned, as the list is not exhaustive.

(21) In other fields of Community law where similar concepts appear, for instance the free movement of goods, the European Court of Justice has held that overriding requirements or public interest reasons can justify national measures restricting the principle of freedom of movement: it has recognised public health, environmental protection, and the pursuit of legitimate goals of economic and social policy as such imperative requirements.

(22) The same concept also appears in Article 6(4) of the Directive. So far, the Court has not given clear indications for the interpretation of this specific concept. The Commission's analysis in the Article 6 guidance document[102] is pertinent for a better understanding of the concept and may be recalled here.

(23) Firstly, it is clear from the wording that only public interests, promoted either by public or private bodies, can be balanced against the conservation aims of the Directive. Thus, projects that are entirely in the interest of companies or individuals would generally not be considered as covered.

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[100] According to Article 9(1)(a), "Member states may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution,… to prevent serious damage to crops, livestock, forests , fisheries and water."

[101] Judgment of 8 July 1987, Commission v Belgium, Case C-247/85, ECR p.3029, paragraph 56.

[102] "Managing Natura 2000 sites - the provisions of Article 6 of the Habitats Directive 92/43/EEC", European Commission, 2000, ISBN 92-828-9048-1, also available on the website http://www.europa.eu.int. See, in particular, section 5.3.2.

(24) Secondly, the "overriding" character of this public interest must be underlined. This qualification implies that not every kind of public interest of a social or economic nature is sufficient, in particular when seen against the particular weight of the interests protected by the Directive. Careful balancing of interests is needed here. In this context, it also seems reasonable to assume that a public interest is in most cases likely to be overriding only if it is a long-term interest: short-term interests that would only yield short-term benefits would not be sufficient to outweigh the long-term interest of species conservation.

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

(25) Such derogations could for example concern the marking of certain individuals of a species for research purposes (e.g. radio collars) in order to understand their behaviour better, or for conservation projects aiming at the reintroduction of species. Research projects must obviously also be subject to consideration of alternative methods if they are likely to have a negative impact on the population concerned.

(e) To allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities

(26) The fifth and last reason for derogation concerns the taking or keeping of certain specimens of the species listed in Annex IV. This reason is subject to several conditions that must be respected[103]. This is why its application in practice seems exceptional:

- "*limited numbers*"

(27) This criterion is not an absolute criterion, but has to be compared to the population level of a species and is directly linked with its conservation status[104]. Therefore it is essential to determine a threshold or quantity below which the derogation can be granted. This threshold/quantity must be fixed taking into account the conservation objectives of the Directive and the need to ensure a system of strict protection for the species concerned.

(28) Derogations should not be granted where there is a risk that the derogation might have a significant negative effect on the population concerned in quantitative or in qualitative (e.g. a negative impact on population structure) terms. In Case C-182/02 (which concerned derogations authorised under Article 9 of Directive 79/409/EEC)[105], the Court confirmed that the condition specifying small numbers *"cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level."* In Case C-344/03, which concerns the derogations granted in Finland for the hunting of bird species, the Court used the criteria of the ORNIS Committee (1% of the

[103] Paragraphs 3.5.20-3.5.48 of the "Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds" contains useful information especially as regards the concept of limited/small numbers.

[104] In a case regarding Article 9 of Directive 79/409/EEC (judgment of 27 April 1988, Commission v France, Case C-252/85, ECR p.2243), the Court stated that: "It is apparent from Article 2, in conjunction with the 11th recital of the preamble to the Directive, that the criterion of small quantities is not an absolute criterion but rather refers to the maintenance of the level of the total population and to the reproductive situation of the species concerned."

[105] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02, paragraph 17.

total annual mortality rate of the populations in question) in order to assess whether the limited numbers requirement was complied with[106].

(29) Obviously, if it can be clearly demonstrated that such derogations will be beneficial to the conservation status of the species or population concerned, there is no obstacle to granting them. However, the Commission services consider that an appropriate plan for the conservation of the species, aiming at restoring favourable conservation status, should be the recommended way of demonstrating compliance with this criterion.

- "*under strictly supervised conditions, on a selective basis and to a limited extent*"

(30) This qualification clearly demonstrates that the EC legislator intended significant constraints.

(31) The principle of strictly supervised conditions implies that any use of this type of derogation must involve clear authorisations that can be related to particular individuals or groups of individuals, places, times and quantities. The term "to a limited extent" supports this interpretation. It also implies the need for efficient enforcement of such derogations to ensure compliance.

(32) The principle of selectivity in turn means that the activity in question must be highly specific in its effect, targeting one species (or group of closely related species), to the exclusion of all others. It also implies that certain technical aspects of the method used should verifiably demonstrate selectivity. There is a need to come to a view on methods that are themselves not entirely selective unless combined with the skills and/or experience of the operator.

(33) From the above, it follows that the implementation of this provision would involve some management, and one way of delivering this would be through a species management/conservation plan. Such plans aim at the long-term conservation of a species and contain measures mainly concerning the viability of the population and the natural range and habitats of the species. Derogations could be provided for in the plan and be part of the regulation of the species population, without this affecting favourable conservation status. Thus, a species management/conservation plan could be an appropriate tool for the use of derogations under Article 16(1)(e), as it is the best way of demonstrating compliance with the strict requirements of Article 16.

Example: Latvian Lynx management plan

The plan was prepared by national experts and confirmed by order of the Minister of Environment and Regional Development in 2002. The entire text is available at www.dap.gov.lv/public/files_uploaded/sugu_plani/lynx_lynx_mp.pdf.

The plan forms the basis for a long-term strategy for the conservation and management of the lynx in Latvia, including strictly limited harvesting of the population by hunting. It takes a long-term view, where the lynx in Latvia currently has its best distribution status within the last 150 years and is considered to have a favourable conservation status. Limited and strictly controlled taking by hunters is considered to have a positive impact on the population as well as on public perception. The practice thus fully complies with Article 16(1)(e) of the Habitats Directive.

[106] See paragraphs 47-59 of the judgment of 15 December 2005, Commission v Finland, Case C-344/03, ECR p.11033.

The following main requirements are imposed to prevent hunting from affecting favourable conservation status:

- The goal is not only to preserve the size and range of population but also to maintain the environmental capacity for and the natural ecological functions of the species in its ecosystem. This allows applications for scientific research providing important data for conservation.
- The season for lynx hunting is adapted to the species' biological requirements.
- Samples for scientific research have to be taken from the harvested animals to monitor the sex-age structure, reproduction rate, diet and health of the population in order to avoid any negative impact on the population structure.
- The annual assessment of population size and distribution range must be continued.
- Annual hunting quotas have to be set considering the monitoring data.
- Public education and involvement must be promoted. Hunters are to be involved in collecting research samples and subsequently informed of the results obtained.

The management plan has been implemented and the national legislation amended accordingly. The authority responsible for supervising management is the State Forest Service (www.vmd.gov.lv).

Summary: the first consideration when envisaging a derogation should be whether it is justified by one of the reasons given under 16(1) (a) to (e). The type and weight of the reason must also be seen in relation to the interest of the protected species in the concrete and specific circumstances in question in order to judge the appropriateness of a derogation.

III.2.2. Absence of a satisfactory alternative (Test 2)

(34) Under Article 16(1), Member States must be certain that "there is no satisfactory alternative" before allowing a derogation. As with Article 6(4) of Directive 92/43/EEC and Article 9(1) of Directive 79/409/EEC[107], this is an overarching condition that all derogations must satisfy.

(35) In conformity with the principle of subsidiarity, it rests with the competent national authorities to make the necessary comparisons and evaluate those alternative solutions. Nevertheless, this discretionary power is subject to several constraints.

(36) Based on the case law of the Court on derogations under Article 9 of Directive 79/409/EEC[108], especially in Case C-10/96, an analysis of whether there is "no other satisfactory alternative" can be considered as having three parts: What is the problem or specific situation that needs to be addressed? Are there any other solutions? If so, will these resolve the problem or specific situation for which the derogation is sought? The following remarks are based on the case law of the Court on Article 9 of the Birds Directive and apply the approach adopted by the Court to Article 16.

[107] For this condition, see also section 3.4 of the "Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds".

[108] Judgment of 12 December 1996, Ligue royale belge pour la protection des oiseaux ASBL and Société d'études ornithologiques AVES ASBL v Région Wallonne, Case C-10/96, ECR p.6775; judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02.

(37) The analysis of whether "there is no other satisfactory alternative" presumes that a specific problem or situation exists and needs to be tackled. The competent national authorities are called upon to solve this problem or situation by choosing, among the possible alternatives, the most appropriate that will ensure the best protection of the species while solving the problem/situation. To ensure the strict protection of species, these alternatives must be assessed with regard to the prohibitions listed in Article 12. They could involve alternative locations (or routes), different development scales or designs, or alternative activities, processes or methods.

(38) In any case, recourse to Article 16 derogations must be a **last resort**[109]**.** The essential common characteristic of any derogation system is that it has to yield to other requirements laid down in the Directive in the interest of conservation.

(39) The same strict approach applies to the interpretation of the term "satisfactory". Given the exceptional nature of the derogation regime and the duty of Member States under Article 10 of the EC Treaty to facilitate the achievement of the tasks of the Community, a derogation would only be justified on the basis of an objective demonstration that there is no other satisfactory solution. According to the Advocate General in case C-10/96, this term "*may be interpreted as meaning a solution which resolves the particular problem facing the national authorities, and which at the same time respects as far as possible the prohibitions laid down in the Directive; a derogation may only be allowed where no other solution which does not involve setting aside these prohibitions can be adopted.*"

(40) As regards the factors for evaluating the existence of another satisfactory solution, it is recognised that this is a matter for the national courts. The appraisal of whether an alternative is satisfactory or not, in a given situation, must be founded on objectively verifiable factors, such as scientific and technical considerations[110]. In addition, the solution finally selected, even if it involves a derogation, must be objectively limited to the extent necessary to resolve the specific problem or situation[111].

(41) Evidently, the requirement to consider seriously other alternatives is of primary importance. The discretionary power of Member States is limited, and where another solution exists, any arguments that it is not "satisfactory" will need to be convincing. Moreover, it should be stressed that another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of the derogation.

(42) The judgment in Case C-182/02 illustrates the strict approach adopted by the Court for derogations under the Birds Directive. In order to determine whether or not a satisfactory solution existed, the Court assessed the "need" and "purpose" of the

[109] See paragraph 33 of the Advocate General's Opinion in Case C-10/96.
[110] See also paragraph 39 of the Advocate General's Opinion in Case C-10/96.
[111] See paragraphs 21-22 and 26-27 of the judgment.

derogation[112]. This judgment confirms the importance of demonstrating that there are compelling reasons to justify a derogation[113].

Managing otter in the fish pond area "Oberes Waldviertel", Austria

While the otter was historically very widespread in Austria, including the Alps, it became rare and nearly extinct during the 19th and early 20th century, most probably due to direct persecution and habitat loss. Since 1980, there has been a slow but steady recovery with the species spreading from its core (relict) populations in the region of Waldviertel (near the border to the Czech Republic) and the Pannonian basin in Burgenland/Styria. The Waldviertel region is known for its fish ponds, mostly for breeding carp. As otters cause damage to these ponds, especially in winter, the need for counter-measures became obvious early on, in the 1980s/90s. The killing or relocation of animals was not an option, however. As the area was (and still is) a core centre of the fragmented Austrian population, an alternative was envisaged: the regional government established a damage compensation scheme for fish pond owners and also financed measures to avoid damage (e.g. electric fences). With these measures, damage to the ponds could be kept down to a certain level and the compensation made the remaining damage acceptable to fish pond owners.

Summary: The second consideration is whether there is a satisfactory alternative to the derogation sought, i.e. whether the problem the authority is faced with can be solved in a way that does not involve a derogation.

III.2.3 Impact of a derogation on conservation status (Test 3)

(43) According to Article 16(1), derogations must not be "*detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range*". The implementation of this provision should include a two-step assessment: firstly, determination of the conservation status of the populations of a species in its natural range within the Member State concerned (and possibly beyond national boundaries if the populations are shared with neighbouring countries) and, secondly, evaluation of the impact of the derogation on the population or populations concerned. The assessment is thus at two levels: the level of "natural range" and the level of "population". For the sake of clarity, "population" is defined here as a group of individuals of the same species that live in a geographic area at the same time and are (potentially) interbreeding (i.e. sharing a common gene pool). As for the definition of "natural range" and for background on the concept of "favourable conservation status", please see chapter I.2.2.

[112] Judgment of 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02. According to paragraph 16, the condition requiring the absence of a satisfactory alternative "cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection (see, to that effect, Commission v Italy, paragraph 39). There would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive."

[113] See also paragraphs 18-46 of the judgment of 15 December 2005, Commission v Finland, Case C-344/03, not yet published.

III.2.3.a) Scale of assessment

(44) One may ask what level is best considered for evaluating whether the impact of a derogation is detrimental, neutral or even positive for the conservation status of a species.

(45) The conservation status of a species must ultimately be considered across its natural range, according to Article 1(i). In discussions with the Habitats Committee, it was therefore agreed that, for the purpose of reporting under Article 17 (in connection with Article 11), conservation status should be assessed at biogeographic level in each Member State. This would ultimately allow information to be aggregated for complete biogeographic regions across the EU. The conservation status of a species within the relevant biogeographic region within a Member State should be important information to be used when considering a derogation.

(46) However, an appropriate **assessment of the impact** of a specific derogation will in many cases, if not most, have to be at a lower level than the biogeographic region in order be meaningful in ecological terms. A useful level in this regard could be the (local) population. The wording of Article 16, which points to *"populations of the species concerned"*, confirms this interpretation. The approach of course needs to be adapted to the species in question: the killing of individuals of a wide-ranging large carnivore will need to be evaluated at population level (transboundary where applicable[114]), while the impact of the destruction of a breeding site in a rather fragmented amphibian habitat may be better evaluated on site or at meta-population level[115]. It should be kept in mind that, according to established case law, derogations must be applied appropriately in order to deal with precise requirements and specific situations[116]. It follows that assessments at lower levels are normally essential, since the derogations have to deal with specific problems and provide suitable solutions. Such an assessment at a lower level would then have to be seen in relation to the situation on a larger scale (e.g. biogeographic or national), for a complete picture of the situation.

Summary: The overall conservation status of a species in a Member State should, in line with the harmonised reporting framework agreed for Article 17 (in relation to Article 11) of the Directive, be evaluated at biogeographic level in each Member State. An appropriate assessment of the impact of a specific derogation will normally have to be at a lower level (e.g. site, population level) in order to be meaningful in the specific context of the derogation.

III.2.3.b) Derogations and conservation status

(47) To begin with, it must be acknowledged that neither the granting of derogations for species in an unfavourable conservation status nor the use of compensation measures is explicitly provided for in the Directive. However, by interpreting and implementing the provision in 16(1) in a way that puts the focus on reaching the overall objective of favourable conservation status, we believe that both concepts may be incorporated in the

[114] Regarding species with transboundary populations or species that migrate across the frontiers of the EU, the overall natural range of these species, including the migration zones outside the EU, should be considered where possible or feasible.

[115] A metapopulation consists of a group of spatially separated populations of the same species which interact at some level. The term metapopulation was coined by Richard Levins in 1969 to describe a model of population dynamics of insect pests in agricultural fields, but the idea has been most broadly applied to species in naturally or artificially fragmented habitats.

[116] See in particular: judgment of 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029, paragraph 7; judgment of 8 July 1987, Commission v Italy, Case 262/85, ECR p.3073, paragraph 7; judgment of 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223, paragraph 21.

interpretation under the condition that reaching this objective is not compromised in any way.

(48) Obviously, the less favourable the conservation status and trends, the less likely that the granting of derogations would be justified apart from under the most exceptional circumstances. It is also clear that the **application of a proportional approach** to derogations is **only possible within a clear and well-developed framework of species conservation measures**. Again (as with protection measures), the conservation status of a species (at biogeographic and population level) is the core concept for a flexible and proportional approach to the use of derogations. It is therefore important not only to consider the present conservation status, but also to examine how it is developing.

(49) Two things have to be distinguished in applying "Test 3":

1. What is the actual conservation status of the affected species — at biogeographic level and at (local) population level?

2. What is the impact of the derogation as such?

(50) Considering the **first question,** it should be recognised that the conservation status of the (local) population of a species in a certain geographical area might well be different from the overall conservation status of populations in the biogeographic region in the Member State (or even the range). Both situations should be considered and taken into account in any decision.

(51) As for the **second question**, it is generally the rule that no derogation can be granted if it has a **detrimental** effect on the conservation status or the attainment of favourable conservation status for a species at all levels. In other words, if a derogation is likely to have a significantly negative effect on the population concerned (or the prospects of this population) or at biogeographical level within a Member State, the competent authority should not allow it. The net result of a derogation should be neutral or positive for a species[117].

(52) Where the population concerned within a biogeographic region in a Member State is healthy and unlikely to suffer detrimental effects from a derogation, even if the picture at biogeographic level is less good, the derogation would naturally be easier to justify than when the population concerned is already in a bad state and declining. In such cases where the conservation status is different at the different levels assessed, the situation at population level should be considered first, and the impact of the derogation on the population should then be examined in the context of the biogeographic region. In this way, a variety of situations and conservation interests can be taken into account.

(53) In line with the proportionate approach, derogations can be more easily justified if

a) requisite (appropriate, effective and verifiable) measures are established and implemented effectively in a Member State for a species to ensure strict protection and to aim for favourable conservation status

b) the derogation does not work against, render ineffective or neutralise the requisite measures

[117] In responses to human health disasters, however, the net result of a derogation may be negative for the species.

c) in the case of the deterioration or destruction of breeding sites and resting places: sufficient compensatory measures (see below) are taken to offset the impact at population and biogeographic levels

d) the impact of the derogation and the effectiveness of compensation measures are closely monitored and lessons are drawn for the future

(54) One recommended way of implementing a flexible and proportional derogation system as part of a strict protection system is the preparation of **species conservation plans** (even though not required under the Directive). Such plans could, besides informing and guiding the requisite measures under Article 12, also give guidance on the implementation of derogation schemes on a species-by-species basis or at transboundary population level, where applicable (guidance on assessing and monitoring the impact of derogations, possible compensation measures, etc.). Such plans would naturally have to be adapted regularly in the light of improved knowledge and monitoring results. These plans could be considered as a tool for demonstrating that the derogation system is in line with the objectives of the Directive.

The role of compensation measures *(derogations from Article 12(1)(d))*

(55) Compensation measures are independent of the activity causing deterioration or destruction of a breeding site or resting place. Such measures are intended to compensate for or offset specific negative effects on a species. Compensation measures should target precisely the negative effects on the species concerned and it is recommended that they are in place and effective before the negative effect occurs[118].

(56) Even though compensation measures are not mentioned in Article 16, and are as such not obligatory, they may be considered to provide better justification of a derogation if there is a risk that the derogation might have a detrimental effect. Compensation measures may be envisaged for derogations from Article 12(1)(d), i.e. in the case of the deterioration or destruction of breeding sites and resting places. Depending on the biology, ecology and behaviour of species, such measures may work well for some species but not for others. In general, compensation would have to:

i) offset the negative impact of the activity under the specific circumstances (at population level),
ii) have a good chance of success and be based on best practice,
iii) guarantee a species' prospects of achieving FCS,
iv) be effective before or at the latest when deterioration or destruction of a breeding site or resting place starts to take place.

(57) Compensation could thus guarantee that no detrimental effect is produced at either population or biogeographic level. ***However, it does not replace or marginalise any of the 3 tests.*** This means that the adoption of a compensation scheme cannot avoid the need for a derogation to pass all three tests described in chapter III.2.

[118] In some cases, compensation measures may not be fully functional by the time deterioration/destruction is taking place. Whether compensation has to be put in place without delay or whether some delay is acceptable depends on the type of species and the species' habitat. This should be taken into account in the decision authorising such compensation measures.

Compensation under Article 16 — a case concerning *Triturus cristatus*

During the planning stage for a housing area, a small Swedish municipality discovered that a small pond within the area designated for exploitation harboured a population of great crested newts (*Triturus cristatus*).

The population and its breeding site were in a difficult situation, as in previous years the surrounding woodland, probably used by wintering newts, had been destroyed and the habitats adjacent to the pond had been degraded. The chances of long-term survival of the population under these circumstances were considered to be uncertain to low. Closer investigation showed that the population size was about 100 adult specimens.

The completion of the housing area was considered to be of public interest and important in the regional context. Alternatives that would have been less damaging to the newt population could not be found in the neighbourhood. The overall conservation status of the species was unclear, with trends not known, although its range in Southern Sweden was continuous and the total Swedish population was estimated at 100 000 reproductive animals. A new population assessment and a National Action Plan for the species were launched during 2005.

It was therefore decided to create new habitats for the newts as a compensatory measure and to move the whole population. If successful, this action would improve the situation of the population concerned. A suitable compensation site was found less than 10 km away, an area already holding newts and providing sufficient habitat (including terrestrial wintering areas) for the long-term survival of the population. Within this area, a new pond was dug. The newts were translocated using the latest "state of the art" techniques. Studies showed that the number of adult newts had increased to about 160 specimens and the number of young leaving the pond in the autumn amounted to about 1 300 specimens.

The derogation was subject to several preconditions: a survey of the breeding newt population was to be performed in the housing area and at potential new sites; the timing of the construction activities for the housing complex was brought into line with the compensation actions; the permit to catch and move newts was linked to monitoring of the effects on the newt population for the following 8-10 years. Through bottle traps, visual counting and the taking of pictures of individual belly patterns, the long-term development of the population was to be assessed. The project was also intended as a pilot study for tackling future situations and has provided valuable information on the translocation of newts.

How can multi-species derogations be dealt with?

(58) For some projects (e.g. large infrastructure projects of public interest, such as transport networks), a number of Annex IV species might be affected. In such cases, the impact on ***each*** of the affected species should be considered and, based on this information, a picture of the overall impact should be formed in order to determine the solution to be implemented. The solution must also meet all 3 "tests". It is not enough to just list the number of species potentially affected without taking the further step of judging the extent of the problems and finding ways to avoid them.

Summary: the less favourable the conservation status and trends, the less likely will the granting of derogations be justified apart from in the most exceptional circumstances. The net result of a derogation should be neutral or positive for a species; detrimental effects should not occur. Compensation measures may, under certain circumstances, be used to offset the impact of a derogation on breeding sites and resting places, but do not replace or marginalise any of the "3 tests". Species conservation plans are not obligatory but are recommended as tools to demonstrate — among other things — that derogations for a certain species are in line with the objectives of the Directive.

III.2.4 Monitoring the impacts of derogations / Reporting on derogations

(59) Competent national authorities not only have to ensure that all the conditions of the derogation scheme are met *before* derogations are granted, but it is also recommended that they should monitor the impact of derogations and the effectiveness of compensation measures, if any, *after* they are implemented. This should ensure that any risk for a species arising unintentionally through the derogations (possibly in combination with other negative factors) is detected. The Directive does not explicitly provide for such monitoring. However, when advocating a proportional and flexible use of the derogation system (as set out above), we consider that the framework conditions must be right to ensure that the flexible approach does not lead to undesired effects. Monitoring is a key element in this regard.

(60) Such monitoring could also be seen as a part of the general surveillance obligation under Article 11 of the Directive. It would be reasonable for such surveillance to be sensitive to the effects (including cumulative effects and the effects of compensation measures) of derogations implemented for species for which derogations are regularly granted or which are in an unfavourable conservation status (and are nevertheless the subject of derogations).

Reporting obligation for derogations set out in Article 16(2) and 16(3)

(61) Derogations must also satisfy the formal conditions set out in Article 16(2) and (3). In the words of the Court in Case C-118/94 (a Birds Directive case), these formal conditions "*are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them.*"

(62) Member States do not need to consult the Commission before applying derogations but are obliged to submit a report every two years to the Commission on the implementation of Article 16. Article 16(2) does not define the precise content of these national reports. It is however clear that the information must be factual and cover the details set out in Article 16(3). On the basis of the information provided in the derogation reports, the Commission must be in a position to supervise the application of Article 16 within the Member States and its compatibility with the Directive. In cases where the Commission concludes that the use of derogations is not in conformity with the requirements of the Directive, it has the right to initiate an infringement procedure against the Member State concerned.

(63) Even though not mentioned explicitly in the Directive under Article 16(3), and therefore not obligatory, the Commission services consider that the two-yearly derogation reports might also include details that provide an understanding of the competent authorities' reasoning in applying a proportionate and flexible approach.

(64) Such additional information could include:

- Information on the conservation status of the derogated species (at biogeographic level in the Member State),

- Special justifications for derogations for species in a less than favourable status (e.g. references to conservation plans, conservation measures undertaken and their effects, summary of the impact assessment of the derogation on the species, alternatives assessed)

- Compensation measures taken

(65) Corresponding changes to the derogation reporting format have now been agreed. The new reporting format and a new IT tool, called the Habitats and Birds Directives Derogation System (HaBiDeS), is currently being tested and will be implemented by the Commission services and Member States.

Summary: Competent national authorities not only have to ensure that all conditions of the derogation scheme are met before derogations are granted (i.e. the "3 tests" are met), but it is also recommended that they should monitor the impact of derogations and the effectiveness of compensation measures, if any, after they are implemented. Again, although not obligatory, the Commission services consider that future derogation reports should include information to allow the Commission to understand and evaluate the use of a proportionate and flexible approach by Member States as set out in this document.

Annex I: Court case references

Annex II: List of animal species covered by Annex II, IV and V

Annex III: Example of a species dossier for *Triturus cristatus*

Annex I

Court case references

- 8 July 1987, Commission v Belgium, Case 247/85, ECR p.3029
- 8 July 1987, Commission v Italy, Case 262/85, ECR p.3073
- 23 February 1988, Commission v Italy, Case 429/85, ECR p.843
- 27 April 1988, Commission v France, Case C-252/85, ECR p.2243
- 15 March 1990, Commission v Netherlands, Case C-339/87, ECR p.851
- 28 March 1990, Criminal proceedings against G. Vessoso and G. Zanetti, joined cases C-206 and 207/88, ECR p.1461
- 17 January 1991, Commission v Italy, C-157/89, ECR p.57
- 28 February 1991, Commission v Germany, Case C-57/89, ECR p.883
- 28 February 1991, Commission v Germany, Case 131/88, ECR p.825
- 30 May 1991, Commission v Germany, Case C-59/89, ECR p.2607
- 2 August 1993, Commission/Spain, Case C-355/90, ECR, p.4221
- 7 March 1996, WWF Italy v Regione Veneto, Case C-118/94, ECR p.1223
- 12 December 1996, Ligue royale belge pour la protection des oiseaux and Société d'études ornithologiques v Région Wallonne, Case C-10/96, ECR p.6775
- 19 May 1999, Commission v France, Case C-225/97, ECR p.3011
- 11 November 1999, Commission v Italy, Case C-315/98, ECR p.8001
- 17 May 2001, Commission v Italy, Case C-159/99, ECR p.4007
- 30 January 2002, Commission v Greece, Case C-103/00, ECR p.1147
- 13 February 2003, Commission v Luxembourg, Case C-75/01, ECR p.1585
- 16 October 2003, Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l'Aménagement du territoire et de l'Environnement, Case C-182/02
- 20 October 2005, Commission v the UK, Case C-6/04, ECR p.9017

- 15 December 2005, Commission v Finland, Case C-344/03, ECR p.11033
- 10 January 2006, Commission v Germany, Case C-98/03, ECR p.53
- 16 March 2006, Commission v Greece, Case C-518/04, ECR p.42
- 18 May 2006, Commission v Spain, case C-221/04, ECR p.4515
- 11 January 2007, Commission v Ireland, case C-183/05, not yet published in the ECR

List of animal species covered by Annexes II, IV and V of the directive 92/43/EEC

Disclaimer : The table enclosed is a consolidated table produced by DG Environment. It is meant purely as an overview tool but we do not assume any liability for its content. The legally binding versions of the annexes are those officially published in the relevant legal acts. The latest version of these annexes on which the table is based is published in the "Council Directive 2006/105/EC of 20 November 2006 adapting Directives 73/239/EEC, 74/557/EEC and 2002/83/EC in the field of environment, by reason of the accession of Bulgaria and Romania"

The species listed in this Annex are indicated

- by the name of the species or subspecies (in bold and italics), or
- by all the species belonging to a higher taxon or to a designated part of that taxon. The abbreviation « spp. » after the name of a family or genus designates all the species belonging to that family or genus.

An asterisk (*) before the name of a species indicates that it is a priority species of Annex II (Annex VI and V do not distinguish between priority and non-priority species).

The annexes consolidated in this table are :

ANNEX II : SPECIES OF COMMUNITY INTEREST WHOSE CONSERVATION REQUIRES THE DESIGNATION OF SPECIAL AREAS OF CONSERVATION

ANNEX IV : SPECIES OF COMMUNITY INTEREST IN NEED OF STRICT PROTECTION

ANNEX V : SPECIES OF COMMUNITY INTEREST WHOSE TAKING IN THE WILD AND EXPLOITATION MAY BE SUBJECT TO MANAGEMENT MEASURES

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
VERTEBRATES				
MAMMALS				
INSECTIVORA				
Erinaceidae				
Erinaceus algirus		**X**		
Soricidae				
Crocidura canariensis		**X**		
Crocidura sicula		**X**		
Talpidae				
Galemys pyrenaicus	**X**	**X**		
CHIROPTERA				
MICROCHIROPTERA				
Rhinolophidae				
Rhinolophus blasii	**X**	**X**		
Rhinolophus euryale	**X**	**X**		
Rhinolophus ferrumequinum	**X**	**X**		
Rhinolophus hipposideros	**X**	**X**		
Rhinolophus mehelyi	**X**	**X**		
Vespertilionidae				
Barbastella barbastellus	**X**	**X**		
Miniopterus schreibersi	**X**	**X**		
Myotis bechsteini	**X**	**X**		
Myotis blythii	**X**	**X**		
Myotis capaccinii	**X**	**X**		
Myotis dasycneme	**X**	**X**		
Myotis emarginatus	**X**	**X**		
Myotis myotis	**X**	**X**		
All other Microchiroptera		**X**		
MEGACHIROPTERA				
Pteropodidae				
Rousettus aegiptiacus	**X**	**X**		
RODENTIA				

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Gliridae				
All species except *Glis glis* and *Eliomys quercinus*		**X**		
Myomimus roachi	**X**	**X**		
Sciuridae				
**** Marmota marmota latirostris***	**X**	**X**		
**** Pteromys volans (Sciuropterus russicus)***	**X**	**X**		
Spermophilus citellus (Citellus citellus)	**X**	**X**		
**** Spermophilus suslicus (Citellus suslicus)***	**X**	**X**		
Sciurus anomalus		**X**		
Castoridae				
Castor fiber	**X**	**X**	**X**	**Annex II** : except the Estonian, Latvian, Lithuanian, Finnish and Swedish populations **Annex IV** : except the Estonian, Latvian, Lithuanian, Polish, Finnish and Swedish, populations **Annex V** : Finnish, Swedish, Latvian, Lithuanian, Estonian and Polish populations
Cricetidae				
Cricetus cricetus		**X**	**X**	**Annex IV** : except the Hungarian populations **Annex V :** Hungarian populations
Mesocricetus newtoni	**X**	**X**		
Microtidae				
Microtus cabrerae	**X**	**X**		
**** Microtus oeconomus arenicola***	**X**	**X**		
**** Microtus oeconomus mehelyi***	**X**	**X**		
Microtus tatricus	**X**	**X**		
Zapodidae				
Sicista betulina		**X**		
Sicista subtilis	**X**	**X**		
Hystricidae				
Hystrix cristata		**X**		
CARNIVORA				
Canidae				
**** Alopex lagopus***	**X**	**X**		
Canis aureus			**X**	
**** Canis lupus***	**X**	**X**	**X**	**Annex II** : except the Estonian population ; Greek

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
				populations : only south of the 39th parallel ; Spanish populations : only those south of the Duero ; Latvian, Lithuanian and Finnish populations **Annex IV :** except the Greek populations north of the 39th parallel ; Estonian populations, Spanish populations north of the Duero ; Latvian, Lithuanian, Polish, Slovak, Bulgarian populations and Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management **Annex V** : Spanish pop-ulations north of the Duero, Greek populations north of the 39th parallel, Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on rein-deer management, Bulgarian, Latvian, Lithuanian, Estonian, Polish and Slovak populations
Ursidae				
**** Ursus arctos***	**X**	**X**		**Annex II** : except the Estonian, Finnish, and Swedish populations
Mustelidae				
**** Gulo gulo***	**X**			
Lutra lutra	**X**	**X**		
Martes martes			**X**	
Mustela eversmanii	**X**	**X**		
Mustela putorius			**X**	
**** Mustela lutreola***	**X**	**X**		
Vormela peregusna	**X**	**X**		
Felidae				
Felis silvestris		**X**		
Lynx lynx	**X**	**X**	**X**	**Annex II** : except the Estonian, Latvian and Finnish populations **Annex IV** : except the Estonian population **Annex V** : Estonian population
**** Lynx pardinus***	**X**	**X**		
Phocidae				
Halichoerus grypus	**X**		**X**	
**** Monachus monachus***	**X**	**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Phoca hispida bottnica	**X**		**X**	
**** Phoca hispida saimensis***	**X**	**X**		
Phoca vitulina	**X**		**X**	
All other Phocidae			**X**	
Viverridae				
Genetta genetta			**X**	
Herpestes ichneumon			**X**	
DUPLICIDENTATA				
Leporidae				
Lepus timidus			**X**	
ARTIODACTYLA				
Cervidae				
**** Cervus elaphus corsicanus***	**X**	**X**		
Rangifer tarandus fennicus	**X**			
Bovidae				
**** Bison bonasus***	**X**	**X**		
Capra aegagrus (natural populations)	**X**	**X**		
Capra ibex			**X**	
Capra pyrenaica **(except *Capra pyrenaica pyrenaica*)**			**X**	
**** Capra pyrenaica pyrenaica***	**X**	**X**		
Ovis gmelini musimon (Ovis ammon musimon) (natural populations – Corsica and Sardinia)	**X**	**X**		
Ovis orientalis ophion **(*Ovis gmelini ophion*)**	**X**	**X**		
**** Rupicapra pyrenaica ornata*** **(*Rupicapra rupicapra ornata*)**	**X**	**X**		
Rupicapra rupicapra **(except *Rupicapra rupicapra balcanica*, *Rupicapra rupicapra ornata* and *Rupicapra rupicapra tatrica*)**			**X**	
Rupicapra rupicapra balcanica	**X**	**X**		
**** Rupicapra rupicapra tatrica***	**X**	**X**		
CETACEA				
Phocoena phocoena	**X**	**X**		
Tursiops truncatus	**X**	**X**		
All other Cetacea		**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
REPTILES				
CHELONIA (TESTUDINES)				
Testudinidae				
Testudo graeca	**X**	**X**		
Testudo hermanni	**X**	**X**		
Testudo marginata	**X**	**X**		
Cheloniidae				
**** Caretta caretta***	**X**	**X**		
**** Chelonia mydas***	**X**	**X**		
Lepidochelys kempii		**X**		
Eretmochelys imbricata		**X**		
Dermochelyidae				
Dermochelys coriacea		**X**		
Emydidae				
Emys orbicularis	**X**	**X**		
Mauremys caspica	**X**	**X**		
Mauremys leprosa	**X**	**X**		
SAURIA				
Lacertidae				
Algyroides fitzingeri		**X**		
Algyroides marchi		**X**		
Algyroides moreoticus		**X**		
Algyroides nigropunctatus		**X**		
Gallotia atlantica		**X**		
Gallotia galloti		**X**		
Gallotia galloti insulanagae	**X**	**X**		
**** Gallotia simonyi***	**X**	**X**		
Gallotia stehlini		**X**		
Lacerta agilis		**X**		
Lacerta bedriagae		**X**		
Lacerta bonnali (Lacerta monticola)	**X**	**X**		
Lacerta monticola	**X**	**X**		
Lacerta danfordi		**X**		
Lacerta dugesi		**X**		
Lacerta graeca		**X**		
Lacerta horvathi		**X**		
Lacerta schreiberi	**X**	**X**		
Lacerta trilineata		**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Lacerta viridis		**X**		
Lacerta vivipara pannonica		**X**		
Ophisops elegans		**X**		
Podarcis erhardii		**X**		
Podarcis filfolensis		**X**		
Podarcis hispanica atrata		**X**		
Podarcis lilfordi	**X**	**X**		
Podarcis melisellensis		**X**		
Podarcis milensis		**X**		
Podarcis muralis		**X**		
Podarcis peloponnesiaca		**X**		
Podarcis pityusensis	**X**	**X**		
Podarcis sicula		**X**		
Podarcis taurica		**X**		
Podarcis tiliguerta		**X**		
Podarcis wagleriana		**X**		
Scincidae				
Ablepharus kitaibelli		**X**		
Chalcides bedriagai		**X**		
Chalcides ocellatus		**X**		
Chalcides sexlineatus		**X**		
Chalcides simonyi (Chalcides occidentalis)	**X**	**X**		
Chalcides viridianus		**X**		
Ophiomorus punctatissimus		**X**		
Gekkonidae				
Cyrtopodion kotschyi		**X**		
Phyllodactylus europaeus	**X**	**X**		
Tarentola angustimentalis		**X**		
Tarentola boettgeri		**X**		
Tarentola delalandii		**X**		
Tarentola gomerensis		**X**		
Agamidae				
Stellio stellio		**X**		
Chamaeleontidae				
Chamaeleo chamaeleon		**X**		
Anguidae				
Ophisaurus apodus		**X**		
OPHIDIA (SERPENTES)				
Colubridae				

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Coluber caspius		**X**		
**** Coluber cypriensis***	**X**	**X**		
Coluber hippocrepis		**X**		
Coluber jugularis		**X**		
Coluber laurenti		**X**		
Coluber najadum		**X**		
Coluber nummifer		**X**		
Coluber viridiflavus		**X**		
Coronella austriaca		**X**		
Eirenis modesta		**X**		
Elaphe longissima		**X**		
Elaphe quatuorlineata	**X**	**X**		
Elaphe situla	**X**	**X**		
Natrix natrix cetti		**X**		
Natrix natrix corsa		**X**		
**** Natrix natrix cypriaca***	**X**	**X**		
Natrix tessellata		**X**		
Telescopus falax		**X**		
Viperidae				
Vipera ammodytes		**X**		
**** Macrovipera schweizeri (Vipera lebetina schweizeri)***	**X**	**X**		
Vipera seoanni		**X**		**Annex IV** : except Spanish populations
Vipera ursinii **(except *Vipera ursinii rakosiensis*)**	**X**	**X**		
**** Vipera ursinii rakosiensis***	**X**	**X**		
Vipera xanthina		**X**		
Boidae				
Eryx jaculus		**X**		
AMPHIBIANS				
CAUDATA				
Salamandridae				
Chioglossa lusitanica	**X**	**X**		
Euproctus asper		**X**		
Euproctus montanus		**X**		
Euproctus platycephalus		**X**		
Mertensiella luschani (Salamandra luschani)	**X**	**X**		
Salamandra atra		**X**		
**** Salamandra aurorae (Salamandra atra***	**X**	**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
aurorae)				
Salamandra lanzai		**X**		
Salamandrina terdigitata	**X**	**X**		
Triturus carnifex (Triturus cristatus carnifex)	**X**	**X**		
Triturus cristatus (Triturus cristatus cristatus)	**X**	**X**		
Triturus dobrogicus (Triturus cristatus dobrogicus)	**X**			
Triturus italicus		**X**		
Triturus karelinii (Triturus cristatus karelinii)	**X**	**X**		
Triturus marmoratus		**X**		
Triturus montandoni	**X**	**X**		
Triturus vulgaris ampelensis	**X**	**X**		
Proteidae				
**** Proteus anguinus***	**X**	**X**		
Plethodontidae				
Hydromantes (Speleomantes) ambrosii	**X**	**X**		
Hydromantes (Speleomantes) flavus	**X**	**X**		
Hydromantes (Speleomantes) genei	**X**	**X**		
Hydromantes (Speleomantes) imperialis	**X**	**X**		
Hydromantes (Speleomantes) strinatii	**X**	**X**		
Hydromantes (Speleomantes) supramontes	**X**	**X**		
ANURA				
Discoglossidae				
Alytes cisternasii		**X**		
**** Alytes muletensis***	**X**	**X**		
Alytes obstetricans		**X**		
Bombina bombina	**X**	**X**		
Bombina variegata	**X**	**X**		
Discoglossus galganoi **(including** ***Discoglossus « jeanneae »*****)**	**X**	**X**		
Discoglossus montalentii	**X**	**X**		
Discoglossus pictus		**X**		
Discoglossus sardus	**X**	**X**		
Ranidae				
Rana arvalis		**X**		
Rana dalmatina		**X**		
Rana esculenta			**X**	
Rana graeca		**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Rana iberica		**X**		
Rana italica		**X**		
Rana latastei	**X**	**X**		
Rana lessonae		**X**		
Rana perezi			**X**	
Rana ridibunda			**X**	
Rana temporaria			**X**	
Pelobatidae				
Pelobates cultripes		**X**		
Pelobates fuscus		**X**		
**** Pelobates fuscus insubricus***	**X**	**X**		
Pelobates syriacus		**X**		
Bufonidae				
Bufo calamita		**X**		
Bufo viridis		**X**		
Hylidae				
Hyla arborea		**X**		
Hyla meridionalis		**X**		
Hyla sarda		**X**		
FISH				
PETROMYZONIFORMES				
Petromyzonidae				
Eudontomyzon spp.	**X**			
Lampetra fluviatilis	**X**		**X**	**Annex II** : except the Finnish and Swedish populations
Lampetra planeri	**X**			**Annex II** : except the Estonian, Finnish, and Swedish populations
Lethenteron zanandreai	**X**		**X**	
Petromyzon marinus	**X**			**Annex II** : except the Swedish populations
ACIPENSERIFORMES				
Acipenseridae				
**** Acipenser naccarii***	**X**	**X**		
**** Acipenser sturio***	**X**	**X**		
All other Acipenseridae species			**X**	
CLUPEIFORMES				

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Clupeidae				
***Alosa* spp.**	**X**		**X**	
SALMONIFORMES				
Salmonidae / Coregonidae				
***Coregonus spp. (except Coregonus oxyrhynchus* -anadromous populations in certain sectors of the North Sea)**			**X**	
**** Coregonus oxyrhynchus* (anadromous populations in certain sectors of the North Sea)**	**X**	**X**		
Hucho hucho (natural populations)	**X**		**X**	
Salmo macrostigma	**X**			
Salmo marmoratus	**X**			
***Salmo salar* (only in fresh water)**	**X**		**X**	**Annex II** : except the Finnish populations
Thymallus thymallus			**X**	
Umbridae				
Umbra krameri	**X**			
CYPRINIFORMES				
Cyprinidae				
Alburnus albidus (Alburnus vulturius)	**X**			
Anaecypris hispanica	**X**	**X**		
Aspius aspius	**X**		**X**	**Annex II** : except the Finnish populations
Barbus spp.			**X**	
Barbus comiza	**X**		**X**	
Barbus meridionalis	**X**		**X**	
Barbus plebejus	**X**		**X**	
Chalcalburnus chalcoides	**X**			
Chondrostoma genei	**X**			
Chondrostoma lusitanicum	**X**			
***Chondrostoma polylepis* (including *C. willkommi*)**	**X**			
Chondrostoma soetta	**X**			
Chondrostoma toxostoma	**X**			
Gobio albipinnatus	**X**			
Gobio kessleri	**X**			
Gobio uranoscopus	**X**			
Iberocypris palaciosi	**X**			
**** Ladigesocypris ghigii***	**X**			
Leuciscus lucumonis	**X**			

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Leuciscus souffia	**X**			
Pelecus cultratus	**X**		**X**	
Phoxinellus spp.	**X**			
**** Phoxinus percnurus***	**X**	**X**		
Rhodeus sericeus amarus	**X**			
Rutilus alburnoides	**X**			
Rutilus arcasii	**X**			
Rutilus frisii meidingeri	**X**		**X**	
Rutilus lemmingii	**X**			
Rutilus pigus	**X**		**X**	
Rutilus rubilio	**X**			
Rutilus macrolepidotus	**X**			
Scardinius graecus	**X**			
Cobitidae				
Cobitis elongata	**X**			
Cobitis taenia	**X**			**Annex II** : except the Finnish populations
Cobitis trichonica	**X**			
Misgurnus fossilis	**X**			
Sabanejewia aurata	**X**			
***Sabanejewia larvata* (*Cobitis larvata* and *Cobitis conspersa*)**	**X**			
SILURIFORMES				
Siluridae				
Silurus aristotelis	**X**		**X**	
ATHERINIFORMES				
Cyprinodontidae				
Aphanius iberus	**X**			
Aphanius fasciatus	**X**			
**** Valencia hispanica (Valencia letourneuxi)***	**X**	**X**		
PERCIFORMES				
Percidae				
Gymnocephalus baloni	**X**	**X**		
Gymnocephalus schraetzer	**X**		**X**	
**** Romanichthys valsanicola***	**X**	**X**		
***Zingel* spp. (except *Zingel asper* and *Zingel zingel*)**	**X**			

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Zingel asper	**X**	**X**		
Zingel zingel	**X**		**X**	
Gobiidae				
Knipowitschia (Padogobius) panizzae	**X**			
Padogobius nigricans	**X**			
Pomatoschistus canestrini	**X**			
SCORPAENIFORMES				
Cottidae				
Cottus gobio	**X**			**Annex II** : except the Finnish populations
Cottus petiti	**X**			
INVERTEBRATES				
ANNELIDA				
HIRUDINOIDEA - ARHYNCHOBDELLAE				
Hirudinidae				
Hirudo medicinalis			**X**	
ARTHROPODS				
CRUSTACEA				
Decapoda				
Astacus astacus			**X**	
Austropotamobius pallipes	**X**		**X**	
**** Austropotamobius torrentium***	**X**		**X**	
Scyllarides latus			**X**	
Isopoda				
**** Armadillidium ghardalamensis***	**X**	**X**		
INSECTA				
Coleoptera				
Agathidium pulchellum	**X**			
Bolbelasmus unicornis	**X**	**X**		
Boros schneideri	**X**			
Buprestis splendens	**X**	**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Carabus hampei	**X**	**X**		
Carabus hungaricus	**X**	**X**		
**** Carabus menetriesi pacholei***	**X**			
**** Carabus olympiae***	**X**	**X**		
Carabus variolosus	**X**	**X**		
Carabus zawadszkii	**X**	**X**		
Cerambyx cerdo	**X**	**X**		
Corticaria planula	**X**			
Cucujus cinnaberinus	**X**	**X**		
Dorcadion fulvum cervae	**X**	**X**		
Duvalius gebhardti	**X**	**X**		
Duvalius hungaricus	**X**	**X**		
Dytiscus latissimus	**X**	**X**		
Graphoderus bilineatus	**X**	**X**		
Leptodirus hochenwarti	**X**	**X**		
Limoniscus violaceus	**X**			
Lucanus cervus	**X**			
Macroplea pubipennis	**X**			
Mesosa myops	**X**			
Morimus funereus	**X**			
**** Osmoderma eremita***	**X**	**X**		
Oxyporus mannerheimii	**X**			
Pilemia tigrina	**X**	**X**		
**** Phryganophilus ruficollis***	**X**	**X**		
Probaticus subrugosus	**X**	**X**		
Propomacrus cypriacus	**X**	**X**		
**** Pseudogaurotina excellens***	**X**	**X**		
Pseudoseriscius cameroni	**X**	**X**		
Pytho kolwensis	**X**	**X**		
Rhysodes sulcatus	**X**			
**** Rosalia alpina***	**X**	**X**		
Stephanopachys linearis	**X**			
Stephanopachys substriatus	**X**			
Xyletinus tremulicola	**X**			
Hemiptera				
Aradus angularis	**X**			
Lepidoptera				
Agriades glandon aquilo	**X**			
Apatura metis		**X**		
Arytrura musculus	**X**	**X**		
**** Callimorpha (Euplagia, Panaxia) quadripunctaria***	**X**			

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Catopta thrips	**X**	**X**		
Chondrosoma fiduciarium	**X**	**X**		
Clossiana improba	**X**			
Coenonympha hero		**X**		
Coenonympha oedippus	**X**	**X**		
Colias myrmidone	**X**	**X**		
Cucullia mixta	**X**	**X**		
Dioszeghyana schmidtii	**X**	**X**		
Erannis ankeraria	**X**	**X**		
Erebia calcaria	**X**	**X**		
Erebia christi	**X**	**X**		
Erebia medusa polaris	**X**			
Erebia sudetica		**X**		
Eriogaster catax	**X**	**X**		
Euphydryas (Eurodryas, Hypodryas) aurinia	**X**			
Fabriciana elisa		**X**		
Glyphipterix loricatella	**X**	**X**		
Gortyna borelii lunata	**X**	**X**		
Graellsia isabellae	**X**		**X**	
Hesperia comma catena	**X**			
Hypodryas maturna	**X**	**X**		
Hyles hippophaes		**X**		
Leptidea morsei	**X**	**X**		
Lignyoptera fumidaria	**X**	**X**		
Lopinga achine		**X**		
Lycaena dispar	**X**	**X**		
Lycaena helle	**X**	**X**		
Maculinea arion		**X**		
Maculinea nausithous	**X**	**X**		
Maculinea teleius	**X**	**X**		
Melanargia arge	**X**	**X**		
**** Nymphalis vaualbum***	**X**	**X**		
Papilio alexanor		**X**		
Papilio hospiton	**X**	**X**		
Parnassius apollo		**X**		
Parnassius mnemosyne		**X**		
Phyllometra culminaria	**X**	**X**		
Plebicula golgus	**X**	**X**		
Polymixis rufocincta isolata	**X**	**X**		
Polyommatus eroides	**X**	**X**		
Proserpinus proserpina		**X**		

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Pseudophilotes bavius	**X**	**X**		
Xestia borealis	**X**			
Xestia brunneopicta	**X**			
**** Xylomoia strix***	**X**	**X**		
Zerynthia polyxena		**X**		
Mantodea				
Apteromantis aptera	**X**	**X**		
Odonata				
Aeshna viridis		**X**		
Coenagrion hylas	**X**			
Coenagrion mercuriale	**X**			
Coenagrion ornatum	**X**			
Cordulegaster heros	**X**	**X**		
Cordulegaster trinacriae	**X**	**X**		
Gomphus graslinii	**X**	**X**		
Leucorrhina albifrons		**X**		
Leucorrhina caudalis		**X**		
Leucorrhinia pectoralis	**X**	**X**		
Lindenia tetraphylla	**X**	**X**		
Macromia splendens	**X**	**X**		
Ophiogomphus cecilia	**X**	**X**		
Oxygastra curtisii	**X**	**X**		
Stylurus flavipes		**X**		
Sympecma braueri		**X**		
Orthoptera				
Baetica ustulata	**X**	**X**		
Brachytrupes megacephalus	**X**	**X**		
Isophya costata	**X**	**X**		
Isophya harzi	**X**	**X**		
Isophya stysi	**X**	**X**		
Myrmecophilus baronii	**X**	**X**		
Odontopodisma rubripes	**X**	**X**		
Paracaloptenus caloptenoides	**X**	**X**		
Pholidoptera transsylvanica	**X**	**X**		
Saga pedo		**X**		
Stenobothrus (Stenobothrodes) eurasius	**X**	**X**		
ARACHNIDA				
Araneae				
Macrothele calpeiana		**X**		
Pseudoscorpiones				

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Anthrenochernes stellae	**X**			
COELENTERATA				
Cnidaria				
Corallium rubrum			**X**	
MOLLUSCS				
GASTROPODA				
Anisus vorticulus	**X**	**X**		
Caseolus calculus	**X**	**X**		
Caseolus commixta	**X**	**X**		
Caseolus sphaerula	**X**	**X**		
Chilostoma banaticum	**X**	**X**		
Discula leacockiana	**X**	**X**		
Discula tabellata	**X**	**X**		
Discula testudinalis		**X**		
Discula turricula		**X**		
Discus defloratus		**X**		
Discus guerinianus	**X**	**X**		
Elona quimperiana	**X**	**X**		
Geomalacus maculosus	**X**	**X**		
Geomitra moniziana	**X**	**X**		
Gibbula nivosa	**X**	**X**		
**** Helicopsis striata austriaca***	**X**			
Helix pomatia			**X**	
Hygromia kovacsi	**X**	**X**		
Idiomela (Helix) subplicata	**X**	**X**		
Lampedusa imitatrix	**X**	**X**		
**** Lampedusa melitensis***	**X**	**X**		
Leiostyla abbreviata	**X**	**X**		
Leiostyla cassida	**X**	**X**		
Leiostyla corneocostata	**X**	**X**		
Leiostyla gibba	**X**	**X**		
Leiostyla lamellosa	**X**	**X**		
**** Paladilhia hungarica***	**X**	**X**		
Patella feruginea		**X**		
Sadleriana pannonica	**X**	**X**		
Theodoxus prevostianus				
Theodoxus transversalis	**X**	**X**		
Vertigo angustior	**X**			

Species name (in bold and italics)	***Annex***			***Geographic restrictions***
	II	**IV**	**V**	
Vertigo genesii	**X**			
Vertigo geyeri	**X**			
Vertigo moulinsiana	**X**			
BIVALVIA				
Anisomyaria				
Lithophaga lithophaga		**X**		
Pinna nobilis		**X**		
Unionoida				
Margaritifera auricularia		**X**		
Margaritifera durrovensis (Margaritifera margaritifera)	**X**		**X**	
Microcondylaea compressa			**X**	
Unio crassus	**X**	**X**		
Unio elongatulus			**X**	
Dreissenidae				
Congeria kusceri	**X**	**X**		
ECHINODERMATA				
Echinoidea				
Centrostephanus longispinus		**X**		

Annex III

An example of a species dossier for *Triturus cristatus*

The crested newt, *Triturus cristatus* (senso lato), is a complex of closely related species occurring in Europe. In fact, *T. cristatus* is now considered to be a superspecies comprising 4 species: 1) Northern crested newt, *T. cristatus* (Laurenti, 1768) (sensu stricto): north and central Europe, to the Ural Mts., in the east; 2) Italian crested newt, *T. carnifex* (Laurenti, 1768): Italy and the Adriatic side of the Balkan peninsula; 3) Danube crested newt, *T. dobrogicus* (Kiritzescu, 1903): lowlands of the rivers Tisza and Danube; 4) Southern crested newt, *T. karelinii* (Strauch, 1870): SE Balkans, Crimea and Caucasus.

Even though these species are mostly allopatric, there is some complexity in transitional areas with morphological and genetic intergradation.

As with other members of the same family, the great crested newt shows an alternation between periods of aquatic and terrestrial activity. During the aquatic period it feeds on aquatic invertebrates, tadpoles and occasionally small fish. During the terrestrial periods it is active at night: searching for invertebrates. During the day it rests under stones, logs and other refuges. Breeding occurs during the aquatic period while summer dormancy and winter hibernation occur during the terrestrial one. Dispersion among ponds can be active, by nocturnal movements, or caused by seasonal floods.

The life cycle of newts shows great variation and is dependent upon several key factors, primarily water temperature and availability. The alternation between aquatic and terrestrial activity, and dormancy, shows considerable variation according to climatic conditions. In northern regions (and higher altitudes), there is a period of winter hibernation. In many southern areas, where water does not freeze, newts do not hibernate, and are found in water from autumn to late spring. Summer dormancy is common in areas of drought or where water temperature is raised.

Eggs are usually laid on the leaves of aquatic plants and larvae take refuge in amongst dense aquatic vegetation (plants and algae). Ponds with a large amount of aquatic vegetation and no fish represent the ideal environment for successful newt breeding, because of refuge availability and the lack of fish predation of both newt larvae and invertebrate prey. The occurrence of good structural variation such as dense terrestrial vegetation in or near the ponds, especially old growth forests, is also important because it offers diurnal refuges to adults during their terrestrial (nocturnal) life period.

Threats to the species include: (1) destruction of aquatic habitat; (2) cleaning of artificial springs, water reservoirs and ponds; (3) lowering of subterranean water table; (4) loss of connectivity including deforestation and consequent loss of small water basins; (5) use of pesticides that can accumulate in trophic webs which effect the invertebrate food of newts; (6) introduction of fish species in to ponds.

Interpretation of definitions for T. cristatus

All points of the definition of breeding site apply to *T. cristatus.*

The pond used for mating has individual male territories within which courtship and mating take place. Eggs are laid singly on emergent plants and mature over a period of 12 – 18 days. Young larvae emerge and swim freely.

The pond is, therefore, the Breeding Site.

T. cristatus does not migrate but does disperse to adjacent pools. Healthy populations of *T. cristatus* utilise a series of pools and move between them dispersing over suitable interconnecting terrestrial habitat. ndividuals may move ca. 1 km from their natal pool.

The Resting Places for *T. cristatus* are thus the ponds they inhabit and the adjacent terrestrial habitat that supports them during the terrestrial part of their life cycle as far as these terrestrial areas are essential and resting places can be identified.

The **functional unit** needed to maintain a viable *T. cristatus* population thus comprises a series of ponds, the majority of which will be resting places and a proportion of which will be Breeding Sites, as well as a proportion of other areas which will be resting places set within suitable terrestrial habitat.







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A great deal of additional information on the European Union is available on the Internet. It can be accessed through the Europa server (http://europa.eu.int).

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FOREWORD

We depend on our forests for a lot. They have to provide timber and other products, but they are important for recreation too. They also play an essential environmental function in protecting biodiversity, enhancing the landscape, and regulating climate, water and soil.

So forests are perhaps the most important natural resource in Europe. That they protect biodiversity is evident from the fact that, compared to other ecosystems, they are home to the largest number of mammals, birds, reptiles and amphibians on our continent. But, sadly, our forests are increasingly under threat, and there is a risk that many species could disappear from some European countries, especially species at the top of the food chain such as the large carnivores and birds of prey.

But European public opinion has consistently demonstrated its interest in the long-term survival of Europe's most valuable and threatened species and habitats. For this reason, in the 1990s, the Community created Natura 2000, and then at the Göteborg summit in 2001 undertook to halt biodiversity decline by 2010. These decisions are crucial in maintaining the Community's commitment to conservation of its natural heritage.

As establishment of Natura 2000 is now virtually complete, with adoption of the lists of designated sites, the 'El Teide' ministerial declaration made clear commitments about involving stakeholders, managing the network and targeting resources. This is especially important for forests, as forest habitats and forest species will be included in over half of all sites. This means that more attention will have to be paid to integrating conservation objectives into forest management.

This document was developed with extensive stakeholder consultation and is designed to give Community citizens a better understanding of Community legislation on conservation of our forests. It makes it very clear that Natura 2000 is not opposed to economic activity in the forestry sector. It explains how sites are designated, and the practical consequences of designation. As another example of the European Commission's policy of openness and transparency, it recommends identifying the measures required to maintain biodiversity through discussion with stakeholders, and expressing the outcome of this process as formal management objectives. A separate section gives numerous examples of creative approaches to implementing Natura 2000 in forests and of the successful combination of forestry with nature conservation objectives. These examples were submitted by Member States and by stakeholders. They come not only from specific conservation programmes such as LIFE projects, but also from integrated projects where nature conservation is just one of several objectives, such as rural development programmes.

I trust you will find this publication informative and will rise to the challenges and opportunities it contains. We may depend on our forests — but they depend on us too!

Margot Wallström
Commissioner for the Environment



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1. Executive summary

This document aims to clarify the role of forests and forestry in the Natura 2000 ecological network, in order to facilitate the uptake of Natura 2000 among forestry operators.

The document provides an overview of the Natura 2000 concept, the legal framework for biodiversity conservation and the specific requirements of the habitats directive, and the importance of European forests in the global conservation context.

The document then provides indicative guidelines for forest management on Natura 2000 sites. These are based on existing interpretations of the European *acquis* for nature conservation, on initiatives to promote sustainable and multi-functional forest management (SFM — Ministerial Conference for the Protection of Forests in Europe) and on relevant literature.

The premise of this document is that Europe's natural heritage has been transformed by centuries of human use, and that the conservation and sustainable use of this heritage within Natura 2000 sites requires a spectrum of measures ranging from no or minimal human activity to various regimes of sustainable use. This assumes that stakeholders can reach a compromise between the objectives of nature conservation and of economic production. The Natura 2000 network is not intended to block all economic activity in designated sites, but requires that the management of each site is tailored to local circumstances and takes into account both the requirements of nature conservation and economic production.

This text recommends that appropriate site management objectives and measures be identified through meaningful stakeholder consultation, and that the outcomes of such consultation be laid down in transparent, long-term management plans.

In order to further facilitate take-up among forest operators, this document also provides:

- an overview of existing and potential Community funding mechanisms and information on their successful use for nature conservation and ecosystem management on forest sites in the Natura 2000 network;

- examples of the successful combination of economically viable forestry with nature conservation objectives on Natura 2000 sites from various Member States and elsewhere;
- a bibliography and useful Internet links.

Abbreviations and acronyms

AASCI	area of special conservation interest (in the emerald network)
BD	birds directive
CAP	common agricultural policy of the European Union
CBD	Convention on Biological Diversity (UNCED, Rio de Janeiro 1992)
CEEC	central and east European countries
CEPF	Confederation européenne des proprietaires forestiers
COP	Conference of the Parties
COPA	Comité des organisations professionnelles agricoles de l'Union européenne
DG	Directorate-General of the European Commission
EAGGF	European Agricultural Guidance and Guarantee Fund
EC	European Community
EEA	European Environment Agency
EEC	European Economic Community
EIA	environmental impact assessment
EFI	European Forest Institute
ESF	European Social Fund
EU	European Union
FAO	Food and Agriculture Organisation of the United Nations
HD	habitats directive
IFF	Intergovernmental Forum on Forests
IPF	Intergovernmental Panel on Forests
IUCN	International Union for the Conservation of Nature
MCPFE	Ministerial Conference on the Protection of Forests in Europe
MS	Member States (of the EU)
NFP	national forest programme
NGO	non-governmental organisation
pSCI	proposed site of Community importance (for Natura 2000)
ERDF	European Regional Development Fund
RDR	rural development regulation
SAC	special area of conservation (for Natura 2000)
SFM	sustainable forest management (as defined by the MCPFE)
SPA	special protected area (for Natura 2000, emanating from the birds directive)
UNCED	United Nations Conference on Environment and Development
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
WWF	World Wide Fund for Nature



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We especially acknowledge the contributions of the Directorate-General for Agriculture, the European Environment Agency (EEA), the Liaison Unit in Vienna of the Ministerial Conference on the Protection of Forests in Europe (MCPFE), the UNEP Regional Office for Europe in Geneva, the Confederation européenne des proprietaires forestiers (CEPF), the European Policy Office of the WWF (World Wide Fund for Nature), the IUCN office in Brussels and the European Specialist Group on Sustainable Use of IUCN, the Union des sylviculteurs du sud de l'Europe (USSE), the Confederation of European Paper Industries (CEPI), English Nature, Birdlife International, the European Landowners Organisation and the Société royale forestière de Belgique (SRFB). We would also like to thank EU Member State administrations for the remarks and examples that they have submitted.

Nature and limitations of this document

This document has been drafted by the services of the Directorate-General for the Environment of the European Commission, following relevant informal discussions that led to constructive inputs from other Commission services, from stakeholders and from the authorities of the Member States. The document reflects only the views of the Environment DG and is not of a binding nature.

The interpretations provided by Commission services cannot go beyond the directives. This is particularly true for the habitats directive as it enshrines the subsidiarity principle and as such allows Member States a wide margin of manoeuvre for practical implementation of specific measures in relation to specific sites within the Natura 2000 network. In any case, Member States are free to choose how to implement practical measures provided these serve the general purpose of the directive.

This document is not intended to provide definitive answers to site-specific questions. Each site should be dealt with on a case-by-case basis, with reference to the guidelines.

Future revisions of this document are anticipated as further experience is accumulated on forestry and Natura 2000 in Member States and any relevant future case law. The Directorate-General for the Environment may also produce a simplified version of this text for wider distribution at a later stage.

The scope of this document is limited to the 15 current Member States and does not take into account specific situations in the candidate countries. This is because the Commission does not have any competence over nature-protection issues outside the EU, and because preparatory consultations did not include the candidate countries.

2. Introduction

2.1. Purpose of this document

This document aims to clarify the role of forests and forestry for the conservation of Europe's natural heritage within the Natura 2000 network. It is hoped that it will facilitate understanding of the mechanics of the habitats directive among various stakeholders, and that this document may be complemented by more country-specific guidance drawn up by Member States.

Taking into account the large variety of forest habitats throughout Europe and the widely differing socioeconomic situations at regional and local levels, this document proposes general guidelines and recommendations for dealing with forest areas within Natura 2000. This text was written with full awareness of Article 5 of the Treaty to establish the European Community, which institutes the principle of subsidiarity, one of the main pillars of the architecture of the European Union. Following this principle and the implementation procedures of the habitats directive, every decision taken in relation to a certain site should always be made at the most appropriate administrative level, taking into account the specific local circumstances.

Specific objectives of these guidelines are:

- to inform private and public forest owners, forestry operators, nature conservation authorities, NGOs and other stakeholders of existing experiences across Europe in the field of Natura 2000 and forestry;
- to initiate and facilitate communication between different stakeholders;
- to give a framework of non-mandatory guidelines for management of Natura 2000 forest sites and to present case studies on how to achieve the goals of the habitats directive;
- to inform stakeholders of existing and forthcoming funding opportunities for forests and forestry arising from the establishment of Natura 2000.

2.2. Why a comprehensive report on Natura 2000 and forests?

As over half of all proposed sites for the EU-wide ecological network Natura 2000 will include forest areas, specific guidance for forest sites is appropriate. The ongoing establishment of the Natura 2000 network, the most ambitious nature conservation initiative in European history, cannot be completed without the understanding and the contribution of the EU forest sector. This publication is a compilation of existing information regarding forests, protected area management and forest management within the context of Natura 2000. It is addressed at national administrations, forest owners, forestry operators, conservation NGOs and citizens working in or with forests. It forms part of a series of publications by the Directorate-General for the Environment on technical and legal issues concerning Natura 2000 ([1]).

During the establishment of Natura 2000, many misunderstandings arose across Europe (see Table 1). These are partly caused by the fact that different Member States have, very rightly, given different interpretations to what their contribution to Natura 2000 should be. The most widespread misconception is that Natura 2000 is intended to establish a system of strict nature reserves where no economic activities can take place. Although, undoubtedly, many of the most endangered species and habitats listed in the annexes of the habitats directive must be better conserved in future, the majority of sites of Community importance (SCIs) and special protection areas (SPAs — see 3.1) have been influenced by human culture for hundreds of years. In many cases, it is this very human influence that has contributed to development of an ecologically valuable habitat. Thus, Natura 2000 aims to permit appropriate economic activity to maintain or improve the conservation status of certain sites.

The general principle that the conservation of flora and fauna will receive priority when managing natural resources is the basis for management of Natura 2000 areas. As long as favourable conservation status can be maintained or restored in combination with the commercial management of forests expected on most forest sites, economic activities can continue without substantial change. In some cases these economic activities might have to be restricted or, on the contrary, more cost-efficient management may help to meet conservation needs. This can only be decided on a case-by-case basis, depending on the conservation status of each site and, if considered necessary, in the framework of site management plans or site-specific conservation objectives.

Natura 2000 offers opportunity for rural development and the reorientation of forest management, in particular through the possibility of compensation for restrictions of ownership rights. These issues must be addressed by Member States, possibly with the help of co-financing through the Community budget (see Chapter 7).

Council resolution of 15 December 1998 on a forestry strategy for the European Union ([2]) recognises the need for the conservation of areas representative of all types of forest ecosystems and of specific ecological interest. The resolution states that the establishment of Natura 2000 should take into account economic, social and cultural requirements, regional and local characteristics and the involvement of forest owners. Consequently, this report formulates recommendations for a participatory approach, involving all relevant stakeholders, to management measures or management plans for the Natura 2000 sites.

([1]) For further information on Natura 2000 as well as all legal texts of the habitats directive and other relevant information, the reader is referred to the nature conservation homepage on the Europa server: http://europa.eu.int/comm/environment/nature/home.htm

([2]) http://www.europa.eu.int/comm/agriculture/fore/index_en.htm

Table 1: Dispelling some of the myths about Natura 2000	
Popular 'myths' about Natura 2000	**Legal and administrative facts**
'The habitats directive is a Community initiative that was concocted in secret by Brussels technocrats'	Ministers of the Member States unanimously adopted the habitats directive in 1992 after five years of debate in the Council and the European Parliament. Many interest groups communicated their position to both the Member States and to Brussels during that period and their observations were taken into account.
'The European Commission decides the sites to be included in Natura 2000'	The responsibility for proposing sites within Natura 2000 lies first and foremost with the Member States. 1. Member States propose a list of sites for their territory. 2. From these national lists, the Commission establishes, in agreement with each Member State, a European list of sites of Community importance (SCI). 3. The Member States designate these sites as special areas of conservation (SACs). For the birds directive the Member States designate sites directly as special protection areas.
'Natura 2000 sites will all become nature reserves'	Member States have a choice of mechanisms to use to manage a site. These can be: ■ statutory (for example, making a nature reserve); ■ contractual (for example, signing a management agreement with the landowner); ■ administrative (providing the necessary means).
'Brussels will dictate to us what can or cannot be done in each site'	The habitats directive, and Natura 2000, are based on the principle of subsidiarity. It is up to the Member States to decide how best to conserve the sites, in compliance with the objectives of the directive. Although not an obligation, management plans are mentioned as a useful tool.
'We will have to stop all our activities within a site for the sake of preserving nature'	Conserving species or habitats can be quite compatible with well-managed human activities,such as tourism, hunting and forestry. Many natural areas are highly dependent upon human activities (such as agriculture). Nature conservation also provides additional opportunities for human activities (environmental tourism, pursuit of leisure activities, labelling of natural produce, etc). Any restricting or stopping of certain activities that are a significant threat to the species or habitat needs to be addressed on a case-by-case basis.
'It is the inhabitants of the Natura 2000 sites that will have to support the costs of this protection'	Member States and the European Commission ensure that the costs of Natura 2000 are shared by all. Member States are asked, at the time of submitting their national list of sites, to evaluate the cost of managing those areas hosting priority species or habitat types and to communicate this to the European Commission. The European Commission will then be required to set up a scheme to co-finance these costs. There are a number of existing Community funds that may be used for this process (such as, agri-environment measures, structural funds, LIFE, etc.).
'There is a general lack of transparency on Natura 2000'	Every effort is made to ensure that the European Commission's activities with regard to the establishment of Natura 2000 are as transparent as possible. A newsletter is produced three times a year and is made available to all those who are interested in following this process.
'Once a site is included in Natura 2000 it becomes untouchable as regards future developments'	The habitats directive does not a priori prevent any new activities or developments within a Natura 2000 site from taking place. Any new plans or programmes that are likely to have a significant effect on a designated site have to undergo an appropriate impact assessment before being implemented. If a proposed activity is likely to cause significant damage to a site and all possible alternatives have been exhausted, it may still go ahead only if it is of overriding public interest and if there is compensation foreseen.

2.3. The importance of stakeholder involvement

The public's right of access to information on environmental issues and legislation has improved over the last years, and the Commission is continuously striving to improve the transparency of its actions in all policy fields. The Commissioner for the Environment, Margot Wallström, expressed this view quite clearly in her foreword to the publication *Managing Natura 2000 sites: the provisions of Article 6 of the habitats directive* ([3]): 'To be successful [Natura 2000] requires, in the first instance, the active involvement of the people who live in and depend upon these areas.'

Widespread concern about the public right of access to information on environmental legislation led to the adoption of the UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters on 25 June 1998 in the Danish city of Aarhus. All EU Member States and the European Community have signed the Convention. After the adoption of three directives — on public access to information, participation in consultation exercises and on access to justice — the European Union will be a full party to the Convention.

The 'Aarhus Convention' ([4]) is a new kind of environmental agreement, with far-reaching consequences for European citizens. It links environmental rights and human rights and is based on the fact that sustainable development can be achieved only through the involvement of all stakeholders. It focuses on interactions between the public and the authorities in a democratic context and it forges a new process for public participation in the negotiation and implementation of international agreements.

Since the habitats directive came into force in 1992, all Member States have, to varying degrees, made efforts to inform stakeholders and the general public about the establishment of Natura 2000. Some Member States followed a very participatory and transparent approach in the designation process, whereby consultations took place and appeals before administrative courts were possible. Other Member States have favoured a more top-down approach. In many regions there has been, and still exists, a lack of information on Natura 2000 at operational level. This shows that further efforts are needed to effectively communicate to the public and each other the important role of Natura 2000 for the future of the European natural heritage. Although it is principally the task of the Member States to inform the stakeholders concerned and the public about Natura 2000, the Directorate-General for the Environment aims to assist these information campaigns where possible.

In the case of forestry, the participation of all concerned (including forest owners, rural communities and forestry operators such as contractors, forest industries and conservation NGOs) in managing Natura 2000 areas is particularly important, as the conservation of biodiversity often depends on the maintenance of human activities, especially if non-climax vegetation formations are to be maintained.

([3]) The publication can be downloaded from the Internet or requested from the European Commission, Directorate-General for the Environment, Unit B.2, Rue de la Loi 200, B-1049 Brussels. Information on the European nature conservation legislation can be found under http://europa.eu.int/comm/environment/nature/legis.htm

([4]) For further information see the Convention homepage at: http://www.unece.org/env/pp/

3. Natura 2000

3.1. The concept

Directive 92/43/EEC (the 'habitats directive') from 1992 sets the goal of establishing a European network for nature conservation, called Natura 2000, consisting of 'special protection areas' (SPAs) under the Birds Directive 79/409/EEC and the forthcoming 'special areas of conservation' (SACs) under the habitats directive. The underlying idea of Natura 2000 is simple: nature does not stop at administrative borders, so if we want to preserve the vitality and the diversity of our natural surroundings, we have to think and act on an international scale. A successful protection of natural resources and their variety on the European continent can therefore only be reached at European level. The approach of the habitats directive is an integrated one — as well as ensuring the conservation of biodiversity it also aims to promote sustainable activities supporting the conservation objectives for the Natura 2000 areas. It can thus be used as an opportunity for promoting new models of also rural development, in particular in some of the EU's most marginal regions. The habitats directive also has an important political significance because its provisions are legally binding for EU Member States.

It is expected that the network will eventually cover some 450 000 km², which means on average ([5]) 10–15 % of EU territory. Natura 2000 is an important joint effort of the EU Member States to comply with international conventions and agreements in the field of biodiversity protection, such as the Convention on Biological Diversity that was adopted at UNCED in 1992.

The European Parliament stated in its resolution ([6]) on the European Community biodiversity strategy COM(98)0042 that 'in contrast to a number of other environmental problems, it is impossible to make up for losses of diversity of species, ecosystems and natural gene banks.' According to information compiled by the European Environment Agency in Copenhagen, biodiversity in Europe is decreasing, many

([5]) This figure is not to be seen as an objective, as it is a mean value around which large deviations will occur because of specific situations in the Member States and differences between regions within Member States.

([6]) OJ C 341/12, 9.11.1998.

species face severe threats, or are nearing extinction (*Europe's environment: the second assessment'*, EEA, 1998 and *The environment at the turn of the century*, EEA, 1999). The declining species are mostly indigenous, associated with natural habitats, clean water and air and little human disturbance. Establishing Natura 2000 will be of great importance in halting the continuous loss of habitats and species and, if possible, reverse the trend of impoverishment of our natural heritage and countryside resources.

Therefore, a coherent network like Natura 2000 will be a step towards a successful protection of our indigenous habitats and species. Even with 15 % of EU territory expected to be ultimately part of Natura 2000, the remaining land area of the EU will still be important for the overall goal of sustainable development and management of biodiversity, in forestry too. This shows the need for much wider integration of biodiversity concerns in national forestry programmes and initiatives, and into general forestry practices for which Natura 2000 can have a pilot function.

3.2. The technical implementation

For the establishment of Natura 2000 it was necessary to elaborate a scientific basis for the site designation process. The habitats listed in Annex I to the habitats directive were originally grouped in five biogeographical regions, based on the Corine land cover identification system. These are the Alpine, Atlantic, Continental, Macaronesian and Mediterranean region. In 1995, when Austria, Finland and Sweden joined the EU, the boreal region was added to this list by a Council decision. The biogeographical regions allow for an assessment that is objective and is not based on national boundaries of the existing natural heritage and the habitats and species in the annexes of the habitats directive.

A total of 59 forest habitat types that are rare or residual and/or host species of Community interest are listed in Annex I to the habitats directive, grouped into the following six forest habitat categories of European conservation interest:

- western taiga
- oak and beech forests
- deciduous Mediterranean forests
- sclerophyllous Mediterranean forests
- temperate mountain conifer forests
- Mediterranean and macaronesian mountain forests.

Next to habitats, the habitats directive also identifies some 200 animal and over 500 plant species as being of Community interest. This implies that several types of measures have to be taken to assure their conservation status, such as designation of sites (Annex II), general protection measures (Annex IV) and regulation of use (Annex V).

The birds directive lists in its Annex I over 180 bird species for which special protection areas (SPAs) have to be designated by a procedure of direct notification from Member States to the Commission. Many of these species are associated with forest habitats, either directly (woodpeckers, grouse, finches and warblers) or

Table 2: The biogeographical regions (see map on p.14)

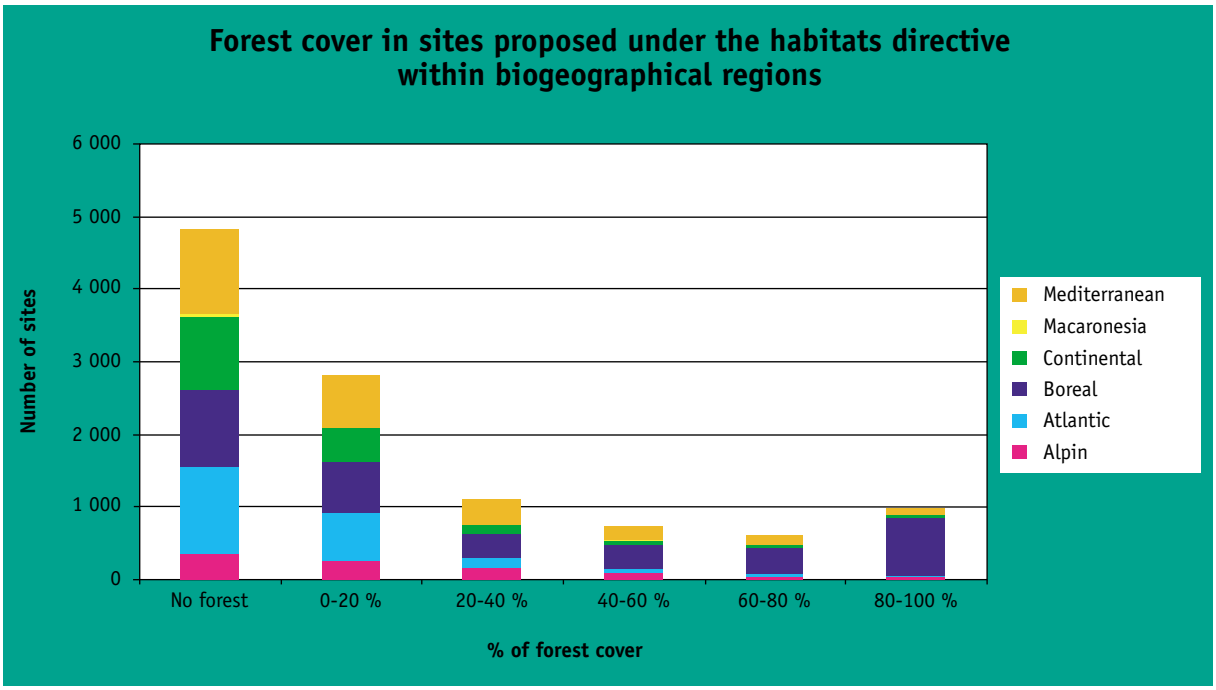
Biogeographical region	*Countries whose territory falls in this region*
Alpine region	Germany, Spain, France, Italy, Austria, Finland, Sweden
Atlantic region	Belgium, Denmark, Germany, Spain, France, Ireland, the Netherlands, Portugal, Sweden, UK
Boreal region	Finland, Sweden
Continental region	Belgium, Denmark, Germany, France, Italy, Luxembourg, Austria, Sweden
Macaronesian region	Spain, Portugal
Mediterranean region	Greece, Spain, France, Italy, Portugal

in connection with varying landscape features like small wetlands (waders, shorebirds) and forest edges (owls and other birds of prey).

According to Article 4 of the habitats directive, Member States are required to propose sites of Community importance related to these forest habitats for each of the six biogeographical regions. It is the explicit aim of the European Commission to ensure that Natura 2000 includes a coherent network of forest areas. The biodiversity action plan for the conservation of natural resources ([7]) sets the ambitious target of having all forest types from Annex I to the habitats directive assessed and sufficiently represented by 2002. This highlights the importance of forest habitats for Natura 2000 and for the overall protection of biodiversity.

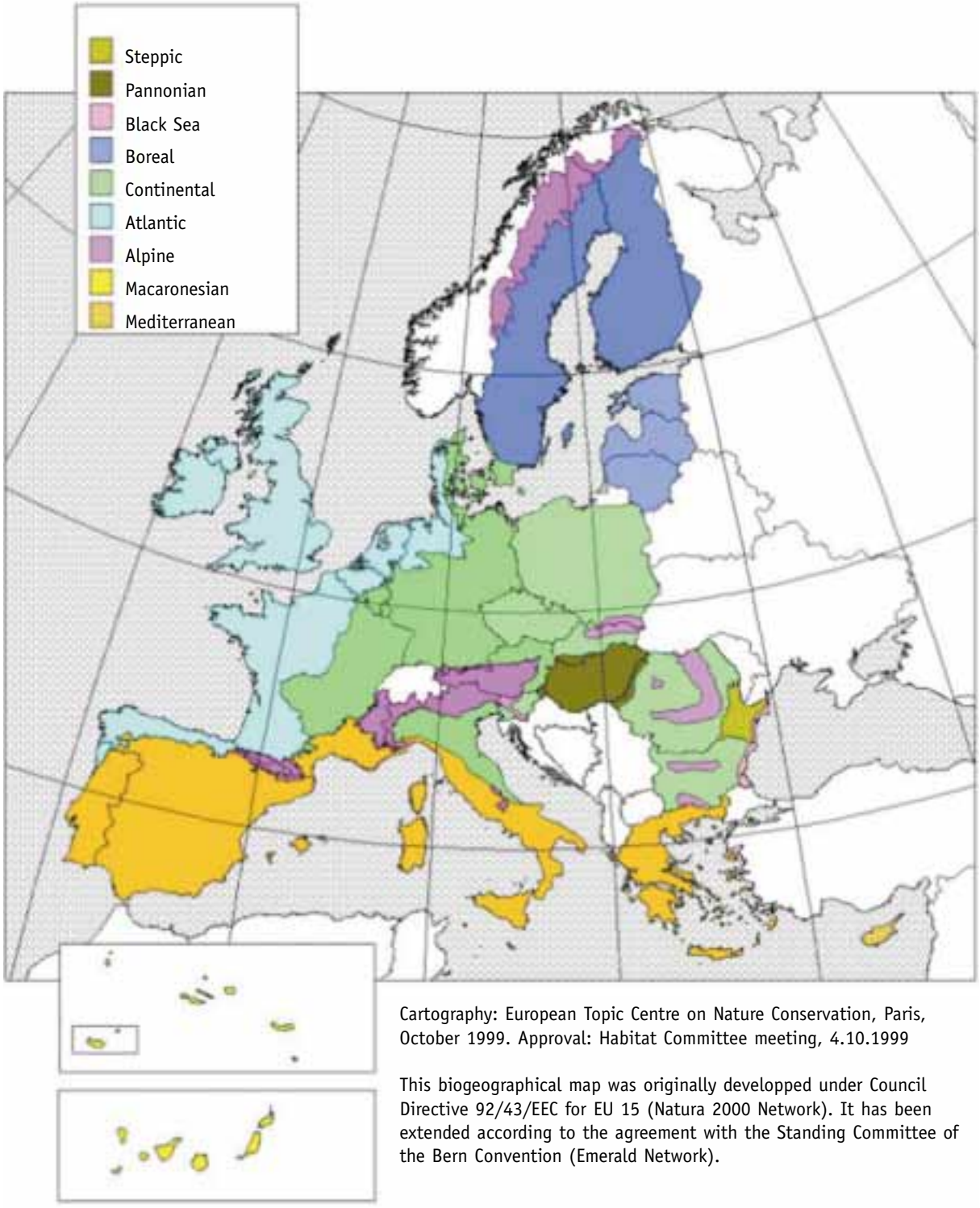
Since 1992, the establishment of Natura 2000 has progressed to varying degrees in all Member States. Some 14 000 sites in the six biogeographical regions in all 15 EU Member States have been listed as proposed sites (pSCI — proposed sites of Community importance) for the network. These proposed lists are then discussed between the Member States, the Directorate-General for the Environment, and observing NGOs such as landowner associations and nature conservation organisations. Revised lists of special areas of conservation (SACs) have then to be designated by Member States, at the latest in June 2004.

The figure above gives an overview of the importance of the forest cover (Annex I HD habitats) within Natura 2000 sites in the different biogeographical regions, according to the actual state of the pSCI designation ([8]).



([7]) The action plan (COM/2001/0162 f) is an instrument for the implementation of Article 8 of the CBD.
([8]) All figures mentioned in this report reflect the data that were available in February 2002.

Indicative map of biogeograpical region EU-15 + 12



Cartography: European Topic Centre on Nature Conservation, Paris, October 1999. Approval: Habitat Committee meeting, 4.10.1999

This biogeographical map was originally developped under Council Directive 92/43/EEC for EU 15 (Natura 2000 Network). It has been extended according to the agreement with the Standing Committee of the Bern Convention (Emerald Network).

4.

Facts about EU forests, forestry and the environment

EU forests cover approximately 113 million hectares (36 % of the Union territory), of which 87 million hectares are considered productive forests. Some 65 % of EU forests are privately owned.

With the accession of Austria, Finland and Sweden, the EU became the world's second largest paper and sawn-wood producer. It is the foremost importer and the third largest exporter of forest products. Forests are also of high importance in the Mediterranean area because of their protective functions and importance for biodiversity. Altogether, the EU forest-based industries' production value amounts to nearly EUR 300 billion, employing some 2.2 million people.

Differences in forest type, forest cover and ownership structure within the EU

- Austria, Finland and Sweden are heavily forested and have substantial forest products industries based predominantly on coniferous forest;
- Greece, Spain, France, Italy and Portugal have Mediterranean woodland, managed primarily for protection and where fire is potentially a serious threat. France and Italy, in particular, also have large areas of temperate forest and mountain forests, including coppice areas, farm woodlots and community forests;
- Belgium, Germany, France and Luxembourg have a mixed ownership structure and a range of forest types with production being significant but not always the primary aim in any forest;
- Denmark, Ireland, the Netherlands and the UK have predominantly artificial forest, based on plantations, although the objects of management have been widened in the last decade to encompass service values;
- south-west France, northern Spain and parts of Portugal have large areas of industrial wood plantations, mainly destined for pulping.

The environmental state of EU forests

(*Sources:* Europe's environment, the second assessment, EEA 1998 and *The environment in the EU at the turn of the century*, EEA, 1999.)

- Forest cover has fluctuated greatly during this millennium, with very low or poor coverage in many countries.
- Present forest cover is a result of a steady increase in recent decades, mainly by planned afforestation and regrowth in semi-natural areas after abandonment of cultivation or grazing. The forest area is still growing and will continue to do so as a result of the evolution of the CAP, which is expected to free more land.
- Forest habitats are changing through intensification of management, the increase in uniformity, fragmentation, the use of exotic tree species, the introduction or maintenance of animal species for hunting, drainage and air pollution.
- Productivity and total production are increasing in many areas, despite declining forest health and severe pest attacks. The increase is probably due to a combination of use of high-yield strains, management including fertilisation and pest control, high levels of airborne CO_2 and eutrophication.
- Only a very small proportion of the natural forest which once covered most of Europe remains untouched, mostly in isolated pockets, and the loss continues for old natural and semi-natural deciduous and coniferous woodlands. In western Europe, less than one third of total forest area is semi-natural and there are nearly no truly natural old forests left.
- Some new forest habitat types are being created, for instance the habitats associated with short rotation Christmas trees, energy woodlands or the use of exotic species such as eucalyptus; these generally have low biodiversity.

Summarising, one can say that, although the absolute area of EU forests is expanding, the environmental quality of the forest ecosystems is often in decline.

Biological importance of European forests

Forests can still be considered as the most important component of European nature. One indicator of the vitality of forests is that the forest biotope remains home to the largest number of vertebrates (mammals, birds, reptiles and amphibians) on the continent.

The distinctive nature of European ecosystems is often forgotten. Even the dominant species of the forests are virtually restricted to Europe. Trees like the European beech and holm oak are not found further east than the Black Sea or the Caucasus. The ordinary sessile oak does not survive further east than the Ural mountains, on the border of Europe. European hornbeams still thrive in the Caucasus but not in Asia proper. Thousands of species of insects and invertebrates are confined to forest habitats constituted by these trees.

Many habitats and plant associations are indeed exclusively European and thus it is solely the responsibility of European countries to safeguard their future. Moreover, Europe hosts a number of restricted-range endemic species.

The changes that forests have undergone over the last few centuries (see Annex I) have brought a great number of species to the verge of extinction. Many species are about to disappear from several European countries and perhaps from the whole continent. This is especially true for organisms at the top of the food chain such as large carnivores and birds of prey.

As part of a new UN/ECE/FAO assessment of the temperate and boreal forests of the world (TBFRA 2000), new data on forest dwelling species were gathered, showing that the number of threatened taxa is alarmingly high. Typically, 20 to 50 % of mammals, and 15 to 40 % of birds of the forest-dwelling species were categorised as threatened. A typical European country harbours several endangered mammals and bird species. In many countries, the proportion of endangered mammals and birds was over 40 %. The situation was almost as bad for lichens, mosses and vascular plants — in some countries, nearly half of the forest-associated lichen species are thought to be at risk.

Sustainable forest management — SFM

Article 10 of the Convention on Biological Diversity encourages the sustainable use of components of biological diversity. For forests, this use should be ensured in the form of sustainable forest management.



Box 1: The first Rio principle

'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'
(Principle 1 of the Rio Declaration, United Nations Conference on Environment and Development, 1992.)

The definition of 'sustainable forest management' has evolved over time according to the changing needs of society. Although comprehensive regulations to balance timber yields and harvests can be traced as far back as the 'ordonnance' of Colbert under Louis XIV in 1667, the first recorded mentioning of the word 'sustainability' actually appeared in connection with forestry in the early 18th century. In 1713, in the German mining town of Freiberg, the local mining authorities urged the foresters to observe the sustainable annual yield of the forest. This historic meaning of sustainability, as it was developed by the forest sector almost three hundred years ago, mainly considered the sustainable yield of woody biomass to cope with historic timber and energy shortages. However, the modern definition of sustainability also includes important social and ecological aspects.

The Brundtland Report ([9]), a key document for the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992, defined sustainable development as follows:

'Sustainable development is development which meets the needs of the present without compromising the ability of future generations to meet their own needs.'

On the basis of this UNCED concept of sustainability, the Ministerial Conference on the Protection of Forests in Europe (MCPFE) ([10]) has developed a common definition of SFM that was adopted at the Helsinki Conference in 1993 ('Resolution H1'):

'The stewardship and use of forests and forest lands in a way, and at a rate, that maintains their biodiversity, productivity, regeneration capacity, vitality and their potential to fulfil, now and in the future, relevant ecological, economic and social functions, at local, national and global levels, and that does not cause damage to other ecosystems.'

This document uses the abovementioned definition of the MCPFE as it was agreed during discussions between experts from the more than 40 States participating in the Council of Europe, including the current 15 EU Member States and all CEECs currently negotiating EU accession.

The same definition was also endorsed by the EU Council in its resolution on the EU forestry strategy ([11]) that was proposed by the Commission in 1998 ([12]) (see below).

More specifically, criteria for sustainable forestry include (Helms, 1998):

(a) conservation of biodiversity;

(b) maintenance of productive capacity of forest ecosystems;

(c) conservation and maintenance of soil and water resources;

(d) maintenance of forest contributions to global carbon cycles;

(e) maintenance and enhancement of long-term benefits to meet the needs of societies;

(f) a legal, institutional and economic framework for forest conservation and sustainable management.

The application of this modern, multi-functional understanding of sustainability can lead to a higher biodiversity in forests. Certain forms of forest management can have positive effects on biodiversity, by creating a high diversity of habitats on a small area and by imitating natural processes of disturbance in the forest ecosystem, including certain forms of agroforestry such as cork production in southern Europe.

([9]) The report 'Our common future' was presented by the World Commission on Economic Development in 1987, and is often referred to by the name of the chairperson, former Norwegian Prime Minster Gro Harlem Brundtland.
([10]) Please refer to the information on the MCPFE in Chapter 5. Further information at: http://www.mcpfe.org
([11]) Council resolution of 15.12.1998, OJ C 56/1, 26.9.1999.
([12]) COM(1998) 649 final of 3.11.1998.

The changing role of forestry in Europe

From being feared as wild, uninviting frontiers that have to be conquered to yield their natural riches, forests are increasingly perceived as a valuable, limited resource that provide much more than timber. Many economic activities in the EU depend on forests as a source of raw material, but forests also provide conservation of the gene-pool and protect other natural resources such as air and water. They provide us with tranquillity, peace of mind, natural beauty and relaxation. These important 'forest services' are becoming increasingly valuable in a rapidly changing world where people tend to prioritise the creation of human living spaces over natural habitats.

Box 2: Framework for Community actions according to the EU forest strategy

- Promotion of forestry activities in rural development action, notably concerning the conservation and the enhancement of ecologicial values of forests.
- Conservation of forest biodiversity, both as an integrated component of forest management and in the establishment of protected forest areas , such as those falling under Natura 2000 designations.
- Enhancement of the role of forests in the mitigation of climate change, both by promoting of woody biomass as a source of energy and increasing the role of forests as a carbon sink.
- Analysis of the possibilities of supporting objectively verifiable, comparable and credible forest certification schemes.

The objectives of forest management are changing towards sustainable management for a variety of results in many Member States and other countries, focusing on new aims as well as the traditional objective of sustainable yield of timber. Different management concepts are becoming closely linked through initiatives such as forest management for sustainability, assessments of external benefits of forests and the introduction of certification schemes for timber extracted from forests where the management regime meets environmental criteria. More attention is being given to the environmental and social functions of forests, for example, for biodiversity, water resources, CO_2 sequestration and recreation. However, most European forest areas are still under the type of management that takes little account of general biodiversity concerns and gives priority to the traditional objective of sustainable timber yield (*Europe's environment, the second assessment*, EEA, 1998).

More detailed information on global forest issues, importance of EU forests, European forest history, naturalness of forests and the role of forestry can be found in Annex I 'General information on forests and forestry'.

The framework for biodiversity protection

Biological diversity is not only of ecological and economic benefit, but also an irreplaceable part of our cultural heritage and history, and a legitimate resource for future generations. At the same time, the rate at which biological diversity is decreasing shows no sign of easing up (*Europe's environment: the second assessment*, Chapter 8, EEA, 1998). The main reasons for this development in the EU are highly intensive forms of land use, pollution, and the break-up of natural habitats through infrastructure and urbanisation. Over the past decades, a series of international instruments have been developed with the objective of protecting our natural heritage.

At the European Council in Göteborg on 15 and 16 June 2001, the Heads of State or Government of the EU Member States agreed on the ambitious target of halting the loss of biodiversity in the EU by 2010 ([13]). This target has also been set in the sixth Community environmental action programme of the EU. The successful establishment of Natura 2000 will be one of the key requirements in reaching this goal.

Annex II summarises the instruments for the protection of natural heritage in Europe.

([13]) See Presidency conclusions at http://europa.eu.int/comm/gothenburg_council/index_en.htm

5. Integration of environmental policy into other EU policy fields

Although the Treaty establishing the European Community does not contain any reference to a comprehensive common forest policy, Community policies on nature conservation, as a part of overall environmental policy, have an effect on national forest policies. The birds and habitats directives are examples of Community legislation that is cutting across forest policy and other policy fields throughout the Member States.

5.1. The Treaty of Maastricht

With the Maastricht reform of the EC Treaty in 1992, the Member States of the European Community agreed on the integration of environmental issues into all fields of Community policy. The Treaty in its consolidated version, last amended by the Amsterdam Treaty, which was signed in 1997 and came into force in 1999, now has a number of articles that are relevant for policy integration at European level.

To further ensure the integration of environmental policy into other EU policy fields, the Treaty of Amsterdam added an explicit reference to sustainable development. In Article 2 of the Treaty, describing the tasks of the European Community, the importance of a 'high level of protection and improvement of the environment' is stressed. Article 6 of the Treaty now demands that environmental protection requirements must be integrated into all Community policy fields.

Article 10 of the Treaty requires that Member States abstain from any measures that might jeopardise the achievement of its objectives. This is important in the context of Natura 2000, as it effectively prevents the development or implementation of any plans or projects that could endanger the conservation status of habitats and species on sites not yet part of Natura 2000 but fulfilling the designation criteria.

5.2. Cross-compliance

According to the cross-compliance principle, projects in the Member States can only be (co-)funded by the Community budget if they comply not only with the

legislation for the operation of the specific budgets, but also with all other existing Community legislation. To stress the importance of an effective implementation of the habitats and birds directives, the Commission requested all Member States in June 1999 to screen measures proposed in their regional development plans for compliance with the nature protection directives. In practice, this means that Member States should not propose any actions to be funded by the EC budget which might have negative effects on Natura 2000 sites.

This support for Natura 2000 was reinforced by an agreement between the Directorates-General for Regional Policy and Environment, signed by Commissioners Wallström (Environment) and Barnier (Regional Policy) and resulting in clear instructions from Commissioner Barnier to avoid deterioration of Natura 2000 sites in connection with Structural Funds spending. The same principle was also applied by Commissioner Fischler to the rural development programmes.

Therefore:

- the rural and regional development plans of the Member States must contain clear and irrevocable commitments to ensure compliance with Community legislation on nature protection (habitats and birds directives);
- the implementation of EU co-financed plans or projects must not have any negative effects on proposed or potential Natura 2000 sites.

Failure to comply with these requirements may result in the loss or delay of the transfer of structural funds and rural development funds to Member States or regions.

5.3. The EU forestry strategy

To coordinate all activities related to forestry at EU level, the Commission communicated to the Council and the European Parliament a 'Forestry strategy for the European Union' in 1998 (see Section 4). This strategy contains a framework for Community action, in which a section on 'Conservation of forest biodiversity' addresses biodiversity concerns in three areas: conservation, sustainable use and equitable benefits arising from the use of forests' genetic resources, as demanded by the CBD. As there are only a few forest areas in Europe which are withheld from commercial use, the most important action for the protection of biodiversity is finding appropriate forest management systems that take biodiversity concerns sufficiently into account, thereby observing multi-functional management objectives throughout all forestry operations.

The EU forestry strategy therefore calls on forest managers to take into account the following guidelines for the conservation of biodiversity:

- appropriate ecological site adaptation measures through diverse silvicultural techniques combined with accessory measures (such as respecting dead wood and other key micro-habitats present in forests);
- maintenance of forest ecosystem health and vitality by enhancing regenerative capacity, resistance and adaptive capacity of forest ecosystems;
- restoration and rehabilitation of degraded areas, species, populations, habitats and ecosystems;
- maintenance of traditional management of those silvo-pastoral systems with high levels of biodiversity which may be lost if these areas are abandoned (for instance, in the Mediterranean regions);
- improving harvesting techniques to keep related damages as limited as possible;
- conducting afforestation measures in a manner that does not negatively affect ecologically interesting or noteworthy sites, habitats and ecosystems (for example, the chosen tree species should be well suited to local conditions and ecosystems; native species or local provenances should be preferred; whenever species are introduced, sufficient attention should be taken to ensure the conservation of native flora and fauna).

Moreover, the EU forestry strategy calls for the establishment of protected forest areas as a complement to sustainable management of forests, especially through Natura 2000. Such protected areas should contribute to enhance social, cultural, environmental and economic benefits of forests.

6. Management of Natura 2000 forest sites

As it is the responsibility of Member States to establish concrete conservation measures and possible restrictions on use of Natura 2000 sites, the local conditions will be the decisive factor for the management of each individual site. However, the habitats directive sets some principles for the management of Natura 2000 sites, based mainly on Articles 4 and 6. This chapter presents a set of non-mandatory guidelines, based on existing interpretations of the directive and on the widely recognised criteria for sustainable forest management adopted by the Ministerial Conference on the Protection of Forests in Europe (MCPFE). These guidelines should be understood as a broad framework within which the concrete negotiations for management plans or measures at site level will be conducted by the stakeholders and local authorities involved. They are not intended, however, to change regulations concerning those Natura 2000 sites that are under strict protection regimes.

During the consultations for this document, forest owners have repeatedly mentioned that many Natura 2000 sites will already comply with the main requirements which are to be listed in this chapter. On the one hand, it is true that there is no need to change existing forest management practice on Natura 2000 forest sites, provided the present management has helped to create or maintain a forest of high biodiversity with a structure and species composition which are in line with the conservation objectives for which it was designated. In this context, the merits of both private and public European forest owners, who stand as a worldwide role model for the sustainable use of forest resources, have to be acknowledged. On the other hand, it has been reported that some Natura 2000 sites are under management that is contrary to the conservation objectives compulsory after their designation.

6.1. Forestry and nature conservation

The concept of multi-functional forestry lies at the heart of the EU forestry strategy and is widely acknowledged in Europe. This concept integrates all the important benefits that forests can yield to society (ecological, economic, protective and social functions).

The nature conservation strategies which Member States have used to implement the nature protection directives vary widely across the European Union (Sunyer and Manteiga, 1998).

In some regions, predominantly in central and northern Europe, there is a tendency towards the designation of small and medium-sized Natura 2000 sites. These regions are characterised by intensive land use, and nature conservation competes strongly with other land-use practices, leaving little room for natural or semi-natural areas. In this strategy, which could be termed 'intensive', the protection of natural sites often involves the purchasing of land or the rights to its use and direct interventions in the dynamics of the ecosystem. This type of management is based on a more distinct environmental culture, greater budgetary provisions and the motivation to recover lost habitats by conserving them at a fixed stage of the natural succession over a reduced area ('reserve'-based approach).

In regions where extensive farming and forestry systems with a high ecological value continue to exist, generally in the south and east European regions, but also in some highlands and mountains in other European countries, the proposed sites of Community importance tend to be larger in size. Here, their conservation is closely related to the maintenance of specific farming systems or forestry practices. In these regions, conservation strategies are different and tend to seek the integration of nature conservation and rural development, in what could be termed an 'extensive' nature conservation strategy.

These two main nature conservation strategies have also been termed 'integrative', that is, integrating all functions into the — rather extensive — land use of large areas, and 'segregative', that is, setting aside areas exclusively for nature conservation purposes amidst intensifying land use on the remaining areas, sometimes beyond the sustainable limit. However, when looking exclusively at forest habitats, this distinction may be less clear, as forestry has always had a considerably lower ecological footprint than, for example, agriculture. Forestry in Europe has mainly followed an integrative strategy in the past. Many forest areas today can be called 'semi-natural', and the need for habitat restoration is not as apparent as it often is, for example, in wetlands and mires where economic use has totally altered landscape features and biodiversity levels.

Preservation of biodiversity in forests across Europe calls for a careful balance between the two conservation strategies previously described, depending on the local and regional situation. The continuation of economic activities under sustainable forest management might very often be part of a nature conservation strategy for forest ecosystems in regions with widely accepted historical traditions of forest use.

Another distinction between existing nature conservation strategies can be made between a static and a more dynamic approach. In most cases, especially in forests, natural dynamics and change must be understood as an integrative part of the nature conservation objective. The natural disturbance of the forest ecosystem through windfalls, lightning and death of old trees, which is often 'simulated' by harvesting operations in sustainable forestry, is an important factor in maintaining a variety of habitat structures, a mosaic-like distribution of different

Box 3: Multi-functional forestry in Europe, a promising model for the future?

A research project called EFISCEN (European forest information scenario model) recently examined the long-term development of European forests under alternative regimes until 2050. The project compared different scenarios by modelling a multi-functional scenario combining the objective of producing more wood (and thus more employment and more bioenergy possibilities) with ecological objectives (thus allowing more dead and decaying wood, forest reserves, more diversity in species, spatial and age structure).

The results showed that, apart from being able to provide society with sufficient renewable natural resources in the form of timber, active multi-functional forest management can also enhance the ecological and recreational quality of European forests (cf. Nabuurs et al., 2001).

age-groups and a high level of biodiversity. This dynamic understanding of nature conservation is needed on Natura 2000 forest sites if conservation strategy is to be integrative.

Yet, not all the objectives of nature conservation can be reached through sustainable forest management. The setting-aside of areas exclusively for nature conservation purposes has to be considered in the case of especially rare or valuable habitats whose conservation status would otherwise decline. Therefore, Natura 2000 will be a network of conservation areas, enjoying a varying degree of protection from absolute reserves to individual species-based restrictions.

In this context, the existence of forest areas undisturbed by economic activity is especially important from a scientific point of view, for example, as 'reference areas' for biodiversity monitoring, and from a nature conservation point of view, for example, as refuge areas for species that require dead or dying wood or large undisturbed habitats. Therefore, 'old growth' ([14]) or 'virgin' forest areas will deserve special attention among Natura 2000 forest sites. In the EU, such forests are now limited to small pockets in managed complexes or to certain regions with specific ecological and social conditions, such as northern Fennoscandia. The degree of human interference that can be reconciled with safeguarding the conservation value of such sites will depend on their regenerative capacity, which may mean that no intervention at all may be the rule in the case of very low growth rates.

Natura 2000 also has the task of consolidating existing systems of strictly protected zones as a scientific reference base and as a possibility of diversifying rural income, such as through tourism. Many of these strictly protected sites are already protected today, for example, as parts of national parks, others might have to be established, such as to safeguard remaining old-growth forests.

6.2. General requirements for forest management on Natura 2000 sites

The basic legal texts for the establishment of Natura 2000 are the Directives 79/409/EC ('birds directive') and 92/43/EEC ('habitats directive') ([15]). According to the habitats directive, the aim of Natura 2000 is to establish 'favourable conservation status' for the habitats and species that are listed as being of Community interest. The concept of 'favourable conservation status' is defined in Article 1 of the habitats directive by reference to species population dynamics, trends in the range of species and habitats and the remaining area of habitats.

The nature protection directives only indicate the result to be achieved through national implementation. They do not prescribe any concrete conservation measures. Therefore the Commission must assure that the objectives of the directives are reached, but it does not have any direct influence on the regional and local negotiation of the management measures on Natura 2000 sites. This also means that Member States may impose a stricter legal framework on their territory than what is required by the habitats directive, but should not fall back on Community legislation to justify this ([16]).

Therefore only a limited number of general forest management requirements can be derived from the directives and it is not possible to give specific indications on areas such as the restriction of harvesting levels, the dimensions of clearings, timing of interventions, etc. as these depend on management measures that have to be negotiated on a local level between the authorities in charge and the forestry operators/owners.

Article 4 of the habitats directive clearly states that as soon as an area is designated as a site of Community importance, it is to be treated according to the provisions of Article 6. First of all, it must be

([14]) Generally defined as not having had any human interference for over 100 years.
([15]) The text of the directives is available in all official Community languages on the nature conservation homepage of the Directorate-General for the Environment: http://www.europa.eu.int/comm/environment/nature/legis.htm
([16]) Environment DG letter of 19 September 2001 to the transport administrations of Belgium, Germany and the Netherlands in relation to the 'Iron Rhine' railway project.

ensured that land-use practices do not lead to a deterioration of the conservation value of the site. For forest sites, this could include, for example, not clearing large areas, not changing the form of land use or not replacing existing indigenous tree species by other, exotic tree species.

Article 6 of the habitats directive states that plans or projects which are not directly connected with or necessary for the management of Natura 2000 sites but which are likely to have a significant effect on them, either individually or in combination with other plans and projects, must undergo an appropriate assessment of the effects on the sites. For example, a forest management activity like logging, track construction or soil drainage falls under this provision, which means that it will have to form part of a management plan or be decided on a case-to-case basis.

Article 6 of the habitats directive also requires specific conservation measures of statutory, administrative or contractual nature to specify the management of the sites. These will be developed on a local basis. Contractual measures are, under certain conditions, generally more widely accepted amongst private forest owners than statutory or administrative measures and should therefore be preferred, where applicable.

The Directorate-General for the Environment has published an interpretation guide 'Managing Natura 2000 sites' ([17]) from which the following baselines for negotiations on site management with forest owners and operators can be derived ([18]).

- If the actual forestry practices do not lead to a decline in the conservation status of habitats or species and are not contradictory to the Member State's own conservation guidelines, then this form of economic use can be continued.
- If the actual forestry practices lead to a deterioration of the conservation status of the habitats or species for which a given site was designated or is contradictory to the Member State's own conservation objectives, then Article 6 of the habitats directive should be applied and forest management targets will have to be adapted.

The Directorate-General for the Environment has addressed the following guidelines and directions for forest management on Natura 2000 sites to Member State authorities ([19]).

- It is preferable to designate perimeters with a sufficient extension to allow conservation objectives to be integrated into existing management plans, rather than to designate small plots corresponding exactly to the descriptions in the habitats reference guide.
- Conservation of habitats and species at the level of an entire site should be the result of measures in favour of habitats and species for which the site was designated, leading to a stable 'biodiversity offer' for the site as a whole. It is self-evident that, in the case of cyclical interventions (in space and in time), such a situation is more easily attained on sites covering larger surfaces.
- Interventions leading to temporary disturbance of forest cover on a limited space (for example, group cuttings) or with a limited intensity (such as thinning) are legitimate, provided that they allow recovery of the initial situation by natural regeneration, even if several stages of natural succession have to follow one another.

These guidelines and orientations apply to habitats as well as species and sometimes a combination of the measures for habitats and species may be required to obtain the desired results.

An example of this is the conservation of the capercaillie (*Tetrao urugallus*), a species of Annex I to the birds directive. If this bird is living in a Natura 2000 forest site, the management should be able to demonstrate that silvicultural measures are adapted to maintain or improve the conservation value of the site for this species. As the capercaillie requires a mosaic of

([17]) Specific advice on the requirements for the management of sites can be found in the publication by the Directorate-General for the Environment 'Managing Natura 2000 sites — The provisions of Article 6 of the habitats directive' on http://www.europa.eu.int/comm/agriculture/fore/index_en.htm and http://www.europa.eu.int/comm/environment/nature

([18]) Letter of 22 September 2000 by Commissioner M. Wallstroem to Dr von Schorlemer, president of AG Deutscher Waldbesitzerverbaende e. V.

([19]) Letter of 23 April 2001 to Mr J. Happart, Minister for Forests and Nature Protection in the Wallonia region, Belgium.



Box 4: Main requirements for forest management resulting from the habitats directive

- Nature conservation measures have to be considered for each Natura 2000 site, in the form of appropriate statutory, administrative or contractual measures. The development of a management plan is recommended (Article 6(1) of Directive 92/43/EEC).
- Nature conservation objectives must have priority on Natura 2000 sites, while the economic and social function of the forest should also be taken into account.
- The conservation status of the site, in relation to the quality of the habitat and the conservation value for the species, must be maintained or improved.
- Projects or plans which might have a negative impact on a Natura 2000 site must undergo an appropriate assessment (Article 6(3) of Directive 92/4/EC).
- The quality of the site must be periodically monitored and reported on by the competent Member State authorities.

different structures in its forest habitats, it is one of many animal species whose populations can benefit from appropriate and carefully planned forest management, without having to put an end to economic exploitation. So far, in most European countries, the few remaining local populations of the capercaillie are declining, because the management is not sufficiently focused on reaching nature conservation objectives.

Another example of conservation-oriented forest management comes from the French Jura, where large sections of the forests are exploited in a manner which leaves a diverse structure of small clearings, underbrush, tall trees, etc. (*futaie jardinée*) as a good habitat for the capercaillie. A LIFE project in the Jura (LIFE/99/ENV/F/00477) developed guidelines for forestry which were agreed with the representatives of the public forest service and the private forest owners. About 20 000 hectares in the project area are now managed under these guidelines (see Chapter 8).

Effective multi-functional management approach also exists in the Hainich beech forest in Thuringia, Germany. A large part of this forest was managed traditionally yielding a great diversity of structure. When the Hainich was designated a Natura 2000 area and a management plan was developed for it, this selective felling system (*Plenterwaldwirtschaft*) was explicitly encouraged and maintained.

6.3. Operational-level guidelines for sustainable forest management on Natura 2000 sites

This section proposes to adopt elements that are relevant for nature protection from the resolutions of the Ministerial Conferences on the Protection of Forests in Europe (MCPFE- cfr. Annex II) at Helsinki (1993) and Lisbon (1998) as the basis for forest management guidelines on Natura 2000 sites.

Using these resolutions as guidelines for the management of sites has several advantages:

- the acceptance amongst stakeholders is high, as the resolutions were developed using a participatory approach involving national authorities and civil society;
- all EU Member States, as well as all candidate countries for EU accession, have been involved in the pan-European process on the protection of forests since its beginning;
- all resolutions and guidelines were prepared by working groups consisting of recognised forestry experts and drawing on national, regional and local experience in forest management from forest authorities, scientists, forest owners' associations and environmental NGOs across Europe;
- the findings of the working groups were endorsed at political level by the ministers responsible for forests
- the EU Council endorsed the results of the pan-European discussions on forests as one of the most important elements of the EU forestry strategy ([20]).

([20]) Council resolution of 15.12.1998, OJ C 56/1, 26.9.1999.

The 'Pan-European criteria and indicators for SFM' adopted at the MCPFE in Lisbon (1998, Resolution L2), have been developed on the basis of resolutions H1 and H2 of the Helsinki MCPFE which concern SFM and forest biodiversity.

The six pan-European criteria providing a basis for monitoring sustainable forest management are:

- **C1**: maintenance and appropriate enhancement of forest resources;
- **C2**: maintenance of forest ecosystem health and vitality;
- **C3**: maintenance and encouragement of productive functions of forests (wood and non-wood);
- **C4**: maintenance, conservation and appropriate enhancement of biological diversity in forest ecosystems;
- **C5**: maintenance and appropriate enhancement of protective functions in forest management (notably soil and water);
- **C6**: maintenance of other socioeconomic functions and conditions.

As a complement to these criteria, the MCPFE has defined a series of operational-level guidelines for sustainable forest management, from which many elements can be applied to verify the compatibility of forest management with Natura 2000 designation on a given site.

A selection from both the guidelines for forest management planning and the guidelines for forest management practices, based on nature conservation as a priority management objective for Natura 2000 sites, is given below:

C2: Maintenance of forest ecosystem health and vitality

- 'Forest management practices should make best use of natural structures and processes and use preventive biological measures wherever and as far as economically feasible to maintain and enhance the health and vitality of forests. Adequate genetic, species and structural diversity should be encouraged and improved to enhance stability, vitality and resistance capacity of the forests to adverse environmental factors and strengthen natural regulation mechanisms.'
- 'Appropriate forest management practices such as reforestation and afforestation with tree species and provenances that are suited to the site conditions or the use of tending, harvesting and transport techniques that minimise tree and/or soil damages should be applied. The spillage of oil through forest management operations or the indiscriminate disposal of waste on forest land should be strictly avoided.'
- 'The use of pesticides and herbicides should be minimised, taking into account appropriate silvicultural alternatives and other biological measures.'

C3: Maintenance and encouragement of productive functions of forests (wood and non-wood)

- 'Regeneration, tending and harvesting operations should be carried out in time, and in a way that does not reduce the productive capacity of the site, for example by avoiding damage to retained stands and trees as well as to the forest soil, and by using appropriate systems.'
- 'Harvesting levels of both wood and non-wood forest products should not exceed a rate that can be sustained in the long term, and optimum use should be made of the harvested forest products, with due regard to nutrient offtake.'
- 'Adequate infrastructure, such as roads, skid tracks or bridges should be carefully planned, established and maintained to ensure efficient delivery of goods and services while at the same time minimising negative impacts on the environment. '

C4: Maintenance, conservation and enhancement of biological diversity in forest ecosystems

- 'Forest management planning should aim to maintain, conserve and enhance biodiversity on

ecosystem, species and genetic level and diversity at landscape level.'

- 'Forest management planning and terrestrial inventory and mapping of forest resources should include ecologically important forest biotopes, taking into account protected, rare, sensitive or representative forest ecosystems such as riparian areas and wetland biotopes, areas containing endemic species and habitats of threatened species, as well as endangered or protected genetic *in situ* resources.'
- 'Natural regeneration should be preferred, provided that the conditions are adequate to ensure the quantity and quality of the forests resources and that the existing provenance is of sufficient quality for the site.'
- 'For reforestation and afforestation, origins of native species and local provenances that are well adapted to site conditions should be preferred. Only those introduced species, provenances or varieties should be used to supplement local provenances if their impacts on the ecosystem and on the genetic integrity of native species and local provenances has been evaluated, and if negative impacts can be avoided or minimised.'
- 'Forest management practices should, where appropriate, promote a diversity of both horizontal and vertical structures such as uneven-aged stands and the diversity of species such as mixed stands. Where applicable, the practices should also aim to maintain and restore landscape diversity.'
- 'Traditional management systems that have created valuable ecosystems, such as coppice, on appropriate sites should be supported when economically feasible. '
- 'Infrastructure should be planned and constructed in a way that minimises damage to ecosystems, especially to rare, sensitive or representative ecosystems and genetic reserves, and that takes threatened or other key species — in particular their migration patterns — into consideration.'
- 'Standing and fallen dead wood, hollow trees, old groves and special rare tree species should be left in quantities and distribution necessary to safeguard biological diversity, taking into account the potential effect on health and stability of forests and surrounding ecosystems.'
- 'Special key biotopes in the forest such as water sources, wetlands, rocky outcrops and ravines should be protected or, where appropriate, restored when damaged by forest practices.'

C5: Maintenance and appropriate enhancement of protective functions in forest management (notably soil and water)

- 'Areas that fulfil specific and recognised protective functions for society should be registered and mapped, and forest management plans or their equivalents should take full account of these areas.'
- 'Special care should be given to silvicultural operations on sensitive soils and erosion-prone areas as well as on areas where operations might lead to excessive erosion of soil into watercourses. Inappropriate techniques such as deep soil tillage and use of unsuitable machinery should be avoided on such areas. Special measures to minimise the pressure of animal population on forests should be taken.'
- 'Special care should be given to forest management practices on forest areas with a water protection function to avoid adverse effects on the quality and quantity of water resources. Inappropriate use of chemicals or other harmful substances or inappropriate silvicultural practices influencing water quality in a harmful way should be avoided.'

C6: Maintenance of other socioeconomic functions and conditions

- 'Forest management planning should aim to respect the multiple functions of forests to society, have due regard to the role of forestry in rural development, and especially consider new opportunities for employment in connection with the socioeconomic functions of forests.'

- 'Property rights and land tenure arrangements should be clearly defined, documented and established for the relevant forest area. Likewise, legal, customary and traditional rights related to the forest land should be clarified, recognised and respected.'
- 'Sites with recognised specific historical, cultural or spiritual significance should be protected or managed in a way that takes due regard of the significance of the site.'
- 'Forest management practices should make the best use of local forest-related experience and knowledge, such as of local communities, forest owners, NGOs and local people.'

6.4. The importance of formal adoption of management principles

The general requirements for management of Natura 2000 sites are given in Article 6 (1) and (2) of the habitats directive. These provisions have been dealt with in detail in the Commission's guidance document 'Managing Natura 2000 sites' ('The provisions of Article 6 of the Habitats Directive 92/43/EEC ') which was published in all Community languages in 2000 and is available on the Directorate-General for the Environment's website: *http://europa.eu.int/comm/environment/nature/*.

It should be recalled that Article 6 of the habitats directive does **not** prescribe any format, procedure or structure for the management measures concerning Natura 2000 sites. The directive only mentions 'the necessary conservation measures' and 'appropriate statutory, administrative or contractual measures' to be taken **by the Member States**. This means that the principle of subsidiarity is fully applicable to the way in which the management of Natura 2000 sites, including forests, is applied at field level. It is also clearly indicated that adopting management plans is not a mandatory but an optional step. Section 8.1 provides numerous examples of management measures taken and procedures followed by Member States' national, regional and local authorities.

In practice, the way in which management decisions or options are formalised will depend on different factors, such as ownership of the site, intensity of economic use, occurrence of priority species and habitats, the relative rarity and sensitivity of the habitats or species concerned and the existing traditional or customary rules on use of natural resources.

Given past experiences with pilot projects (see Section 8.2 — LIFE projects) and the existing practices in the EU forest sector (see Section 8.1 — examples from the Member States), the Directorate-General for the Environment recommends that management objectives for Natura 2000 forest sites be formalised in long-term management plans with legal value. Such management plans may be part of existing or general forest management plans but they may also be specifically designed for Natura 2000 sites or for certain habitats or species. It is clear that the management objective for a very small site, such as a core area of high conservation value, will be quite different from that for a whole national park in which there are obvious possibilities for continuing resource use without loss of conservation values. Management plans are particularly appropriate for establishing a coherent approach to interrelated sites or for cross-border sites. Along with management plans, other instruments, such as contract conservation and conditional compensation payments can also be considered (see Chapter 7).

The following is a non-limitative indicative overview of factors which can be taken into account when defining management principles for Natura 2000 forest sites:

- felling system: clear felling (size), strip felling, group felling, selection felling, absence of exploitation;
- regeneration technique: planting, vegetative multiplication, natural regeneration (with any additional measures to influence the species composition);
- use of exotic vs indigenous trees; use of site-specific indigenous species composition;
- origin of regeneration material (in compliance with the mandatory Community regulatory framework on movement of forest seeds, cuttings and plants, it should be borne in mind that use of indigenous species for reforestation can result in

failure and genetic pollution if the provenance of material is not verified);

- rotation length (by stand or by tree);
- ploughing or other soil disturbing activities;
- thinning regimes;
- game management and grazing;
- use of controlled fire;
- continuation of traditional practices (for example, coppice and standards, *taillis-sous-futaie/Mittelwald*).

These factors are of key importance to biodiversity, which is why they should be taken into account in relation to Natura 2000 implementation. In cases of designation based on existing natural resources use, it will mean these factors may not need to be changed, unless on a voluntary basis and/or with the help of financial incentives from outside. However, changing these factors in an environmentally negative way (for example, increasing clear felling size or shortening rotations) could come into conflict with the guidelines mentioned in Section 6.3. On the contrary, optimising these factors for environmental benefits on a voluntary basis and/or with the help of incentive measures, is to be welcomed as a positive contribution to the overall enhancement of Natura 2000.

6.5. Recommendations for biodiversity conscious forestry on protected areas and beyond

In addition to the points raised in the preceeding sections, a series of practical recommendations can be given for day-to-day management practices in Natura 2000 sites and beyond.

Indeed, as only 5 % of the land surface of the earth falls under some form of nature protection status, one should be aware that there will always be more net biodiversity in the countryside in general than in areas targeted especially for conservation — which are principally a refuge from where the recolonisation of cultural landscapes can take place after disturbance. Therefore, the ideal form of biodiversity management is an integrated approach that does not affect parts of a territory for one function exclusively. Just as Natura 2000 should not only be a system of strict reserves, the surrounding cultural landscape should not be a monofunctional production line where everything but a few cultivated plants or animals can be eradicated.

Forest managers and planners may consider the following recommendations for preserving biodiversity at the management unit level, that is, taking into account local circumstances:

- conserving individual, mature and dead or decaying trees, which offer suitable habitats for woodpeckers, birds of prey, insects and many lower-level plants (fungi, ferns, bryophytes, etc);
- conserving trees with cavities which could be used as nesting sites for small birds and mammals;
- conserving large trees and their immediate surroundings if they appear to be regularly occupied by nesting raptors;
- maintaining forest ponds, brooks, springs and other small water bodies such as mires and fens in a state that allows them to play their role in the reproductive cycle of fish, amphibians, insects, etc., by avoiding excessive fluctuation in water levels, damage to natural embankments and water pollution;
- appropriate zoning, both regarding forestry operations and tourism/recreation, of large forest areas according to different levels of management intervention, allowing to apply buffer zone measures around protected areas;
- using management decisions after natural disasters such as large-scale windfall and fires to take account of the possibilities for biodiversity enhancement by allowing natural succession processes to proceed in potentially interesting areas;
- adapting the timing of silvicultural and logging operations so as to avoid interference with the reproductive season of sensitive animal species, most notably the spring nesting and breeding of forest birds;

- maintaining adequate distances to avoid disturbance of rare or threatened species whose presence has been confirmed;
- allow a cyclical rotation of areas with different degrees of intervention in time and space;
- if not contradictory to existing forest laws and regulations, it is worth considering not filling up all the available space when replanting, so as to maintain small natural environments associated with forests, such as grassy patches, calcareous grasslands, heaths, mires, bogs, alluvial bottomlands and landslides. All these can enormously enrich the overall biodiversity offer of an estate, because of the increased occurrence of transitions ('ecotones') between different vegetation types;
- by the same logic, a decision not to replant the 'fallout' spots in recent economical plantations may provoke additional variation and scattered spontaneous recolonisation by pioneer species, which leads to an increase in biodiversity in the long term by providing adequate niches for a large variety of species; moreover, the added value of 100 % complete regeneration is usually low, as replanting operations are very expensive;
- assuring regular monitoring of the richness of natural species, so as to gauge the effects of certain measures and to assure awareness of the presence of rare or threatened fauna and flora elements.

This type of measure and the absence of certain interventions can easily be introduced in the management of public forest holdings, given the political will to do so. For private forests they may well be subject to grants, contractual agreements, tax breaks, technical assistance, etc. in order to compensate owners for income foregone, services rendered to society as a whole and, if applicable, capital depreciation.



Metsäpanoraama/J. Luhta

7. Financial instruments

An adequate approach to the financial and economic implications of Natura 2000 is one of the most important conditions for the acceptance of the network amongst the rural population, landowners and economic operators using natural resources on designated areas. Such an approach is required according to Article 2 of the habitats directive, which holds that measures related to Natura 2000 have to take account of social, economic and cultural circumstances. It must also be mentioned that this issue has to be seen in the light of Article 17 of the Charter of Fundamental Rights of the European Union ([21]), which sets the principle of compensation for income foregone. On 9 May 2002, the 'El Teide Declaration' ([22]) endorsed the prominent role of Natura 2000 in delivering the EU's biodiversity objectives. It also recognised that the delivery of the EU's biodiversity objectives 'requires targeted resources'.

Article 175(4) of the EC Treaty holds that environmental measures have to be paid for by the Member States. This implies that costs resulting from the operation of a network for the protection of the European natural heritage have to be settled by the Member States. This chapter gives more information on the possibilities for Member States to use financial support from the EC budget for managing Natura 2000 sites. Until now, not many of these possibilities have been used by national, regional or local authorities and the forestry sector has not been well informed about them.

Community financing of Natura 2000 is dealt with in Article 8 of the habitats directive. At the moment, the only Community funding dedicated exclusively to Natura 2000 is the LIFE-Nature fund, which is used to promote management planning and pilot/demonstration projects for habitats and species management. In several Member States, local compensation schemes or grant funds operate on a reduced scale.

([21]) Article 17: Right to property
1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.
(OJ C 364/12, 18.12.2000).

([22]) The declaration was made by the Commissioner for the Environment, Margot Wallström, and the Spanish Minister for the Environment, Jaume Matas, on behalf of the Council.

Other policy measures, in particular elements of the rural development programmes, are already providing substantial support to the implementation of the network by way of payments for non-intensive agricultural management of land or for more ecologically oriented forestry. In some Member States, there has also been significant use of regional development funding to finance specific investments related to Natura 2000 sites ([23]). On the basis of these various elements, the Directorate-General for the Environment created a working group on Article 8 of the habitats directive in 2001 to formulate proposals for developing a structured approach to financing Natura 2000. An outline of the conclusions of this working group ('Final report on financing Natura 2000' — available to the public at the end of 2002 ([24])) is given hereafter.

7.1. Existing support systems

7.1.1. Contract conservation

Contract conservation consists of establishing management measures on privately owned land by specifying the measures in contractual agreements between conservation authorities and landowners. These agreements usually lead to financial benefits for those landowners whose income from land-use practices is affected by restrictions that result from conservation measures. The advantage can be in the form of direct payments, tax breaks, soft-lending conditions, other land-use rights, etc. The conservation measures can be carried out by the landowners or holders of user rights themselves (who are then paid for the work) or they can be carried out by others, such as contractors or volunteers of NGOs. Under specific circumstances, the measures can also be co-financed by the Community budget (rural development and regional development policies).

Contract conservation has been successfully applied in several Member States to meet the requirements laid down by the habitats directive under the national nature conservation legislation for privately owned Natura 2000 sites. To ensure the maximum acceptance of this instrument, a number of basic recommendations about the characteristics of such contracts can be made (based on Giesen, 2001).

- The most important aspect of a contract should be that it offers security, that is, that the contract should, as far as possible, be final in its requirements. The forest owner must be able to depend upon the negotiated agreement, and be free from further demands from the nature conservation authorities, insofar as this security is possible under national legislation. This means that contracts should be of long duration and their application should be adequately monitored.
- A conservation contract must be economically viable. Any form of compensation for measures must be proportional to the incurred costs or the loss of income. Compensation does not have to be limited to monetary remuneration: even the guarantee of fast and effective cooperation with the authorities can be a valuable form of compensation.
- Conservation contracts must be tailored to local circumstances, but at the same time they must be based on a certain national or regional standard. The owner must be able to rely on this basic standard contract, without having to carefully check each new contract agreement and without having to consult professional advice.
- Standards for assessment of compensation levels should be jointly agreed between competent authorities, forest owners' organisations and scientific experts.

Contract conservation should not, however, be seen as an alternative to designation of Natura 2000 sites.

7.1.2. Forestry measures under EU environmental policy: LIFE

General description

The LIFE programme is intended to fund pilot environmental actions, the results of which can be applied to the 'main' financial instruments of the EU,

([23]) The EC has already published a full study on this: 'Financial instruments for the Natura 2000 network', Sunyer & Manteiga, 1998.
([24]) See website http://europa.eu.int/comm/environment/nature/

such as the agricultural and Structural Funds budgets.

LIFE was created in 1992. The first phase was completed in 1992–95, the second phase ran from 1995 to 1999 and LIFE III is now continuing from 2000 to 2004 with a total budget of EUR 640 million. Before LIFE, other financial instruments, such as the ACE fund ([25]), provided Community support to actions in the field of the environment.

Actions eligible for LIFE funding belong to three fields:

- **LIFE Environment**: innovative and demonstration actions for industry; demonstration, promotion and technical assistance actions for local authorities; and preparatory actions to support Community legislation and policies ([26]).
- **LIFE Nature**: pilot actions aimed at the conservation of natural habitats and of wild fauna and flora of EU interest ([27]). This means that LIFE Nature is directly targeted at priming the operation of the Natura 2000 network.
- **LIFE Third countries**: technical assistance in the establishment of environment-related administrative structures, nature conservation actions and demonstration actions to promote sustainable development.

Maximum rates of support for LIFE projects are 50 % of the eligible costs (exceptions: 30 % of eligible costs for income-generating actions) and 75 % of eligible costs for actions concerning priority natural habitats or priority species as defined in Directive 92/43/EEC or species of birds in danger of extinction.

LIFE is open to 'all natural or legal persons'.

LIFE Nature and forestry

With an annual budget of approximately EUR 80 million completely devoted to nature conservation measures linked to Natura 2000, LIFE Nature is the most important financing mechanism for the establishment of the network. Since 1992, 237 projects with relevance to forests or forest management have been funded under LIFE Nature. These can be divided into three categories (Table 3). Table 4 shows the key activities of the funded projects, grouped in 18 categories. Here, only the projects of category I and II (*Key forestry project* resp. *Relevant forestry project*) are examined.

Many of the LIFE Nature projects focus on an extensification of forest management or on more ecologically friendly forms of forestry. Achieving a balance between nature conservation objectives and the economic aspects of land use and landowners rights is often the main focus of LIFE Nature projects.

LIFE Environment and forestry

The scope of LIFE Environment is much wider than that of LIFE Nature and is **not directly related to Natura 2000**. This part of the LIFE programme has financed projects for setting standards to integrate biodiversity concerns in forestry outside Natura 2000 areas. It has also supported projects for improving the environmental efficiency of forest industries. Some examples of relevant LIFE Environment projects are given in Section 8.2.

7.1.3. The new generation of Community funds, 2000–06

Once the common agricultural policy had guaranteed food security and modernised European agriculture, a need to develop more economically oriented and environmentally sustainable agriculture became apparent at the end of the 1980s. The 1992 CAP reform made the first changes towards decreasing market support, reduction of surpluses and agri-environmental and afforestation programmes. Forestry profited from rural development measures through the afforestation premiums within the framework of Regulation 2080/92. This regulation led to the afforestation of over 900 000 hectares of agricultural land between 1994 and 1999, and contributed to rural development by the

([25]) A brief history of the Community financing for nature conservation, environment and third countries projects is available at http://europa.eu.int/comm/environment/life/life/nature_history.htm
([26]) Further information is available on the LIFE-Environment homepage: http://www.europa.eu.int/comm/life/envir/index.htm
([27]) Further information is available on the LIFE-Nature homepage: http://www.europa.eu.int/comm/life/nature/index.htm

Table 3: Main categories of LIFE Nature projects with relevance for forestry

Category	*I* *Key forestry project*	*II* *Project with relevance for forestry*	*III* *Horizontal forestry project*
Relevance for forestry	The relation between forest management and biodiversity is the main focus of the project, for example, forest management is used to achieve nature conservation objectives.	Forest management is one of several aspects of the project, for example, as part of a management plan.	The project involves one or more forest areas without focusing on forest management.
Number of projects	43	105	88
Number of countries	10	15	14
EC contribution in EUR	37 042 454	67 049 095	60 961 844
Total budget in EUR	74 118 538	125 393 704	116 442 514

(In total, EUR 315 954 757 has been spent on forestry related projects since 1992 under LIFE Nature, with an EC contribution of EUR 165 053 394.)

Table 4: Main types of activities under LIFE Nature projects with relevance for forestry

Main type of activity *(Basic data about and brief descriptions of all LIFE Nature and environment projects is available online at http://www.europa.eu.int/comm/life/home.htm)*	*Number of projects with this type of activity* *(including 148 projects of categories I and II, several types of activities possible for each project)*
Habitat restoration, for example, afforestation or removal of trees	111
Public relations and environmental awareness raising (aimed at informing the general public)	92
Development or implementation of a management plan	78
Tourism/visitor management	70
Wildlife management, for example, hunting	67
Land purchase	65
Stakeholder participation/private public partnership (aimed at communication with stakeholders)	63
Biodiversity inventory and monitoring	59
Ecological forestry, such as sylvi-environmental measures	39
Compensation for income foregone	30
Contract conservation	29
Environmental disaster prevention	19
Traditional management, for example, extensive grazing	18
Rural development, for example, through support of local market structures	13
Extensification of landuse	12
Extension and training	12
Multilateral/ transboundary cooperation	3
Local Agenda 21 implementation	1

creation of a total of 150 000 jobs in forestry (IDF, 2001).

As the European public became increasingly aware that agriculture is not just about food production, but also about maintaining traditional landscapes and rural communities, the Commission submitted a communication on 27 January 1999 entitled 'Directions towards sustainable agriculture', which stressed the need for better integration of environmental requirements in agriculture. The ensuing 'Agenda 2000 reforms' of the CAP introduced links between support to farmers and compliance with environmental standards and gave a much higher profile to the objective of supporting a 'greener' agriculture. It is the explicit aim of the EU biodiversity action plans ([28]) to further promote the integration of biodiversity concerns into programming documents under the Rural, Structural and Cohesion Funds and other programmes relevant for EU and third countries.

Possibilities for supporting Natura 2000 under EU rural development policy and under EU regional policy have been explored by a working group on Article 8 of the habitats directive.

7.2. Working group on Article 8 of the habitats directive

Financing Natura 2000

Article 8 of the habitats directive foresees Community co-financing of measures required for the implementation and ongoing management of Natura 2000. The text of the article makes reference to the use of existing Community instruments, but until now the provisions of Article 8 have not been implemented. In addition, the nature of the legal interpretation of Article 8 may be of importance in deciding on what kind of financial support systems to establish in the future.

When considering the financing of Natura 2000 one has to be aware that in the near future the European Union will expand, resulting in an obligation to co-finance a network for 25 Member States. Rough estimates indicate that a higher percentage of land area in the candidate countries will be designated as Natura 2000 sites than in current Member States. At the moment no precise figures are available regarding numbers of sites or the area that will have to be added. Therefore the working group has concentrated on the current EU network of 15 Member States.

Composition and mandate of the working group on Article 8 of the habitats directive

In order to address the financing issue in a comprehensive and effective way the European Commission set up, in December 2001, a working group on Article 8, involving experts from Member States and stakeholders**.** Representatives from the Directorate-General for the Environment along with those for Agriculture, Regional Affairs and Budget supported this group. The Habitats Committee of 30 November 2001 agreed with the establishment of this working group.

The remit of the group includes the following main objectives:

- to develop a common understanding of the provisions of Article 8 of the habitats directive;
- to obtain estimates of the financial costs associated with the future management of the Natura 2000 network of sites across the Member States;
- to make recommendations on the necessary Community funds for the co-financing of these costs.

Proceedings of the Working Group on Article 8 of the habitats directive

Three meetings were held (on 17 December 2001, 28 February 2002 and 18 April 2002) to decide the approach of the group, to examine relevant publications, to develop a questionnaire to be sent to Member States and to discuss potential procedures, methods and results.

In April 2002, the questionnaire was sent to Member States, asking for information on the way in which financial aspects of Natura 2000 had been worked out at national or regional level. The response was

([28]) Available on the Europa server at http://europa.eu.int/scadplus/leg/en/lvb/l28023.htm

considered at a meeting of the group held on 11 and 12 September 2002, and the content and approach of this final report were also decided. The last meeting of the working group was held on 4 November 2002 to finalise the report.

The approach has been based on the need to explore solutions to the current absence of an agreed framework for funding Natura 2000. Without such agreement the objectives of the network will never be realised. This meant that the group did not confine itself to an examination of Article 8 alone. Instead, it set out to explore options which take into account the changes which have taken place since 1992 in the use and the purpose of EU funding instruments, in the Community budget, and in policy initiatives — such as the environmental action programmes and in the integration of biodiversity and sustainable development considerations.

7.3. Conclusions of the working group on Article 8 of the habitats directive

General aspects

Taking account of the opinion of the legal services and having regard to the original rationale behind Article 8, the working group came to the common understanding that Article 8 was drafted in recognition of the 'exceptional financial burden' that the habitats directive might place on Member States, and particularly on those countries rich in biodiversity. Since 1992, the habitats directive and Natura 2000 have assumed greater strategic importance than many people anticipated. They are now recognised as being the EU's principal tools for achieving the CBD commitments and the new global and EU objective of halting the decline in biodiversity by 2010. At the same time, there has been a continuous improvement in the level of integration of environmental aspects in the legislation that governs the use of the main EU financing instruments directed to the rural world, such as the Rural Development Regulation (1257/99) and the Structural Funds Regulation (1260/99).

The working group has made an estimation of the total cost that would arise for managing a completed Natura 2000 network, on the basis of different calculation techniques (extrapolation/addition), a literature review, the nature of activities to be considered and information submitted by Member States through a questionnaire. From this has resulted a best estimate for the total cost of managing Natura 2000 of between EUR 3.5 and 5.7 billion per annum.

The working group has identified the range of existing and potential Community funding mechanisms which can be used for managing Natura 2000 sites. An overview of these sources of financing is given in Table 5. During this work it was also concluded that there is a clear perception amongst the authorities responsible for Natura 2000 that current EU co-financing has been insufficient, too subject to chance, and too time-limited to form an adequate basis for providing support to Member States in meeting the requirements of the directive. Funding arrangements are very complex, potentially involving a large number of funds, each with separate application processes and each designed to deliver against their own objectives, rather than those of Natura 2000.

Analysis of future funding options

On the basis of existing funding possibilities, the working group concluded that current arrangements are inadequate to meet the needs of Natura 2000. Based on this analysis, the group agreed that three main options are available for securing future co-financing for Natura 2000. These three options are:

- **Option 1** — using existing EU funds, such as the RDR, Structural Funds, etc, but modify these as necessary in order to deliver against Natura 2000 needs;
- **Option 2** — enlarging and modifying the LIFE Nature instrument to become the principal delivery mechanism;
- **Option 3** — creating an entirely new funding instrument dedicated to Natura 2000 management.

The working group further examined the various strengths and weaknesses of these funding options, drawing on the experience of the group members and on the responses to the Member State questionnaire.

This led to the following final recommendations:

1. In the short term (actual budgetary period 1999–2006), the mid-term review of the CAP would be the most straightforward opportunity to increase funding for managing Natura 2000 sites. If the trend of shifting resources from direct support to farmers to rural development measures can be confirmed and even enhanced, important opportunities will emerge for the forest sector, and not least for more ecologically conscious forest management. At the same time, the conclusions of the group should be taken into account when deciding about a future fourth phase of the LIFE fund after 2004.

2. In the long term, the financing of managing Natura 2000 should be an intrgral part of the discussions about the use of Community financial instruments during the next budgetary period starting in 2007. Introducing a specific requirement in all major EU funding instruments, including EAGGF, ERDF and ESF, for them to support the achievement of EU environmental legislation and in particular, the proper management of the Natura 2000 network should certainly be among the options to be considered during the upcoming budget negotiations.

3.To aid the development of EU funding measures as well as promoting the provision of adequate funding by the Member States themselves, nature planners and land managers from across the EU should work together to prepare guidelines to improve the coherence and cohesion of the Natura 2000 network, and promote the development of multiannual management programmes to enable the proper planning and delivery of funding for site management. This work needs to be supported by further research to improve knowledge about site condition and management requirements, which is crucial for setting appropriate intervention levels for management of sites across the EU.



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Table 5: Overview of financing instruments of the EU, which could potentially be used for Natura 2000 and forestry

Financing mechanisms:	*Main objective of the funds*	*Responsible Directorate-General*	*Budget per year (in the financial year 2001):*	*Possibilities for the funding of sustainable forestry on Natura 2000 sites (examples):*
LIFE III (2000–04) (LIFE Nature and partly LIFE Environment)	Promote and support nature conservation, support the establishment of Natura 2000	Directorate-General for the Environment	EUR 0.08 billion	Pilot projects for Natura 2000: ■ Measures towards ecological forestry ■ Habitat restoration ■ Direct conservation measures ■ Land purchase ■ Development of management plans ■ Information campaigns ■ Stakeholder involvement ■ Inventory and monitoring of Natura 2000 sites
EAGGF (Guidance Section)	Afforestation, according to Article 31 of RD Regulation 1257/99	Agriculture DG		■ Afforestation
Structural Funds for rural development (Regulation 1257/99, for example Articles 30 and 32);	Improvement of the economic, social and ecological structures of rural areas, especially in the fields of agriculture and forestry	Agriculture DG	EUR 4 495 billion	■ Training of farmers and foresters ■ Agro-tourism ■ Measures towards ecological forestry ■ Fire-protection corridors ■ Innovative projects for rural development, for example regional tourism concepts
Community initiative Leader +	Development of rural areas through high quality and ambitious integrated strategies for local rural development	Agriculture DG	EUR 2 020 billion (financed by the EAGGF Guidance Section)	■ Strategic, innovative concepts for rural development, especially multi-stakeholder and intersectorial concepts ■ Visitor and information centres
Community initiative Interreg III	Support for transboundary, transnational and interregional cooperation in balanced rural development, especially in areas adjoining accession countries	Regional Policy DG	EUR 4 875 billion (total 2000–06)	■ Transboundary projects, for example, in the field of nature tourism ■ Transboundary management for protected areas

Table 5: Overview of financing instruments of the EU, which could potentially be used for Natura 2000 and forestry

Financing mechanisms:	*Main objective of the funds*	*Responsible Directorate-General*	*Budget per year (in the financial year 2001):*	*Possibilities for the funding of sustainable forestry on Natura 2000 sites (examples):*
European Regional Development Fund (ERDF)	Creation of jobs by fostering competitive and sustainable development	Regional Policy DG	EUR 30 billion	■ Diversification of farm income ■ Training and further education of land and forest hosts ■ Innovative rural development initiatives ■ Exchange of experience between regions and countries
ESF (European Social Fund)	Creation of jobs through further education	Employment and Social Affairs DG	EUR 60 billion (total 2000–06)	■ Training and further education for foresters and nature conservation staff
Cohesion Fund (minimum volume of projects: EUR 10 million	Strengthening the economic and social cohesion within the Union through projects in the fields of environment and trans-European traffic networks	Regional Policy DG	EUR 2 717 billion	■ Natura 2000 databases ■ Reafforestation ■ Development of management plans ■ Habitat restoration ■ Strategic territorial and spatial planning

Source: IEEP, 1999; European Commission, 2001–02.





Käpytikka1/J. Luhta

8. Best practices, examples and experiences

Examples and experiences about management of Natura 2000 forest sites can be drawn from various sources. Though far from complete, this section lists some examples and experiences throughout the EU that combine nature conservation and forest management objectives on Natura 2000 sites. It also gives indications of the kind of 'statutory and administrative measures' mentioned in Article 6(1) of the habitats directive that have already been taken by Member States.

These following examples have been selected from the LIFE Nature database ([29]), from various other Commission programmes and from information supplied by Member States after a request by the Directorate-General for the Environment to the Habitats and Standing Forestry Committees. They show the potential for finding practical solutions and the importance of communication and exchange of experiences between Member States.

8.1. Examples submitted by Member States

Forestry and nature protection authorities from 12 Member States have submitted information for this chapter. As expressly requested by several Member States, selected examples are reproduced here for the benefit of sharing and disseminating ideas for the implementation of the birds and habitats directives and for the management of Natura 2000 sites throughout the EU.

8.1.1. Belgium

Walloon Region

Fiscal measures:

In the Walloon Region of Belgium, all Natura 2000 sites are exempted from inheritance tax and from property tax. By this positive example of indirect financial support towards private owners of protected sites, the loss of property value that has been reported to be a possible effect of the designation as a Natura 2000 site can be compensated.

([29]) http://www.europa.eu.int/comm/life/nature/index.htm

Management measures:

- The 10 forest habitats of Annex I to the habitats directive that occur in the Walloon region would originally have covered 130 000 hectares of forest land. Of the total area of 160 000 hectares that has been designated as pSCI until present, more than 40 000 hectares lie in public forests which are administrated by the regional forest service according to legally binding management principles. These are based on a multi-functional approach to forestry which takes into account biodiversity concerns and protection of water resources. This is put into practice by providing management unit directors with guidelines on:
  - conservation *in situ* of old trees and deadwood;
  - maintaining clearings and forest edge vegetation;
  - regulation of forest exploitation activities with respect for nesting and breeding seasons of birds;
  - avoiding afforestation of peat soils;
  - limitation of the dimensions of clearcuts;
  - prohibition of drainage measures on certain soils.
- For private forest owners, the forestry chapter of the regional rural development plan for 2000–06 foresees possibilities of financial compensation for the following actions:
  - establishment of private forest reserves;
  - forest biodiversity conservation measures;
  - protection of soils and water;
  - establishment of ecological corridors between forest areas;
  - establishment of management plans.

It is expected that these measures will make designation under Natura 2000 more attractive to landowners.

Legislative measures

On 28 November 2001, the Regional Assembly adopted a specific 'Décret Natura 2000', which establishes the legal bases for designation of sites, establishment of constraints and associated management measures.

Contact person: *Mr Patrick De Wolf*
Tel. (32-81) 33 58 16
E-mail: p.dewolf@mrw.wallonie.be

Flemish Region

Specific conservation measures

The Decree on Nature Conservation of 1997 foresees the creation of a 'Flemish nature structure' consisting of the Flemish Ecological Network (VEN — 125 000 hectares of core conservation areas with other activities being allowed only under specified conditions) and the Integral Supporting and Interweaving Network (IVON — 150 000 hectares of multi-functional conservation area, linked by interconnecting areas.

The proposed VEN designation includes at least 90 % of the pSCI, of which almost half are in forests. Public consultations on the VEN/IVON designations started in September 2002 and will run into 2003. It is assumed that all pSCIs and SPAs will ultimately be taken up in the Flemish Nature Structure.

For all sites included in VEN, IVON and for all pSCI and SPAs, a nature objective plan has to be developed indicating the site-specific measures to be taken to implement the objectives developed for that site. A proposal for general measures and the site-specific measures that can be taken in VEN areas was accepted in principle by the Flemish government and is now scheduled for final approval. This decision includes financial support for private owners to carry out conservation measures on their land.

Nature and forest reserves

About 7 000 hectares of forests are included in both private and public nature reserves. Another 1 650 hectares are currently included in forest reserves. Both protection statutes have nature conservation as their primary goal: the biological value of the forests will be enhanced through specific management or non-intervention (spontaneous development: estimated area = 5 000 ha). A large majority of these areas are included in the pSCI (for example, 1 440 out of 1 650 hectares of forest reserve).

General measures

In Flanders, the Forest Decree of 1990 replaced the Forest Act of 1854, which is still valid in Wallonia. The new legislation defined the 'forest' concept, which applies to public as well as private property and explicitly states that all forests are multi-functional. Together with the Nature Conservation Decree of 1997, this has resulted in forest management being quite tightly regulated for all types of property status and a general principle of 'stand-still' being applied to most valuable biotopes by limits on afforestation and drainage.

Practically, this means that the actual extension of most habitat types — such as heaths, fens, bogs, wetlands, marshes, inland dunes and historic permanent grasslands — which have declined after the intensification of forest management, is 'frozen' and their management made subject to specific conservation measures. There is also a general ban on timber harvesting during the spring breeding season and an absolute ban on deforestation.

In 2001, management rules for public forests were adopted which address the objectives of biodiversity conservation and nature protection by permitting the natural succession of vegetation types in a spatial variation — this is achieved by cyclic interventions in forest complexes with a mosaic-like age–class distribution. The same guide sets out an official policy for replacing conifer plantations with forests with indigenous species by natural regeneration. As the larger part of Flemish public forests are designated under Natura 2000, these policy measures are an important step towards their adequate management.

Contact persons: Ms. Els Martens,
Tel. (32-2) 553 78 85
E-mail:
els. martens@lin.vlaanderen.be
Mr Raoul Van Haeren,
Tel. (32-2) 553 80 11
E-mail:
raoulj.vanhaeren@lin.vlaanderen.be

8.1.2. Denmark

As in other countries with reduced forest cover and highly anthropised rural areas, forest conservation discussions in Denmark are mainly about naturalness of existing forests and about the composition of 'pristine' forests that preceded them. The question of the 'openness' of primeval ecosystems and the role of herbivores in them has led to different models of primeval ecosystems (of north-west Europe) such as the 'high forest model' and the 'wood-pasture model'. This has increasing influence on the setting of management objectives for protected areas that are part of Natura 2000 sites.

Danish designation criteria for Natura 2000 and forests

The Danish pSCI series has been proposed on the basis that Annex I forest habitats are mainly semi-natural woodland and that such woodland in general is rare (structurally natural or near-natural stands) or residual (other stands — including coppice, wood pasture and other quite intensive management types). Certain cases, this can also include planted forests of native trees if they form high forest, have typical undergrowth (meaning that they can be referred to as a forest community/association) and host species of Community interest. For planted stands, Denmark has taken the view that such stands must have attained a fairly high age, implying that young, even-aged, planted monocultures do not qualify.

Several Danish SPAs comprise large forest districts. These are mostly planted forests including large spruce plantations managed to a wide extent with clearcuts and replanting. This has proven beneficial and seems to be a necessary feature for the continuous presence of *Lullula arborea, Lanius collurio* and *Caprimulgus europeaus* of Annex I to the birds directive. These species usually decline or disappear in Danish forests without clearcuts.

Denmark has about 163 000 hectares of broadleaved forest (status 2000), of which about 25 000 hectares or 15 % are in accordance with one of the Natura 2000 forest types. The rest are either other Corine forest types (not in Annex I to the habitats directive) or planted stands without sufficient semi-natural quality or without species of Community interest.

In order to develop and disseminate a better understanding in Denmark of the Natura 2000 habitat types including forests, the Danish Forest and Nature Agency has published a book with descriptions, key

and photographs of the Danish Natura 2000 habitat types (Buchwald and Søgård, 2000). A preliminary edition of the book (text only) was used in 1999 when mapping the Natura 2000 forest types in State forest pSCIs. The book represents the official Danish understanding of what is included under the definition of each Natura 2000 habitat type in Denmark.

Denmark made a preliminary proposal in the range of one third to three quarters of the area of each Natura 2000 forest type as pSCI, depending on their rarity, representativity and other qualities as described in Annex III to the directive. The figures are preliminary because field inventories and mapping/digitising of the Natura 2000 forest types have only been carried out in the pSCI of the forests of the Ministry of the Environment (State Forests), while other areas are estimated.

Thoughts about future management

Denmark is preparing/updating the scientific and legal framework for establishing the necessary conservation measures for SACs as stipulated in Article 6.1 of the directive. A very significant contribution to the conservation of forests has been the 'Strategy for natural forests and other forest types of high conservation value in Denmark' launched in 1992 and implemented mainly since 1994.

The natural forest strategy defines terms and objectives (overall aim is biodiversity protection) and sets targets for protecting large areas with a variety of conservation management schemes for which management principles are defined (untouched forest, grazing forest, coppice woods, selective felling and other special forest management systems). From 1992 to 2000, the area of protected forest in these categories greatly rose, partly financed by the LIFE project No B4-32000/95/513- 'Restoration of large areas of natural forest for the benefit of endangered birds, plants and biotopes'.

Conservation objectives

For each Natura 2000 habitat type and species found in Denmark, conservation objectives at national and SAC/SPA levels are being set — British publications have been used as inspiration for this (English Nature 1999). Guidelines will be further developed after the involvement of stakeholders.

In general, the guidelines must take into account that many pSCIs/SPAs consist of a mosaic of different Natura 2000 habitat types, and that each of these may be represented in each pSCI by several (sub)localities, which may have differing quality, management, species content, continuity, representativity, etc. and therefore should also in the future have differential management.

Flexibility concerning Natura 2000 forest habitats in SPAs/SACs

Requirements for Natura 2000 forest habitats may allow the following approach when setting conservation targets and associated management measures:

National/biogeographic level:

favourable conservation status as defined in Article 1 (e) of the directive.

pSCI/SAC level:

1. Management activities and prescriptions shall ensure that the natural qualities and features, structures, functions, species and variations of relevance to Natura 2000 are preserved or enhanced. The approach shall allow for dynamic evolutions and changes.

2. No 1 may be deferred by way of specific prioritisation in conservation objectives/management plan, for example, by allowing/planning for a priority type/species to be enhanced in area or population at the cost of population or area of a non-priority type/species.

3. No 1 may be deferred because of natural dynamics for example, natural vegetation evolution/succession or natural coastal/hydrological/aeolian sand movements, etc.

4. No 1 may be deferred because of economic, social and cultural requirements, pursuant to Article 2.3 and 6.4 of the habitats directive.

Examples of the application of this flexible approach to restoration projects:

1. In a SAC there is a raised bog (7110) surrounded by degraded bog (7120) and bog woodland (91D0). Both the last two types were type 7110 before human impact in the form of peat extraction and drainage. The management plan can (but



does not need to) prescribe that type 7120 and 91D0 wholly or partly be managed in a way which enhances restoration to type 7110. This can mean total clearcutting of the 91D0 forest, which in this case is acceptable. In other cases preservation of the woodland with or without forest management would be the case.

2. Several of the largest Danish forest districts are wholly or partly appointed pSCI and are SPAs already. The areas are typically a mixture of non-forest, non-native plantation forest, native planted forest, managed semi-natural forest and semi-natural forests. They may be under non-intervention or planned management (for example, selective cutting) from before their appointment as pSCIs. Several different Natura 2000 forest types usually occur, parts of which are native planted forest, while other parts are semi-natural with variable degrees of management from intensive to non-intervention, and with a variable age–class structure. In these cases, the *minimum* requirement must be to preserve the balance between management regimes (because different typical species like different regimes) or to change the balance in a way which is deemed beneficial (or unchanged) for the relevant biodiversity/typical species. As mentioned above, at least some Annex I BD birds in Denmark are known to thrive in the clearcuts of plantation forests (*Lullula arborea, Caprimulgus europeaus* and *Lanius collurio*), while they cannot live in forests without clearings. Therefore the minimum requirement must not include a ban on clearcuts or planting.

3. In 1996, the Danish Forest Act was changed. One of the changes was a paragraph stating that 'Oak scrubs shall be conserved…'. The State subsequently had to register oak scrubs in order to ensure their conservation. Almost all stands of Natura 2000 type 9190 'Old acidophilous oak woods with *Quercus robur* on sandy plains' fall under the definition of oak scrub in the Forest Act. Since 1996, all oak scrubs have been registered and most were deemed worthy of conservation. For a large number of them, agreements have been made on a specific management regime with the private owners, including economic compensations. As a principle, planting of tree species non-native to this habitat type is now prohibited, and any deliberate regeneration must use the local oaks by either coppicing, natural regeneration or planting/sowing offspring from the same stand. Use of pesticides and fertilisers is banned and the same goes for (deep) ploughing. Harrowing is permitted to enhance regeneration. The authorities have the right to remove non-native invasive trees/shrubs if it is deemed necessary and the owner does not do it.

Contact person: Mr Erik Buchwald,
Tel. (45) 39 47 20 00
E-mail: ecb@sns.dk

8.1.3. Germany

I. A working group set up between the federated states to deal with nature protection and recreation issues was indicated by the federal authorities as the best source of information about the state of implementation of Natura 2000. They submitted the following elements.

Since the implementation of Natura 2000 is still in full progress and the local coordination with the forest authorities for the necessary conservation measures has not yet been completed in many *Bundesländer*, there is still a lack of concrete experience of conservation-oriented forest management in Natura 2000 areas. A number of projects were initiated in the *Bundesländer* and the administrative background for the implementation of Natura 2000 in forests is progressing well. It appears that the individual *Bundesländer* use different means in order to achieve a lasting protection for the Natura 2000 areas. Indeed, adaptation of legislation, formats for management plans, relations with forest owners and with the public are all handled differently. On the whole, about half of the *Länder* (not counting the city states) have started statutory and/or administrative procedures related to forest management in Natura 2000 areas.

The following selection of projects was highlighted by the abovementioned working group:

1. **Implementation of conservation measures within the framework of large-scale-projects for nature protection (*Naturschutzgrossprojekte*)**

Large-scale projects for nature conservation are funded by the federal government, and are carried out in areas with important natural resources. In the

project areas, conservation measures are financially supported.

The federal government deals with 75 % of the costs, the *Bundesländer* with 20 % and a regional body with 5 %. The funds are spent principally in the so-called core zones, where the habitats or species to be conserved are concentrated. The regional body is a local NGO, with representatives of the local political groups, land users, regional planners and conservation authorities. Wooded areas are included in these projects and the required conservation measures are set out in a management plan. Such projects are run, for example, in Sachsen-Anhalt at the middle Elbe and in the nature park Uckermaerkische Seen in Brandenburg (lakes in the Uckermark).

2. Assurance of property rights by assignment of land to conservation foundations or nature conservation associations

In accordance with an agreement between the *Bundesländer* and an association or a foundation, land is given in custody without payment for conservation purposes. This is done by a public tender in which the basic management criteria are specified and to which conservation organisations can apply with detailed implementation proposals in order to be selected. The areas concerned are either already safeguarded as a protected area or their designation as a protected area is underway. The contractual partners have to comply with the provisions of the regulation on protected areas and/or obligations going beyond that which are specified in the agreement. In order to assure the durability of the conservation objectives, a written guarantee of custody for nature protection over the assigned land is recorded in the land register. The agreements furthermore include stipulations for ecologically sound forest management. Forest areas which are designated as pSCI must, beyond that, according to the agreements, be treated in compliance with formally stated conservation aims. This approach was used in Brandenburg on land which was assigned for nature conservation purposes from the federal government to the *Länder*.

3. Contractual conservation measures for the implementation of the habitat directive

For special conservation measures undertaken by the forestry owners, which go beyond traditional practice and natural forestry, forest owners can underwrite contracts, which honour the special expenditure required for nature protection measures to be carried out. In the *Bundesländer* Schleswig-Holstein, Bavaria, Nordrhein-Westphalia and Saxony the legal conditions for this type of 'contract conservation ' have been established.

In Schleswig-Holstein, for example, conservation contracts can be concluded for private forests which have special conservation functions. Thus, it is possible to implement conservation measures which otherwise could only be carried out by land purchase or formal legal procedures. Some of the contracts are co-funded by EU instruments, such as the rural development plans. For such measures, forests in Natura 2000 areas are given priority. Other contracts, which are concluded under a local programme 'The future of the rural area' (without EU co-funding), run for over 30 years.

4. Management plans for nature parks and national parks

For large protected areas, such as national parks or natural parks, specific conservation plans are prepared, which contain explicit articles about forestry practices. These plans are established after consultations with a specialised advisory body, consisting of local politicians, regional authorities, NGOs, representatives of land users and specialists. The plans are advertised in the region and are discussed. In order to make these plans accessible to the maximum number of people, executive summaries of the final versions are published. It has to be noted that German national and natural parks are not nature reserves. They mostly consist of areas in which legal restrictions of land use already exist (for example, on landscape protection) and in which the forest administration has made a commitment to taking a more ecological approach.

5. Cooperative agreement between forest and conservation authorities in Thuringia for the protection of bogs

With regard to the implementation of the habitat directive, the bogs situated in the Thüringer Wald and in the Westliches Schiefergebirge are of special importance. These bogs are not large areas of con-

tinuous habitat types listed by the directive, but they are outstanding and rare ecosystems.

Because most of these bogs are in a bad state of conservation, it was vital to act in order to conserve these valuable biotopes and/or to restore the damaged bogs. Since most of the bogs were already wooded to a certain degree, a close collaboration was necessary between conservation and forest administrations for the implementation of necessary conservation and restoration measures. A common operational framework was agreed, with the goal of ensuring favourable conservation conditions for the bog habitats. Important outcomes were a coordinated overall concept for the future development of the bog woodland as well as a priority list of measures to be taken.

6. The LÖWE programme in Lower Saxony

In the German forests of Lower Saxony, the forest administration is implementing a strategy for 'close-to-nature forestry' called 'LÖWE' (an acronym for long-term ecological forest development in the State forests of Lower Saxony: *Langfristige Ökologische Walderneuerung*). One of the effects of LÖWE since its introduction was that costs for harvesting per cubic metre were drastically reduced, as well as the costs for planting, as LÖWE uses the forces of nature wherever possible, such as for the natural regeneration of forests. LÖWE was supported by measures that are essential for the change to ecological forest management, in particular ensuring an adequately low number of deer per hectare to be able to naturally regenerate the forests without the use of expensive fencing (Janssen, 2000; www.forstnds.de/portrait/loewe.htm).

The realisation of the LÖWE programme has been carried out with great success until now. The LÖWE programme was drafted in 1991 as a comprehensive production and nature protection strategy. Economical considerations were originally not part of the 13 principles of the LÖWE programme, but they can be derived from them. The objectives of girth limit felling, for example, have resulted in a profit increase. After only eight years of realisation praxis, ecologically orientated forestry based on the principles of the LÖWE programme has already led to a considerable reduction in expenditure and a corresponding income increase in the Lower Saxon state forests.

This example shows that ecologically based forestry can also, under certain conditions, be the most economically viable form of management.

The working group also mentioned the kind of financing techniques that were used.

1. *Länder*-owned forest

The measures are an integral part of the management of the state forest by the state forest authority (*Landesforstverwaltung*). The implementation lies within the scope of the executive work by the local forestry authorities.

2. Corporate and private forest

The necessary measures are coordinated by mutual agreement between the forest administration and the forest owners. The measures can be implemented by state forest workers. The costs are shared by the forest and nature conservation administrations, with no costs arising for forest owners.

In this manner, spruce plantations have been cleared in the nature reserve Saukopfmoor on the Regenmoorkalotte over an area of more than 7 ha, which is the property of the private company Bodenverwertungs- und -verwaltungs GmbH. Similar measures can also be funded under the programme for the promotion of nature conservation and the preservation of the countryside in Thuringia.

3. Job-creation measures (ABM) and/or structural adjustment measures (SAM)

In the case of the implementation of nature protection measures forestry administrations have often been supported by employees of the secondary job market. The implementation of certain measures (for example, water engineering projects, cleaning clear cut areas) represent a meaningful opportunity to employ jobseekers, at little cost to the employer.

4. Compensation measures for impacts in nature and landscape

In the western slate mountains (Westliches Schiefergebirge) disturbed forest moors were restored in compensation for the impact the building of the power station *Goldisthal* had on nature and land-

scape in the area. These measures were planned together by forest and nature authorities and undertaken under the direction of the local forestry commissions.

II. In Nordrhein Westphalia (NRW), comprehensive legislation for Natura 2000 implementation with the following basic characteristics is currently being adopted.

- All pSCIs in NRW must receive the status of nature protection areas or form part of landscape planning regulations.
- Obligatory state-wide models for contracts between landscape authorities and forest owners were developed. Thus habitats directive-compliant management of designated forest complexes is ensured and forest owners have a long-term planning security. Furthermore, a decree of the *Land* (Nordrhein-Westfalen) regulates the involvement of the nature conservation associations.
- Regular monitoring of the state of conservation of habitats and species in pSCIs will take place in all forest areas, whereby forest structure, species inventories and outside influences will be taken into account. To carry out this work, NRW has developed specific guidance on cartography and assessment methodology.
- The designation of forest Natura 2000 sites has to focus on surfaces containing 'natural forest cells' that are able to function as core areas in which natural developments can take place with human intervention. Existing forest management in surrounding stands must strive towards a balance between the different succession stages that can exist in semi-natural forests.
- Characteristics of existing habitat types listed in Annex I of the habitats directive must be preserved by forest management measures if possible (for example, maintain more than 50 % oak in 'Old acidophilous oak woods with *Q. robur* on sandy plains' / 9190).
- General management prescriptions are as follows:
  - no replacement of broadleaves by conifers;
  - conifer percentage to be stabilised at actual occurrence;
  - up to 10 trees per hectare to be maintained to provide nesting space for bats, day raptors, owls, woodpeckers, black stork;
  - clearcuts larger than 0.3 hectares not allowed.
- Detailed guidelines and decrees regulate the degree to which these measures are obligatory or voluntary in relation to specific habitats and species.
- Compensations for economic losses are foreseen in relation to:
  - the maintenance of well-defined levels of decaying trees and deadwood;
  - transformation of conifer stands into indigenous broadleaved forest.
- A separate support facility has been created for the conservation of *Luzulo-Fagetum* beech forests (hab. type 9190) and 'Old acidophilous oak woods with *Q. robur* on sandy plains (hab. type No 9190)

III. Bavaria has introduced management planning measures for Natura 2000 forest sites with the following characteristics:

- Implementation of Natura 2000 should be completely transparent and should have the cooperation of stakeholders.
- Division of tasks between several public bodies who are involved:
  - the state Ministry of the Environment has overall steering competence;
  - the state Forest Service and nature conservation authorities work out the concrete conservation objectives;
  - the state Forest Service is completely responsible at site level (planning and carrying out of management plans, monitoring, controls, reporting) because it has long-standing experience with ecologically sound forestry, disposes of considerable administrative resources and enjoys a high level of confidence from private forest owners.
- Landowners are involved and informed at all stages of management planning: before starting the work, during field studies, by commenting on

draft plans and during completion of the work. They have full access to complete text versions and maps on the Internet.

- The knowledge of local experts and conservation NGOs is seen as a valuable source of information for management planning.
- All the above-listed procedures and principles were first tested in pilot projects.
- For state forests, a Natura 2000 management plan will be an obligatory component of the valid forest management plan.

IV. The Federal Nature Protection Authority (BfN) commissioned a study by the University of Freiburg with the objective of defining the concept of 'good forestry practice' on the basis of existing rules and regulations in the 15 federal states.

- This study, led by Professor G. Winkel, defined good forestry practice on the basis of a series of criteria for the integration of nature protection in forest management. Meeting these criteria would then be seen as a threshold that forest management must reach in order to become eligible for compensation of lost income resulting from specific ecological requirements.
- It has to be stressed that BfN has only presented this study as the basis for initiating a more intensive dialogue with the forest sector and not as a series of mandatory rules. Most of the quantitative figures that are needed to make the criteria operational will have to be established by intersectoral discussion.
- The criteria for 'good forestry practice' presented by Prof. Winkler are:
  - use of natural regeneration;
  - use of natural succession processes;
  - strictly regulated use of forest machinery;
  - minimising soil disturbance by tillage;
  - careful planning of forest road systems;
  - setting of minimal rotation lengths;
  - protection of specific biotope elements, such as individual trees;
  - integration of nature protection measures in commercial stands;
  - respecting the ecological functions of structurally diverse forest edges;
  - limitation of the use of pesticides, herbicides and chemical timber protection;
  - maintaining adequate game densities;
  - avoiding the use of genetically modified organisms;
  - limiting the establishment of large single-species stands;
  - limiting the use of exotic tree species;
  - avoiding the use of nitrogen fertilisers;
  - limiting clearcuts to a minimum size.

Contact person at federal level: *Dr H.-J. Mader, Head of Unit, Brandenburg Ministry of Agriculture, Environmental Protection and Spatial Planning. Tel. (49-331) 866 75 00, Fax (49-331) 866 71 58 E-mail: hajo.mader@mlur.brandenburg.de*

8.1.4. Greece

Greece submitted experiences derived from several LIFE projects, where forestry should be viewed in an integrated way, taking into account biological diversity and landscape conservation. One of the first steps in the planning process is the drawing up of management plans. Up-to-date forest management plans should not just include sustainable logging practices, but should also reflect biodiversity conservation issues.

In the case of Natura 2000 forest sites, management plans have to prescribe actions targeted to habitat types and plant and animal species of Community interest. Monitoring the results of management actions in relation to the conservation status of the species listed is considered as essential feedback to management. A national project 'Conservation and management of sites of Community importance in Greece' was executed on 10 pSCIs of which five are forest sites where the following principles were applied.

1. The project began by setting the context, that is, the elaboration of guidelines and specifications that reflected the current scientific knowledge and the spirit and content of Directive 92/43/EEC and the Biodiversity Convention. The pilot element was that, for the first time since the adoption of Directive 92/43/EEC, specifications for management plans for forest areas were elaborated (addressing the abovementioned requirements) and a monitoring guide was produced, providing the framework for the design of monitoring programmes, at site, habitat type, and species level.
2. Existing forest management practices were reviewed and management actions were prescribed with special emphasis on logging, road network design and construction, and visitor management. Inherent to the management plans was a monitoring system which was proposed for each site, at site, habitat type and species level, based on the monitoring guide.

As an overall benefit, it can be concluded that these projects have re-oriented forest management to take into consideration the conservation objectives of Natura 2000 sites.

Another interesting example, in this case for the use of forest areas for tourism, comes from Crete, where the palm forest of Vai lies on the north-east coastal tip of the island, covering around 20 hectares, within a semi-arid ecosystem. Its significance is inversely related to its size, since it is the only natural palm forest in Europe, and possibly the only forest of *Phoenix theophrasti* in the world. It is one of Crete's main tourist attractions, with some 200 000 visitors every year. The project combined awareness raising, restoration and reforestation efforts to create a sustainably managed tourist destination.

Contact person: Mr Panagiotis Drougas,
Tel. (30-1) 362 83 27
E-mail: daspro5@minagr.gr

8.1.5. Finland

The Finnish Ministry of the Environment submitted the following examples of best practice concerning relations between forest management and management of the Natura 2000 network.

National forest programme 2010

At national level the Government of Finland has adopted the national forest programme 2010 as a tool for forest policy. The drafting process of this programme has been accessible both to experts and to a large number of interest groups and private citizens. According to this programme, the ecological sustainability of forestry will be secured by further development of the ecosystem management of commercial forests and by the establishment of nature conservation areas on the sites included in national conservation programmes. Most of these sites also belong to the Natura 2000 network.

Since the adoption of the national programme in 1999, regional forest programmes have been prepared for all provinces. In addition, the government has set up a special working group to prepare a forest protection programme covering the south of Finland, the western parts of the province of Oulu and the southwestern region of Lapland. The working group is expected to give its proposals by the end of June 2002.

Natura 2000 network in Finland

In accordance with the Finnish government decision on the designation of Natura 2000 sites, the network in Finland includes around 1 500 sites and covers roughly 4.77 million hectares. Most of these sites are existing nature conservation areas (30 %), wilderness areas (30 %) or belong to the national conservation programmes (30 %), which means that they will be protected as nature conservation areas in the near future. In general, commercial forestry is not allowed on these sites or is allowed only within certain limitations. On certain sites, however, more flexible implementation is possible because of the habitat types or species found on them.

Example from the public sector: Landscape ecological forest management planning by the forest and parks service Metsähallitus

This method is applied especially on those Natura 2000 sites which are mainly used as State-owned national hiking areas (about 28 000 hectares) but also on some other forested sites, which include, for example, habitat types such as 'Coniferous forests on eskers' (9060), 'Bog woodland' (91D0), 'Fennoscandian springs and springfens' (7160), 'Western Taiga' (9010).

Landscape ecological planning (LEP) is integrated with forest management planning. The idea is that ecological goals are aligned with different forms of forest use, while bearing in mind the objectives of forestry in the area. LEP views an extensive forest area as a whole including managed forests, nature conservation areas, game areas and special areas for recreational use.

The long-term objective of LEP is to assure the survival of the area's native species as viable populations. Among other things, this requires the conservation of valuable existing habitats and allows for new ones to evolve. In this way planning contributes to the continued existence of valuable habitats as defined in the Forest Act and the Nature Conservation Act in Finland. Planning can also be used to focus nature management activities including restoration operations on the sites that are the most crucial in ecological terms. The planning also attempts to assure the necessary conditions for the spread of various species. In this scheme, the valuable habitats and ecological processes in managed forests complement and enhance already existing nature conservation areas. Together these form an ecological network, which preserves biodiversity.

Another central goal of planning is to ensure that the conditions exist for multiple forest uses and for nature-based sources of livelihood. The procedure thus involves inventories of game habitats, scenic value and cultural, educational and research sites. In northern Finland, the demands of reindeer husbandry play an important role. The weight given in planning to recreational use depends on the characteristic features of the area and on the recreational needs of the region.

Landscape ecological plans are drawn up in an open, interactive and people-oriented way. The participatory management as applied in the LEP includes disseminating information, gathering value-based and geographic input, talking with the stakeholders and the public and giving them feedback. The aim is to improve the working relationship with all those stakeholder groups and citizens interested in the use of State lands and in the LEP process of Metsähallitus (Finnish Forest and Park Service). For this purpose, open forums and working groups of stakeholders are arranged during the planning process. All public input is documented, analysed and, if feasible, taken into account. It is envisaged that, through participatory management, Metsähallitus will take care of the common property in a broadly acceptable way.

More than 100 people, including more than 20 professional biologists, have participated in the fieldwork during the past five years. The costs of this work totalled EUR 7.5 million. The results, including the map material, are published as landscape ecological plans and they are available on request from Metsähallitus at a nominal price.

Currently, the completed LEP covers 6.4 million hectares. Some 3.3 million hectares of this is standard production forest by land use. Of the productive forestland, 129 400 hectares have been designated as key-biotopes and ecological corridors. Commercial forestry activities will no longer be carried out on these lands. These new areas increase the strictly protected forest area in Finland by 18 %. Furthermore, 205 000 hectares of productive forest land subject to conservative forestry activities has been designated as an area subject to limited forestry operations. The aim of forestry activities is to secure the special characteristics and functions of these areas. These areas consist mainly of valuable scenic areas such as riparian forests and important game areas such as Capercaillie leks.

It is obvious that the positive impact of the key biotopes and ecological corridors on biodiversity is higher than their proportion of the commercial forest land area, since they are based on a systematic analysis and field inventory of the natural resources of each individual LEP area. These areas are concentrated in older forest stands on more fertile sites than commercial forest land in general. These stands are the most valuable ones in economic terms as well. Subject to the extended rotation periods, the key biotopes, ecological corridors and stands reduce the annual cutting budget of Metsähallitus by 12 %. In other words, the investment in nature conservation, recreation, culture and other resources reduces the business profit of Metsähallitus annually by EUR 24 million.

Example from the private sector: LIFE project 'Protection of taiga and freshwater ecosystems in central Finland' (management plan preparation by the Forestry Centre of Central Finland)

This project concerned two Natura 2000 sites in central Finland owned by private landowners.

The Forestry Centre of Central Finland supervises the forestry legislation in central Finland. The aim of the LIFE project was to prepare forest management plans for two Natura 2000 sites, protected under the Forest Act, totalling 400 hectares. The management planning areas are owned by private landowners. The Forestry Centre prepared the management plans for the two Natura 2000 sites: 'Vaarunvuoret' (FI0900039) in Korpilahti and on 'Iilijärven alue' (FI0900083). The Forestry Centre was responsible for negotiations with private landowners and for the preparation of plans which included suggestions for the management of each forest compartment and the supervision of possible harvesting.

Thorough inventories were needed before the plans could be drawn up. Aerial photography was an important tool for this task. Inventories that targeted species and habitats under the habitats directive and the birds directive were carried out. Additionally, a Centre expert identified key habitats under the Forest Act and sites of endangered and rare birds, insects, fungi and vascular plants, which were taken into account in the management plans.

Inventories were essential to avoid the harmful effects of forest management on biodiversity. Some of the inventory work was carried out in collaboration with biologists from the Central Finland Regional Environment Centre. Several endangered and rare beetle species were observed in the planning areas. Detailed suggestions of management were prepared for each forest compartment by the Forestry Centre.

Landowner participation was essential for the success of the project. Therefore, the Forestry Centre contacted 27 landowners directly. Nine forest management plans were drawn up, covering 488 hectares of forest. Compensation was paid to some landowners because they agreed to preserve the most diverse sites of their forests by leaving them outside commercial management. Much effort was put on the personal guidance of landowners in order to increase understanding of the plan contents and targets. The forest management planning procedure was welcomed because most of the landowners held the view that the project would provide new choices and approaches for managing their forests. Earlier, before the project began, landowners were uncertain about the targets of the Natura 2000 network and in doubt as to how they would be allowed to manage their forests. The project was successful in adapting forestry activities to the conservation aims of the sites. The landowners will be able to use their property efficiently without causing the deterioration of habitats or the disappearance of the species for which these forested areas were designated as Natura 2000 sites.

Contact person: *Mr Heikki Korpelainen*
E-mail:
(heikki.korpelainen@ymparisto.fi)

8.1.6. France

A. General presentation of Natura implementation in France

In 2001, France completed the transfer of the nature protection directives in its legislation by enacting separate legislation on site designation and on site management.

Three essential choices were made:

- acting in transparency and cooperation, at all the stages of the procedures, in particular through the steering committee set up for each site;
- development of contract management, based on the initiative and motiviation of the owners and managers of the territories concerned;
- incorporating environmental aspects into the management and development of rural areas.

Essential elements of the French approach to implementing Natura 2000 are the following:

The 'objectives document' (document d'objectifs — DOCOB)

The DOCOB defines the management guidelines and the contractual conservation measures and indicates, if necessary, the administrative and regulatory measures to be implemented on the site. It specifies methods of financing the contractual measures. It is established by a technical operator chosen by the State administration, in cooperation with the local actors concerned who meet on the steering committee for the site. On the basis of the objectives doc-



ument, approved by a prefect's decree, Natura 2000 contracts are drawn up.

To help with drawing up objectives documents, several tools are at the disposal of the public services and the operators:

- a methodological guide worked out following an experimental operation on 37 'pilot' sites, co-financed by the European Union;
- a training plan which has been functioning since 1999 for officials and operators, and which includes exchange of experiences between the regions;
- a series of habitat guides giving a synthesis of knowledge on the habitats and the species targeted by the habitats directive and their management.

The steering committee

The steering committee is the main instrument for the exchange of information and for cooperation on each site. It is set up and chaired by the local prefect and brings together partners concerned with the site such as elected representatives, owners, users, NGOs etc. It meets regularly and can set up specialised working parties.

This committee is associated with the drawing up of the objectives document. The technical operator reports to the commitee on the results of his work and takes account of its opinions. After approval of the DOCOB by the prefect, the committee is informed about its implementation and is asked to come to conclusions about the measures being applied and subsequently to evaluate them.

Natura 2000 contracts

Individual participation in the implementation of the DOCOB by the actors who are in charge of management and maintenance of the natural environments will be regulated by public service contracts called 'Natura 2000 contracts'. These contracts will enable the signatories (owners, farmers, foresters, hunters, associations and communes) to be remunerated for the work and the services rendered to the community and have to be passed directly between the State (via the prefect of the department) and the holders of land-use rights to the sites concerned. Their duration will be at least five years.

Natura 2000 contracts will define the tasks required to achieve preservation or restoration of the natural habitats and the species which justified the designation of the site. They will give the nature and the modalities for remuneration by the State (and the local authorities if necessary) in exchange for the conservation benefits to be provided. Partly financed by the European Union, under the rural development budget in particular, this public aid will be granted as investment subsidies or annual aid per hectare. The contracts will have to be in conformity with the regulations of the objectives document and will offer attractive conditions of financing in the case of Natura 2000 sites.

In this way, Natura 2000 will be endowed with substantial financial resources, and will be a genuine tool for territorial development, guaranteeing the conservation of flora, fauna and natural habitats.

B. Implementation of Natura 2000 in forestry environments in France

Scientific and technical tools

The French authorities have published guidance documents for biodiversity-oriented forest management which are of an exceptional quality because of the way in which they link scientific accuracy and practical recommendations.

1. With the support of a LIFE Environment project that was carried out together with the Walloon Region in Belgium and the Grand Duchy of Luxembourg, an excellent guide for identification and integrated management of forest habitats and species was published in 2000. This guide, called *Forest management and biological diversity,* consists of three volumes, relating to Wallonia and the Grand Duchy and to Atlantic and continental France respectively. It is a useful tool which allows forest owners to identify habitats and species found in their own forest and to draw management conclusions with the help of a vast range of descriptions of practical situations. The publications also contain a substantial chapter with basic information about biodiversity and nature protection. A most interesting aspect of the project is that forest owners' organisations cooperated in the compilation of the reference book,

making it a kind of bottom-up, participatory approach that aimed at increasing the acceptance of Natura 2000 amongst key stakeholders.

2. In 2001, the Ministry of the Environment and the Ministry of Agriculture, together with the national Museum for Natural History, started the publication of a series called *Natura 2000 habitats references*, with a comprehensive guidance document about forest habitats in France. This is the first publication of a series of detailed guides on the habitats and species listed in the annexes to the habitats directive, to be followed by editions about coastal, humid pastoral and rocky habitats and also by two volumes about species, one on fauna and one on flora.

This forest habitat guide has been conceived as a system of records, in which each habitat is listed under its French name with the Natura 2000 and Corine codes. Next follows information about diagnosis, phytosociological position, succession stages, associated habitats, floristic composition, conservation value, potential threats, production capacities and economic use, management practices and research needs.

The outstanding value of this guide lies in its integrating approach, which presents forest managers with a systematic linking of conservation-related data and economic use.

Specific measures under rural development for the contractual management of forest environments

The French national rural development plan envisages Community co-financing under the Guarantee Section of EAGGF for measures of contractual management of Natura 2000 sites (individual measures carried out in the perimeters of pSCIs and SPAs forwarded to the European Commission). As regards collective actions for Natura 2000, the RDP also comprises training and awareness-raising measures.

Aid for the contractual implementation of the management of the Natura 2000 sites in forests and associated environments is thus envisaged in measures I.2.7 and I.7.2 of the RDP (corresponding to Chapter VIII, Articles 30 and 32 of the rural development regulation). This concerns investment as well as management support (cfr. first indicative list of eligible forestry measures).

Indicative list of measures for contractual management of Natura 2000 sites in forests and associated environments eligible for measures I.2.7 and I.7.2 of the French RDP:

I. TYPOLOGY OF ELIGIBLE MEASURES UNDER MEASURE I.2.7 OF THE RDP (ARTICLE 30 OF THE RDR — operations not dealt with within the framework of forestry investment aid):

- creation and restoration of clearings in closed forest stands, in order to create environments favourable to maintenance and to the reproduction of habitats or of species habitats of Community interest;
- creation and restoration of forest ponds essential to maintenance and to the reproduction of habitats or of species habitats of Community interest;
- enrichment of plantations with non-productive objectives, with a view to restoring habitats or species habitats of Community interest;
- preparation and monitoring of natural regeneration in stands which are not very productive and where existing forest policy would have recommended artificial regeneration;
- clearing and thinning of stands with non-productive logic, with a view to restoring habitats or species habitats of Community interest that need significant increase in the light on the forest floor;
- creation and restoration of riverine forests, including the works for stabilisation of banks, with a view to restoring habitats or species habitats of Community interest;
- establishment of complex, multi-storey and gradual forest edges, with a view to restoring habitats or species habitats of Community interest;
- covering excess costs connected with manual clearing or undergrowth thinning, corresponding to the protection of habitats or of species habitats of Community interest on sites where the existing forestry policy would have resulted in resorting to mechanical or chemical interventions;
- creation of simple and sturdy crossings of small water-courses in forests that include aquatic habitats or fish species of Community interest, in order to prevent forest machinery from destroying these habitats;

- fencing and safeguarding small areas with natural regeneration, making it possible to reduce the surface of the basic unit of regeneration significantly when the maintenance of habitats or of particularly fragile species of Community interest habitats requires the creation of a mosaic-like horizontal forest structure.

II. TYPOLOGY OF ELIGIBLE MEASURES UNDER MEASURE I.7.2 OF THE RDP (Article 32 of the RDR):

- participation in the financial charges resulting from increased stand heterogeneity, with a view to restoring habitats or species of Community interest, when it leads to losses of expected value and reduced exploitability;
- maintenance of clearings and ponds in forests, in order to guarantee the conservation of habitats and reproduction species of Community interest;
- establishment of complex, multi-storey and gradual forest edges, with a view to restoring habitats or species habitats of Community interest.

STUDY FOR THE DEVELOPMENT OF A TECHNICAL-ECONOMICAL REFERENCE FRAMEWORK FOR THE MANAGEMENT MEASURES IN FORESTS AND ASSOCIATED ENVIRONMENTS

To facilitate the drafting of the DOCOB and of the contractual measures following from them in forest environments, the Ministry for Ecology and Sustainable Development launched a study in June 2002 to define an initial technical and economic reference framework and to assemble the existing data in this field at regulatory level, especially in relation to technical matters and financing methods. This reference framework does not aim to draw up a limitative and exhaustive list of contractual measures eligible for financing Natura 2000. On the contrary, its design envisages simple updating methods to supplement it along with the advance of Natura 2000 implementation.

The study, carried out by a consultancy, is co-managed by the Ministry of the Environment and the Ministry of Agriculture. It will last 10.5 months and presents three phases:

National phase

The following will be worked out in parallel:

- a national practical guidebook on the general methods of implementation: administrative procedures, eligibility conditions, general principles of calculation of aid, organisation of the various sources of financing and definition of good forestry practices excluded from the field of financing;
- a national guidance book of technical measures (compensatory investments or payments) for forest habitats, forest species, habitats and micro-habitats associated with forests.

As a result of a national steering committee meeting which included the various Natura 2000 actors, and after joint validation of the choices by the Ministry of the Environment and the Ministry of Agriculture, final editions of these books will be produced in order to be able to start discussions at regional level.

Regional phase: 'sylvo- environmental meetings'

In order to further develop the national guidebook into 22 regional catalogues of measures and to refine the definition of tasks on the basis of field experience, 12 meetings will be organised in the various French regions. The technical and financial aspects of the measures will be approached during these meetings.

Final phase: final catalogue of measures and financial reference framework

On this basis, the national reference framework of measures (synthesis of the 22 regional catalogues) will be written with all the technical indications and their financial aspects. The production of the final documents and of the summary report will be based on the choices and proposals of the national steering committee and finally those of the Ministry of Agriculture and the Ministry of the Environment.

Contacts: Mr François Bland,
Tel. (33-1) 42 19 19 26
E-mail:
francois.bland@environnement.gouv.fr
Mr Christian Barthod,
Tel. (33-1) 49 55 51 19
E-mail:
christian.barthod@agriculture.gouv.fr
Website:
http://natura2000.environnement.gouv.fr

8.1.7. Ireland

The Department of Marine and Natural Resources of the Irish Forest Service 'Coillte' has submitted the following elements on forest management in and around Natura 2000 sites in Ireland.

The ways in which Natura sites and forestry can interact in Ireland may be broken into the following three categories:

1. Natura forest sites that have been designated for their intrinsic forest values;
2. forests within (larger) Natura sites;
3. afforestation in or near Natura sites.

These are more fully described below.

1. Natura forest sites that have been designated for their intrinsic forest values.

These are semi-natural (usually referred to as semi-natural woodland) and are those that most resemble natural forests. Many now require management in order to ensure that their biodiversity potential is realised and protected — the Native Woodland Scheme (described below) will support this. The People's Millennium Forests project (also described below) has been very successful in raising the profile of Ireland's semi-natural woodlands.

Background.

While Ireland has approximately 9 % forest cover, semi-natural woodland is quite rare and occupies a fraction of 1 % of the land cover. The area of semi-natural woodland in Natura (forest) sites is approximately 6 000 hectares — the forest types represented are old oak woodland, alluvial woodland, bog woodland and yew woods.

The threats to these forests are (a) the introduction and proliferation of exotic species — Rhododendron ponticum is a major threat to semi-natural woodlands on acid soils, conifers were planted in them in the past — and (b) grazing by sheep or deer. It is a common feature of many of these woodlands that they (a) are not managed (they may have been managed in the past but management often ceased about a century ago) and (b) they are even aged. The result is often a canopy dominated by one species. It is necessary to bring these woodlands within a management regime. It is envisaged that this management will be supported to a very significant extent by the native woodland scheme.

Brief description of the native woodland scheme.

The scheme has been launched by the Forest Service in close cooperation with Dúchas, the Heritage Service, Department of the Environment and Local Government and with the Native Woodland Scheme Development Group (which includes statutory bodies, all sectors of the forest industry, researchers, landowners and non-governmental organisations).

The scheme consists of two elements — native woodland conservation and native woodland establishment. It provides for grants for work carried out to approved standards and for annual premium payments. It is a key feature of the scheme that the plan for each project is drawn up by a forester and an ecologist. The primary objective is to protect and expand Ireland's native woodland resource and associated biodiversity using appropriate 'close to nature' silviculture. Where compatible, the realisation of wood and non-wood potential is also encouraged. Conservation and biodiversity are prioritised, with wood production encouraged where appropriate.

The People's Millennium Forest Project.

The People's Millennium Forests consisted of tree planting and woodland restoration. Much of this occurred on Natura 2000 sites where exotic species (including rhododendron and conifers) were removed, the fencing of the sites was secured and appropriate native species of trees were planted. Awareness of the concept of native woodlands was raised through an outreach programme and by involving local people and the schools in planning the work. In addition trees were planted where appropriate — each family in the country was assigned a newly planted tree. A certificate describing the location of the relevant tree was issued to each family. The trees for each family are on a permanent register.

2. Forests within Natura sites

Forests in this category tend to be in Natura sites because of their place in the landscape. For example they may be within a protected riparian zone or

within a special protection area (SPA) — they form part of a greater landscape. These forests may range from semi-natural to older and new plantations of both indigenous and exotic tree species.

In these cases the management objectives vary depending on the environmental constraints. In the case of the managed plantations at least, timber production is a primary objective. The environmental and economic values of the forests and of the larger landscape are balanced through consultation. The management plan for the Natura site (the responsibility of Dúchas) follows widespread consultation. In addition to that, the issuing of felling licences (as required by the 1946 Forestry Act) to enable harvesting within these sites requires prior consultation with Dúchas.

3. Afforestation in or near Natura sites

There is consultation and regulatory procedures are in place to ensure that any afforestation that does occur does not diminish the Natura site in question.

Afforestation requires prior approval from the Forest Service, Department of Communications, Marine and Natural Resources. The following consultation is required before a decision is taken concerning approval in and near protected sites (including Natura 2000 sites):

- if the site proposed for afforestation is within a Natura site, the proposal is subject to public notification and consultation, including consultation with Dúchas as well as with An Taisce, the environment non-governmental organisation (eNGO);
- if the site is within 3 km upstream of a protected site, the Forest Service consults with Dúchas prior to making a decision on the issuing of afforestation approval.

Contact: Mr Noel Foley
E-mail: tnoelfoley@eircom.net

8.1.8. Italy

General management principles

The management of Natura 2000 forest sites in Italy intends to implement all necessary and reasonable conservation initiatives to maintain or improve the conservation status of the features (habitat or species) for which the site was notified (object-oriented conservation strategy).

The decision-making process requires an adequate knowledge of the following elements: the assessment, through appropriate indicators, of the condition of the features of interest in the given site; the detection of actual (or potential) local factors that (may) lead to a deterioration of those habitats or species; the application of the most appropriate management measures to preserve the site's features of interest.

Depending on the local situation, habitats may be maintained by continuing the economic activities traditionally carried out on the site and by undertaking appropriate remedial action (restoration measures) when the habitat is in unfavourable conservation status or when local influence may lead to decline of its conservation.

Forests in Italian Natura 2000 sites frequently represent areas where human intervention has complemented nature to produce an ecological equilibrium: in this way the management of semi-natural areas, a key component in maintaining the coherence of the Natura 2000 network, becomes an effective means of development for the rural areas and forests they contain. In this way, the state of conservation of forest habitats becomes a quality indicator of the environmental integration of human activities and, at the same time, a continual testing-ground for the effectiveness of management guidelines adopted.

Specific technical guidelines

I. Under the Life project 'Verification of the Natura 2000 network and management guidelines', the Italian Nature Conservation Direction has produced a primary framework of guidelines for managing Natura 2000 sites and a reference book with specific management indications. To demonstrate the network structure of Natura 2000 sites, these management indications are arranged according to the 24 categories into which the Italian Natura 2000 sites have been classified on the basis of their respective features of interest. In 10 categories the feature of interest is one or more forest habitat.

This project is specifically focused on the following.

- Information provided by the reference book on the management of forest categories: habitats of interest; habitat ecological requirements; parameters for a statistical description, at national level, of main deterioration factors (such as fire risk, grazing pressure, percentage of built areas in the site) acting upon the classified sites; indicators for the assessment of habitat conservation status; indication of the actual (or past) forestry practices that lead to a deterioration of the habitats of interest; sustainable forest management guidelines, that is, suggested forest management actions in relation to habitat conservation status.
- Guidelines for the development of conservation measures for three categories specifically related to Mediterranean forest habitats, as outlined in the table below:

II. Because a high number of forest sites are contained in nationally protected areas, another technical instrument was produced to promote and clarify the correct ways for managing Natura 2000 forest habitats: 'Guidelines for a sustainable management of the forest resources in protected areas'. This guidance document, a result of collaboration between Italian Nature Conservation Direction and the Italian Academy of Forest Sciences, is also aimed at designing measures to maintain or restore the favourable conservation status of natural and semi-natural forest habitats of Community interest, taking into account the economic, social and cultural requirements and the regional and local characteristics.

Contact: Mr Eugenio Dupré,
Tel. (39-(0)6) 57 22 82 00
E-mail: Dupre.Eugenio@minambiente.it

	Habitat of interest	***Measures of prevention from deterioration factors***	***Sustainable forest management guidelines***
Mediterranean *Quercus* sp.forests	6310, *91H0, 9280, 9330, 9340	Fire control, suspension or regulation of grazing activities	Habitat in favourable conservation status: 1. continuation of coppice cultivation by application of less intensive management methods favouring retention trees and compositional diversity; 2. high stand conversion. Habitat in favourable conservation status: 1. high stand conversion, where ecologically and economically feasible; 2. extension of cultivation cycles, application of appropriate management practices for the restoration of coppices.
	9250, 9350	Contractual measures for the acquisition of nearby lands suitable for a (new) establishment of the *Q.trojana* and the *Q. macrolepis*	
Mediterranean and (oro) Mediterranean *Pinus* sp. Forests	9530, *9535, 9540	Fire and pests control	Active management oriented to in situ conservation of genetic diversity of endemic pines (P.nigra, P. leucodermis)
Mediterranean dune scrub	2260, *2270, 5211, 5212	Coastal erosion control, regulation of accessibility and circulation of visitors in sand dunes.	Habitat in unfavourable conservation status: restoration of vegetation cover on sand dunes by plantation of dune herbaceous and sclerophyllous species

* Priority habitats as defined in Article 1(d) and listed in Annex I of the habitats directive (92/43/EEC).

8.1.9. Netherlands

The Dutch Government submitted the following comment.

1. Management of Natura 2000 sites

Nearly all Natura 2000 sites are managed by either the State Forest Service, or by private nature conservation organisations (Vereniging Natuurmonumenten and Provinciale Landschappen), although up to now even these organisations have hardly been involved in the process of the selection of Natura 2000 sites. This means that, so far, no special projects or initiatives to involve NGOs or private forest owners have been carried out and that nearly all designated forest sites are already under a nature conservation-oriented management.

The existing experiences with forest management on Natura 2000 sites are mainly based on information from the State Forest Service (Staatsbosbeheer), which suggests that the concept of 'sustainable forest management' offers a useful and acceptable approach.

For the State Forest Service, sustainable forest management can have different objectives:

- in forests with emphasis on natural values: management activities are directed at increasing natural values, for example, stimulating structural diversity, removing introduced tree species, very limited harvest or no harvest, etc.;
- in multi-functional forests with normal forest management: management includes normal harvesting (but never more than 70 % of the annual increment), no clear fellings or clear felling of very small (< 0.5 hectare) size, avoidance of summer fellings, preference for natural regeneration and presence of dead wood and older trees with diameter > 40 cm.

An important prerequisite for sustainable (forest) management is the availability of a management plan with, among other things, a description of the actual situation, relevant processes (both internal and external), goals and management methods (including monitoring) and an evaluation of the management results. Such a management planning system is used by the State Forest Service and the private nature conservation organisations, Natuurmonumenten and Provinciale Landschappen, and it seems to work quite well for all habitats in the Natura 2000 network.

The State Forest Service has set up a sound and common set of indicators as an indispensable tool for the evaluation of management results. Experience so far suggests that further elaboration is needed on the basic characteristics (indicators) for the quality of the habitat types (including forest types).

For the near future, some aspects related to the national selection and delimitation of the Natura 2000 habitats seem to **need further clarification**; in a few years we hope to have more information on the following issues:

- the proper maintenance of small units of certain forest habitat types. (Often small areas only have one age class or development stage of a forest type);
- the status (and management) of non-target forest habitats, within the designated areas (such as the areas of oak and pine forest within 'de Sallandse Heuvelrug', where only the heathland communities are priority habitats);
- the impact of recent dramatic changes in abiotic conditions. The most obvious case here is De Biesbos — this is a floodplain forest where, after completion of the Deltaplan, the tidal regime has been replaced by a much more stable water level, but many other areas are affected by long-term changes in hydrology and nitrogen inputs.

2. Economic use and SFM in relation to Natura 2000

A special aspect of the management of Natura 2000 forest sites in the Netherlands is the role of recreation. Basically, all Dutch State forest land is open to the public and recreational use is incorporated in the management planning. So far there is no clear evidence that recreational use is in conflict with the Natura 2000 regulations. However, further analyses of the effects of recreational use on the quality of the designated habitat types might be necessary. Recreational use often offers opportunities for compromise between economic benefits and conservation measures.

The EU-funded research project 'Niche markets for recreational and environmental goods and services from multiple forest production systems' (RES-project / FAIR1 PL95-0743) developed market solutions and strategies for various forest outputs. These, however, were considered to be unmarketable or barely marketable.

A case-study-report of the RES-project describes several successful cases of multi-functional forest management on (or in the vicinity of) Natura-2000 sites in the Netherlands.

National Park Foundation — De Hoge Veluwe

The park area of about 5 500 hectares belongs to a private foundation (50 % of woodlands, the rest are dunes and fens). The park is well known for its game species (red deer, boars and does). Besides the beautiful natural resources, a variety of recreational and information facilities are offered. Another component of the park is a famous art museum.

The park is fenced and entrance fees vary according to the number of vehicles, the ages of visitors and the duration of their stay. The capacity of the park is approximately 700 000 visitors. In total, 42 permanent and 40 freelance staff are employed. At present the park covers its costs.

Fees for the recreational use of a national park — Province of Noord-Holland

The province of Noord-Holland lets a nature preservation area to a waterworks. The waterworks firstly uses the soil water, but the managers have also developed the area for recreational purposes and charge an entrance fee. The landscape in the area is very beautiful and attracts five million visitors annually. The visitors can choose between 30 different hiking paths, and the area has panoramic views and restaurants. The waterworks markets the area independently. Retailers are involved and they get commission on the sale of tickets. At present, a profit is made. An important legal framework condition was regulations concerning water preservation.

Tree crown path — State Forest Service

A national forest administration (3 000 hectares of woodlands) offers an information path visiting tree tops. Other RES products are paths for hiking and riding, educational nature paths, tours with a horse-driven tram and activities for children.

Nature preservation weekend — Vereniging Natuurmonumenten

The nature conservation organisation offers a package of a nature preservation weekend at the Loonse and Drunense Duinen (2 500 hectares), which consists of a stay at a luxurious hotel, a slideshow, a visit to an information centre, a bicycle tour, a bird-watching trek and an information package.

Environmental sponsoring foundation — Het Gelders Landschap

The nature preservation organisation, Het Gelders Landschap, maintains approximately 9 500 hectares of nature preservation areas, and for this purpose acquires sponsors for financing. The main sponsors are three waterworks which finance, for example, the transition from conifer plantations to hardwood forests to improve groundwater supply.

3. Other instruments to promote and support sustainable forest management

In a densely populated country like the Netherlands, the ecological and social forest functions have become more important than timber production. This situation is reflected in existing structures and regulations to support sustainable forest management which can play an important role in financing conservation-oriented management on Natura 2000 forest sites.

Nature management scheme

This scheme provides output-based financial incentives to private forest owners for the provision of social and ecological forest functions. The level of financial compensation is based on the type and level of services (biodiversity, landscape, recreational, environmental services) provided by the forest. A contract is signed between the forest owner and the government in which both parties agree upon a set of measures to be taken to achieve specified ecological and other goals.

Tax exemptions and dispensations

Three tax exemption rules, based on the Estate Act of 1928, are relevant for the forest sector:

- woodlands (and nature areas) with public access get dispensation from inheritance tax;
- legal bodies and private owners are exempted from property taxes for forests;
- income from forestry and nature management is free from income tax (but financial losses are not deductible).

According to the nature preservation law, landowners can benefit from a special tax advantage system on condition that they leave at least 30 % of their property under forest cover.

Contact person: *Mr Ghijs van Tol*
E-mail: g.van.tol@eclnv.agro.nl

8.1.10. Spain

The Spanish Ministry of the Environment has sent three examples of multi-functional forest management in large public and mixed property estates which are both SPAs and pSCIs. One example shows that the existing management can sometimes fit well under Natura 2000. In the other example, adequate management concepts were developed with support of the regional rural development plan.

As environmental and nature protection issues are a decentralised matter in Spain, regional governments have the responsablity of producing detailed guidelines for the management of Natura 2000 sites. Many regional governments have already enacted legislation on forest management plans that takes into account Natura 2000, and others are to follow ([30]).

1. The Valsaín forest in Segovia

The Valsaín forest complex covers almost 14 000 hectares on the northern slopes of the Sierra de la Guadarrama. An estate that formerly belonged to the crown, it has now passed into public hands and is managed by the autonomous Spanish National Parks Service. The forest is dominated by *P. sylvestris* with associated broadleave formations. It has been managed for the production of softwood timber of exceptional quality for centuries and current production is estimated at approximately 35 000 m^3/yr.

As well as the historic and current importance of commercial timber production and sawmilling, the area has always offered an exceptional range of biodiversity, which is why it was designated under Natura 2000. Over 800 plant species have been recorded and over 100 species of nesting birds, among which 10 from Annex I to the birds directive have been observed. The continuous presence of *Aguila adalberti* and *Aegypus monachus* as well as several endemic bat species has been confirmed. There are 54 species of endemic invertebrates in the area and over 400 insect species have been recorded.

Nevertheless, it is a truly multi-functional forest, in which different types of use such as timber cutting, grazing, collection of non-wood products, nature conservation and recreation are all being maintained by a forest management system that is based on cyclic selective group cuttings and natural regeneration. For special conservation purposes, one of the 25 *cuarteles* (management units) has been set aside as a non-intervention area. **In the case of the Valsaín forest, designation under Natura 2000 has not brought many changes in the existing management**.

2. The Alduide area in Navarra

Two thirds of this complex of more than 9 000 hectares in the foothills of the western Pyrenees consists of semi-natural beech stands, with the remainder under different types of traditional pastoral use. More than half of the area under beech is considered to be of Community importance, and pastoral use is in decline. The site is nearly completely owned by local public entities. The area is known as a major woodpecker site and has some of the best populations of river trout.

In this case, the Natura 2000 designation has caused important changes in the management of the site because the previous forms of economic use had provoked a substantial decline in natural resources.

- Positive aspects of previous management were the use of natural regeneration, the very marginal use of exotic species, a balanced age–class distribution, very effective protection against erosion and good conservation status of forest fauna.

([30]) See http://www.larioja.org/ma/econoticias/indexgob.htm for an example from La Rioja

- Negative aspects of the former management (from a conservation point of view) were the concentration on one economic species (*Fagus sylvatica*), the lack of ecological links between different forest stands, the build-up of standing timber volume in homogenous stands with little clearings or understories.

Under the rural development plan (2000–06) for Navarra, a project to develop an adequate management plan for the area was carried out in consultation with all local stakeholders. The agreed management plan included not only specifications of exploitation levels and regeneration techniques, but also an obligation to reinvest a fixed percentage of revenue in activities related to forest use and nature protection. Specific guidelines have been agreed to move away from the monoculture of beech, to establish more gradual transitions between forest stands and other types of land use, to increase the amount of dead wood on the forest floor, to increase the structural variability of the forest stands by opening the canopy, to allow non-wooded clearings to subsist and to manage wetland areas and water courses for conservation purposes.

3. The 'Montes de Aralar' in the Basque Country

The Aralar Natura 2000 site in the Gipuzkoa province covers over 10 000 hectares of which two thirds are publicly owned. Multi-functional use in the past has produced a varied landscape dominated by beech forest ('Atlantic acidophilous beech forest' / Hab. No 9120) and extensive pastures ('Species-rich *Nardus* grasslands' / Hab. No 6230). One of the problems with the management of this site is that the natural beech stands are in a state of severe degradation because of a long history of exploitation under coppice and overgrazing. The regional Basque government has approved separate management plans for the wooded parts and the open landscapes with the aim of achieving a more balanced use of the natural resources. In the case of the beech forests, this is done by the implementation of a high forest restoration plan that is based on quite straightforward forest management: adoption of a rotation period of 140 years and subdivision of the existing stands in seven regeneration sectors. Timber production is an essential part of the scheme and occurs through group cutting, allowing the regeneration process to succeed according to the specific light requirements of *Fagus sylvatica*.

8.1.11. Sweden

The Conservation Section of the Swedish Environmental Protection Agency (SEPA) submitted the following best practice examples on Natura 2000 and forests. It is interesting to note that both of these examples relate to cooperation of the public and the private sector.

Example 1: *Project Snöberget*

This is an example of a cooperation project between the county administration, the Regional Forestry Board and a private forest company SCA. The Nature Conservation Association (NGO) was also involved. The scope of the project was to reach both conservation and production goals in the area through ecological landscape planning and to get the authorities to cooperate on this. The project has involved ecological landscape planning, the development of new methods and the establishment of a nature reserve. Geographical information systems (GIS) also played an important role.

In 1993, the Forestry Board was given new goals, equally important for production and environment. Previously there was a production goal, which included a consideration for nature conservation. The State authority, the county administration, has the main responsibility for the creation of nature reserves.

Snöberget is situated in the north of Sweden in the county of Norrbotten and the municipality of Luleå. The involved bodies have all participated financially with their normal funding.

The result of the project is a model, the Snöberget Model, which is a concrete example of how the planning process should proceed when important conservation interests conflict with strong forestry interests. It is also an example of how the economical responsibility for a landscape's biological resources can be shared between the State and the forestry companies.

Contact: The Regional Forestry Board, Håkan Håkansson.

Example 2: *Project white-backed woodpecker landscapes and new nature reserves (Fjornshöjden)*

This is an example involving the same groups as above, the Swedish Conservation Association, the Forestry Board and the county administration. The Swedish EPA was also involved. The white-backed woodpecker *Dendrocopus leucotos* is endangered in western Europe. Its most important habitat is the 'western taiga'. The population of these birds has declined considerably, mainly because of loss of habitat. The scope was to preserve and develop natural boreal forests with aspen to improve the white backed woodpecker habitat and to ensure the landowners were interested, involved and positive to the necessary measures. Among the activities were nature reserves, biotope reserves, and conservation agreements as well as environmental measures. The work was based on landscape planning. An information campaign targeting the landowners was launched in order to raise awareness of the need to preserve these ecologically important natural forests. The project also involved practical habitat management such as forest fire.

The project concentrated on 10 areas in southern Sweden where 'western taiga' is the dominating habitat. The total area for these 'Woodpecker landscapes' was some 20 000 ha. Fjornshöjden for example is situated in the middle of Sweden in the county of Värmland and municipality of Årjäng. This was financed by LIFE Nature and the groups involved financed the Swedish part with their normal funding for nature reserves and conservation agreements. A total of SEK 30 million (EUR 3 million) were spent, of which half came from LIFE Nature.

Results

The total area protected as nature reserves (NR), biotope reserves (BR) and conservation agreements (CA) was 1 913 ha. Another 250 ha were managed to increase natural values (AF). This included conservation burning, increasing the abundance of dead wood by girdling, removal of spruce to increase the proportion of deciduous trees, etc. It was important to involve the landowners in all parts of the project. Voluntary conservation and environmentally adapted forestry (EMF) without economic compensation cover a large part of the area.

Habitat restoration is being followed by experimental introduction of new specimens to increase the population size. This is being coordinated by a group with representatives from the Swedish Society for the Conservation of Nature, the Swedish Environmental Protection Agency, the National Board of Forestry, Stora-Enso forest-company and the Swedish University of Agricultural Sciences. This activity is being continuously evaluated.

Contact person: Ms. Helene Lindahl,
Tel. (45-8) 698 14 22
E-mail: helene.lindahl@naturvardsverket.se

8.1.12. United Kingdom

The UK Forestry Commission submitted information about the Sunart Oakwood Project as a good example of forest management in Natura 2000 areas. A characteristic element in this project is that it has managed to secure funding from different sources while continuously and patiently working towards the same objectives over a considerable period of time.

Location: Loch Sunart Atlantic Oakwoods, Ardnamurchan, Lochaber, Scotland.

The Sunart Oakwood Project

This project is a successful woodland restoration project covering almost 3 000 hectares which, from modest beginnings, has grown into a major woodland initiative. It is driven by efforts to conserve and restore the Atlantic oakwoods, but also to maximise rural development benefits provided by the woodlands to the fragile local rural communities of the area. The key to success has been the development of strong working partnerships, particularly with the community but also between agencies. These partnerships have helped to secure substantial funding, particularly from Europe, to implement restoration, community engagement, recreation and tourism work, to date in excess of GBP 1.5 million.

Sources of public funding

- **Domestic.** Forestry Commission (through the Woodland Grant Scheme and Forest Enterprise), The Highland Council, Scottish Natural Heritage,

Local Enterprise Company (Lochaber Enterprise), Millennium Forest for Scotland (Lottery), Crofters Commission and Rural Challenge Fund (Scottish Executive).

- **European**.
  - Leader 2: Initial survey of threats to oakwoods, chainsaw training, recreation and interpretation facilities and project manager.
  - LIFE Nature: Removal of threats on public and privately-owned SAC and adjacent catchment. Focus on control of grazing and rhododendron and removal of planted conifers, extended to access and interpretation with additional bid.
  - Objective 1 transitional fund administered by the Highlands & Islands Partnership Programme — Developing recreation, green tourism, community involvement and project staffing.

Best practice demonstrated by the project

Undertaking positive conservation work with the additional objective of maximising rural development opportunities has led to considerable local input to the project, a widening of its objectives and local economic and conservation benefits.

Community involvement:

- wide consultation using planning for real techniques;
- formation of steering group with strong community representation to coordinate the project;
- participation of local schools, for example, in developing the interpretation and establishing tree nurseries;
- employment of locally based project manager and community ranger;
- gaining local political support for restoration and expansion of the oakwoods;
- programme of meetings and events to demonstrate and discuss opportunities;
- greater awareness of the importance and potential of the area's woodlands and increased community capacity in woodland management;
- participation of local private woodland owners in positive forest management, in some cases as a diversification from agriculture.

Economic benefits:

- a locally run forestry and environment training programme resulting in an improved local skills base and a pool of locally based skilled contractors;
- employment of these local contractors to undertake most of the restoration work. Contractors have been employed on a flexible basis to fit in with other job commitments such as tourism, fishing and crofting. Some have invested in machinery capable of smaller-scale forestry work;
- improved access and interpretation of the woodlands and marketing through a local tourist association;
- support in the supply of timber to a locally based sawmill, and other small-scale wood users.

Conservation benefits:

- ongoing improvement in the condition of the woodlands through removal of threats (grazing, rhododendron, conifers and neglect), improving extent, age structure and species mix;
- ongoing refinement of restoration techniques in the light of experience;
- widespread monitoring of regeneration, butterfly and deer populations to inform management decisions;
- public education —'global' environmental issues such as biodiversity, sustainability, etc. addressed through local action.

Wider objectives:

- public sector owners acting as a catalyst for demonstrating restoration and the opportunities for rural development, and attracting public funding to private owners;
- formation of the Sunart Oakwoods Research Group to undertake community-based survey and recording of archaeological features including past woodland management systems;

- innovative partnership approach between public and private owners to collectively manage grazing including deer control, now extending to wider management issues;
- a study completed by Professor George Peterken and Dr Rick Worrell identified the optimum conservation management of the SAC oak woods. The potential for this management to support rural development has established a new and more widely applicable benchmark for the integration of best practice conservation management and local socioeconomic benefits;
- long-term development of a forest habitat network based on the SAC core but linking other native and non-native woodlands in the area.

The provision of substantial EU funding has been crucial not in realising the oak wood restoration but also to unlock the rural development benefits that are provided by both public and private woodlands. The link between the designation of sites and EU financing has led to growing awareness of the practical benefits for communities. Later, the designated area was extended to include some additional woodlots where conifers have been removed and conservation-oriented management is underway.

Direct contact: *Jamie McIntyre,*
Sunart Project Manager,
Forest Enterprise, Lochaber Forest District, Torlundy, Fort William
E-mail:
jamie.mcintyre@forestry.gsi.gov.uk

Natura 2000 coordinator at the Forestry Commission:
Mr Gordon Patterson,
Tel. (44-131) 314 64 64
E-mail:
gordon.patterson@forestry.gsi.gov.uk

8.2. Examples from selected LIFE Nature and LIFE Environment projects

LIFE project data	*Project description*
Country: Austria Title: Ramsar management for March-Thaya floodlands (LIFE95 NAT/A/000768) Beneficiary: Distelverein, Franz-Mair-Strasse 47, 2232 Deutsch-Wagram Österreich Contact: Mr Michael Kaplan Tel. 432 24 75 11 08 Fax 43 22 47 51 10 89 Duration: 1 April 1995 to 1 July 1998 Total budget: EUR 1 963 200 LIFE contribution: EUR 981 600 (50 %)	The March-Thaya floodplain landscape east of Vienna is unique in Austria. The lower March river, with its shallow gradient, is a typical meandering lowland river. Its peculiar hydrodynamic regime (slow currents, extensive spring flooding) and the effects of the continental climate combine with the traditional extensive farming practised here to generate a wide range of biotopes attractive to birds in particular. The aim is to preserve this wetland of European significance, which simultaneously has cultural heritage value as an example of traditional farmland. Ecologically sustainable forms of land use and resource exploitation are to be fostered or taken up again (for example, grazing of periodically inundated meadows) without formalising this too excessively and thereby alienating the community. Farmers, hunters, fish farmers and forest owners will be approached as potential partners in joint actions for sustainability, and intensive public relations work will be carried out to gain local support. Technical measures include initiating restoration of natural conditions in the rivers to improve the hydrological regime of the floodplains in collaboration with the river management authorities, as well as management actions for the meadows and alluvial forests. Trilateral cooperation with the Czech and Slovak Republics will be strengthened.
Country: Denmark Title: Restoration of large areas of natural forest for the benefit of endangered birds, plants and biotopes (LIFE95 NAT/DK/000216)	The Danish government launched, in 1992, an ambitious 50-year national strategy for Denmark's natural forests. This LIFE project is destined to help implement that part of the programme relating specifically to the conservation of the 14 most strategically located and important candidate SAC forest sites. Thus, approximately 65 hectares of priority natural forest will be purchased, management agreements will be negotiated on 400 hectares of private land and urgent management work undertaken on 700 hectares of land within two State forests.

LIFE project data	*Project description*
Beneficiary: Ministry of the Environment, National Forest and Nature Agency, Haraldsgade 53 2100 Copenhagen Ø Danmark Contact: Mr Mickeal Kirkebaek Tel. (45) 39 27 20 00 Fax (45) 39 27 98 99 Duration: 1 April 1995 to 1 October 1999 Total budget: EUR 2 430 800 LIFE contribution: EUR 1 215 400 (50 %)	Finally, if the national strategy is to succeed, there must also be a change in perception amongst the foresters themselves. Thus, an essential component of the project will be the running of a nationwide conservation training course for foresters as well as other public-awareness initiatives. As our knowledge of endangered fauna and flora improves, it is becoming increasingly clear that natural broad-leaved forests are tremendously important for safeguarding Europe's biological diversity. However, throughout Europe, and especially in Denmark, these natural forests have been disappearing at a constant and rapid rate over the centuries, originally, to make way for agricultural land but, more recently, to be replaced by highly productive commercial forest plantations. Today, only around 34 000 hectares of Denmark's natural forest remains, representing less than 1 % of its territory. Yet, despite their scattered and fragmented state, they are still of high conservation value. Amongst others, they hold eight priority habitat types under the habitats directive and numerous Annex I species under the birds directive. This importance is reflected in the number of candidate forest SAC sites put forward by Denmark. Their conservation is, however, far from easy, especially when they are in private ownership, as they are of considerable commercial value. Moreover, in State forests as well as in private forests, any change in management practices for conservation benefit, even with little or no economic impact, requires understanding and acceptance by the foresters themselves.
Country: Finland Title: Quark Archipelago (LIFE97 NAT/FIN/004110) Beneficiary: Länsi-suomen ympäristökeskus (West Finland Regional Environment Centre) Koulukatu 19a — PO Box 262 65101 Vaasa Finland Contact: Ms Susanna Ollqvist Tel. (358-61) 325 65 11 Fax (358-61) 325 65 96 Duration: 1 February 1997 to 1 January 2001 Total budget: EUR 2 323 480.89 LIFE contribution: EUR 1 161 740.45 (50 %)	The miracle is that Merenkurku is still so unspoilt. In order to properly integrate nature conservation, recreational use and local people's traditional use of land (hunting, berry-picking, firewood cutting, etc.), LIFE will complement other initiatives towards sustainability funded under the ERDF, Interreg and Regulation 2078/92, by drawing up a management plan in collaboration with landowners, tourism operators and other local interest groups for part of the archipelago. It will include land-use zoning and a tourism master plan so that recreational use and small-scale nature tourism dovetail with the aims of nature conservation. Meanwhile, LIFE will also quadruple the size of the protected core areas, by financing land purchase and compensation for giving up rights to build holiday homes or exploit forests. Planted forestry monocultures will be removed while grazing by sheep and hay-making will be started up again in grove and meadow habitats. Felling of forests, reforestation with pine, uncontrolled nature tourism and boating, building of holiday homes and the decline of traditional grazing are all looming over the internationally unique Merenkurku (also known as Kvarken or Quark) Archipelago. Geomorphologically unusual in being one of the best examples in the world of the long and narrow De Geer moraines, a rare formation shaped by the last Ice Age, Merenkurku's bizarre topography is a product of the withdrawal of the icecap, submergence by the Baltic Sea and rapid isostatic uplift (about 9 mm per year) of the land in reaction to the disappearance of the ice. This foundation in turn hosts an extraordinarily representative succession series (vegetation and geoformations): lagoons, fladas and glo-lakes; barren heaths, old spruce-dominated mixed forests, birch forest, shore meadows and park-like birch groves grazed by sheep. This is the northernmost place where the marine fauna and flora of the Baltic Sea occur.
Country: France Title: Forests and linked habitats in Burgundy (LIFE99 NAT/F/006314) Beneficiary: Direction Régionale de l'Office National des Forêts de Bourgogne 29 rue de Talant 21000 Dijon, France	The project aims to define and implement sustainable methods of managing woodland environments by striking a balance between the economic, social and environmental functions of the forests. It is based on a close partnership between the public authority responsible for managing public forests in France (the ONF) and a regional NGO (Conservatoire des sites naturels bourguignons). The work will be carried out in the public forests of the nine pSCI involved in the project, and will lead to the development of a sustainable forest management strategy which can also be used for private forests. Over 500 hectares of private forest habitats of special interest need to be included to facilitate this management strategy. Forest management plans and restoration work programmes will be drawn up for all these sites in order to apply the aforementioned strategy. Arrangements will be made to compensate private owners for any operating

LIFE project data	*Project description*
Contact: M. Jean-Pierre Perrot Tel. (33-3) 80 76 98 35 Fax (33-3) 80 76 98 49 Duration: 1 May 1999 to 1 December 2002 Total budget: EUR 2 048 599.22 LIFE contribution: EUR 1 024 299.61 (50 %)	constraints. Limits on public use will be imposed. Finally, it is anticipated that regulations will be drawn up to protect those forests with the most outstanding features. The 11 000 hectares covered by the nine proposed sites of Community interest involved in the project include 7 500 hectares of public forests (beech, oak, maple, box and juniper pioneer vegetation, etc.) and associated open habitats (calcareous grasslands and meadows, scree, limestone pavements, etc.). The area contains 20 types of habitat of Community interest, six of which have priority status, and 17 of the species listed in Annex II to the habitats directive, including the plants *Cypripedium calceolus* and *Liguria sibirica* and the insect *Callimorpha quadripunctaria*. These woodland environments are struggling against economic demands resulting from the intensification and standardisation of forestry production techniques or, conversely, suffer from neglect. In order, therefore, to conserve at least some of the natural habitat of these environments, changes must be made to the methods of forestry management employed, in order to nurture all the stages of plant growth, in both time span and area, through actions ranging from the maintenance of open habitats to the preservation of old trees.
Country: France Title: Integrating biodiversity in the management of forest ecosystems (LIFE95 ENV/F/000542) Beneficiary: Institut pour le développement forestier Contact: M. Gérard Dume Tel. (33-1) 40 62 22 80 Fax (33-1) 45 55 98 54 E-mail: idf.paris@wanadoo.fr Duration: 1 January 1996 to 1 January 1999 Total budget: EUR 839 593.26 LIFE contribution: EUR 406 007.69 (48.36 %)	The creation of the Natura 2000 network required by the habitats directive has deeply disturbed the French country actors, especially the forest owners and managers. In fact, they are not yet familiar with such environmental questions as forest biodiversity, though they officially appear on the forest policies in France, Wallonia and the Grand Duchy of Luxembourg. Therefore it was necessary to initiate a broad programme of awareness-raising, information and training for the locally elected councillors and the forest professionals: ■ on the forest habitat types and species from Annexes I and II, including birds (Directive 79/409/EEC), ■ on the principles and good practices for the sustainable management of forest sites with ecological interests in the three member countries. The first aim of the project is to search for representative field examples of various habitat types and species habitats on Directive 92/43/EEC whose past management operations are known. Some of these will make up a demonstration system of reference in the field. A field-guide to recognition and sustainable management of the forest species and habitats of European interest within the Atlantic and continental biogeographic regions of France, Wallonia and Luxembourg, will be published. It will include a descriptive part and an operational part, stemming from previous field observations. This book will be an educational aid for an awareness-raising, information and training programme for local elected councillors, professionals in charge of forest economic organisations and managers of public and private forests. In that respect, the demonstration system of reference will serve to assist the field trips.
Country: France Title: Sustainable management of deciduous non-even-aged high forests. (LIFE99 ENV/F/000477) Beneficiary: Société Forestière de Franche-Comté, 22bis, rue du Rond-Buisson, 25220 Thise, France	Some tools for a sustainable non-even-aged deciduous high forest management already exist. But there is a real need for complementary tools, and above all for ensuring the demonstration, development and diffusion of all these tools, in order for them to be largely and efficiently applied. The project then contains four operations: ■ elaborating complementary tools, decision making, management and monitoring tools. They will be constructed by studying existing information (forest management plan, databases, etc) and by discussions between experts of various origins; ■ setting up a demonstration network of these tools in conjunction with forest-owners: a forest management plan on 1 000 pilot hectares and 50 demonstration sites; ■ carrying out development operations (training, sensitising, popularisation) aimed at forest owners and managers: involving some 1 100 persons;

LIFE project data	Project description
Contact: Ms Marie Cosar Tel. (33-3) 81 47 47 37 Fax (33-3) 81 80 26 00 Duration: 1 September 1999 to 1 March 2003 Total budget: EUR 596 311.95 LIFE contribution: EUR 296 326.59 (49.69 %)	■ ensuring a wide and efficient dissemination of the results through the diffusion of informative documents (sylviculture guide, decision-making document for the choice of the treatment, forest management plan scheme, monitoring tools document, videotape), publications (Bulletin de la Société Forestière de Franche-Comté, Revue Forestière Française, Bois National...) and international meetings. Communes will be closely associated with the whole process as forest-owners. Whereas even-aged high forest management has been used for a long time and is now well known, non-even-aged high forest management is innovative and remains badly mastered in deciduous forests: it is therefore handled in an intuitive and limited way. Now, in order to achieve sustainable forest management, it is necessary to have several well-mastered management methods at our disposal to adapt to the diversity of local situations. In particular, non-even-aged high forest management allows in some cases for a better integrated environment. Finally, the intuitive approach to non-even-aged management entails high risks of deviating from a sustainable management path. In that context, the project aims to provide forest-owners (communes and private owners) and forest managers with reliable technical tools for developing sustainable non-even-aged deciduous high forest management. The project will be conducted in Franche-Comté, the most forested region in France where partners are used to working in a concerted way. Supported by the EU, the Regional Council of Franche-Comté, the Ministry of the Environment and the Ministry of Agriculture, it will involve partners of public and private forests (SFFC, ONF, CRPF and owners), experts and scientists. At its completion (March 2003), the project will permit: ■ a sustainable non-even-aged high forest management of deciduous forests (regeneration, equilibrium, stability); ■ biodiversity enhanced through diversification of management methods; ■ in some contexts, better preservation of the ecosystem and sensitive landscapes; ■ economic advantages for owners; ■ gain in rural employment.
Country: Germany Title: Integrated Habitat Protection for the Grouse in the Black Forest (LIFE98 NAT/D/005087) Beneficiary: Forstliche Versuchs- und Forschungsanstalt Baden-Württemberg Contact: Mr Rudolf Suchant Tel. (49-761) 40 18-0 Fax (49-761) 40 18-333 E-mail: suchant@fva.lfv.bwllfv.bwl.dbp.de Duration: 1 May 1998 to 1 May 2002 Total budget: EUR 228 651.21 LIFE contribution: EUR 114 325.61 (50 %)	The Feldberg in the southern Black Forest is, at 1 493 m., the highest mountain in Baden-Württemberg and a popular destination all the year round for tours and outdoor sports. To serve the two million visitors a year, a dense network of hiking tracks, cross-country skiing routes and downhill ski fields has been created, and it is planned to expand this further. Simultaneously the Feldberg area is, because of its altitude, one of the last refuges of sub-Alpine fauna and flora outside the Alps themselves. Typical species are two kinds of grouse, the capercaillie and the hazel grouse. Wherever they or their tracks are spotted in the forests, one can be sure that other characteristic species of the higher altitude forest habitats are not far off. However, the number of grouse have been declining radically for many years, and not only on the Feldberg — the Black Forest is, in fact, a last stronghold for grouse between populations in the Alps and small groups in the central European ranges such as the Vosges and Ardennes. The tourist infrastructure and its year-round use is certainly one of the contributing factors to the decline, but forestry, by fostering high-yield plantations unable to fulfill the birds' habitat requirements, must also bear part of the blame. Baden-Württemberg's Forestry Research Institute is taking on the role of advocate for the grouse, and will try to involve all interested parties in establishing a forward-looking, landscape-oriented tourism and a more ecological kind of forestry. This will improve the habitat conditions for the grouse and other species. The Institute is drawing on a model already applied successfully in the central Black Forest and will be aided by experienced colleagues from a similar LIFE (Nature) project in the French Jura. The objective is to achieve and maintain grouse populations able to survive in the longer term and to augment the value of the unique forest habitats on the Feldberg. The project will prepare and implement an integrated resource management plan which

LIFE project data	*Project description*
	bears the interests of forestry, tourism and conservation in mind. The idea is that all concerned collaborate from the beginning. Instead of unilateral bans, clever visitor guidance and well-targeted alterations to forest structures should improve the prospects of survival for the grouse and act as a model for similar projects.
Country: Germany Title: European Network of Natura 2000; management plan for the future nature reserve Hainich (LIFE95 NAT/D/000070) Beneficiary: Thüringer Ministerium für Landwirtschaft Naturschutz und Umwelt Contact: Mr Uwe Spangenberg Tel. (49-361) 21 44 330 Fax (49-361) 21 44 750 Duration: 1 November 1995 to 1 January 1999 Total budget: EUR 1 151 200 LIFE contribution: EUR 575 600 (50 %)	The planned establishment of a national park in the Hainich to preserve the beech forests and the succession zones, could at the same time offer the local communities promising opportunities and could function as a catalyst for economic development. The LIFE project's principal task is therefore to draw up a management plan which, besides the usual planning aspects, will also grapple with social and economic issues, that is, how the planned national park can contribute to the local economy. To gain the support of the local inhabitants, the management planning work will be accompanied during the project by intensive public relations work, in particular through exchanges with mayors and other representatives of communities located in existing national parks elsewhere. The Hainich zone covers 20 000 hectares of a mainly forested ridge in the Thuringian Basin, over which almost no roads run and which boasts the largest coherent deciduous wood in Thuringia. Two recently-abandoned Red Army military training areas have become a showcase for undisturbed ecological succession from bare ground to deciduous forest; with their total surface area of 8 000 hectares they are the most extensive sites in Germany where succession towards a beech forest can be observed. Other curiosities in the Hainich are the 4 000 hectares of 'Plenterwälder' (forests shaped by centuries of traditional selective logging) and 25 hectares of juniper heathland. Because the area lay near the borders of the GDR, it remained relatively undisturbed, but since the Wall came down it has been under constant threat from infrastructure development plans. As in many other parts of eastern Germany, local unemployment is very high, so that decision-makers are putting all their efforts into working out concepts for the economic revival of the district.
Country: Greece Conservation and management of Mainalo Mountain (LIFE99 NAT/GR/006481) Conservation and management of Mainalo Mountain Beneficiary: Arcadia SA — Development Agency of ArcPref Eleftheriou Venizelou, 34 22100 Tripolis, Ellas Contact: Mr Panayiotis Giannopoulos Tel. (30-71) 23 41 24 Fax (30-71) 23 42 09 E-mail: plan@tri.forthnet.gr Duration: 1 January 2000 to 1 January 2003 Total budget: EUR 1 418 515.68 LIFE contribution: EUR 709 257.84 (50 %)	The project aims to promote the legal protection, conservation and sustainable management of the region. One of the main measures is to design and implement a management plan that focuses on managing the black pine forests. The project also aims to reorganise the intensive silviculture by applying a forestry certification system (ISO 14000). Lastly, it plans to create an action plan for tourist access so as to help the local authorities succeed in drawing up a sustainable plan for their tourism activities. The specific protection and conservation measures include fencing off sensitive regions, managing vegetation and creating small lakes for the amphibian populations. It is also planned to limit access to some forest tracks, maintain forest footpaths and set up an information centre and two kiosks. The awareness-raising actions include producing information brochures, posters and slides and organising seminars for forest ecosystem users. Mount Mainalo is in the centre of the Peloponnese and exemplifies a well-preserved natural and cultural heritage. It is composed of a vast natural forest area, Mediterranean-type thickets and alpine meadows, which are surrounded by a number of small villages of great historical and cultural interest. The geographic location of this region increases the mountain's ecological value, as Mount Mainalo forms a natural link between the massif of the northern Peloponnese and the mountains of the southern (Taigetos) and eastern (Parnonas) Peloponnese. Because of the value of the timber resources, the region is subject to major commercial silviculture and the construction of an extensive network of forest tracks. The habitats of the alpine meadows have the problem of overgrazing and are simultaneously threatened by the uncontrolled development of mountain tourism. These activities have the result of fragmenting and destroying the biotopes. Combined with the pressure caused by hunting and the illegal gathering of plants, this creates unfavourable conditions for the endemic plant species and fauna listed in Annex II to Directive 92/43/EEC. Despite the ecological importance of the region, no appropriate legal framework exists to protect its natural resources.

LIFE project data	*Project description*
Country: Italy Title: Integrated plan of action to protect two Natura 2000 sites (LIFE98 NAT/IT/005112) Beneficiary: Università degli Studi di Udine, Dip. di Scienze della Produzione Animale Via S. Mauro, 2 33010 Pagnacco (UD) Italia Contact: Mr Piero Susmel Tel. (39-432) 65 01 10 Fax (39-432) 66 06 14 E-mail: Piero.Susmel@dspa.uniud.it WWW-Page: http://www.uniud.it/dspa/ Duration: 1 January 1999 to 1 January 2002 Total budget: EUR 665 799.42 LIFE contribution: EUR 332 899.71 (50 %)	The project intends to introduce an integrated system of wildlife management and forest grazing to the two pSCIs which is to allow conservation to be combined with social and economic objectives. One of the first targets is to have the Tarvisio Forest designated SPA under the birds directive. Elaboration of a management plan will be accompanied by a series of actions geared towards the preservation of the 7 habitats and 14 species of Community interest occurring there. Bringing some order to tourism, elaborating a management plan for hunting and involving local interest groups in forestry and livestock management will, together with PR work, aim at reducing human pressure. Actions in the forestry sector, besides improving the habitats, will aim at maintaining and expanding populations of *Rosalia alpina*, *Lynx lynx*, *Canis l*upus, *Ursus arctos* and various bird species listed on Annex I to the birds directive. The Tarvisio forest, strategically located where the borders of Italy, Austria and Slovenia meet, is being used as a corridor by bears from these two countries to recolonise Italian habitats. Because the forest is also important for many bird species of Community interest, the site manager, the Ministry of Agricultural Policy, has launched the administrative procedure to have it designated SPA. The two pSCIs already present at the site display a very rich and heterogeneous vegetation: considerable tracts are covered in *Pinus nigra* forests, mixed beechwoods, Alpine calcareous grasslands, Alpine and subalpine heaths and Nardus grasslands. Besides the brown bear, other priority species such as the wolf and the *Rosalia alpina* beetle occur. Summer and winter tourism is the main human impact, and it is often disorganised, taking no account of the forest's equilibria and the biological cycles of wildlife. As well as tourism, hunting is popular, and is directed with particular intensity at ungulates and at game birds. The abandonment or modification of traditional forest grazing means that the meadows are shrinking and the typical creatures of the forest environment are declining.
Country: Italy Title: Valgrande Wilderness (LIFE95 NAT/IT/000764) Beneficiary: Ente Parco Nazionale Valgrande Villa S. Remigo, Via S. Remigo 28922 Verbania Pallanza (VB) Contact: Ms. Franca Olmi Tel. (39-323) 55 79 60 Fax (39-323) 55 63 97 E-mail: parco.nazionale.valgrande@comunic.it www: http://www.parks.it Duration: 1 January 1995 to 1 January 1999 Total budget: EUR 228 800 LIFE contribution: EUR 114 400 (50 %)	Through LIFE, the EC will provide the necessary support to elaborate the management plans which follow from these strategic priorities. Specifically, plans will be drawn up for forest management, controlled access to the park, wildlife management, land use and the ecological management of the park.. The park will set up a geographic information system (GIS) in collaboration with the regional and national authorities, which will allow networking with the databases of these bodies, in order to keep tabs on the development of the plans and to promote their implementation. Public awareness campaigns will also be launched to inform and involve the local population in creating conditions for a sustainable development of the entire wilderness area. The Valgrande in Piedmont is one of the most important wilderness areas left in the Alps, where there are only a few roads open to traffic, economic activity is very limited and tourist infrastructure is non-existent. Within the Valgrande is a 12 000 hectare national park which in turn encompasses a 3 400 hectare SPA boasting numerous habitats and species listed in the annexes to Directives 79/409/EEC and 92/43/EEC, including priority habitats such as species-rich Nardus grasslands and active raised bogs, as well as siliceous screes. The Valgrande national park was established in 1993 and the two top priorities of its management board, appointed this year, are developing methods to prevent and fight the numerous fires which break out here and to tackle the negative impacts brought on by unregulated tourist access.

LIFE project data	*Project description*
Country: Sweden Demonstration of methods to monitor sustainable forestry (LIFE98 ENV/S/000478) Beneficiary: Skogsstyrelsen, 551 83 Jönköping, Sverige Contact: Mr Erik Sollander Tel. (46-36) 15 57 27 Fax (46-36) 16 61 70 E-mail: erik.sollander@svo.se www: http://www.svo.se Duration: 1 July 1998 to 1 January 2002 Total budget: EUR 1 950 071.29 LIFE contribution: EUR 968 337 79 (49.66 %)	The project will demonstrate and compare methods to monitor all aspects of sustainable forestry in Sweden, France, Denmark, Germany and Finland. Gap analyses relating to the pan-European process on the protection of forests will show the need to develop methods. New methods will be developed and existing methods adapted, and relevant methods will be tested in demonstration areas: the result will support the work on sustainable forestry of the European countries. The project addresses the need for effective assessment of sustainability of forestry. Almost every European country has revised its forestry policy in recent years. The project will demonstrate means of monitoring the sustainability of forestry, which reflect new state-of-the-art methods. The Swedish National Board of Forestry is the lead agency. The partners are the Danish Forest and Landscape Research Institute; the Forestry Development Centre TAPIO, Finland; the Institut pour le Développement Forestier and, CEMAGREF, France; the Niedersächsische Forstliche Versuchsanstalt, Germany; and the Swedish Environmental Protection Agency. Six pan-European criteria and quantitative indicators for sustainable forestry form the basis for the work. Phase 1 includes national analyses of how existing monitoring methods fulfil the needs to assess the criteria. This exercise will also be used to identify the need for further indicators. In Phase 2, each country will assess the selected indicators in the demonstration areas. Appropriate organisations will be invited to participate in this process. Special emphasis will be put on validity, accuracy and cost-effectiveness of the methods. The national experiences will be continuously compared and exchanged. Each partner will disseminate the results within its country. The dissemination to other countries will include workshops. The French partners will invite Belgium, Luxembourg and the Mediterranean countries. Niedersachsen will invite the other German states and Austria. The Danes will invite the UK, Ireland and the Netherlands. Finland and Sweden will invite the Baltic States and Norway. Sweden will arrange the initiation workshop and Finland will arrange the concluding workshop. The latter workshop includes an evaluation of the strengths and weaknesses of the methods.
Country: Sweden Title: Protection of western taiga in Svealand and Götaland (LIFE98 NAT/S/005369) Beneficiary: Swedish Environmental Protection Agency (SEPA) Contact: Ms. Christina Lindhal Tel. (46-8) 698 14 09 Fax (46-8) 698 10 42 E-mail: christina.lindhal@environ.se Duration: 1 February 1998 to 1 July 2002 Total budget: EUR 4 007 959.68 LIFE contribution: EUR 2 003 979.84 (50 %)	Western taiga is a priority habitat that only exists in Sweden and Finland within the Community. Characterised by their complex composition of both young and old trees of deciduous and coniferous species, these virgin forests are extremely rich in biological terms, providing habitats for many threatened species of animals and plants. The dead wood, in particular, plays a central role in maintaining this high conservation value and its scarcity is one of the most serious threats to biodiversity. Much of this richness is due to the fact that the forests have had little or no intervention over hundreds of years, other than naturally occuring fires. Today much of the original natural forest has been harvested and replaced with monocultures. It is estimated that only appoximately 3 % remains of the original western taiga and this is under constant threat from commercial forestry. It is for this reason that the habitat type is considered a priority for conservation under the habitats directive and why the Swedish Environment Protection Agency has initiated a nationwide programme for its conservation. The great biological resources represented in the remaining western taiga sites cannot be protected without extensive restrictions on commercial forestry. Thus, purchase of land or compensation to landowners is the only truly effective means of obtaining its long-term preservation. The project targets seven of the best remaining coniferous forest areas (69 to 992 hectares) in south and central Sweden. Once purchased, the areas will be left to develop naturally, but burning in order to restore conditions for species favoured by fire is planned for two sub-areas of forestry affected. Together with the other two projects agreed for western taiga conservation in Sweden this year, the present project should make a significant contribution to the long-term conservation of the habitat type in the EU.

LIFE project data	*Project description*
Country: United Kingdom Title: Securing Natura 2000 objectives in the New Forest (LIFE97 NAT/UK/004242) Beneficiary: Hampshire County Council The Castle, Winchester, Hampshire SO23 8UE United Kingdom Contact: Mr Tim Greenwood Tel. (44-1962) 84 18 41 Fax (44-1962) 84 67 76 E-mail: plantg@hants.gov.uk Duration: 1 February 1997 to 1 October 2001 Total budget: EUR 7 488 389.67 LIFE contribution: EUR 3 744 911.76 (50.01 %)	A powerful consortium of organisations — from graziers and foresters to conservationists — has put together an ambitious programme to undertake a wide range of habitat management and restoration measures designed to tackle the key threats to the New Forest. The main targets are to produce a management plan to cover the entire pSCI; to increase the land owned and managed for nature conservation purposes; and to restore 4 000 hectares of the pSCI habitats to favourable conservation status. Much of the habitat restoration work will involve clearance of rhododendron, removal of planted and invasive conifers, introducing traditional broadleaved woodland management (like pollarding), and repairing/controlling erosion. One of the most innovative elements of the project is the action to secure the long-term viability of grazing animals in the New Forest. Since much of the nature conservation interest is bound up with traditional grazing practices — ponies, cattle and pigs — it is important that these should not decline. New Forest pony grazing is thought to be most at risk and project activities will focus on stock improvement through incentive payments linked to competitions and stock management by pony owners. Originally created as a hunting forest by William the Conqueror in the 11th century (hence its name) the 'New' Forest is an extensive site covering nearly 300 km^2. It is probably best known as an area of ancient woodland and swathes of 'open forest' grazed by roaming herds of New Forest ponies. Its EU nature conservation interest lies in the nine habitat types (including three priority ones) and two species of the habitats directive and the five Annex I birds directive species it supports. Situated in the densely populated south of England, the New Forest is a magnet to visitors — estimated at 16 million annually. This popularity brings with it problems: recreational pressure causes erosion and disturbance. Afforestation with non-indigenous species leaves a legacy of conifer plantations that are out of keeping with the natural character of the area. Other invasive species like bracken and rhododendron all threaten its integrity.

8.3. Leader + and Interreg III examples

LEADER + and Interreg are Community initiatives to enhance sustainable development in rural and cross-border areas. When combining nature conservation and economic objectives in the field of forestry, LEADER + projects could be used as one possibility for financing innovative approaches to management of Natura 2000 sites (See website reference in footnote in Section 8.3.4).

The LEADER group of Garfagnana in the Tuscany region/Italy has implemented a series of projects in the field of forest management with the aim of protecting the environment and creating jobs. In parallel with the introduction of, and experimentation with, ecological forest management in the zone, and based on training programmes, other 'eco-forestry' activities have been carried out: experimenting with new machines which are better adapted to forest exploitation in mountains and, above all, cultivating native plant species used to restore/reafforest a natural environment severely damaged by erosion and flooding.

Key-elements:

- accredited training for forest workers and the unemployed, in order to reinforce the role of a sector essential to local employment and in order to restore a damaged or fragile environment;
- spreading of good practice in the field of recovery of land and vegetation damaged by erosion and flooding;
- specialisation of a forest nursery in the culture of native forest species.

Several other Leader+ projects have worked on small-scale marketing and processing of forest products.

8.4. Rural development plans and forestry

Giving complete information about the forestry elements in the rural development plans for the present budgetary period has proven to be a task that surpasses the scope of this document because of the sheer magnitude of research needed, the complexity of the programmes and the fact that many of the first reports on projects that started from 2001 onwards still have to come in.

A very interesting attempt to present a synthesis of the current state of forest-related activities that are part of rural development programmes is currently being undertaken in the UK by the Universities of Gloucestershire and of Exeter in collaboration with the Institute for European Environmental Policy (IEEP). A team directed by Prof. H. Buller and Prof. M. Winter has presented a report that compares the RDPs of several Member States and presents an overview of their forestry components. This work was commissioned by the UK Forestry Commission and the Great Britain Countryside Agencies' Land Use Policy Group and will be available on www.forestry.gov.uk).

8.5. Pro Silva: practical close-to-nature forestry

Pro Silva is a European federation of foresters who advocate a type of forest management which has been called 'continuous cover forestry'.

Pro Silva supports the implementation of such management in the following ways:

- exchange of information within regional working groups;
- establishment of demonstration forests;
- meetings and excursions in demonstration forests;
- cooperation with educational and scientific institutions, and other bodies.

Pro Silva forestry principles

Pro Silva promotes forest management which optimises maintenance, conservation and use of forest ecosystems in such a way that the ecological and socioeconomic functions are sustainable and profitable while delivering four categories of benefits to society:

1. Conservation of ecosystems

However society may wish to use forests, the vitality and interrelation of lifeforms within the forest ecosystem is seen as the foundation for all the other forest functions. The preservation, and if necessary the restoration, of the ecosystem is therefore the main priority.

Pro Silva recommends the following methods to allow forest ecosystems to function:

- paying careful attention to (that is, maintaining or restoring) the natural forest vegetation pattern, while making use of the forest;
- maintenance of soil productivity, through continuous cover and through the maintenance of biomass in the forest (including dead wood);
- propagation of mixed forests with special attention to rare and endangered species;
- restricting the use of exotic tree species to cases where this is an economic necessity, and if they can be mixed with the indigenous vegetation pattern within certain limits;
- in special cases, forgo any harvest.

2. Protection

Pro Silva considers the following methods essential to achieve the benefits from the protective functions of forests:

- adopt a holistic approach involving perpetual forest cover;
- achieve specific biological protective functions by specific measures, for example, limits on exploitation, use of exotics, fertiliser, harvesting methods, drainage, etc.;
- establish a regional network of protected forest areas of various kinds, including some non-intervention areas.

3. Production

Pro Silva supports the management of forests and the use of renewable resources such as timber and other forest products.

As methods for achieving a functional production forest, PRO Silva recommends:

- continuous forest cover to protect soil productivity;
- adding value by selection felling and tending at all stages of development;
- maintaining growing stock at an optimal level;
- working towards a balance between increment and harvesting in each management unit;
- paying attention to the function of every single tree in tending and harvesting;
- avoidance of clearcuts and other methods which destroy forest continuity;
- abolition of rotation age as the instrument for determining when a tree should be cut;
- spontaneous forest renewal and forest development, through single tree harvesting and group harvesting with long regeneration periods;
- harvesting methods which do not harm the soil or the stand;
- minimising the use of additional materials (fertilisers, plant protection materials);
- limiting game density to levels which are in balance with the carrying capacity;

4. Recreation, amenity, and cultural aspects

Pro Silva recognises the increasing importance of forests for physical and mental health, especially in densely populated countries in Europe.

Pro Silva recommends the following methods for developing the recreational function of forests:

- giving priority to quiet forms of recreation, by providing appropriate trails and other facilities;
- in so far as is needed, the concentration of recreational facilities in specific zones;
- encouraging attractive trees, groves and other special features;
- maintenance and creation of attractive forests by varied forest structures;
- establishment of non-intervention areas where nature is left to follow its course;
- maintenance of forest meadows, valleys, rocky outcrops, water courses, views, etc.

In the light of the above, it is self explanatory that forest management according to Pro Silva principles and Natura 2000 designation can be quite compatible.

A considerable number of public and private forest owners have adopted Pro Silva principles as the basis for the management of their forest estate.

Contact: Mr Thomas Harttung,
president of Pro Silva, Barritskov God,
7150 Barrit, Denmark
E-mail:Th@barritskov.com,
Tel. (45) 75 69 11 77.

8.6. Conservation easements: the American way

A 'conservation easement' is a legal tool which is commonly used in the USA to maintain land in an undeveloped state by a voluntary agreement between a property owner and a qualified organisation, such as a land trust or a government department. The agreement limits the activities and uses that can take place on the property in exchange for compensations to the landowners. Property owners can give up rights to their property in a selective way and the easement may apply only to part of a property. Usually, a third party is responsible for monitoring the property to ensure that the terms of the agreement are being respected. In any case, the owner retains full entitlement to the land and can sell his property when and to whom he wishes, although the easements have a long-term or perpetual validity and are recorded in the land registry.

This system of compensation for income foregone and capital depreciation has proven to be an effective shield against 'urban sprawl' and has resulted in the preservation of 'working forests' in areas of high biodiversity in many states of the USA. Conservation easements can be purchased by government programmes, with the costs borne by nature protection budgets, or by private foundations with all types of co-financing between public and private funding. An instrument of this kind allows effective cooperation between the public sector and many foundations, corporations, NGOs and individual owner families, without disrupting social structures in rural areas.

Information: Society of Amercan Foresters (SAF) — April/May and June/July 2002 issues of Journal of Forestry on http://www.safnet.org/pubs/periodicals.html

8.7. A look down under: nature protection on private land in Tasmania

In order to establish a system of protected areas that is truly representative of the country's enormously diverse natural heritage, the Australian government has established a system of 'conservation covenants' with private landowners that complements public protected areas. Under these contractual agreements, which are established on a voluntary basis, the owners of sites that have a scientifically recognised conservation value can be financially rewarded for not developing their land further, accepting restrictions on economic use or carrying out biotope management work on it.

The regional administration of Tasmania submitted the following description of procedural steps for participation in its 'private forest reserve programme':

1. Contacts between landowners and the programme to initiate an assessment process.
2. A conservation officer visits the site(s), explains the programme's dues and rewards and draws up an assessment of the conservation resources.
3. Using the assessment information, an independent scientific advisory group makes a recommendation about the potential for inclusion of the property in the private forest reserve system.
4. In the case of a positive recommendation, a negotiator is appointed to work out an agreement that suits all parties.
5. An advisory committee considers proposals for agreements that have been negotiated and recommends them for a financing decision at ministerial level.

Contact: Dr Steven Smith
(steven.smith@dpiwe.tas.gov.au)
www.privaterfa.tas.gov.au

Silsombos Fraxinetum 032001 a/G. Raeymaekers

9. General conclusions about forestry on Natura 2000 sites

Pro-active involvement of forest owners and practitioners in discussions on all levels is a prerequisite to preserving the multi-functionality of forestry on Natura 2000 sites. While there is no intention to block all economic activities on Natura 2000 sites, the economic function of forests, usually the highest priority in forest management, will have to be adapted according to the requirements of the ecological function and the conservation of biodiversity on most Natura 2000 forest sites.

This may call for changes in current forest management practices, either by finding new and additional sources of income to continue a traditional form of management, whose profitability is in decline, or by increasing incentives to use forest products obtained by conservation-based management as a substitute for non-renewable, more polluting and more energy-intensive materials. Finding a balance between the potential for local development based on conservation of landscapes, nature, local cultures and global environmental objectives is not impossible. As most of the regions of great natural interest are catalogued as economically underprivileged it would be a mistake to insist that they should compete with intensive forms of land use. If such areas are to find a competitive advantage, it is necessary to look for a differentiating factor, such as 'quality'.

This quality exists, because Natura 2000 sites are areas where, thanks to the outstanding natural resources, goods and services of high environmental and cultural quality can (continue to) be produced, if possible by applying the integrative concept of SFM that does not consider ecological requirements in isolation from other forest functions but aims to unite economic, ecological and social benefits. This also entails increased efforts towards public relations work on the part of foresters and forest owners' associations, to show society that, if biodiversity conservation commitments are to be met, producing modern commodities with the sustainable methods of the past may sometimes be the most appropriate option for the future.

Silsombos Fraxinetum 032001 c/G. Raeymaekers

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11.

Useful Internet links

Topic	*Institution/agency/NGO*	*Link*
Access to information on environmental issues	United Nations Economic Commission for Europe	http://www.unece.org/env/pp/
Bern Convention	Council of Europe	http://www.nature.coe.int
Biodiversity — clearing house mechanism	European Environment Agency	http://biodiversity-chm.eea.eu.int
Birds directive — text	Directorate-General for the Environment	http://www.europa.eu.int/comm/environment/nature/legis.htm
Convention on Biological Diversity	CBD Secretariat	http://www.biodiv.org
Environmental protection in Europe	EEB — European Environmental Bureau	http://www.eeb.org/Index.htm
EU clearing house mechanism on biodiversity	European Environment Agency	http://biodiversity-chm.eea.eu.int
European nature conservation journals and publications	European Centre for Nature Conservation	http://www.ecnc.nl/
Forest management certification	PEFC — Pan-European Forest Certification	http://www.pefc.org/
Forest management certification	FSC — Forest Stewardship Council	http://www.fscoax.org/
Forest management certification comparative matrix	CEPI — Confederation of European Paper Industries	http://www.cepi.org/htdocs/newsletters/
Forest resources	European Forest Institute	http://www.efi.fi
Forest resources	United Nations Economic Committee for Europe — Timber Section	http://www.unece.org/trade/timber/Welcome.html
Forests and biodiversity — research on indicators	BEAR project	http://www.algonet.se/~bear
Funding nature conservation	Institute for European Environmental Policy	http://www.ieep.org.uk/eufunds.html
Glossary of international terms of natural forests and natural forest research	EFI — European Forest Institute (COST E4, 1999)	http://www.efi.fi/Database_Gateway/FRRN/howto/glossary.html..
Habitats directive — text	Directorate-General for the Environment	http://www.europa.eu.int/comm/environment/nature/legis.htm
Indicators for forest biodiversity in Europe	BEAR project	http://www.algonet.se/~bear/
International Conservation of Biodiversity	World Wide Fund for Nature	http://www.wwf.org/
Legal texts of European nature conservation legislation	Directorate-General for the Environment	http://europa.eu.int/comm/environment/nature/natura.htm

Topic	*Institution/agency/NGO*	*Link*
LIFE programme	Directorate-General for the Environment	http://www.europa.eu.int/comm/life/home.htm
Managing the European natural heritage	Eurosite	http://www.eurosite-nature.org/
Ministerial Conference on the Protection of Forests in Europe	MCPFE Liaison Unit Vienna	http://www.mcpfe.org/
Monitoring the EU forest policy activities	Fern (NGO)	http://www.fern.org/
National forest programmes	FAO	http://www.fao.org/forestry/foda/infonote/infont-e.stm
Nature conservation in Europe	WWF European Policy Office	http://www.panda.org/resources/programmes/epo/
Nature conservation in Europe	IUCN — The World Conservation Union	http://www.iucn-ero.nl/eng_working_in_europe.htm
Regional policy in Europe and administration of Structural Funds	Regional Policy DG	http://europa.eu.int/comm/dgs/regional_policy/index_en.htm
Research	Joint Research Centre of the European Commission	http://www.jrc.org/
Research on forestry and agriculture	Research DG	http://www.europa.eu.int/comm/research/quality-of-life/ka5/
Research on forestry and agriculture	Research DG	http://www.europa.eu.int/comm/research/agro/fair/en/index.html
Rural development in Europe and LEADER II initiative	LEADER Community initiative	http://www.rural-europe.aeidl.be/
State of the World's Forests Report 2001	Food and Agricultural Organisation of the United Nations	http://www.fao.org/docrep/003/y0900e/y0900e00.htm
Studies on financing nature conservation and rural development	Institute for European Environmental Policy	http://www.ieep.org.uk/
Text of the Convention on Biological Diversity	Earth Summit 2002	http://www.earthsummit2002.org/toolkits/women/un-doku/otherun/biodivtext.htm

Annex I: General information about forests and forestry

1. Global forest condition

Forests cover about 3 870 million hectares, or 30 % of the earth's land area. Tropical and subtropical forests comprise 56 % of the world's forests, while temperate and boreal forests account for 44 % (FAO, 2001).

Together, tropical, temperate and boreal forests offer a multitude of habitats for plants, animals and micro-organisms, holding the vast majority of the world's terrestrial species. Forest organisms provide a wide array of goods and services, from timber and non-timber forest products to playing an important role in mitigating climate change as carbon sinks. At the same time, forests provide livelihoods and jobs for hundreds of millions of people worldwide. Forest biological diversity also has an important economic, social and cultural role in the lives of many indigenous and local communities. Forests are therefore essential for the protection of global biodiversity (Kapos and Iremonger, 1998).

In the last 8 000 years about 45 % of the Earth's original forest cover has disappeared, cleared mostly during the past century. This process of global deforestation continues at an unprecedented rate (FAO, 2001), so that numerous species of plants and animals have already vanished forever together with their forest habitats. Between 1990 and 2000, another estimated 5 % of the world's forest cover was lost, at a rate of around 14 million hectares per year. Deforestation is mainly taking place in tropical forests, which present the most valuable reservoir for biodiversity and have important functions for the world's climate, and in boreal forests, which regenerate very slowly.

The EU has been one of the dominant actors in the international discussion on forests. It is working to halt global deforestation and to reach sustainable forest management (SFM) through cooperation in all global policy processes, such as:

- the UNCED follow-up process (for example, the United Nations Forum on Forests and preceding fora IPF and IFF);
- the Convention on Biological Diversity (CBD) and its recently adopted 'expanded programme of work on forest biodiversity'

- development policies which take into account environmental constraints;
- integrating environmental protection in new procurement rules in favour of wood products from sustainable sources ('green procurement').

2. Forests in the European Union

The EU and its Member States have chosen to act responsibly with regard to one of the main ecological challenges of our time, the preservation and the sustainable management of forests, by approving ([31]) in 1998 a forest strategy for the European Union, proposed by the Commission ([32]).

The strong European influence on the international forest policy debate puts an increasing responsibility on EU countries to serve as a role model for forest protection and sustainable forest management. In this context, the successful establishment of Natura 2000 along with other initiatives, for example the national forest programmes and the application of the resolutions of the Ministerial Conference on the Protection of Forests in Europe (MCPFE), are important achievements for the EU at international level.

Socioeconomic importance of European forests

Forests and forestry in the European Union are characterised by a wide variety of climatic, geographic, ecological as well as socioeconomic conditions. About 70 % of the forest area is located in four countries: Finland, France, Germany and Sweden. Nevertheless, the largest potential for preserving and restoring forest biodiversity lies in the south of Europe. The Mediterrenean biogeographical region has an amazing number of 30 000 vascular plants, of which over 10 000 are exclusively regional, making it one of richest areas concerning endemism.

Forestry is an important economic factor in Europe: forestry and forest industries employ about 2.2 million people. The total amount of industrial roundwood produced in the EU per year was 226 million cubic metres in 1998 (FAO, 2001). Sweden, Finland, Germany, France and Austria are among the world's top 10 exporters of forest products. Nevertheless, an increasing part of European exploitable forests tend to be underutilised and a general phenomenon of forest biomass build-up has been noticed. Actually, annual growth exceeds harvests, and thus very densely stocked forest stands are prevailing in many EU countries (e.g. DFWR, 2001). The sustainable use of European forest resources, taking into account economic, social and ecological objectives like biodiversity protection, should therefore be maintained and even strengthened and the consequences in terms of management considered on a site-specific basis if Natura 2000 areas are affected.

There are approximately 12 million forest owners in the EU today, with an average ownership of less than five hectares of forest. Ownership, however, varies widely within the Community. In Greece and Ireland, the State owns about two thirds of forest lands, while in Belgium, Spain, Italy, Luxembourg, France and Germany, local communities play an important role as forest owners. The forest area per capita is 0.3 hectares on EU average, but again varying widely between Member States.

Forest cover in the EU is actually rising, *not only* through afforestation programmes co-financed by the EU (1 million hectares since 1991) but even more as a result of natural succession on abandoned land that was mostly grazed in the past (IDF, 2001), and it has reached over one third of EU land cover (FAO, 2001). Although this trend is generally viewed as positive, there are some issues that give rise to concern. The fact that afforestation, often with exotic species, tends to be restricted to poor soils and marginal areas endangers some key habitats of open landscapes, while it goes along with a trend of intensification and further specialisation on the remaining agricultural land (EEA, 2001). Partly for this reason, significant new afforestation projects which may impact on existing (semi-)natural open landscapes should generally undergo an environmental impact assessment before they can be approved.

([31]) Council resolution of 15 December 1998, OJ C 56/1, 26.9.1999.
([32]) COM(1998) 649 final of 3 November 1998, transmitted to Council, not published.

The rise in forest area also conceals the fact that some of the last pristine forests in Europe, usually rich in biodiversity and endangered species, are still threatened to be replaced by intensively managed semi-natural forests or plantations (EEA, 1998). Moreover, preference for conifers over deciduous trees and of exotic species over the original species can have a negative impact on biodiversity even though the total forest area is increasing. Therefore it is the quality of the forest rather than the quantity that recent initiatives for nature conservation are focusing on.

Europe's recent forest history

Historical research shows that forests have had a fundamental importance as a basic resource for the progress of human settlement and for the creation of a civilised and prosperous Europe. Until the late 18th century, European forests were mainly seen as wild and uninviting realms of nature, and at the same time as inexhaustible sources of materials, fodder and energy at the ready disposal of the growing human population.

Many central European countries faced a sharp decline in their forest area starting in the 17th century, with devastating effects on forest resources reaching far into the 19th century. Only when wood as the main source of energy could be substituted by coal and later by oil, did the depletion of many of Europe's once heavily forested regions come to a halt. For various needs such as shipbuilding, mining, firewood and building material, salt production and production of charcoal and potash for glass, many forest areas had been logged completely, often without basic regards for sustainable yield. To make matters even worse, the same forests were often subject to poorly regulated and little supervised forms of primitive multi-functional use by rural populations enshrined in local 'user rights'. This led to the open landscapes consisting of forests degraded and impoverished by extensive grazing and diffuse gathering of forest products that appear on the first accurate landcover maps of the late 18th century as heaths or inland dune areas. The lack of clear forest ownership structures and extended periods of warfare spurred this development of general forest decline.

The turnaround for the diminished forest resources in many European countries came when the imminent threat of a timber shortage was recognised and forestry became a scientific profession, with higher education of foresters spreading across Europe. During the early 19th century, this led to the extension of the concept of foresters as 'guardians of the woods', which was originally restricted to the estates of Europe's high nobility, to a double function of managing and policing the national forest patrimonium as a whole, entrusted to self-standing forest administrations. As a result, the decline in forest resources was slowly reversed and vast regions were allowed to regenerate or were actively reforested. This trend further accelerated after 1850, when ever more abandoned agricultural land and disused pasture continued to be converted to forests. However, the main objectives of this forest recovery were the fast and efficient production of timber to supply growing markets and protection against erosion. This mostly led to the establishment of monocultures of conifers. Managed as even-aged plantations, these 'new forests' offered only little value for biodiversity, although some of them have become more diverse as a result of natural decay or human intervention.

Wood shortages occurred again in parts of Europe, on a smaller scale, after the first and the second world wars. Many areas that were devastated or had been logged during or shortly after the war years were replanted for timber production, to serve the demands of society at the time. Thus, in many parts of Europe, forests are characterised by relatively young, even-aged stands of few tree species, offering habitats only to a rather limited number of organisms.

These problems did not occur, or at least not to the same extent, in the vast forests of northern Europe nor in the inaccessible alpine areas and mountain regions of southern Europe, where relatively untouched forests and open multi-functional woodlands can still be found today. These areas represent the last remains of natural forests and traditional woodland use in Europe, and thus they are of extremely high scientific and ecological value. As the economic value of the old-growth timber is often equally high and as pressure for agricultural intensification continues to build up, commercial exploitation often collides with the interests of nature conservation in these areas.

Naturalness of European forests

The actual appearance of forests in Europe is the combined reflection of two fundamentally different phenomena (Falinski and Mortier, 1996) ([33]):

- a primary differentiation that occurred during the postglacial recovery by forest building species, starting during the Holocene geological period approximately 10 000 years ago, a process conditioned by climatic and soil factors;
- a secondary differentiation under the influence of human settlement which has modified forest cover and structure from the Neoliticum, starting 5 000 years ago.

A. The glaciations have left a considerable footprint on northern Europe, central Europe and the mountain regions, leading to a floristic north–south gradient that is still very characteristic today.

- Northern Europe's boreal forests are of most recent origin and have less plant species. Their establishment followed the regression of the ice-cap and the youngest formations, such as the oak-beech and beech-spruce forests of central Europe, only took shape some 5 000 years ago. Pioneer formations, such as the pine-birch forests already appeared much earlier.
- Southern Europe's forests are much older. Some of these formations have already existed for over 15 000 years and as they have been much less influenced by the glaciations, their number of species and the diversity of their floristic associations is much higher.

To this has to be added that the climatic west–east gradient from oceanic to continental influence also implies a decrease in richness of species and vegetation types.

B. The history of human settlement and its impact on forests also reflects a north–south gradient, with the oldest colonisation taking place in the south, starting from the Middle East towards Greece about 8 000 years ago and reaching Fennoscandia as recent as 2 500 years ago.

Human influence first produced fragmentation of forest cover in the plains and has further reduced it categorically to conquer space for agriculture, to open pastures and to meet energy needs. The older the colonisation process, the more its consequences are visible in the present-day landscape. As a result, the high forest cover in Fennoscandia and the large forest complexes in central Europe that exist today are in stark contrast with the situation down in the south-west. In France, forest cover was estimated at around 80 % at the dawn of the Roman conquest, whereas it was down to 15 % by 1800 and has risen again to over 30 % today. In Fennoscandia, slash and burn cultivation had an important impact until the 19th century, but considerably more closed forest cover developed after its abandonment.

The most important impacts of human activities on forest biodiversity are the following:

- harvesting of trees before they reach physiological maturity and potential age, resulting in a decrease of species associated with old and decaying specimens;
- clearing of alluvial forests for pasture, change in composition of alluvial forests after alteration of hydrological conditions in swamp forests;
- modification of tree species composition and vertical structure by silvicultural interventions;
- establishment of formations that do not occur naturally, such as fruit-bearing stands of selected species, coppice, coppice and standards, wicker cultivation, agro-forestry systems, etc., often leading to the development of associated biodiversity linked to continued human interference in natural succession processes;
- drainage of peat soils and humid forests to accelerate tree growth;
- construction of timber road networks in wilderness areas;
- reforestation of abandoned agricultural lands and formerly grazed environments.

It has to be understood that these individual factors

([33]) This section is largely based on a publication by the authors mentioned in a special edition of *Revue forestière française* (XLVIII); which itself refers to ample literature on the subject. To a lesser extent, the work of Noirfalise on the Corine vegetation cover definitions was also taken into account.

did not necessarily occur side by side but that they may have had simultaneous or subsequent influences, which have also produced synergetic effects on specific locations.

From the above, it can be concluded that biological diversity and the naturalness of European forests have been influenced to a varying degree by human activities for a very long time and that natural or 'virgin' forests have become absolutely rare throughout Europe and even more so in the EU. Indeed, if the primary and secondary differentiation influencing forest composition and structure were put together in a matrix-like grid of crossing influences, this would result in an infinite number of possible situations, whereby in general it can be concluded that those sites with the highest biodiversity, especially on fertile soils, are probably the ones that have undergone the most intense change, as they proved to be most interesting for human settlement. Very little untouched forest is left, totally artificial forest is not really abundant and the largest part of Europe's forest can be called semi-natural (for example, Anglo-Saxon literature) or subnatural (for example, French-Swiss literature). Thereby the distinction between natural and semi-natural forests is often difficult to establish because past human influence can lead to many combinations of natural and human influences. Among those forests which are considered to be semi-natural today, one can find plantations with and natural regeneration of indigenous species on agricultural land that was abandoned over 100 years ago, natural forests of which the authentic herbaceous layer was nearly completely degraded by grazing and export of litter, natural forests which have been 'enriched' with exotic species that have regenerated spontaneously, etc.

There also exists confusion between naturalness, meaning absence of human influence, and biodiversity, meaning species and structural richness. Indiscriminate mixing of such concepts has led to mythical visions of what could or should be the aspect of the 'original', 'ancient' or 'primeval' forest, which are sometimes put forward as a management objective for protected areas.

Keeping this in mind the habitats that are listed for their community importance in Annex I to the habitats directive can be divided into three functional groups (Barbier, 2000):

- habitats which occur in environments that have always been marginal in economic terms and were never colonised by man, such as riverine formations, dune areas, wet pockets in forests and active bogs;
- little anthropised climax habitats, such as certain oak forests, beech forests and natural spruce forests, which have been exploited for timber and kept in a stable condition by management of the indigenous species;
- habitats which are mainly man-made landscapes or their transition to the climax vegetation, such as heaths, wooded bogs, open (grazed) woodlands, natural grasslands or pastures.

This leads to the conclusion that there is too little conclusive evidence to determine, with a reasonable degree of confidence, what would have been the exact composition of potential natural vegetation cover on any given spot in Europe and that, in many cases, the continuation of human intervention is absolutely essential to habitat conservation.



ENV-Medittерenean forest2 P. sylvestris nevadensis/A. Gutierrez

Annex II: The framework for biodiversity protection in Europe

1. The birds directive

Directive 79/409/EC, known as 'the birds directive', was adopted in 1979 and its main provision is the obligation for EU Member States to designate special protection areas ('SPAs') for a series of listed birds whose conservation status is threatened and for migratory birds in general. A second important feature of this directive is that it sets common baseline rules for hunting and trading of birds in all Member States.

2. The Bern Convention

The Convention on the Conservation of European Wildlife and Natural Habitats, often referred to as the 'Bern Convention', was agreed at the Council of Europe in 1979 and entered into force in the EU in June 1982. It is one of the oldest international agreements on biodiversity protection but its signatory parties are not tied by mandatory implementation provisions.

The Bern Convention aims to ensure conservation of wild flora and fauna species and their habitats. Special attention is given to endangered and vulnerable species, including endangered and vulnerable migratory species specified in appendices. Altogether 44 States have ratified the Convention, ranging from Turkey to Iceland and from Ukraine to Morocco.

3. The habitats directive

Directive 92/43/EEC, known as the 'habitats directive' or the 'fauna, flora and habitats (FFH) directive', was adopted in 1992 as an implementation instrument of the Bern Convention for EU Member States. The aim of this directive is to contribute to the conservation of natural habitats and species of wild fauna and flora in the European territory of the Member States, taking account of economic, social and cultural requirements and regional and local characteristics. The protection of natural habitats and species listed in its annexes is ensured through the adoption and implementation of specific mea-

sures, such as the designation special areas of conservation (SACs) or the establishment of systems of strict protection for species of Community interest. This directive creates the Natura 2000 network and lays down rules for its establishment and operation.

4. The EU enlargement and the emerald network

The emerald network is the common tool for the protection of habitats under the Bern Convention in non-EU States that have ratified this convention. At the same time, the emerald network is an effective preparatory tool for EU candidate countries, as its areas of special conservation interest (ASCIs) will be used as a basis for the later adoption of special areas of conservation (SACs) as required by the habitats directive. As there will be no transition periods for the implementation of the habitats directive, those countries which have undertaken all necessary efforts to set up the emerald network will be in a good starting position for EU accession.

Many candidate countries can be proud of an exceptionally rich natural heritage. Eastern Europe is still rich in untouched river valley and forest complexes with complete food chains thanks to the presence of large carnivores. In Romania alone, an estimated 6 000 bears are still living in the wild — more than twice as many as in all other European Union Member States put together. At the same time, the fast rate of economic development in many of these countries is threatening this rich natural heritage, and it has to be ensured that economic development is carried out in a sustainable way.

As a part of the EU enlargement preparations, technical consultations to adapt the annexes of the birds directive and of the habitats directive to the specific situation of habitats and species of conservation value in CEECs were concluded in 2001.

5. The Convention on Biological Diversity (CBD)

One of the key agreements adopted at the 1992 Earth Summit in Rio de Janeiro is the Convention on Biological Diversity (CBD). This pact among the majority of the world's governments sets out commitments for maintaining the world's natural heritage along with sustainable economic development. The Convention establishes three main goals: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits from the use of genetic resources.

Some of the many issues dealt with under the CBD include:

- measures and incentives for the conservation and sustainable use of biological diversity;
- regulated access to genetic resources;
- access to and transfer of technology, including biotechnology;
- technical and scientific cooperation;
- impact assessment rules;
- education and public awareness raising.

The CBD has 186 parties, and 168 signatures at present. The European Community, as well as all individual Member States, has signed the Convention. The European Environment Agency in Copenhagen has set up a 'clearing-house mechanism for biodiversity' ([34]) to ensure optimal flow of information between European signatories.

At the sixth Conference of the Parties of the CBD in The Hague in April 2002, an 'expanded programme of work on forest biodiversity' was adopted. This programme sets out an ambitious series of objectives and activities which the contracting parties have committed themselves to reach, according to their own priorities. They include applying an ecosystem approach to the management of all types of forests and measures to improve protection, recovery and

([34]) A 'clearing-house' originally referred to a financial establishment where checks and bills are exchanged among member banks so that only the net balances need to be settled in cash. Today, its meaning has been extended to include any agency that brings together seekers and providers of goods, services or information, thus matching demand with supply. The EEA clearing-house website is: http://biodiversity-chm.eea.eu.int/

restoration of forest biodiversity by its sustainable use and important monitoring efforts.

6. The EU biodiversity action plans

To ensure that the protection of biodiversity plays a role in other important policy fields, Commission services have recently developed 'biodiversity action plans' for agriculture, fisheries conservation of natural resources and development and economic cooperation (COM/2001/0162 final). These plans set targets to be reached for the improvement of biodiversity protection and are to be adopted by the co-decision procedure of the European Parliament and the Council of the European Union.

The establishment of Natura 2000 is an important element of these action plans. Concerning forests, the biodiversity action plan for the conservation of natural resources sets the target that all forest types from Annex I to the habitats directive should be assessed as 'sufficiently represented' by 2002. This action plan calls also for a further integration of biodiversity supporting measures into programming documents under the Rural, Structural and Cohesion Funds and programmes relevant for third countries.

The adoption at the sixth COP of the CBD of the abovementioned 'expanded programme of work on forest biodiversity' may lead to more attention for forest-related elements in the existing EU biodiversity action plans.

7. National forest programmes

The purpose of national forest programmes (NFPs) is to establish a workable social and political framework for the conservation, management and sustainable development of all types of forests, which in turn will increase the effectiveness and efficiency of public and private operational commitments. They are an outcome of the follow-up process of the Rio Earth Summit in 1992 (UNCED) regarding forests.

- National forest programmes are guided by the elements and principles that were endorsed as proposals for action by the Ad hoc Intergovernmental Panel on Forests (IPF, 1997), established by the United Nations Commission on Sustainable Development.

More than 120 countries have developed or updated their national forest programmes during the past 15 years. The tangible results of these processes include new forestry policies and improved legislation, institutional reforms, redefinition of the role of the State in forestry development, decentralisation of forest management responsibilities, transfer of power to communities and local groups, greater transparency and participation in decision-making processes.

Biodiversity plays an important role in many national forest programmes, in accordance with the abovementioned international commitments. The funding of some of the Community support mechanisms is tied to a successful establishment of NFPs (that is, the support within the framework of Regulation (EC) No 1257/99 for the support of rural development).

8. The Ministerial Conference on the Protection of Forests in Europe (MCPFE)

The Ministerial Conference on the Protection of Forests in Europe (MCPFE) ([35]) is a major initiative of cooperation amongst European countries to contribute to the protection and sustainable management of their forests. It is shared by the more than 40 member countries of the Council of Europe and numerous observers to address threats and opportunities related to forests and forestry. This process is constituted by a chain of political-level conferences and seconded expert meetings for the follow-up work and brainstorming. The participating States are responsible for the national and regional implemen-

([35]) More information on the work of the MCPFE is available in the Internet at http://www.mcpfe.org or at the MCPFE Liaison Unit in Vienna, Marxergasse 2, A-1030 Vienna, Austria; Tel. (43-1) 710 77 02, Fax (43-1) 710 77 02 13, E-mail: liaison.unit@lu-vienna.at

tation of the recommendations made at the conferences. The discussions and exchanges between the conferences are called the 'MCPFE process', which is characterised by a joint approach of national forest administrations and civil society representatives.

The results of the MCPFE process are recommendations in the form of resolutions which are adopted at the ministerial conferences. So far, these have been held in Strasbourg (1990), Helsinki (1993) and Lisbon (1998) and have produced the following resolutions:

S1: European network of permanent sample plots for the monitoring of forest ecosystems

S2: Conservation of forest genetic resources

S3: Decentralised European databank on forest fires

S4: Adapting the management of mountainous forests to new environmental conditions

S5: Expansion of the Eurosilva network of research on tree physiology

S6: European network for research into forest ecosystems.

H1: General guidelines for the sustainable management of forests in Europe

H2: General guidelines for the conservation of the biodiversity of European forests

H3: Forestry cooperation with countries with economies in transition

H4: Strategies for a process of long-term adaptation of forests in Europe to climate change.

L1: People, forests and forestry: enhancement of the socioeconomic aspects of sustainable forest management

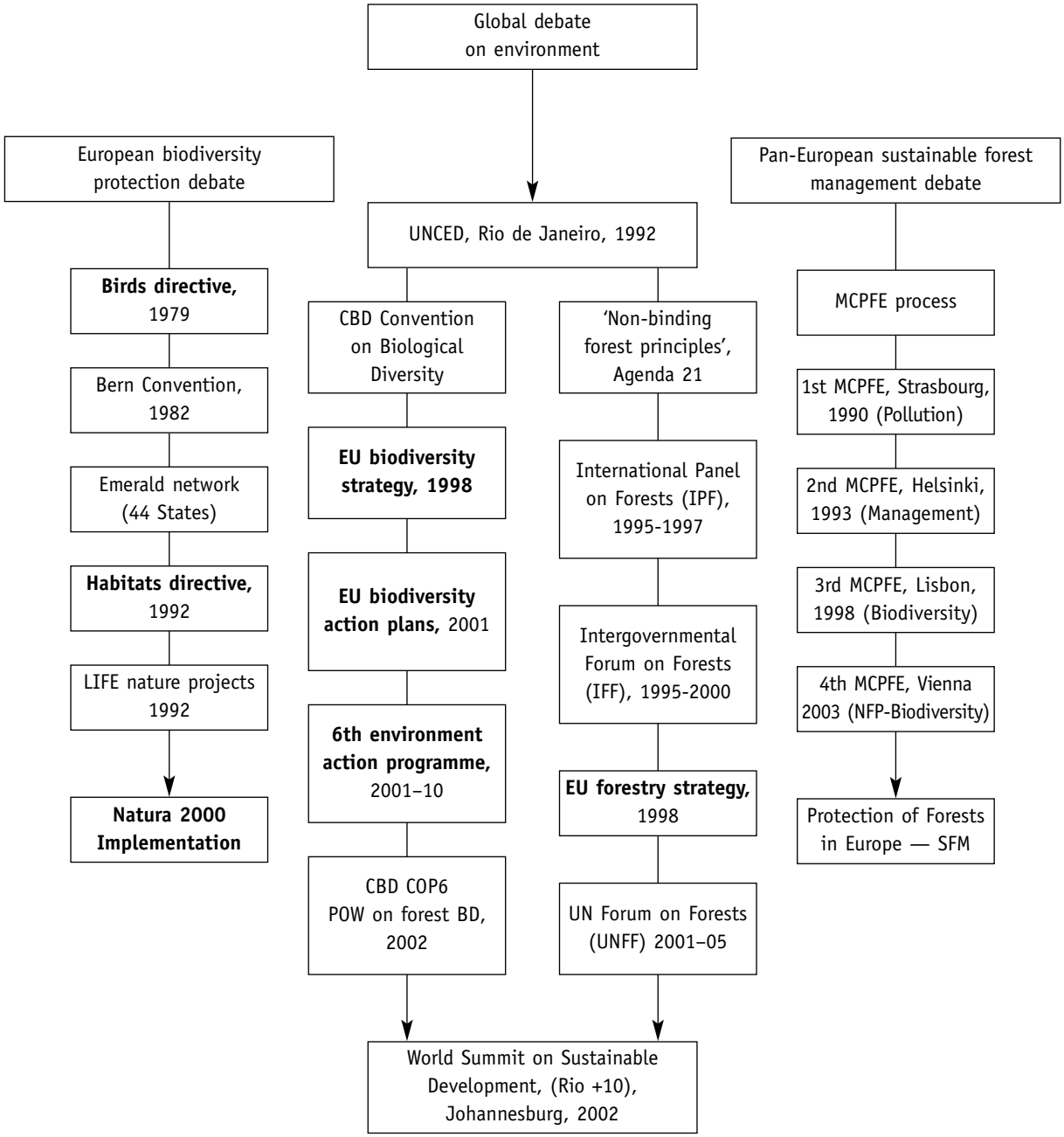
L2: Pan-European criteria, indicators and operational level guidelines for sustainable forest management.

The resolutions cover protection, conservation and sustainable development of Europe's forests and lay down guidelines for achieving those three objectives, including the implementation of objectives from the Convention on Biological Diversity. Because of the comprehensive nature of the resolutions, the European Parliament has emphasised the importance of this pan-European process in relation to the EU forestry strategy ([36]).

([36]) Cf. http://europa.eu.int/comm/agriculture/fore/comm/649_en.pdf

9. Overview of discussions on biodiversity protection and forest issues, 1992–2002

(EU instruments are in **BOLD** text)



European Commission

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Avenue du Roi 202/Koningslaan 202
B-1190 Bruxelles/Brussel
Tél. (32-2) 538 43 08
Fax (32-2) 538 08 41
E-mail: jean.de.lannoy@infoboard.be
URL: http://www.jean-de-lannoy.be

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Introduction

Who is the document for?

This document is for all stakeholders concerned with the development of sustainable tourism within a Natura 2000 site and, by extension, in protected areas in general. These include managers of Natura 2000 sites or protected areas, suppliers of local tourism services, tour operators and local authorities. It should help inspire local politicians, and be of interest at the national and regional government level.

What kind of area does it concern?

It is relevant to all Natura 2000 designated sites in Europe. These areas are incredibly diverse and include a wide range of ecosystem, from wetlands to mountain areas, and including rural areas. It can be extended to Eastern European areas. It is also relevant to all types of protected area in general.

What is it based on?

The document is the result of the organisation of a European seminar held in Lisbon in December 1999 carried out by the contractor SECA, Société d'Eco-Aménagement (France) in association with ECOTRANS (Germany), THE TOURISM COMPANY (United Kingdom), and the FRENCH FEDERATION OF REGIONAL NATURE PARKS (France). Examples of good practice, existing initiatives and general principles selected and presented at the conference, are analysed here.

In the preparation of the conference, 866 people were contacted from all over Europe, including Eastern European countries, and 70 projects were analysed, of which 47 examples of good practice were selected and presented. The final short list of 47 was chosen to reflect a wide spread of types of area, geographical location, tourism context, organisations, and initiatives. 129 participants attended two plenary sessions and four workshop sessions over three days. The 15 Member States were well represented, and there was a good balance between both the tourism and the environment sectors.

The document is the result of active participation throughout the seminar and in its follow-up, of the many comments gathered in an evaluation form completed by the participants, and of the constant review of the publication in its draft form.

In what context was this document produced?

The EU has established a legislative framework for protecting and conserving Europe's wildlife and habitats in order to encourage its Member States to take nature conservation further.

At the centre of this policy is the creation of a coherent ecological network of protected areas across the EU, known as Natura 2000. This is based on two European directives: *Birds* (1979) and *Habitats* (1992). Each Member State is responsible for the choice of sites and management tools in line with European requirements.

Recently, sustainable tourism has been promoted and supported though several European initiatives: studies, publications, workshops, funding programmes. These initiatives address rural and coastal areas and protected areas in general.

As these initiatives have evolved, it has become increasingly important to address tourism in Natura 2000 sites. These sites are notably more sensitive and vulnerable than traditional protected areas because of their characteristics (size, status, management…).

In order to promote sustainable tourism, the European Commission prepared a seminar in Lisbon in December 1999 which was due to be followed by the publication of a new set of guidelines. Contrary to the original aim of the seminar, **the participants all agreed it was not necessary to draw up new specific guidelines for sustainable tourism in Natura 2000, and on the need to adapt and promote existing initiatives.**

In consequences, this document aims to reinforce previous initiatives and focus on the Natura 2000 network. It aims to introduce the concept of sustainable tourism in the network, to encourage managers and stakeholders to follow and adopt certain guidelines and to promote existing initiatives and good practice from all over Europe.

What does it cover?

This document is in four Parts:

Part 1. Describes the Natura 2000 network, its requirements, the benefits of being designated Natura 2000 and belonging to the network. It analyses the Habitats Directive from a sustainable tourism perspective and gives advice on how to translate it into guidelines and general principles for Natura 2000 stakeholders.

Part 2. Provides a brief description of 17 initiatives relevant to protected areas, which have developed specific recommendations, charters, codes and guidelines for sustainable tourism. A detailed analysis and comparison of two important European initiatives (WWF PAN Parks and the EUROPARC Charter) provides further information for the reader.

Part 3. Presents a list of priorities and general principles for sustainable tourism which are relevant to the characteristics of Natura 2000 sites. These principles are based on the examples of good practice presented at the Lisbon seminar.

Part 4. Provides a summary of specific recommendations and advice addressed to Natura 2000 stakeholders in the light of the Habitats Directive described in Part 1 and based on the general principles in Part 3.

A second volume (annex) gives a description of 21 selected examples of good practices, which illustrate some of the main principles and provide insight into the application of sustainable tourism in practice.

Part 1. Natura 2000, Characteristics and requirements

Introduction au réseau Natura 2000

. LE RÉSEAU NATURA 2000 : COMMENT ET POURQUOI ?

La conservation de la nature est une préoccupation majeure de la politique environnementale de l'Union Européenne depuis les années 1970. Depuis plus de trente ans, les textes législatifs et réglementaires pour la protection de la nature se sont développés également dans les pays de l'Union Européenne. D'autres mesures réglementaires concourent indirectement à la protection de la nature aujourd'hui : lois pour l'aménagement du territoire et sur les études d'impact, planification sectorielle ou territoriale du développement économique et des transports, programmes contractuels, notamment entre les Etats et le niveau local, en faveur du développement économique durable. La mise en place de ces mesures est cependant très variable d'un pays à l'autre et n'a pas permis de voir disparaître les menaces sur certains habitats et espèces.

Au regard de ces menaces persistantes, la Commission Européenne a créé un outil novateur à l'échelle européenne, qu'elle a voulu le plus performant possible en faveur de la protection d'un patrimoine commun à l'ensemble des pays de l'Union : le **Réseau NATURA 2000**. Ce réseau est le symbole de la conservation des ressources naturelles de l'an 2000 et au delà. La protection et la gestion efficace des sites qui constituent ce réseau auront une importance vitale pour la survie à terme de nombreuses espèces ou habitats. Mais plus encore, NATURA 2000 donne l'occasion unique de démontrer que les préoccupations environnementales peuvent être intégrées à d'autres politiques. La conservation de la nature fait partie intégrante de la politique d'aménagement du territoire et peut être compatible avec l'agriculture et les autres activités économiques. Elle peut aussi stimuler la création d'emplois.

Assurer le futur du riche patrimoine naturel de l'Europe suppose la pleine participation de tous les partenaires impliqués et des groupes d'intérêts locaux. Une saine gestion patrimoniale n'est pas du seul ressort des administrations nationales et européenne. Le succès du réseau NATURA 2000 devra s'appuyer sur une large adhésion et sur l'engagement de tous ceux qui sont propriétaires ou gestionnaires ou qui apprécient notre patrimoine naturel.

. QUELLES SONT LES QUALITITÉS D'UN RÉSEAU ?

Si jusqu'ici, il a surtout été appliqué dans les fédérations de sites ou d'acteurs de la conservation de la nature, le concept de réseau de sites naturels, apparaît ou est sous-entendu dans les directives européennes et les traités internationaux en faveur de la conservation de la nature. Le principe du réseau est aussi très développé dans certains pays où la conservation de la nature est déjà ancienne, par les organismes publics ou des associations (Grande-Bretagne, Pays-Bas, France).

Dans la conservation de la nature, **le réseau est d'abord une réalité biologique** : protéger des espèces et des habitats, c'est connaître l'ensemble des sites présentant les mêmes habitats ou des habitats similaires, et accueillant les mêmes espèces (voire les mêmes individus) à tout moment de leur cycle biologique. **Le réseau, est un lien entre les acteurs pour améliorer la cohérence des actions** dans un secteur qui se professionnalise progressivement. La bonne conservation du patrimoine naturel repose sur **l'harmonisation des méthodes (de la gestion et de sa planification) et des suivis essentiels à la bonne évaluation des mesures mises en place**.

Il est reconnu, que localement, les différents groupes d'intérêts s'entendent généralement pour mettre en place des projets concertés. La Commission Européenne a d'ailleurs permis de mener à bien des expérimentations ponctuelles au travers des financements ACE et ACNAT, puis grâce aux LIFE Environnement mais surtout aux LIFE Nature. **Pour que ces expériences localisées, servent à l'intérêt général, les réseaux sont essentiels à la valorisation et à l'extension des bonnes pratiques**.

. *LA SPÉCIFICITÉ DU RÉSEAU NATURA 2000*

Constitués sur la base volontariste de ses membres, les réseaux nationaux ou internationaux de sites protégés ne sont pas représentatifs des enjeux de conservation du patrimoine naturel de l'Union Européenne.

La politique de l'Union Européenne en faveur de la conservation de la nature sur le territoire communautaire repose essentiellement sur deux textes législatifs : la Directive 79/409/CEE du Conseil, adoptée en avril 1979 et qui concerne la conservation des oiseaux sauvages (aussi appelée "Directive Oiseaux") et la Directive 92/43/CEE du Conseil, adoptée en mai 1992 et qui concerne la conservation des habitats naturels ainsi que de la faune et de la flore sauvages (aussi appelée "Directive Habitats"). Ces deux Directives constituent le cadre législatif de la protection et de la conservation des habitats et des espèces sauvages d'Europe. Le réseau écologique cohérent d'espaces protégés NATURA 2000 comprendra :

- des Zones de Protection Spéciale (ZPS) visant la conservation des 182 espèces et sous-espèces d'oiseaux figurant à l'Annexe I de la Directive Oiseaux ainsi que des espèces migratrices

- des Zones Spéciales de Conservation (ZSC) visant la conservation des 253 types d'habitats, des 200 espèces animales et des 434 espèces végétales figurant aux Annexes de la Directive Habitats.

Son objectif est d'assurer le maintien ou le rétablissement des habitats et des espèces dans un état de conservation favorable au sein de leur aire de répartition naturelle.

Le réseau NATURA 2000 fonctionnera sur tout le territoire européen et permettra d'inclure des espaces naturels qui ne sont pas pris en compte par les réseaux actuels de la conservation. Ainsi, le réseau NATURA 2000, tous types de site confondus, et constitué sur la base de critères européens, est une première.

Un site NATURA 2000, bénéficiera d'un gestion planifiée et de mesures en faveur de la préservation des espèces et des habitats pour lesquels il a été désigné. Les actions de gestion

seront mises en place au regard des moyens techniques et financiers à disposition et en fonction des exigences socio-économiques et culturelles.

La cohérence du Réseau NATURA 2000 reposera sur la bonne application des directives dont la responsabilité revient aux Etats. Il est d'ailleurs préconisé dans la Directive Habitats, de traduire cette directive en droit national afin de permettre le cas échéant, de compléter les règlements nationaux en faveur de la protection de la biodiversité. De nombreux pays disposent déjà de textes réglementaires et législatifs dans l'esprit des Directives Habitats et Oiseaux. La Directive tend ainsi à harmoniser ou à renforcer des mesures déjà prises ou à prendre.

. *COMMENT SERA CONSTITUÉ LE RÉSEAU NATURA 2000?*

La constitution du Réseau NATURA 2000, s'effectue en constante collaboration entre la Commission Européenne et les Etats. Sa mise en place, telle qu'elle est définie dans la Directive Habitats se fait en trois étapes:

Etape 1 : Sélection au niveau national
Elle est effectuée sur la base d'**inventaires complets** ou **des connaissances acquises**. Chaque Etat fait l'évaluation de l'état de "santé" de chaque espèce ou habitat visé en fonction des éléments d'information dont on dispose.

Les habitats et les espèces figurant aux Annexes I et II de la Directive Habitats sont reconnus comme étant menacés à l'échelle européenne. Cependant, le niveau de connaissance sur leur répartition et leur état de conservation dans chaque Etat Membre est assez disparate. C'est pourquoi, la première étape du processus de désignation a consisté, pour chaque Etat Membre, en une évaluation précise à l'échelle nationale de chaque habitat ou espèce visé, présent sur leur territoire. Sur cette base, les sites importants pour leur conservation ont été identifiés et soumis sous la forme d'une liste nationale à la Commission.

Le choix des sites est effectué sur la base de critères de sélection standards (définis à l'Annexe III de la Directive). Cela signifie que les décideurs doivent tenir compte de la *représentativité* du type d'habitat sur le site considéré, de la *superficie qu'il y occupe* au regard de la superficie nationale de l'habitat considéré et de la *qualité écologique* de ce type d'habitat sur le site (en intégrant les possibilités de restauration).

De même, pour les espèces, ces critères doivent prendre en compte *la taille et la densité* de la population de l'espèce sur le site considéré en comparaison de la population nationale, la *qualité* du site pour l'espèce visée (en intégrant les possibilités de restauration) et son degré d'isolement sur le site par rapport à l'aire de répartition naturelle de la population.

Dès lors que le Réseau NATURA 2000 vise la conservation des habitats et des espèces sur l'ensemble de leur aire de répartition, il est essentiel que les informations fournies par les Etats Membres soient standardisées. C'est pourquoi, un formulaire NATURA 2000 a été conçu; il doit être complété pour chaque site et transmis en accompagnement de la liste nationale. La précision des informations demandées est importante. Elle est un élément essentiel non seulement pour l'aboutissement du Réseau NATURA 2000 mais aussi pour tout futur débat sur la conservation d'un site dans le cadre d'autres initiatives d'aménagement du territoire (ex: création d'une nouvelle route, ou projet d'écotourisme).

Etape 2 : Sélection au niveau européen : Les Sites d'Importance Communautaire

Les **Sites d'Intérêt Communautaire** *, sont sélectionnés au travers d'une analyse commune aux Etats et à la Commission au sein de 6 grandes régions biogéographiques : alpine, atlantique, boréale, continentale, macaronésienne et méditerranéenne.

Carte des régions biogéographiques

Les sites proposés par les Etats sont retenus au niveau européen lorsqu'ils contribuent de manière significative au maintien ou au rétablissement dans un état de conservation favorable des types d'habitats et des espèces visés, à la cohérence du réseau Natura 2000 et/ou au maintien de la diversité biologique des zones biogéographiques concernées. La liste n'est pas fermée. En novembre 1999, près de 10 000 sites ont été proposés par les Etats membres pour une superficie d'environ 350 000 km². Le Natura 2000 Barometer donne des informations régulières sur le nombre de sites proposés par les Etats (site web de la Commission Européenne et la revue Natura 2000 Informations).

La Communauté abrite six régions biogéographiques distinctes. Chacune possède ses propres caractéristiques et sa propre originalité en matière d'habitats et d'espèces, même si certaines sont communes à plusieurs régions. Du point de vue écologique, il est cependant important de considérer les objectifs de conservation de l'Union Européenne dans leur contexte biogéographique.

La sélection des Sites d'Importance Communautaire est menée sur la base des critères définis à l'Annexe III de la Directive. Ces critères évaluent les sites selon leur *valeur* relative à l'échelle nationale, leur *importance* en tant que voie de migration ou de site transfrontalier, leur *surface* totale, la *coexistence* des divers types d'habitats et d'espèces visés et leur valeur en terme d'unicité pour les régions biogéographiques ou pour l'Union.

Les sites des listes nationales identifiés comme abritant des espèces ou des types d'habitats prioritaires du fait de leur risque imminent de disparition ou d'extinction (signalés par un astérisque dans l'Annexe de la Directive) seront automatiquement sélectionnés en tant que Sites d'Importance Communautaire (sauf si ces sites "prioritaires" représentent plus de 5% du territoire national). De même, la Commission pourra dans des cas exceptionnels proposer d'ajouter un site à la liste, s'il peut être démontré sur des bases scientifiques que ce site est essentiel à la préservation du type d'habitat ou de l'espèce concerné.

Etape 3 : Les Zones Spéciales de Conservation
Une fois retenu comme SIC par le Comité Habitats, un site doit être **désigné Zone Spéciale de Conservation** par l'Etat d'ici à 2004. Cela signifie que l'Etat s'engage à mettre en place, si besoin est, les mesures nécessaires pour sa conservation (plan de gestion, actions de restauration, mesures réglementaire ou contractuelle, etc.). De nombreux sites proposés par le Etats bénéficient déjà de telles mesures.

Les Etats Membres devront traiter prioritairement les sites les plus menacés ou les plus importants en terme de conservation. Cette période préalable à la désignation sera mise à profit par les Etats Membres pour préparer les plans de gestion et de restauration de ces sites afin de leur assurer un état de conservation favorable.

. *ENTRETENIR LE RÉSEAU NATURA 2000*

La plupart des sites constituant le Réseau NATURA 2000 devraient être protégés de fait. Cependant, cela ne signifie pas que le processus s'arrête là ou que le Réseau NATURA 2000 sera figé une fois pour toutes. Il sera essentiel de maintenir une démarche dynamique qui devra être ajustée en fonction des réussites ou échecs relatifs des mesures de protection entreprises. Par conséquent, à l'instar de la Directive Oiseaux, il sera hautement recommandé que des sites continuent à être intégrés au Réseau NATURA 2000 dans l'éventualité où une espèce ou un habitat continuerait de décliner du fait de la dégradation des habitats.

Il est de la responsabilité partagée de la Commission et des Etats Membres de contrôler la réussite du Réseau NATURA 2000 en matière de réalisation des objectifs de conservation de la Directive.

La constitution du réseau NATURA 2000 est un travail ambitieux et progressif. La difficulté technique principale pour proposer des Sites d'Intérêt Communautaire représentatifs au niveau européen et de surface pertinente est de disposer des connaissances nécessaires à l'analyse par les experts du Comité Habitats. Le manque le plus important étant des bonnes cartographies, les données socio-économiques, voire les données naturalistes pour certains sites. Il existe néanmoins nombre de cas où l'on " a fait du NATURA 2000 avant l'heure et sans le savoir" et pour lesquels la désignation en ZSC ne soulèvera aucune contestation. Valoriser ces expériences acquises est aussi l'un des moyens d'illustrer au mieux les implications de l'application de la Directive Habitats. Les promoteurs et les partenaires de ces expériences sont souvent les meilleurs ambassadeurs et constituent les premières éléments de la chaîne de compétences qui va se constituer au sein du Réseau NATURA 2000.

Voir un territoire devenir site NATURA 2000 est plus qu'un label. C'est d'abord la reconnaissance de l'importance d'un site pour le patrimoine européen. C'est ensuite, pouvoir mettre en place des actions concertées de préservation et de développement économique durable avec le soutien de la Commission Européenne et de l'Etat. C'est aussi participer à une œuvre commune avec le volonté affirmée de travailler en concertation avec le plus grand nombre des acteurs (services publics, exploitants, gestionnaires, aménageurs). C'est prendre conscience qu'on a à rendre des comptes aux générations futures par le biais d'une autorité commune. C'est enfin, faire partie d'un groupe, donc ne plus être isolé.

Tourisme durable au regard de la Directive Habitats

Les sites du réseau NATURA 2000 seront des sites protégés pour lesquels les mesures seront prises par les Etats membres (outils réglementaires, financiers, en fonction des contextes locaux, des stratégies nationales…). Le poids réglementaire du réseau Natura 2000 repose sur la responsabilité des Etats. Il est donc nécessaire de pouvoir opposer un règlement ou des obligations à tout promoteur de projet. La Directive Habitats donne les grandes lignes et les régles pour une planification efficace de projet de développement durable sur un site protégé.

Les directives Oiseaux et Habitats servent de base à l'élaboration du réseau NATURA 2000. La Directive Habitats, plus récente, comporte les préconisations faites aux Etats pour la mise en place de ce réseau. Ce sont les articles 2 et 6 qui clarifient le lien entre la conservation et les usages possibles sur les sites NATURA 2000. C'est donc dans ces articles que nous trouvons le cadre possible du développement d'un projet touristique sur les sites Natura 2000 qui constituera un exemple de tourisme durable.

Article 2.3 Les mesures prises en vertu de la présente directive tiennent compte des exigences économiques, sociales et culturelles, ainsi que des particularités régionales et locales. L'homme ou ses activités n'est pas exclu aujourd'hui ou demain. La directive Habitats cherche à promouvoir le développement durable.	On favorisera donc la **concertation** et le **partenariat** en - Développant et en mettant en place des projets répondant à une stratégie de tourisme durable - Tenant compte de la culture locale - Soutenant les productions traditionnelles et l'activité économique locale - Créant ou développant des écolabels, de nouveaux produits, des modes d'hébergement adaptés

. *L'ARTICLE 6 DE LA DIRECTIVE HABITATS*

L'article 6 de la Directive Habitats crée le cadre de la conservation et de la protection des sites. Il s'applique aux Zones de Protection Spéciale (ZPS) classées en vertu de la Directive Oiseaux (sauf article 6.1) et aux sites visées dans la Directive Habitats (ZSC).

L'article 6.1 prévoit le régime de conservation général que les Etats membres doivent instaurer **pour les Zones Spéciales de Conservation (ZSC) désignées**. Il s'agit de mesures dites positives (établissement de plans de gestion, mise en place de mesures réglementaires, administratives ou contractuelles) à prendre en faveur des espèces et des habitats présents sur le site en cause, sauf ceux dont la présence n'est pas significative.
Le régime de conservation des Zones de Protection Spéciale (ZPS) classées est prévu dans les articles 4.1 et 4.2 de la Directive Oiseaux. Les articles 6.2, 6.3 et 6.4 de la Directive

Habitats, comprenant les mesures préventives et les procédures dans le cas de projets d'envergure, s'appliquent au ZPS comme aux ZSC.

L'article 6 de la Directive Habitats incite les Etats à gérer les espaces protégés d'une manière durable et fixe des limites aux activités susceptibles d'avoir un impact négatif, tout en permettant des dérogations dans certains cas. Il constitue l'un des principaux moyens de concrétiser le principe d'intégration environnementale et d'instaurer, à terme le développement durable.

. *ZOOM SUR LE TOURISME DURABLE DANS L'ARTICLE 6 DE LA DIRECTIVE HABITATS*

A. Les mesures actives

*Article 6.1 Pour les zones spéciales de conservation, les États membres établissent **les mesures de conservation** nécessaires impliquant, le cas échéant, des **plans de gestion** appropriés spécifiques aux sites ou intégrés dans d'autres plans d'aménagement et les **mesures réglementaires, administratives ou contractuelles** appropriées, qui répondent aux **exigences écologiques** des types d'habitats naturels de l'annexe I et des espèces de l'annexe II présents sur les sites.*	Les projets touristiques sont possibles sur les sites Natura 2000 dès lors qu'ils respectent la biodiversité et les objectifs de la Directive Habitats et de la Directive Oiseaux. **Tout projet touristique devra tenir compte des mesures nécessaires mises en place pour la conservation.** **Il devra s'intégrer dans une démarche de planification existante ou à mettre en place.** **Il devra s'inscrire dans une stratégie de tourisme durable.**

Le plan de gestion n'a rien d'obligatoire et peut prendre toute forme selon le choix des Etats membres. Le plus important étant qu'il prenne en compte les exigences environnementales. Il doit au mieux s'intégrer dans les cadres de planification existants. Un plan de développement touristique sur un site Natura 2000 peut être développé par un groupe privé, une collectivité publique, l'organisme gestionnaire du site. Si la méthodologie d'élaboration de plan de gestion du site existe, elle peut intégrer une partie spécifique au tourisme durable pour aider le concepteur du projet. Le caractère durable d'un projet de tourisme durable repose sur la bonne méthode de sa planification, de son évaluation et de son actualisation.	Il existe une grande diversité de types de planification au niveau territorial ou sectoriel, au niveau local ou national, voire transfontraliers, qui peuvent concerner un projet touristique quelque soit son importance : - plan de développement des infrastructures de transport - plan territorial de développement économique - plan de gestion de l'urbanisation, de l'occupation de l'espace - plan de gestion et d'exploitation des ressources naturelles - programme de préservation du patrimoine naturel, historique, culturel - plan de gestion de sites naturels protégés de tout type. Un projet touristique durable tiendra compte de ces plans. On peut d'ailleurs y trouver des données socio-économiques, écologiques, historiques nécessaires à analyser ou à intégrer dans le projet. Dans l'idéal, le projet touristique s'inscrit dans la procédure d'élaboration de l'un de ces plans et bénéficie du cadre de concertation que cela peut offrir. La planification d'un projet n'est efficace que dans une démarche partenariale et de concertation. Elle devra être suivie par une approche d'évaluation régulière du projet et par son actualisation avec l'ensemble des partenaires et acteurs concernés.

Les exigences écologiques : définissent tous les besoins écologiques nécessaires pour assurer un état de conservation favorable des habitats et espèces concernés. Cela implique une bonne connaissance scientifique, au travers de critères que l'Etat est appelé à identifier avec l'aide de la Commission si nécessaire.

Un projet de développement touristique sera d'autant mieux appréhendé qu'on aura une bonne connaissance du site et de ses exigences écologiques. En l'absence de bonnes connaissances, le principe de précaution peut amener à limiter fortement les projets. L'élaboration d'un projet de tourisme peut comprendre l'amélioration des connaissances.

Pour tout projet, on doit mettre l'accent sur la recherche de tous les éléments d'information, et garder en mémoire la vulnérabilité des espèces et des habitats qui sont à l'origine de la désignation en site Natura 2000.

Pour cela on doit :

- connaître les limites du site, même si le projet est en dehors du site

- s'informer sur la teneur des mesures réglementaires (lois nationales, réglementations sur le sites qui bénéficient d'un statut de protection) ou contractuelles (dans le cadre de conventions visant la gestion des milieux naturels) qui s'y appliquent.

- se procurer ou à défaut, faire réaliser les cartographies aux échelles adaptées au projet, les études sur les exigences écologiques des espèces et des milieux concernés et leur degré de vulnérabilité, dans le site ou en dehors.

- identifier et évaluer les menaces et les enjeux sur la conservation durable des espèces et des habitats.

Les mesures réglementaires, administratives et contractuelles sont très variables selon les pays et les sites et sont laissées à la discrétion des Etats, de par le principe de subsidiarité. Elles doivent être positives, comme signifier la non intervention, la définition de zones interdites d'accès, etc. Le tourisme, même s'il est durable, ne se développera pas dans tous les sites Natura 2000. Tout site Natura 2000 n'est pas un site potentiel pour le développement touristique, ou de n'importe qu'elle activité économique, même considérée comme durable par ailleurs.	Un site Natura 2000 peut être un espace nécessitant une protection stricte ou destiné à des actions minimales de gestion pour le maintenir dans un état de conservation favorable. S'il est envisageable, un projet touristique devra tenir compte des mesures réglementaires mises en place au niveau national et local. Elles sont parfois nombreuses et d'origines diverses : conditions d'accès aux sites, d'exploitation des ressources naturelles, nécessité d'autorisation spéciale pour l'aménagement ou l'exploitation, etc. Tout promoteur de projet se doit de les connaître, que ce soit les mesures de protection de site, ou les mesures contractuelles dont pourra bénéficier le projet s'il répond aux critères des contrats mis en place. Le projet pourra avoir pour objectif de participer à la conservation et pourra éventuellement faire appel au soutien financier des Etats ou de la Commission Européenne lorsqu'ils existent.

B. Les mesures préventives

Article 6.2 Les États membres prennent les mesures appropriées pour éviter, dans les zones spéciales de conservation, la ***détérioration*** *des habitats naturels et des habitats d'espèces ainsi que les* ***perturbations*** *touchant les espèces pour lesquelles les zones ont été désignées, pour autant que ces perturbations soient susceptibles d'avoir un effet significatif eu égard aux objectifs de la présente directive.*	C'est le principe de prévention qui s'applique à tout type d'activités humaines, comme à des accidents dus à des phénomènes naturels ou non. Cela peut donc concerner des activités en dehors des sites, dont les effets peuvent se faire ressentir à l'intérieur du site. Cet aspect est primordial pour l'élaboration d'un projet économique qui nécessite une bonne connaissance de la fonctionnalité des milieux, de la sensibilité des espaces et des espèces, et des mesures de conservation mises en place. L'information est à diffuser au plus grand nombre. **Développer au mieux les outils d'évaluation, de communication, de valorisation et sensibiliser. Avoir une image vraie de la nature et pas une représentation.**

Indicateurs de détérioration
L'aire de répartition naturelle de l'espèce" diminue ou risque de diminuer ou remet en cause l'existence et la probabilité d'existence d'un habitat suffisamment étendu pour que ses populations se maintiennent à long terme".

Pour le tourisme, cela concerne tous les projets d'infrastructures, de modes de transport, d'augmentation de la densité de la fréquentation, d'aménagements pour l'accueil du public… qui doivent être envisagés selon leurs conséquences au long terme, donc suivis et maîtrisés.

Un projet de tourisme durable peut comporter des aménagements, voire la création d'infrastructures nouvelles qui auront une incidence paysagère, au minimum.

Pour éviter de conduire à une détérioration, il faut avoir une très bonne connaissance des habitats et des espèces autant dans le site, qu'à l'extérieur. Il existe des organismes et des personnes ressources dans ce domaine qu'il peut être nécessaire d'intégrer dès l'élaboration du projet afin d'évaluer au mieux l'impact potentiel du projet.

Si les aménagements et les infrastructures nouvelles impliquent la création de nouvelles activités, une fréquentation plus élevée, on doit en évaluer également l'impact au préalable.

Un projet de tourisme durable doit également promouvoir autant que possible la réduction des pollutions, l'utilisation minimale d'énergie et l'exploitation raisonnée des ressources naturelles, qui sont par ailleurs préconisées pour favoriser le développement durable.

Indicateur de perturbation Sur un site, la perturbation est relative au statut de conservation des espèces au regard de la contribution du site au réseau Natura 2000. Tout événement contribuant à la diminution de la taille de l'habitat des espèces à l'intérieur du site peut être considéré comme une perturbation significative. Cela peut concerner des projets de parcours sur des milieux sensibles, de visites régulières de l'avifaune en particulier. L'absence de limitation de certaines activités (tout genre confondu) est le cas le plus courant de perturbation.	La fréquentation humaine est parfois la source de perturbation la plus importante. Elle repose souvent sur une méconnaisse des espèces et des habitats. On doit donc évaluer les capacités de charge des sites, maîtriser les flux de visiteurs, à l'intérieur ou à l'extérieur des sites. Le promoteur du projet doit aussi envisager une démarche active de sensibilisation, voire d'éducation à l'environnement, qui ne soit pas qu'un outil de promotion ou un slogan. On peut ainsi favoriser les programmes d'éducation à l'environnement, des codes de bonne conduite, les nouvelles technologies, et les modes d'appréhension de la nature par l'interprétation. Le discours "naturaliste" ou "environnemental" est l'une des spécialités en plein développement dans les espaces protégés, le monde de l'éducation. Des organismes et des personnes ressources existent donc et peuvent être étroitement associés à l'élaboration du projet comme à la mise en place de programmes de sensibilisation. Il existe des fonds spécifiques pour ces objectifs à différents niveaux.

C. Les procédures d'évaluation d'un projet

*Article 6.3 Tout **plan** ou **projet** non directement lié ou nécessaire à la **gestion** du site mais susceptible d'affecter ce site de manière significative, individuellement ou en conjugaison avec d'autres plans et projets, fait l'objet d'une évaluation appropriée de ses incidences sur le site eu égard aux objectifs de conservation de ce site. Compte tenu des conclusions de l'évaluation des incidences sur le site et sous réserve des dispositions du paragraphe 4, les autorités nationales compétentes ne marquent leur accord sur ce plan ou projet qu'après s'être assurées qu'il ne portera pas atteinte à l'intégrité du site concerné et après avoir pris, le cas échéant, l'avis du public.* Cet article met l'accent sur l'avis officiel à	Un projet d'écotourisme peut comprendre partiellement ou totalement des infrastructures ou des travaux importants. Il importe dans ce cas de prévoir parallèlement des mesures d'atténuation et les solutions alternatives qui pourraient assurer l'absence d'effets négatifs sur le site. L'étude préalable ou évaluation du projet est alors indispensable et doit être réalisées au regard des objectifs de conservation du site qui sont définis dans le formulaire descriptif du site voire détaillés dans un plan de conservation préétabli (plan de gestion, plan d'action, document d'objectif de conservation) et généralement consultable auprès de l'autorité compétente.

délivrer par une autorité compétente sur tout projet (travaux de construction ou interventions sur l'environnement naturel par exemple) ou sur tout plan (aménagement du territoire, programmes sectoriels par exemple) afin d'évaluer leur compatibilité avec les objectifs des deux directives. La procédure décrite est déclenchée par la seule probabilité d'effets négatifs de plans ou projets situés à l'extérieur ou à l'intérieur du site. On doit également considérer des projets ou plans au regard des éventuels effets conjugués de plusieurs plans ou projets, qui sont proposés effectivement et pas seulement prévus. Si un projet est susceptible d'avoir une incidence négative au regard des directives, il doit comporté des solutions alternatives que l'autorité compétente pourra évaluer à leur tour.	L'évaluation du projet peut suivre la procédure envisagée dans le cas d'étude d'impact environnemental de projets publics ou privés. La Directive européenne 85/337/CEE modifiée par le directive 97/11/CE définit la notion de projet et la forme de l'évaluation à envisager. Elle est un référent incontestable. Les lois nationales sur l'étude d'impact environnemental peuvent également être utilisées dans certains pays qui en disposent. Plus l'étude est détaillée et motivée plus la décision de l'autorité compétente sera facilitée. Cette étude a l'avantage de rendre l'avis émis non critiquable sur un projet, et éventuellement de favoriser le débat, voire la concertation locale. En l'absence de plan de gestion de site on suggère ici au meneur de projet d'avoir une méthode stricte, rigoureuse. Ce qui peut être le cas d'un site Natura 2000 ne bénéficiant d'aucune mesure de protection avant sa désignation.
*Article 6.4 Si, en dépit de conclusions négatives de l'évaluation des incidences sur le site et en l'absence de solutions alternatives, un **plan** ou **projet** doit néanmoins être réalisé pour des raisons impératives d'intérêt public majeur, y compris de nature sociale ou économique, l'État membre prend toute mesure compensatoire nécessaire pour assurer que la cohérence globale de Natura 2000 est protégée. L'État membre informe la Commission des mesures compensatoires adoptées. Lorsque le site concerné est un site abritant un type d'habitat naturel et/ou une espèce prioritaires, seules peuvent être évoquées des considérations liées à la santé de l'homme et à la sécurité publique ou à des conséquences bénéfiques primordiales pour l'environnement ou,*	Les mesures compensatoires doivent être nouvelles (la désignation supplémentaire de site n'en est pas une en soit mais peut l'être exceptionnellement) et vraiment compenser les dommages en allant au delà de la simple application des directives. Elles doivent être mises en place avant et prouver qu'elles fonctionnent quand les atteintes au site visés par le projet sont effectives. Elles peuvent prendre les formes suivantes : - recréation d'habitats sur un site nouveau ou agrandi et incorporation dans le Réseau Natura 2000 - amélioration d'un habitat sur une partie du site ou sur un autre site Natura 2000 dans une mesure proportionnelle aux

après avis de la Commission, à d'autres raisons impératives d'intérêt public majeur Un projet pourra être justifié pour **raison impérative d'intérêt public majeur**, dans le cas d'initiatives ou de politiques visant des valeurs fondamentales pour la population (santé, sécurité, environnement), dans le cas de politiques fondamentales pour l'Etat et pour la société, dans le cas de réalisation d'activités économique ou sociale visant à accomplir des obligations spécifiques de service public. Les mesures compensatoires qui visent à contrebalancer les effets négatifs sur l'espèce ou l'habitat en cause ne sont que le dernier recours.	pertes provoquées par le projet De nombreuses expériences de recréation d'habitats ont été menés par les organismes porteurs de projets de conservation de la nature et constituent des références techniques et scientifiques reconnues. Le principe pollueur payeur signifie que le concepteur ou responsable du projet prend en charge les frais des mesures compensatoires. Le promoteur du projet doit prendre en compte l'appartenance du site qu'il vise à un réseau de sites protégés dont la cohérence doit être maintenue, soit par l'atténuation des effets négatifs de son projet, soit par les compensation envisagées si son projet est reconnu d'utilité publique. Un formulaire d'information pouvant aider à préparer l'évaluation est disponible au auprès des services compétents (Etat ou Commission Européenne).

Les spécificités et caractérisitiques des sites Natura 2000

L'objet de la directive Habitats est d'assurer la protection de la biodiversité dans l'Union au travers de la conservation des habitats et des espèces sauvages présentes dans les pays où s'applique la Directive. Elle propose la mise en place de mesures pour le maintien et la restauration d'habitats dans une état de conservation favorable, en tenant compte des exigences économiques, sociales et culturelles, ainsi que des particularités régionales et locales.

Si les critères de désignation dépendent d'espèces et d'habitats considérés comme prioritaires à protéger, les facteurs anthropiques sont également pris en compte. Les sites Natura 2000 sont des espaces protégés qui n'excluent pas l'homme ou les activités socio-économiques dès lors que cela ne porte pas atteinte aux espèces ou aux habitats pour lesquels le site sera désigné. Il est d'ailleurs reconnu que certaines activités humaines concourent directement à la bonne conservation d'espèces ou d'habitats. De même, le réseau Natura 2000 peut participer au maintien d'activités socio-économiques voire au développement de nouvelles, par le biais de mesures réglementaires ou contractuelles mises en place par les Etats ou leurs déclinaisons locales. Le tourisme durable est l'une des activités qui peut trouver sa place.

. *QUELS TYPES D'ESPACES SONT CONCERNÉS?*

La réseau Natura 2000 est en cours de constitution. Il s'agit principalement d'espaces ruraux, forestiers ou naturels (montagne, littoral, zones humides). A noter qu'au regard de la directive Oiseaux, des sites urbains en particulier portuaires ont été désignés en ZPS et seront intégrés au réseau Natura 2000.

Espaces protégés partiellement ou complètement

En premier lieu, sont proposés par les Etats les sites ou parties de sites bénéficiant de mesures nationales en faveur de la préservation de la nature.

- Les plus communs sont les parcs nationaux, les réserves nationales (réserves naturelle, de chasse, de pêche).
- Les parcs régionaux (ou parcs naturels) constituent des territoires où le développement des activités économiques dépend de mesures contractuelles en faveur de la protection de l'environnement dans son sens le plus large.
- Certaines grandes forêts bénéficient parfois de règlements nationaux spécifiques imposant une forme stricte d'exploitation (publique ou privée).
- Enfin des sites d'intérêt patrimonial international bénéficient de protection par la maîtrise foncière en vue de leur protection, opérée par des organismes publics comme privés.

La majorité de ces sites disposent de plans de gestion formels ou en auront à moyen terme. Tout projet de tourisme durable peut donc s'y intégrer en tenant compte des critères exposés dans le chapitre précédent. Par ailleurs des expérimentations ou des principes ont été élaborés pour de nombreux types de sites, comme détaillé dans le reste de ce rapport.

Espaces non protégés
Les SIC aujourd'hui proposés par des Etats ne bénéficient pas tous d'un statut national de protection réglementaire.
On trouve pour certains pays, des zones désignées par les Etats comme pilotes pour le développement d'une agriculture raisonnée, soutenue par les Etats et la Commission Européenne, accompagnés parfois d'écolabel offrant des produits à valoriser dans le cadre de projets de tourisme durable assez aisément.
Enfin, la plupart des sites désignés par les Etats ont un label au travers d'un traité ou d'une convention international : site Ramsar, réserve Man and Biosphère, etc. Il apparaît évident que ces zones doivent concourir à la constitution du Réseau Natura 2000. Les différents guidelines proposés dans ce rapport présentent un panel de planification de projet adaptable à chaque type de site.

. *QUELLE EST LA DIVERSITÉ DES SITES?*

Les réalités socio-économiques sont très diverses d'un pays à l'autre de l'Union. Il en est de même des politiques publiques et des initiatives privées ou associatives en faveur de la conservation. Le niveau de préservation des habitats/espèces et les connaissances que l'on en a sont aussi divers.

On peut citer schématiquement deux extrêmes qui participent à la richesse du patrimoine naturel européen :

. Les unités nationales ou régionales ayant bénéficié d'un développement économique favorable qui n'aura pas toujours tenu compte de l'environnement et ayant une densité de population élevée, où l'on aura des espaces de nature réduits ou des sites nécessitant une gestion constante pour être maintenus en un état de conservation favorable. C'est d'ailleurs dans ces pays ou ces régions qu'on trouvera les initiatives les plus anciennes de conservation de la nature, un haut niveau de professionnalisation de cette branche et des budgets important privés comme publics sont consacrés à la gestion de sites protégés.

. Les unités nationales ou régionales qui ont un développement économique limité ou qui accusent une déprise dans certains secteurs (industrie, agriculture) et qui laissent des espaces de nature vastes, presque intouchés au côté d'espaces entièrement dégradés. Certains de ces espaces très dégradés étant la conséquence d'un développement touristique non raisonné parfois.

. *LES SITES NATURA 2000 ONT –ILS TOUS UNE VOCATION TOURISTIQUE?*

Les projets de développement de tourisme durable devront tenir compte de cette typologie, aussi schématique soit-elle. Le tourisme durable, en plus du développement économique qu'il peut permettre, peut pourvoir aux besoins financiers de la gestion écologique, sous la forme de taxes professionnelles, de séjour, de location, d'écotaxes à destination de la gestion des sites Natura 2000.

Le tourisme durable à différentes déclinaisons, selon les situations locales.
La pédagogie est primordiale sur des sites très fréquentés. L'éco-citoyenneté peut participer à reréveler la citoyenneté à proximité des zones urbaines en crise. Le tourisme peut être une activité économique de substitution dans les régions ou pays en déprise. Il revient au Etats ou

aux collectivités locales de dresser en premier les objectifs prioritaires d'activités touristiques ou de loisirs durables qui pourront servir de critères de sélection au projets proposés.

Les destinations touristiques littorales restent les plus importantes pour le loisir ou les congés, pour les activités terrestres et maritimes qu'elles proposent. Elles sont par ailleurs très peuplées (60 % de la population mondiale vit sur une bande de 100 à 150 km des côtes). Il est nécessaire d'envisager dès maintenant des projets de tourisme durable sur les zones côtières selon une un mode de gestion intégrée qui englobe un espace plus large que la stricte bande littorale. Dans une moindre mesure, il en est de même pour les zones de montagne.

Des espaces de nature moins connus ou moins prisés, peuvent cependant bénéficier de la création d'activités touristiques. Pour déterminer au mieux la vocation touristique d'un site, il est conseiller de se reporter aux principes généraux déclinés dans le fin de ce rapport.

En tout état de cause, un projet de tourisme durable sur un site Natura 2000 ou à proximité, doit s'intégrer dans une démarche planifiée dans l'espace et dans le temps, qu'elle soit spécifique au projet ou qu'elle soit préexistante. Le projet doit éviter les incidences négatives sur le site, voire concourir à la conservation du site dans la mesure du possible. La planification de la conservation est en cours ou existe sur les sites Natura 2000, il appartient dont au promoteur de projet de s'y intégrer le mieux et le plus tôt possible. Les principes de planification et d'évaluation de projet dans le cas de l'Ecotourisme sont le garant de l'appropriation locale des projets et d'une concertation efficace entre l'ensemble des acteurs et des responsables de la conservation des sites.

L'information disponible sur Natura 2000

La Lettre d'information Nature de la Commission Européenne DG XI "Natura 2000" avec en particulier le baromètre
La brochure "Natura 2000, gérons notre patrimoine"
La brochure "Natura 2000 : protection via le partenariat"
Le site web : http://europa.eu.int/en/comm/dg11/

Part 2. The description and analysis of existing initiatives (codes, charters, recommendations…)

Why promote existing initiatives?

The participants of the Lisbon seminar came to the conclusion that it was better to promote existing initiatives than develop new ones specifically for the Natura 2000 network.

Out of the twenty-five initiatives collected for the purpose of the seminar, seventeen have been selected and analysed. Two initiatives, considered to be of the most relevance to Natura 2000, are analysed in more detail. These are EUROPARC's European Charter for Sustainable Tourism in Protected Areas and WWF's PAN Parks Principles and Criteria. A comparison of the two initiatives provides insight into their use and application in practice. Complete lists of the criteria and principles developed by these initiatives are provided in annex. Similarly, more detailed information on all the seventeen selected initiatives is to be found in annex.

The seventeen initiatives do not target Natura 2000 sites specifically, but are relevant to stakeholders of Natura 2000 sites. They have been selected because they are relevant to the development of sustainable tourism in sensitive areas in general.

The purpose of this chapter is to help Natura 2000 stakeholders make better use of existing documents in the development of a sustainable tourism strategy.

It should be used in conjunction with the following chapter (part 3) which is the result of this compilation of existing initiatives and contains the suggested principles and guidelines presented at the Lisbon seminar and illustrated by examples of good practice (cf. Annex).

It is clear that co-ordination and collaboration for improved coherence between the promoters of the following initiatives is necessary in Europe and would be useful to the Natura 2000 network.

What does the term " initiative " mean?

The term " initiative " is used here to describe a vast range of documents, which are available to the public. These documents are principles, codes, charters, recommendations, declarations, and statements of commitment... They have been developed by diverse promoters, for different interest groups, and disseminated in different forms (publications, leaflets, kits, and conference proceedings…). Their common objective is the promotion of sustainable tourism in sensitive environment.

Which criteria have been used to select these initiatives?

These seventeen initiatives have been selected according to various criteria. The main selection criteria were the relevance of the initiatives to Natura 2000 in particular, and to protected areas and sustainable tourism in general. The initiatives were analysed and described with the help and verification of the promoters. Promoters were interviewed with the following questions as a basis for discussion.

Context: What type of initiative? Why was it prepared? With what objective? By whom? For whom? Under what circumstances?

Content: What does the initiative refer to? What is the key issues? What are the implications? What are the main requirements?

Impact: What impact has the initiative had in practice? What did the initiative generate? Are there examples of the practical application of the initiative? Will it be developed further in the future?

Diffusion: How widely was it diffused? How wide an audience was reached?

Relevance to Natura 2000: In what ways is the initiative relevant to managers of Natura 2000 sites? How could the initiative be applied to Natura 2000 sites?

What were the results of the interviews?

Impact and influence

Some of the selected initiatives are particularly significant because of their impact and subsequent influence. These are the initiatives which, when placed in context, were especially innovative or generated other initiatives. The World Charter for Sustainable Tourism (1995), for example, had a large media impact internationally and conveyed a message about sustainable tourism that has served as a base-line reference for other initiatives. The charter has been widely distributed in a form of a booklet and is now available on the WTO and UNEP Internet site.

Content

In other cases, it is the content of the initiative that stands out. Several initiatives provide guidelines for a specific type of ecosystem (mountain, coastal, rural…) or protected area (national park, nature park…) such as those mentioned from the Council of Europe which provide recommendations for protected areas (1995) and coastal areas (1997). In contrast, other initiatives refer to sustainable tourism in more global terms or present wide general principles.

Format and intended audience

The format of each initiative depends on the purpose of the document and the audience it intends to reach. Selected initiatives, which are widely read and easy to use, are highlighted as being especially accessible. "Loving them to death?" (1993) and "Integrated Quality

Management in Rural Destinations" (1999) are examples of documents which are easy to use, are well laid out and include case studies illustrating good practice in action.

Relevance to Natura 2000

The initiatives selected are of relevance to Natura 2000 to a greater or lesser extent. The EUROPARC Charter and the PAN Parks Principles and Criteria are the most relevant initiatives today, because they are aimed at protected areas and they promote a conservation and tourism strategy. They constantly refer to the protection of endangered habitats and species. However, some other initiatives will be of importance as well when contracting with the tourism industry. For instance, the Tour Operators' Initiative (1999) supported by UNEP, is very likely to be of relevance to Natura 2000 sites as it envisages supporting conservation projects in natural sites.

Why are these initiatives so diverse?

The selected initiatives illustrate the diversity of existing initiatives concerning sustainable tourism. This diversity does not facilitate the use of these initiatives by those in the field. Moreover, many of the initiatives do not specify who they are aimed at, and why exactly they were developed. This analysis is an initial attempt to clarify their status and facilitate their use.

They address protected areas in different ways. According to their different objectives, they focus on areas ranging from specific destinations and types of protected area or ecosystems to more global issues.

They address different interest groups. They are often aimed at several players: The tourism industry, managers of protected areas, Member States, tourists, host populations, administrations...

They have different spheres of influence**:** Member States of the European Union (4 of the selected initiatives), Europe extended to the EEC (2), the Mediterranean (2) International (8),

They are named after different types of document*:* Six recommendations; one charter (a kit with methodology, action plan, strategy, statement of commitment), one conference report, one statement of commitment, one set of guiding principles, two sets of guidelines, two codes of conduct or ethics, one certification process (criteria for developing a strategy and action plan for the certification process), one declaration (consensus at the end of a conference)

They are promoted and supported by different types of organisation: International organisations (UNEP, Council of Europe, INSULA, UNESCO, and WTO), NGOs (WWF, IUCN), Institutions (Secretariat Convention on Biodiversity, European Commission), Intergovernmental organisations, Tourist industry associations (on a local, regional or international scale), Consultative bodies (MCSD)

They are disseminated according to their format: Official document or report for Member States, publications, conference declarations, contractual commitment, working document, examples of good practice.

They are disseminated in different ways: Printed and disseminated on request, available on an Internet site, or are not for public distribution.

Which initiatives were selected?

The following initiatives have been selected and summarised in a table. More comprehensive details and practical information about each initiative can also be found in annex where each initiative is presented individually in a common framework.

1. LOVING THEM TO DEATH? 1993

(EUROPARC Federation, Kröllstrasse 2, D-8352 Grafenau, Germany, Tel. +49 8552 2839).
The result of a study of the management of tourism in protected areas by a working group to provide guidelines for managers of protected areas. The publication includes special guidance for developing tourism in particularly sensitive areas (mountains, coasts, Mediterranean regions, wetlands) and makes recommendations for action by international organisations, national governments and the tourism sector.

2. THE EUROPEAN CHARTER FOR SUSTAINABLE TOURISM IN PROTECTED AREAS, 1999

(FFPNR, 4, rue de Stockholm, 75008 Paris, France, Tel. +33 1 44 90 86 20)
An initiative which emerged from the report "Loving them to death?", the Charter addresses protected areas, providers of tourism services and tour operators. It contains principles for sustainable tourism, and a detailed methodology for the preparation and implementation of a sustainable tourism strategy. Those who sign the Charter commit themselves to defining a strategy and action plan.

3. PAN PARKS, 1999

(WWF International, Avenue du Mont Blanc, 1196 Gland, Switzerland, Tel. +41 22 364 9426, Internet site: http://www.panparks.org)
A follow-up to the World Conservation Union's (IUCN) recommendations in 'Parks for Life' (1992), this initiative aims to create a pan-European network of large-scale, well-managed protected areas awarded the PAN Parks quality mark. It includes principles and criteria to be met for the development of a sustainable tourism strategy and for the award of the logo.

4. TOWARDS QUALITY RURAL TOURISM - INTEGRATED QUALITY MANAGEMENT (IQM) OF RURAL TOURIST DESTINATIONS, 1999

(European Commission Enterprise Directorate, 200 re de la Loi, B-1049 Brussels, Belgium, Tel. +32 2 296 9700)
The result of a study into how the concept of IQM can be applied to the management of sustainable tourism in Europe's rural tourist destinations. Aimed at all those concerned with the management of rural areas, it sets out recommendations based on the analysis of 15 case studies of good practice.

5. PARKS FOR LIFE: ACTION FOR PROTECTED AREAS IN EUROPE, 1994

(IUCN Publications Services Unit, 219c Huntingdon Road, Cambridge, CB3 0DL, UK)
A well-detailed publication intended as an action plan for protected areas in Europe. It sets outs the policies and actions which each country should make to ensure an adequate, effective, well-managed network of protected areas. Important initiatives are endorsed, recommendations are made to governments and 30 priority projects are highlighted. This action plan was updated in 1997.

6. TOUR OPERATORS' INITIATIVE, 1999

(Secretariat Tour Operators' Initiative for Sustainable Tourism Development, UNEP, division of Technology, Industry and Economics, 39-43, Quai André Citroën, 75739 Paris Cedex 15, France, Tel. +33 1 44 37 14 50, Internet site: http://www.toinitiative.org)

A voluntary, non-profit-making initiative open to all tour operators regardless of their size or geographical location. Tour operators sign a statement of commitment committing themselves to putting into practice the various principles of sustainable development.

7. ECOTOURISM DIAGNOSTIC AND PLANNING GUIDELINES FOR PROTECTED AREAS MANAGERS, 1992

(WWF US, 1250 24th Street N.W., Washington D.C. 20037, USA, Tel. +1 202 778 9624)

A concise method for creating an ecotourism strategy developed by WWF in the USA for managers of protected areas in the form of a technical paper. This document has been widely used in the Southern Hemisphere by protected area managers.

8. TOURISM, ECOTOURISM AND PROTECTED AREAS, 1996

(IUCN, IUCN Publications Services Unit, 219, Huntingdon Road, Cambridge CB3 0DL, UK/ IUCN Communications Division, rue Mauverney 28, CH-1196 Gland, Switzerland)

A comprehensive publication, which reviews the state of nature-based tourism internationally and provides guidelines and case study examples targeted at protected area planners and managers for its development.

9. GUIDELINES: DEVELOPMENT OF NATIONAL PARKS AND PROTECTED AREAS FOR TOURISM, 1992

(IUCN, WTO, c/Capitan Haya, 42, 28020 Madrid, Spain, Tel. +34 1 571 0628/ UNEP, Tour Mirabeau, 39-43 Quai André Citroën, 75739 Paris, France, Tel. +33 1 40 58 88 50)

Guidelines, which aim to encourage appropriate tourism development, targeted at those concerned with the management of national parks and protected areas, particularly in less economically developed countries.

10. COUNCIL OF EUROPE RECOMMENDATIONS, 1993/1999

(Council of Europe, F-67075 Strasbourg Cedex, France, Tel. +33 3 88 41 22 64)

The Council of Europe has produced two official documents, which concern environmentally friendly tourism development in protected areas directly. It has provided recommendations for sustainable development in protected areas (1995) and in coastal areas (1997). Both are aimed at the 41 Member States, EEC included and are approved by the Committee of Ministers.

11. WORLD CHARTER FOR SUSTAINABLE TOURISM 1995

(INSULA, Internet site: http://www.insula.org)

The declaration made at the World Conference for Sustainable Tourism in Lanzarote (27-28 April 1995) comprising principles and criteria for sustainable tourism. With 1000 participants and significant media coverage, the conference declaration aimed to contribute to the implementation of sustainable tourism initiatives and policies, by raising awareness among international, national and local authorities.

12. CONVENTION ON BIOLOGICAL DIVERSITY 1992

(Convention on Biological Diversity Internet site: http://www.biodiv.org)

An international legal instrument for the conservation and sustainable use of biological diversity opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development (the Rio "Earth Summit") and ratified in 1993 with 168 signatures.

13. DRAFT PRINCIPLES FOR (THE) IMPLEMENTATION OF SUSTAINABLE TOURISM, 1998

(UNEP Division of Technology, Industry and Economics, Internet site: http://www.uneptie.org/tourism/new.html)

An official report that consolidates existing guidelines into a set of key principles aimed at guiding governments, intergovernmental, private sector and other organisations in the integration of sustainable tourism into their overall policies for sustainable development.

14. BLUE PLAN, 1999

(Blue Plan, 15, rue L. Van Beethoven, Sophia-Antipolis, 06560 Valbonne, France, and Tel. +33 4 92 38 71 30)

A document produced by the Blue Plan, one of the regional centres of the Mediterranean Action Plan (MAP), which presents recommendations and proposed action for tourism and sustainable development in the Mediterranean adopted by the Contracting Parties to the Barcelona Convention.

15. INTERNATIONAL CONFERENCE ON SUSTAINABLE TOURISM IN SMALL ISLAND DEVELOPING STATES (SIDS) AND OTHER ISLANDS, 1998

(WTO, UNEP Division of Technology Industry and Economics, Internet site: http://www.uneptie.org/tourism/confer.html)

A report produced following the conference held in Lanzarote (25-28 Oct. 1998). It includes recommendations to the United Nations Commission on Sustainable Development (CSD) which focus on the specific requirements of small islands and in particular of small island developing states (SIDS).

16. GLOBAL CODE OF ETHICS FOR TOURISM 1999

(WTO, Internet site: http://www.world-tourism.org)

A 10 point code of ethics aimed at tourist destinations, governments, tour operators, travel agents, workers and travellers. It includes the creation of a World Committee on Tourism Ethics to act as a conciliation mechanism to ensure the implementation of the Code.

17. RESPONSIBLE TOURISM IN THE MEDITERRANEAN, 1999

(WWF Mediterranean Programme, Via Po 25c, 00198 Rome, Italy)

A set of general principles and a code of conduct developed to address specific issues related to tourism in the Mediterranean, which target tourists, the tourist industry and government authorities.

Summary table of 17 selected initiatives relevant to Natura 2000 stakeholders

Name of the initiative	Promoter	Type of promoter	Focus area	Type of initiative	Aimed at	Date	Sphere of influence	Format	Place of distribution	Langs.
1. Loving them to death?	**EUROPARC Federation**	European voluntary organisation	National Parks Nature parks	• Guidelines for the development of tourism in protected areas • Recommendations for developing tourism in particularly sensitive areas • Recommendations to international organisations, national governments and the tourism sector	• Managers of protected areas • Governments • International organisations • Tourism professionals	1993	European Union countries	• Publication • Recommendations • 15 case studies of good practice	FFNPE Kröllstrasse 5 8352 Grafenau Germany Tel +49 8552 2839 Fax +49 8552 3242	Eng. Fr. Ger. Sp.
2. European Charter for Sustainable Tourism in Protected Areas	**EUROPARC Federation, French Federation of Regional and Nature Parks (FFPNR)**	European voluntary organisation	National parks Nature parks	• Charter • Principles • Methodology for the preparation of a strategy and action plan • Checklist for evaluation • Case studies	• Managers of protected areas • Tourism businesses • Tour operators and transport companies	1999	European Union countries	3 reports: • Brochure of official text • Principles and methodology • Brochure of case studies	Fédération des Parcs Naturels Régionaux de France 4, rue de Stockholm 75008 Paris France Tel +33 1 44 90 86 20 Fax 33 1 45 22 70 78	Eng. Fr. Ger. Sp. Catalan It.
3. PAN Parks	**WWF**	Independent conservation organisation	Protected areas	Principles and Criteria (final draft in process)	• Managers of protected areas • Tourism businesses • Other private sector organisations	1997	European	Draft document	WWF International Avenue du Mont Blanc 1196 Gland Switzerland Tel +41 22 364 9426 Fax +41 22 364 3239 Internet site: http://www.panparks.org	Eng.

4. Towards quality rural tourism : Integrated Quality Management (IQM) of Rural Tourist Destinations	**European Commission DG Enterprise**	Institution	Rural tourist destinations	• Recommendations • Code of practice • 15 case studies	Organisations responsible for tourism in rural destinations: • Local authorities • Governments • Politicians • Managers in related sectors	1999	European Economic Area Countries	Publication	Enterprise Directorate General (Tourism Unit) 200 Rue de la Loi 1049 Brussels Belgium Tel +32 2 296 9700 Fax +32 2 295 6969	Eng. Fr. Ger.
5. Parks for Life : action for protected areas in Europe	**IUCN**	Non-governmental organisation	Protected areas	An action plan for Europe's protected areas made up of: • The endorsement of existing initiatives • Recommendations • 30 priority projects	• Decision-making governmental and non-governmental organisations • Managers of PA • Local communities • Businesses • Land owners • The general public	1994	All Europe, EEC countries included	Publication	IUCN Publications Services Unit 219,Huntingdon Road Cambridge CB3 0DL UK	Eng. Fr. Sp. Ger.
6. Tour Operators' Initiative for Sustainable Tourism Development	**UNEP**	International organisation	Global	• Statement of commitment • Principles for sustainable tourism • Programme of activities	Tour operators	2000	International	Statement of commitment Constitution Questionnaire	Secretariat The Tour Operators' Initiative for Sustainable Tourism Development UNEP DTIE 39-43, Quai André Citroën 75739 Paris Cedex 15 France Tel +33 1 44 37 14 50 Fax +33 1 44 37 14 74 E-mail uneptie@unep.fr Internet site: http://www.toinitiative.org	Eng.
7. Ecotourism Diagnostic and Planning Guidelines for Protected Areas Managers	**WWF US (Author: E. Boo)**	Independent conservation organisation	Protected areas	• Guidelines • Methodology for the creation of an ecotourism strategy	Managers of protected areas	1992	International	Technical paper	World Wildlife Fund 1250 24th Street N.W. Washington D.C. 20037 Tel +1 202 778 9624 Fax +1 202 293 9211	Eng. Fr. Sp.

8. Tourism, Ecotourism, and Protected Areas	**IUCN (Author: H. Ceballos-Lascurain)**	Non-governmental organisation	National parks Protected areas	Essential guidance on: • Tourism and the Environment • Negative tourism impacts • Government policy • Creating and managing tourism in protected areas • Assessing, monitoring and management techniques • Preparing protected areas for tourism	Protected area planners and managers	1996	International	Publication	IUCN Publications Services Unit 219, Huntingdon Road Cambridge CB3 0DL UK IUCN Communications Division Rue Mauverney 28, 1196 Gland Switzerland	Eng.
9. Guidelines : Development of National Parks and Protected Areas for Tourism	**WTO, UNEP, IUCN (Authors: H. Ceballos-Lascurain, J.A. McNeely, J.W. Thorsell)**	International organisations	National parks and protected areas in less economically developed countries	Guidelines on: • Costs and benefits of tourism • Tourism considerations in the selection of areas for National Parks • Capacity limits • Planning • Guidelines for the development of facilities • Hunting in protected areas • Guidelines for providing education and interpretation programmes	Organisations responsible for the management of national parks and protected areas: • Managers of protected areas • Administrations • Local communities	1992	International	Publication	WTO C/ Capitan Haya, 42 28020 Madrid Spain Tel +34 1 571 0628 Fax +34 1 571 3733 UNEP Tour Mirabeau 39-43, Quai André Citroën 75739 Paris France Tel +33 1 40 58 88 50 Fax +33 1 40 58 88 74	Eng. Fr. Russ. Sp.
10. Council of Europe Recommendations	**Council of Europe**	Intergovernmental Organisation	Protected areas Coastal areas	• Recommendations • Principles and guidelines	41 Member States	1993 /99	Europe, EEC countries included, 41 Member States	Official document approved by the Committee of Ministers	Mme Bouguessa Council of Europe 67075 Strasbourg France	Eng. Fr.

11. World Charter for Sustainable Tourism	**WTO, Insula, UNESCO, UNEP, UN, European Commission, Spanish authorities**	Intergovernmental organisations	Tourist destinations world-wide	• Declaration • Set of principles and criteria	• The international community • Governments • Public authorities • Decision makers • Tourism professionals	1995	International	Booklet	Insula internet site: http://www.insula.org	Eng. Fr. Sp.
12. Convention on Biodiversity and Tourism	**Secretariat of the Convention on Biological Diversity**	Institution	Global	• International agreement on biological diversity and tourism • Principles • Recommendations	Contracting States	1997	International	Official report	Internet site: http://www.biodiv.org	Arabic Chinese Eng. Fr. Russian Sp.
13. Draft principles for the implementation of sustainable tourism	**UNEP**	International organisation	Global	Set of proposed principles (the consolidation of existing guidelines)	• Governments • Intergovernmental organisations • Private sector organisations	1998	International	Draft	Not for public distribution UNEP Division of Technology, Industry and Economics Internet site: http://www.uneptie.org/tourism/new.html	Eng.
14. Blue Plan	**Mediterranean Commission on Sustainable Development (MCSD)**	Consultative body	Mediterranean	• Recommendations on tourism and sustainable development in the Mediterranean • Proposed actions	21 Contracting Parties to the Barcelona Convention	1999	Mediterranean regions, EU plus all Mediterranean countries	Official document	Blue Plan 15 rue L. van Beethoven 06560 Valbonne France Tel +33 4 9238 7130 Fax +33 4 9238 7131 E-mail planbleu@planbleu.org Internet site: http://www.planbleu.org	Fr. Eng.
15. Conference on Sustainable Tourism in small island developing states (SIDS) and other islands	**WTO, UNEP**	International organisations	Small islands and in particular Small Island Developing States (SIDS)	• Recommendations • Key issues • Case studies	• Governments in small island (and in particular SIDS) • Private sector organisations • The international community	1998	International	Report	UNEP Division of Technology, Industry and Economics Internet site: http://www.uneptie.org/tourism/confer.html	Eng. Fr. Sp.

16. Global Code of Ethics	**WTO**	Intergovernmental organisation	Tourist destinations world-wide	10 point code of ethics: • 9 articles outlining 'rules of the game' for tourism • 10th article for the creation of a World Committee on Tourism Ethics	• Destinations • Governments • Tour operators • Travel agents • Workers • Travellers	1999	International	Code	WTO internet site: http://www.world-tourism.org	Eng. Fr. Sp.
17. Responsible Tourism in the Mediterranean	**WWF**	Independent conservation organisation	Mediterranean destination	• Principles • Code of conduct	• Tourists • Tourism industry • Government authorities	1999	Mediterranean	Short publication	WWF Mediterranean Programme Via Po 25c 00198 Rome Italy	Eng.

A detailed presentation of the two most relevant initiatives

Two initiatives have been identified as the most relevant to characteristics of Natura 2000. They address protected areas specifically on a European level. They have been developed through a wide consultation process with the help of a steering committee and tested throughout several pilot parks. They are widely disseminated in Europe.

They are:

- ☞ The European Charter for Sustainable Tourism in Protected Areas (EUROPARC / FFPNR) resulting from the recommendations of "Loving them to death?",

- ☞ The W.W.F. PAN Parks Principles and Criteria,

The guidelines for implementation of the European Charter for Sustainable Tourism and the PAN Parks Criteria and Principles (3rd draft), are provided in annex.

THE EUROPEAN CHARTER FOR SUSTAINABLE TOURISM IN PROTECTED AREAS

The EUROPARC Federation (the Federation of National and Nature Parks of Europe), founded in 1973, is a politically independent pan-European organisation that works to support and enhance the full range of European protected areas.

Since the 1990s, the question has been raised of the compatibility of nature conservation and tourism in Europe's protected areas. Europe's protected areas are becoming increasingly popular tourist destinations, although most of these fragile regions are ill prepared to receive crowds of visitors.

In 1991, the EUROPARC Federation, aware of this threat, launched an initial study of protected areas and the tourist trade involving more than fifteen European representatives. The project aimed to define guidelines for developing sustainable tourism within and around protected areas and to identify case studies illustrating how sustainable tourism was being developed.

The publication "Loving them to death"

Their work culminated in the publication of the report "*Loving them to death?"* in 1993, a highly practical guide dealing with the appropriate control of tourism in protected areas

The publication reviews tourism and protected areas, and provides:

- **General guidelines** for the development of sustainable tourism in and around protected areas
- **Special guidance** for developing tourism in special areas (mountain areas, coastal areas, Mediterranean regions, wetlands)
- **Recommendations** for action by international organisations, national governments and the tourism sector

One of the publication's recommendations was for the creation of a '**European Charter for Sustainable Tourism**' which would regulate relations between the Parks, providers of tourism services and tour operators. The Federation of National and Nature Parks of Europe had taken part in the report, and was asked to put this into practice.

The European Charter for Sustainable Tourism

In 1995 the European Commission DG Environment financed a LIFE project led by the FFPNR, on behalf of EUROPARC, to establish the Charter.

The preparation of the Charter was based on two ideas:

- bringing together tourism professionals and managers of Protected Areas to form a working group
- basing their work on pilot projects in several Member States of the EU

The Charter was drafted by a Steering Committee made up of representatives of protected areas, the tourism industry and international organisations. Ten pilot parks from six European Union countries took part in the trial phase of the Charter over a period of three years. The text of the Charter was officially presented in April 1999 in Lilles, France.

The Charter consists of three documents:

- ☞ **The official text of the Charter**
- ☞ **A guide to the implementation of the Charter which includes an extensive evaluation checklist**
- ☞ **A brochure outlining the experiences of pilot parks**

Using the Charter

The Charter seeks to be a practical tool in the hands of protected areas, tourist service providers and tour operators. It is presented in kit form:

- The **main principles** and a **detailed methodology** for the preparation and implementation of a sustainable tourism strategy

- An **evaluation process** for the definition of the strategy and the action plan. This is based on a table of criteria aimed to help form an accurate diagnosis of the strengths, weaknesses and potential of the area, and to evaluate how efficient the measures taken have been at the end of the period. Points from 1 to 5 are allocated for various criteria, based on the judgement of their initial state, their level of relevance and level of improvement.

It is aimed at the authorities responsible for the protected areas, the tourism industry and the local community.

Its purpose is to act both as a standard and guidelines, helping each signatory develop high-quality, sustainable tourism, defined as:
"*any form of development or management of tourism activities ensuring the long-term protection and preservation of natural, cultural and social resources and contributing in a positive and*

equitable manner to the economic growth and well-being of individuals living in, working in or visiting the protected areas".

Participation in the Charter is both voluntary and contractual. Protected areas who sign the Charter commit themselves to respecting the principles of sustainable tourism, and defining a strategy and an action plan.

- ***The protected area*** is committed to a strategy and a 5 year action plan, defined in partnership with local tourist businesses and local residents. This intervention ensures consistency between policies and actions in the area.

- ***Tourism service-providers*** define a strategy and a 1-year action plan contributing to the achievement of the area's objectives. In particular, they undertake to adopt management methods, which respect the environment, to value the natural and cultural heritage and to make customers environmentally aware.

- ***Tour operators and transport companies*** are not generally present in the area. Their responsibility is to inform visitors and make them aware, select suppliers who are signatories to the Charter, and support the areas in the marketing of tourist products.

10 principles for sustainable tourism as set out in the Charter

✓*Respect the limits of carrying capacity*
✓*Contribute to heritage conservation and enhancement*
✓*Preserve natural resources*
✓*Support the local economy*
✓*Promote the involvement of local residents*
✓*Develop appropriate high-quality tourism*
✓*Make protected areas accessible to everyone*
✓*Develop new forms of employment*
✓*Encourage behaviour that respects the environment*
✓*Serve as a model for other economic sectors and influence their practices.*

The definition of a strategy and an action plan

The definition of a strategy takes these principles into account, and follows a standard pattern set out in the Charter:

1. Diagnosis
Complete diagnosis of the needs and constraints of the area (environmental, social, economic)
2. Consultation and involvement of all partners
Involvement of local authorities, the local community and providers of local tourist services
3. Definition and implementation of an action plan
The action plan must include a description of the current situation, the main development objectives, and improved criteria and tools for evaluation
4. Evaluation
In theory, the Charter comprises an evaluation process whereby a technical committee evaluates the results of the strategy and the five year action plan and recognises the area as an "area of excellence in the development of sustainable tourism in protected areas".

The key issues surrounding the Charter at present are:

- the actual make-up of the technical committee and the evaluation process
- the form that the final product will take (label, quality mark…)
- sources of funding

As it stands, the Charter has developed a process aimed at improving quality in protected areas. The structure of the Evaluation Committee is still to be defined, and the question of what is to be awarded to the successful protected areas remains as yet unresolved.

The practical application of the Charter

In 1995, 10 European parks became involved in the Charter as pilot parks and made possible the testing of the criteria, which were being developed. During this trial phase, the Charter was tested in different kinds of protected area (national and regional nature parks) and in different situations.

In 2000, 18 parks have signed the Charter, out of which two parks (Zona Volcanica de la Garrotxa Nature Park and Alpi Marittime Nature Park) have reached the final stages of the definition of their strategy and action plan and are ready to undergo evaluation. 10 of these Park are French. Other than in France, parks in Austria, Germany, Italy, UK, Portugal and Spain have become signatory parks.

The Charter's Pilot Parks

Austria	Hohe Tauern National Park
Belgium	The Hautes Fagnes-Eifel Nature Park
France	Cévennes National Park
	Vosges du Nord Regional Nature Park
Italy	Abruzzes National Park
	Alpi Marittime Nature Park
Spain	Sierra de Cazorla Segura y las Vilas nature Park
	Zona Volcanica de la Garrotxa Nature Park
UK	Broads national Park
	Exmoor National Park

The signatory parks today

Austria	Hohe Tauern National Park
Germany	Naturpark Frankenwald
	Naturpark Steinhudermeer
	Naturpark Insel Usedom
France	Avesnois Regional Nature Park
	Cévennes National Park
	Lubéron Regional Nature Park
	Marais du Cotentin et du Bessin Regional Nature Park
	Martinique Regional Nature Park
	Scarpe Escaut Regional Nature Park
	Vercors Regional Nature Park
	Verdon Regional Nature Park
	Vexin français Regional Nature Park
	Vosges du Nord Regional Nature Park

Italy	Abruzzes National Park
	Alpi Marittime Nature Park
	Monti Sibillini National Park
Portugal	Peneda Gerês National Park
	Serra de S. Mamede Nature Park
Spain	Zona Volcanica de la Garrotxa Nature Park
UK	Exmoor National Park

The future of the Charter

The Charter is listed among the priority projects adopted by the World Conservation Union (IUCN) in its action programme for European Protected areas 'Parks for Life. It also pursues the principles for sustainable tourism as formulated by the 1995 World Conference on Sustainable Tourism held in Lanzarote.

The successful application of the Charter depends to a great extent on the protected area itself. The protected area must decide how to translate the Charter in practice, adapting it to the characteristics of their site.

Some parks, such as the Zona Volcanica de la Garrotxa Nature Park in Catalonia, have developed the Charter further than others. The case study of La Garrotxa Nature Park is described in chapter 5, good practice in action.

The FFPNR is currently working on the definition of a mechanism for labelling and evaluating the work of the signatory parks. The next step will be to ensure funding and supporting funds for signatory parks.

Once these are resolved, the FFPNR plans to help implement strategies by means of training programmes and assistance and publicise the Charter to encourage its implementation in other protected areas. A Leonardo training programme and manual is under way to help implement the charter.

Key principles of the Charter:

- Starting from the needs of the area (environmental, economic, social and tourism needs)
- Carrying out a complete survey of the strengths, opportunities, needs and weaknesses
- Working in partnership with all stakeholders, establishing ways of working together
- Designing and implementing a strategy and an action plan
- Setting up criteria to follow up the strategy and monitor results regularly.

. THE PAN PARKS PRINCIPLES AND CRITERIA

Initiated by the WWF and the Molecanten Group (a Dutch leisure company), **PAN (Protected Area Network) Parks** is an initiative which aims to establish a recognisable pan-European network of unique and well-managed protected areas which welcome visitors while giving priority to nature conservation.

The PAN Parks project began as an idea in 1997, and has generated a lot of enthusiasm. As a result, the PAN Parks process is now well underway.

The central idea of the concept is that nature can become the driving force for healthy economic development in the rural areas of Europe. PAN Parks aims to change tourism in Europe's protected areas from a threat into an opportunity by building partnerships with nature conservation groups, travel agencies, the business community and other interest groups on a local, national and international level.

The initiative aims to provide a nature based response to the growing market of nature-oriented tourism by creating a quality mark standing for:

- an expanding network of well-managed protected areas with high conservation value,
- sustainable tourism development of regions and local communities surrounding protected areas,
- responsible high quality nature-based experiences for visitors and tourists,
- the creation of public awareness, appreciation and support for nature conservation,
- the generation of wide political and financial support at all levels for nature conservation.

Once created, the network of highly protected areas will be co-ordinated by a PAN Parks managing body. As well as being a tool for joint marketing and communication, PAN Parks will create economic incentives for nature conservation through the building of partnerships with the private sector.

This quality mark will be awarded to protected areas and companies that fulfil the PAN Parks Verification Principles and Criteria. When finalised, these principles and criteria will form the basis of PAN Parks.

In 1998, seven pilot parks signed a letter of intent to co-operate as pilot areas. Since then, a PAN Parks logo has been developed. The third draft of the Principles and Criteria (October 1999) has been tested in 17 protected areas and is currently being finalised. The network of PAN Parks is expected to be in place by mid 2001.

Principles and Criteria

The Principles and Criteria (P&C) for the award of the PAN Parks logo form the core of the PAN Parks programme. The process of developing this document began in autumn 1998 and has been prepared on the basis of literature and experts' interviews and comments, and on the basis of best practices found in Europe's protected areas. Currently in its third draft, the final document is due to be finalised by July 2000.

PAN Parks Principles and Criteria consists of five principles (cf the complete list of principles and criteria in the annex)

Principles 1-3 cover criteria and indicators for the protected areas and management body (it is the protected area which becomes the actual PAN Park)

Principle 4 sets criteria for a sustainable tourism development strategy to be developed by park managers and relevant interest groups in the region, which will be evaluated

Principle 5 covers criteria and indicators for commercial partners (including tourism accommodation etc.)

The guiding principle in the P&C drafting process has been to elaborate strict quality standards, applicable to different types of nature and administration of protected areas in Europe. The PAN Parks label must prove that endangered flora and fauna of a protected area are protected, and that tourists can visit the park without causing any harm to nature conservation.

Principles 1-3:
These cover detailed criteria necessary for a protected area to become a PAN Park. **PAN Parks will be large areas; strictly protected core areas must be at least 10,000 hectares.** This is important because large protected areas are necessary for the long term conservation of ecological processes and threatened species. There are 2 levels of PAN Parks:

Candidate PAN Park	Areas, which, according to independent verification, meet all essential criteria, but have some minor shortcomings. These parks can get Candidate PAN Parks status, provided they are commited to overcoming all of these shortcomings in 5 years, after which time, they will be reviewed.
PAN park	Areas that, following independent verification meet all PAN Parks P&C.

The PAN Parks logo will only be awarded to parks with high-standards of nature protection, which offer a variety of nature-based activities and facilities, and where visitors can observe and experience wildlife and other natural based features without causing disturbance to nature.

The implementation of a management plan for nature protection will be necessary and must be supported by relevant research and monitoring. Similarly, a visitor management plan is required, including, for example, an inventory of the number and type of visitors, and an estimate of the future trends.

Principle 4:
PAN Parks require the preparation of **a strategy for conservation and sustainable tourism development** for the area concerned. Park managers and relevant interest groups set out numerous criteria and indicators for the development of this strategy. Commercial partners wishing to use the PAN Parks trademark and logo must follow the strategy.

The aim is to ensure that tourism supports nature conservation in the protected area. This means, for example, that a certain share of the profits that tourism brings to the region must return to the "green magnet", for investment in the protected area and its management.

Principle 5:
In order to ensure that nature-oriented tourism brings long-term benefits and jobs to local communities surrounding the protected area, criteria are set out concerning local businesses.

Between December 1999 and March 2000, the Principles and Criteria (third draft) were tested on a large scale. Results of the consultation process and field-testing will be analysed and from that basis, the final version will be prepared. The ultimate responsibility to approve the final document lies with the PAN Parks Supervisory Board. These are vital steps towards the implementation of a full scale PAN Parks system across Europe.

The Practical application of the Principles and Criteria

Pilot areas
WWF is working closely with seven pilot areas on the concept of PAN parks. The areas have signed a letter of intent stating their willingness to work on the initiative.

April 1998:	Bialowieza (Poland) Slovensky raj (Slovakia) Dadia Forest Reserve (Greece)
September 1998:	Duna-Drava (Hungary) Sumava (Czech Republic) Abruzzo (Italy)
April 1999:	Biebrza (Poland)

These will not necessarily be among the first PAN Parks. However, in return for their valuable input, the PAN Parks Organisation provides the pilot areas with support, promotion and funding for small scale projects.

Self-assessment participants
17 protected areas, most of them National Parks, from 14 European countries participated in a self-assessment process between December 1999 and March 2000. The aim of self-assessment was to test the third draft of the Principles and Criteria.
The participating protected areas range from well-established national parks, to newly established nature reserves. The geographic make-up of these protected areas is diverse and includes such ecosystems as deciduous forests, river valley systems, coastal island groups and wetland habitats.

These areas were selected on an ad hoc basis and will not necessarily become the first PAN Parks.

- Bulgaria — Strandzsa National Park
- Czech Republic — Sumava National Park
- Finland — Oulanka National Park
  The Southern Archipelago National Park
- France — Mercantour National Park
- Greece — Dadia Forest Reserve
- Hungary — Duna-Drava National Park
- Latvia — Kemeri National Park
- Poland — Bialowieza National Park

	Bieszcady National Park
	Biebrza National Park
☞ Portugal	Guadiana National Park
☞ Romania	Retezat National Park
☞ Slovakia	Slovensky raj National Park
☞ Sweden	Fullfjallet Nature Reserve
☞ The Netherlands	Terschelling National Park
☞ Turkey	Dilek Peninsula National Park

The self-assessment participants completed a comprehensive self-assessment questionnaire focusing on management policy, visitor management and sustainable tourism development. This questionnaire was based directly on the third draft of the PAN Parks Principles and Criteria. It was evaluated by the PAN Parks European Management Organisation.

The self-assessment process highlighted the following issues:

- ✓ Out of the 17 protected areas, about 4 or 5 already meet most of the necessary criteria to become PAN Parks
- ✓ Although the areas have found the PAN Parks criteria strict, they do not think that the standard should be lowered

The self-assessment process has been a way of turning the initiative into an operational programme by testing the Principles and Criteria on the ground. The results have provided feedback necessary for the finalisation of the PAN Parks Principles and Criteria document.

Steps to becoming a PAN Park:

Step 1	Complete the PAN Parks Self-assessment Questionnaire
Step 2	Compile a working report on the results of self-assessment
Step 3	Carry on an evaluation of the site by an independent certification body
Step 4	Submit the evaluation report to the PAN Parks Principles and Criteria Standard Committee
Step 5	The PAN Parks European Management Organisation will review the result of self-assessment and check whether the PAN Parks label can be awarded

Once a protected area has been certified as a PAN Park, commercial partners in the region of the park can also apply for the PAN parks logo. They too have to meet special conditions and undergo an independent certification process.

The future of PAN Parks

The Principles and Criteria are due to be updated and finalised by July 2000. Once a network of PAN Parks is in place (expected in mid 2001), the PAN Parks product will be launched and a promotional and communication strategy put into action.

Key principles of PAN Parks:

- A basis for partnership between relevant stakeholders
- Raising awareness, pride and a sense of ownership
- Action on a pan-European scale
- Incentive to allow external verification
- Providing economic support for conservation

A comparative analysis of the European Charter for Sustainable Tourism and PAN Parks

. TWO INITIATIVES SUPPORTED AND PROMOTED BY THE SAME ORGANISATIONS

The EUROPARC Charter and the PAN Parks initiative are in line with ”Parks for Life: Action for Protected Areas in Europe“, the first ever action plan for protected areas in Europe. The plan was prepared by the IUCN, together with the EUROPARC Federation, WWF, BirdLife International and WCMC, in co-operation with around 200 contributors from all around Europe. The aim of the Parks for Life programme was simple: ”An adequate, effective and well-managed network of protected areas in Europe“.

This short comparison and analysis of two initiatives on sustainable tourism and protected areas in Europe, supported and promoted by the ”Parks for Life“ is an extract from a paper presented at the Lisbon conference by Andrej Sovinc, "Parks for Life" co-ordinator at IUCN. The presentation is based on summarising the main points of the two initiatives and the points raised might sometimes be simplified.

The preparation of the Charter was listed as one of the ”Parks for Life“ Priority Projects. The IUCN/World Commission on Protected Areas (WCPA) was represented at the Steering Group for this project. ”Parks for Life“ was also involved in the process of setting up the PAN Parks process (an ongoing co-operation) from its early stages as the PAN Parks concept is foreseen as a ”recognisable network of well-managed protected natural areas which welcomes visitors and avoids potentially conflicting activities“. This viewpoint clearly indicates the links with the above-mentioned overall aim of ”Parks for Life“.

. SIMILARITIES, DIFFERENCES AND COMPLEMENTARITIES

Some of the similar or indentical principles of both intiatives

Both the Charter and PAN Parks initiatives:

1) provide concepts for encouraging and managing tourism in protected areas in harmony with the suitable management of natural resources and for the socio-economic benefits of stakeholders.
2) are built on the concepts on partnerships between protected areas, tourism and other businesses and the local population, and of supporting conservation and socio-economic development through tourism.
3) Aim to develop a 'quality brand' for partners involved in the process (protected areas and businesses) which must undergo an independent certification process. (It should be noted that several ”labels“ for tourism industry already exist such as the Council of Europe's ”European Diploma“ for well-managed protected areas).
4) Require the preparation of a strategy for conservation and sustainable tourism development in the area concerned.
5) Involve a ”testing phase“ in evidence in the Charter's ”10 Pilot Parks“ and PAN Parks's self-assessment process.

6) Aim to involve mainly large protected areas, such as National and Regional Parks, with high tourism ambitions and high potentials for the conservation of species, habitats and landscapes. The PAN Parks concept, in principle, defines the minimum size of protected areas to be involved (25.000 ha).

Complementary points of both intiatives

Geographical influence

- Although both initiatives aim to become Pan-European, the Charter, at present, is designed for the EU Member States only (and therefore needs adapting for the CEE countries).
- The PAN Parks initiative started in the CEE National Parks (at present there are seven National Parks from the EU Member States involved). This initiative originated in so-called ”forest“ parks.

Participation process

- The Charter requires close consultation betweem all participatory parties in the preparation of a sustainable tourism strategy and action plan for the protected area. In addition it makes provision for local tourism businesses and for tourism operators using the area to prepare separate Action Plans for their enterprises.
- PAN Parks promotes the establishment of a joint independent executive organisation to define a widely supported plan for conservation and tourism development in PAN Parks.

Main conceptual differences between the two initiatives

1) The PAN Parks initiative aims to include only well-managed protected areas, especially those with outstanding conservation values (”must-see“ sites in Europe; and therefore an ”exclusive club“), while the concept of the Charter sets no such conditions.
2) PAN Parks strives to become a new organisation to be managed by a European management organisation (supported by the Supervisory and Advisory Boards and Certifying Organisation), whereas the Charter is only a strategic approach and a widely used tool for sustainable tourism development and conservation in protected areas.

General conclusions and recommendations

1) Both initiatives provide effective guidelines for developing and managing tourism in protected areas which could be applied, after some amendments, to various types of protected area networks, including european and international designations, IUCN Protected Area categories on a national level and also to Natura 2000 sites.
2) Both initiatives are mutually dependent. The Charter, at present, is in need of a good marketing and communication strategy, whereas WWF's PAN Parks concept should be supporting the use of the Charter's principles and their application in less well-managed protected areas for them to become potential future candidates for PAN Parks. On the other hand, the PAN Parks concept could take advantage of existing EUROPARC principles and criteria so that partners are involved in the process of the creation of the conservation and sustainable tourism strategy for protected areas.

The need for collaboration and co-operation between the 2 initiatives

These 2 initiatives have been promoted by the same organisations and are originally the result of the same analysis. They have been developed separately with similar tools (criteria, pilot sites, tests, validation, signatories, and communication…). They both constitute excellent working material for the Natura 2000 network and could be the testing ground for the development of a specific tool for Natura 2000. They could also be merged into one initiative for all the sensitive and remarkable areas in Europe, made up of a variety of tools according to the different characteristics of such a diversity of sites: size, level of knowledge, stage reached in the drafting of a management plan, status and geographical situation.

The other initiatives described here should serve as a reference and should be used to encourage their partners (tour operators, the tourism industry in general, Member States, Administrations…) to adopt a sustainable tourism strategy and to commit themselves alongside protected areas.

Part 3. Suggested General Principles for Natura 2000

Principles based on existing experience

In preparation of the seminar, a draft list of general principles was drawn up as part of the process of putting together the seminar programme, identifying the examples of good practice and selecting the workshop topics.

This list was submitted to the participants during the seminar and served as a basis for discussion and debate in the workshop sessions. It helped the participants reach the main conclusions, including a general concensus that new detailed guidelines specific to Natura 2000 were unnecessary.

The principles, which are set out below, have been confirmed during the workshops and in the post-seminar evaluation phase. They were based on an analysis of the main principles reflected in the existing initiatives described in Part 2.

The principles can form the basis for the development of charters, strategies, and action plans for sustainable tourism.

Although the principles are not specific to Natura 2000 sites, they reflect general Natura 2000 processes, such as initial inventories, monitoring, environmental impact assessment (EIA), buffer zone co-operation, and local participation.

The principles also form a framework and basis for recommendations made in the final chapter of this report, which empasises particular issues pertaining to Natura 2000 sites in the light of analysis of the Habitats Directive. Examples of good practice, presented at the seminar, and described in the following chapter, also help to refine the principles and inform the recommendations made in the final chapter.

Priorities for sustainable tourism in protected natural areas

. STRATEGY – POLICY – PLANNING

Resource assessment – characteristics of the protected area - carrying capacity – consultation and partnership in developing and implementing a sustainable tourism strategy

Assessing resources, recognising vulnerability, choosing appropriate tourism

- ***Reflect existing designations and plans***
  Keep in mind the requirements of the designation, such as directives 6.1-6.4 for Natura 2000 sites. Integrate the Natura 2000 sustainable tourism strategy into existing management plans. Refer to existing regional and national plans and strategies.

- ***Start by understanding the site***
  Base all that you do on a full knowledge of the site's needs and sensitivities. Carry out an inventory of natural and human resources, assessing their well being and need for conservation, and potential to benefit from tourism. Use, for this purpose, the information available in the Natura 2000 form that was filled in for the designation of the site.

- ***Undertake further research***
  If necessary, bring in new expertise to research areas under pressure and endangered species, to have a better idea of their vulnerability.

- ***Know your existing visitors***
  Use surveys to understand exactly who is visiting the site at the moment, when, why and with what impact.

- ***Be aware of market potential and pressures***
  Be realistic about the volume and type of visitors who might come in future. Be alert to growing pressures as well as market potential.

- ***Identify capacity limits***
  Decide whether, where and when there are limits to the number and types of visitor the site should receive in the future if the environment and heritage is not to be degraded. Consider environmental, social and inter-user capacity limits.

- ***Select types of tourism to match resources and markets***

Based on the assessment of needs, resources and markets, identify the kinds of tourism appropriate to the site in the future.

Creating a strategy based on consultation and partnership

- ***Involve all stakeholders from the beginning***

  Involve a wide range of local partners from the beginning. Consider holding an open forum at the outset. Make sure the strategy is based on a wide consultation between site managers, conservationists, tourism operators and local communities.

- ***Establish partnership groupings***

  Take the strategy forward through establishing working groups and seminars. Encourage an association of local tourism professionals to become official partners responsible for the strategy.

- ***Raise awareness and commitment***

  Promote widespread awareness of the strategy process. Involve local media. Organise field trips locally and to other areas. Ask all stakeholders to formally commit themselves to the strategy, including signing any resulting charter.

- ***Allocate necessary resources***

  Allow sufficient time to create the strategy (minimum of 6 months). If necessary use external consultants to help with methodology, drafting and evaluation. Designate and train a specialist in sustainable tourism to co-ordinate and oversee the strategy.

- ***Ensure the strategy is simple and clear***

  Produce a strategy document, which is well-focused, easy to read and understand and well disseminated.

- ***Keep everyone involved and informed***

  Inform your partners at every stage. Have a wide discussion on early drafts. When finalised, launch the strategy officially through an event and promote early results and visible benefits.

- ***Widen the scope of the area***

  Address strategic issues of tourism management and development in the areas around the site, including buffer zones.

Implementing, evaluating and updating a sustainable tourism strategy. Relating it to national policy.

- ***Establish realistic action programmes and plans***

  Prepare annual action programmes based on the strategy which are realistic and can be implemented.

- ***Select monitoring indicators***

  At the outset, consider what kinds of indicators of performance and impact should be used to monitor the strategy and judge success.

- ***Identify responsibilities for action***

  Through the action programme allocate responsibility for specific actions to appropriate partners.

- ***Use a range of direct action, incentives and controls***

  Include action to be undertaken directly by the site management, as well as incentives and controls on others. Use relevant local and regional laws and measures such as financial incentives, planning controls, labels and awards. Include corrective measures and actions to rectify problems as well as pursuing new opportunities.

- ***Seek evaluation and recognition for the strategy***

  Ask external consultants to evaluate the strategy and results or refer to official national or European assessment processes.

- ***Reflect and influence regional/national strategies***

  Make sure your approach reflects national and regional strategies on sustainable tourism and nature conservation. Through your work, seek to influence policy, laws and actions at these higher levels.

- ***Review the strategy every 3-5 years***

  See the strategy as a dynamic process. Seek to review it every 3 to 5 years.

OFFER – MARKET – PRODUCT

Market studies – Targeting new markets – Product design – Innovative programmes and packages – Contribution to local economy and conservation – Joint venture and partnership with tour operators

Knowing and targeting new markets, creating new innovative packages

- ***Reflect new trends in nature tourism***
  Refer to existing national and international data on new trends in nature related tourism, and relate this to your knowledge of existing visitors.

- ***Explore new markets which fit the needs of the area***
  Identify specific niche markets which can be easily targeted and which fit the needs of the site in terms of special interest, volume, timing of visits and environmentally friendly activities.

- ***Reflect the needs of disadvantaged visitors***
  Pay particular attention to visitors with special needs, especially disabled people but also families, young people and those with limited financial means.

- ***Work with people who are in touch with markets***
  Build up partnerships from the start with specific tour operators that have developed their own sustainable tourism policy, code of ethics and partnership with Natura 2000 sites. Ask them to help design new packages. Ask specialist associations for advice on how to adapt your offer to the needs of specific clientele, such as associations of disabled people.

- ***Design and test innovative packages***
  Identify specific visitor experiences that reflect the real value of the site, and environmental management and educational priorities. Where appropriate, work up packages with tour operators and events with local communities, and test the market reaction to them.

- ***Explore new types of marketing***
  Create specific events to target new markets. Focus on specialised & alternative forms of marketing (fairs on different topics such as birds, trekking and nature...)

- ***Network with other protected areas***
  Work with other sites and protected areas to promote a range of show case packages based on enjoying and learning about nature and cultural aspects of these areas.

Improving the offer; supporting traditional and local products and appropriate accommodation; providing guidance to local entrepreneurs

- ***Assess the quality of the existing offer.***
  Give priority to improving existing facilities and services before developing new ones. Introduce quality checks and improvement procedures based on obtaining feedback and setting standards.

- ***Consider including new themes and sites***
  Make a list of new locations or themes that have not been identified or promoted but have potential for tourism. Consider, in particular, opportunities for observing wildlife, developing new nature guided tours, understanding and participating in local traditions, visiting farms and craft producers, etc. Pay particular attention to opportunities in the buffer zone.

- ***Ensure tourism development which reflects local heritage***
  Favour small-scale tourism developments, which use existing resources and reflect natural and historic heritage in style, design and setting.

- ***Encourage use of local products***
  Identify locally produced food, crafts and other products. Encourage sale to visitors and use by tourism enterprises. Support networks of local producers and improve distribution systems.

- ***Support the local culture***
  Support local events, traditions, dialects, art and music, especially where these reflect the special heritage and themes of the area. Use these creatively to interpret the site.

- ***Provide recreation opportunities that reflect environmental conditions***
  Pay attention to a growing demand for outdoors-recreational activities. Where appropriate identify walking and cycling routes away from the most fragile areas and of a length to meet the demands of different kinds of visitor. Control intrusive recreational activity.

- ***Provide appropriate guidance and training***
  Provide direct advice, seminars and training programmes for local tourism enterprises to help them understand the special sensitivities and qualities of the site, as well as improve their own performance.

- ***Link product providers together***
  Encourage small accommodation enterprises, attractions, nature guides and other local services to work together. Encourage tourism enterprises to work more closely with other sectors, such as agriculture.

Supporting conservation and local economies and communities, applying sustainable management to accommodations

- ***Encourage tourism operators to support conservation***

  Seek direct support from tourism enterprises for conservation schemes. This may be financial or support in other forms (in kind, voluntary & environmental holidays…).

- ***Provide mechanisms for visitors to support conservation***

  Ensure visitors are fully aware of the conservation needs of the site. Explore with tourism businesses specific mechanisms for raising voluntary financial contributions from visitors (visitor payback schemes). Encourage programmes for direct participation by visitors in conservation. Ensure the results of action supported are regularly communicated.

- ***Support traditional economic activities through tourism***

  Support forms of tourism or specific initiatives, which in turn support other traditional sectors, and the maintenance of traditional landscapes, such as low intensity agriculture and wildlife management.

- ***Promote local employment***

  Favour the employment of local people in tourism and educational services. Encourage young people to take up opportunities and provide relevant training.

- ***Involve local residents in tourism planning***

  Ensure local residents are involved in the tourism strategy and have a regular opportunity to express their views and concerns.

- ***Support facilities and services for local residents***

  Support ways of improving the quality of life of local residents, including access to the site and the use of local facilities and services.

- ***Apply environmentally friendly management to accommodations***

  Encourage local accommodation establishments to adopt good environmental practice. Reduce waste by avoiding the use of individually wrapped products and favouring fresh products. Recycle waste as much as possible. Use recycled or partially recycled products as often as possible

- ***Reduce energy consumption***

  Reinforce insulation to avoid heat loss. Reduce CO_2 emissions by using energies such as wind or solar power. Install low-energy bulbs for lighting and low consumption electrical equipment.

- ***Communicate your environmentally oriented strategy***

  Explain the measures you have taken and the reasons for them to your guests and clients through an information leaflet and/or posters. Insist on the results achieved (savings in energy consumption and costs). Inform your guests of rules, which are very

simple to observe, and that can save energy. Organise special events to inform guests about environmentally friendly management through games or competitions.

- ***Encourage the use of environmentally friendly products***
  Encourage the use of environmentally friendly products by "eco-taxing" non-environmentally –friendly products.

COMMUNICATION – PROMOTION – AWARENESS

Image – Messages – Information – Interpretation – Environmental education – Codes of Conduct – New technologies - Ecolabels – Guidelines

Developing the right image, messages, information and interpretation

- ***Identify the core values of the area***
  Identify and discuss the current strengths and weaknesses of all aspects of the tourism and nature product: landscape, biodiversity, living and built culture, facilities and relationships between local people and visitors.

- ***Consult and agree on images and messages***
  Compare the core values with images held by local people, visitors, local tourism enterprises and tour operators (via mixed discussion groups and surveys). Agree on an image to promote and, where appropriate, use experts to help to articulate this.

- ***Develop a communication strategy***
  Establish a working group to prepare a communication strategy. Seek support and involvement from all those who influence the image and its promotion (local people, tour operators, media etc.).

- ***Work with others to implement communication***
  Identify a programme for improving communication and changing images held about the site. Identify the right way of communicating with specific target groups (local people, tourism enterprises, and visitors) and also of improving communication by them to others.

- ***Use creative tools in communication delivery***
  Choose the most appropriate communication tools – word of mouth, local newsletters, regional guides, Internet, etc, - for the target audience. Provide mechanisms for joint promotion between local enterprises and organisations. Form promotional alliances with other sites (horizontal links) or tour operators, conservation bodies, etc. (Vertical links) at a local, national or European level.

- ***Assess and improve on-site information***

Pay particular attention to the quality of on-site information, including signposting, brochures, visitor centres and guiding services, which can have a significant influence on visitor experiences and behaviour. Ensure it is located and available where and when it can have maximum impact on visitors.

- ***Extend environmental education***

  Assess the impact of any educational programmes provided, such as guided walks, and seek to extend their outreach. Consider establishing codes of conduct for visitors.

- ***Use innovative methods to put across educational messages***

  Use original techniques and methods to work with specific targeted groups. Make the learning fun when working with children (video, internet..)

- ***Provide a follow-up to the initiative***

  Produce material on the initiative implemented, emphasising objectives and results achieved. Distribute it to all those who participated. If possible, use it as a tool.

Developing and communicating Eco-label and certification schemes

- ***Communicate good practice in your area***

  Identify examples of good practice (e.g. in accommodation, guided tours or local food and products) and identify their specific strengths with respect to your own priorities. Promote awareness of them within and outside the local area (e.g. through articles in media).

- ***Investigate existing Eco-labels and awards***

  Research and compare existing Eco-labels (from the Internet or experience of others). Check their criteria target groups and achieved success or weaknesses. Compare them with your interests and identify potential for co-operation.

- ***Join suitable existing schemes***

  Discuss with others the “pros & cons” for joining regional, national or international Eco-label and certification schemes. Join or recommend an existing scheme if compatible with your desired image, criteria and target groups.

- ***Develop your own Eco-label if appropriate***

  Develop your own scheme if nothing appropriate already exists. Establish a clear, achievable and dynamic set of criteria. Give advice and support to those who are interested in being awarded, through seminars, individual checking, consultation, manuals and guidance on sources of information. Make sure that the awarding process is transparent and that the awarding institution is independent from and accepted by the applicants.

- ***Promote the awarded products and services***

  Support the marketing of the awarded facilities, services and entrepreneurs through your own communication tools. Co-operate with external information services, networks and

media to multiply the information about your Eco-label and the awarded suppliers and products.

Developing and implementing guidelines

- ***Assess the different guidelines available***
  Find out about the various guidelines available for sustainable tourism in protected areas and sites. Set their objectives, content and approach against your own situation and requirements.

- ***If necessary adapt guidelines to your own situation***
  If existing guidelines do not meet your needs, consider how they can be adapted or improved. Relate them to other accreditation or training schemes for individual facilities in your area.

- ***Provide feedback to producers of guidelines***
  Work with other sites and the agencies developing guidelines to improve them. Give feedback on your impressions and any results arising from implementation.

- ***Encourage consistency between different guidelines***
  Encourage all agencies producing guidelines to ensure consistency between their core principles and approach. Avoid confusion amongst site managers, tourism operators and visitors.

. ASSESSING AND MANAGING IMPACTS – IQM – TRANSBORDER CO-OPERATION

Environmental Impact Assessment – Indicators – Monitoring – Zoning – Conflict Management – Environmental Management – Visitor and traffic management – Soft transportation – Renewable energy – Quality management – Benchmarking

Assessing and measuring the impacts of tourism

- ***Prepare a baseline audit***
  Understand the current state of the natural environment and heritage resource. Make an inventory of existing assets, to form a benchmark against which to observe and measure change.

- ***Use EIAs***

  Ask for an environmental impact assessment of all proposed development of tourism facilities and infrastructure, irrespective of size. Use established methodologies for EIAs.

- ***Work with others to assess impact***

  Form partnerships with local conservation bodies. Encourage, and train local people (including tourism operators) to observe impacts on the environment. Ask visitors to report on changes and problems they encounter. Work with users, groups and clubs to monitor their impact.

- ***Measure tourism flows***

  Keep a regular check on volumes of visitors, including traffic flows and car parking. Concentrate on most densely visited areas, and also on most fragile areas.

- ***Use global and site specific indicators***

  Consider general measurements, such as air and water quality, as well as observational changes on selected sites. Work with local research institutions.

- ***Assess impact on local people***

  Obtain feedback from local people on the impact of tourism. Assess the contribution made by tourism to local jobs, as well as negative impact from congestion and intrusion.

- ***Seek to rectify adverse changes***

  Use measures of impact positively, as a basis for introducing action to reduce negative impact and restore damage caused.

Managing visitors and traffic, reducing energy consumption and pollution

- ***Influence land planning policies***

  Make sure that policies to control and influence the form of tourism development and promote conservation are closely integrated into the statutory planning legislation for the area, and the local management plan for the site.

- ***Use zoning techniques***

  Identify areas most suitable for different forms and levels of tourism activity. Seek to manage tourism and influence development in a buffer zone around the site. Work with neighbouring areas to identify alternative sites to promote away from the more sensitive locations.

- ***Restrict access if necessary***

  If the environment is threatened, be prepared to restrict or reduce access. If necessary, restrict traffic on certain roads or at certain times. However, be aware of the needs of disabled visitors and local residents.

- ***Use information positively***

  Influence visitor behaviour and visit patterns with information, which is positive, explaining the reason for any restrictions and promoting alternative opportunities.

- ***Reduce seasonality***

  If appropriate to the site, promote access at less busy times and discourage over-promotion of the busiest periods. Take account of the natural seasons of the site and species it supports, in terms of how this affects visitor interest as well as vulnerability.

- ***Encourage non-polluting transport***

  Favour access by walking, cycling, non-polluting vehicles and public transport, both to and within the area. Work with local bus and rail operators. Consider providing shuttle services. Promote alternative transport as a positive opportunity for visitors, not just a restriction.

- ***Promote good environmental practice and management***

  Provide advice and training to local tourism enterprises on visitor management and information as well as reducing waste and the use of energy and water. Promote alternative energy systems suitable to the local environment.

Developing integrated quality management, benchmarking and transborder cooperation

- ***Obtain regular visitor feedback***

  Provide a means for all visitors to give their reaction to the site and services offered. Undertake a regular survey of visitors to measure levels of satisfaction.

- ***Obtain regular feedback from staff and partners***

  Ensure everyone working on site management is involved in delivering quality and can make suggestions for improvement. Obtain regular feedback from local tourism enterprises on their needs and opinions.

- ***Set quality standards for all tourism services***

  Ensure all tourism operators meet optimal standards of safety and comfort. Promote existing quality assessment schemes where appropriate. Set quality standards for all services delivered by the site management team.

- ***Maintain a programme of improvement and training***

  Introduce initiatives to improve quality, especially through appropriate training programmes for staff and local enterprises.

- ***Make comparisons with other areas***

  Compare issues, approaches, lessons learnt and quality achieved, with other sites and protected areas. Encourage mutual study tours. Maintain close relationships with

neighbouring sites. Work within networks to improve visitor management and promote sustainable tourism.

- ***Foster cross-border co-operation***

  Where sites are close to international borders, seek partnerships with sites and protected areas across the border. Identify common conservation and visitor management issues and opportunities for co-ordinated programmes. Extend the principles of Natura 2000 and Sustainable Tourism across the whole of Europe, East and West.

Part 4. Summary of advice and recommendations to Natura 2000 stakeholders

This chapter summarises the most relevant recommendations to the Natura 2000 network, following the analysis of the Habitats Directive in Part 1, and of existing initiatives (charters, codes, recommendations...) in Part 2. It reinforces and refines the principles for sustainable tourism for Natura 2000 suggested in Part 3 and which are illustrated by examples of good practice in the annex. These recommendations are based on the comments made by the participants at the seminar and in the follow-up evaluation questionnaire.

This summary of recommendations is addressed to all actors concerned with the implementation of a sustainable tourism strategy in Natura 2000 sites. It casts further light on aspects, which are specific to Natura 2000 such as **biological inventories, the participation of all actors, management plans, zoning, the restoration of degraded sites…**

These recommendations should be read in conjunction with the general principles set out in Part 3. In order to avoid repetition, the summary does not duplicate all these principles, but picks up and elaborates on a number of them. It highlights the main points concerning the Habitats Directive, which require detailed attention and call for particular vigilance on the part of Natura 2000 actors.

Seeking a level of involvement appropriate to the site

There are a number of reasons why Natura 2000 sites should be engaged with tourism:

- Bringing economic benefit to local communities, thereby winning more local support for the designation and management of the site as Natura 2000.
- Improving the management of visitors, reducing adverse impacts from visitor pressure.
- Increasing understanding and appreciation of the special qualities of the site, and hence support for its conservation, amongst local people and visitors.
- Reducing negative impact of existing and future tourism enterprises, while encouraging them to promote and benefit from the site in positive and sensitive ways.

Natura 2000 sites vary greatly in their size, location, and purpose of designation, management regimes and resources. The balance of the above objectives and resultant priorities and actions will vary from site to site. For some sites, it will make sense for them to have only a limited involvement in tourism; for others it will be a key issue. The purpose of this document is to encourage all sites to consider what their relationship should be with tourism, and to set out principles, approaches and examples to follow. Each site should address and interpret these in relation to their own circumstances and resources.

Some sites may wish to develop their own action programme for tourism based on these principles. In some circumstances it may make sense for a joint approach to be adopted for a number of smaller Natura 2000 sites in the same district or region.

Larger protected areas and parks already have emerging mechanisms at the European level for stimulating and recognising sustainable tourism strategies. These have been described elsewhere in this report. The European Charter for Sustainable Tourism in Protected Areas sets out a process and accreditation system for all such areas to follow. Major parks of significant size, providing a high level of wilderness and wildlife experience, may also seek recognition as PAN Parks.

Specific recommendations

. *STRATEGY, POLICY, PLANNING*

Widen and deepen the knowledge you have about your site

" For the designation of a site as Special Protection Area (SPA) and Special Area for Conservation (SAC), the Directive requires preliminary inventories. In the absence of good knowledge of the site and its requirements, caution may lead to tourism projects being limited and the Natura 2000 designation itself being abandoned. Good knowledge of a site and its requirements will help understand the potential impacts that a tourism project could have." (cf. Part 1.)

- Review what data is available, make a summary of scientific inventories carried out in the preliminary selection phase.
- Carry out additional research and investigations into areas, which are less well covered such as socio-economic data, employment, and the expected benefits of the Natura 2000 designation, impacts and monitoring.

Develop a specific management plan for your site with a section on sustainable tourism

"For special areas of conservation, it is advised to produce an adapted management plan incorporated into other development plans, which takes into account the environmental requirements of the site".

- If the site is situated in a protected area, which already has a management plan, adapt the existing document to the specificity of the Natura 2000 site and characteristics.
- If the Natura 2000 site already has a management plan, incorporate a strategic approach to sustainable tourism into it.
- Use the suggested principles in Part 3 and the EUROPARC and PAN Parks initiatives in Part 2, which provide tools for the development of a sustainable tourism strategy in protected areas (criteria in the annex). Refer also to the guide produced in your country on how to produce strategic documents for Natura 2000 sites.

- Encourage national representatives to draw up guidelines and a national handbook on how to develop a management plan and a sustainable tourism strategy.
- Refer to the analysis of the Habitats Directive in Part 1 and the implications the Directive has on tourism projects at all stages of the elaboration of a strategy and a plan.
- Associate all the actors of the site from the very beginning when carrying out inventories, and in the development of a strategy and an action plan. Encourage participation and wide consultation.
- Encourage managers of related projects to refer to the site's sustainable tourism strategy and use it to validate their project.

Encourage the consultation and the implication of all actors involved in the Natura 2000 site at all levels

- After the planning phase, it is necessary to support all forms of participation in the protection of species, the management of the site, and in the better use of traditional activities and local products
- Develop partnership models between managers, the local population and private tourism operators in Natura 2000 sites (conditions, contracts, concessions, charters of commitment, codes of ethics, codes of conduct) which encourage different parties to commit themselves to the conservation of the sites.
- Develop partnerships for maintaining and developing biodiversity in protected areas, semi-natural areas and agricultural areas.
- Associate all sectors (tourism, agriculture, and forestry), including scientists, in the concertation phase. Ensure that environmentalists and private companies have the opportunity to discuss tourism projects.

. *OFFER, PRODUCT, MARKET*

Check how vulnerable your site is and whether developing tourism is appropriate. Remeber that the main objective is to conserve habitats and species

" Not every Natura 2000 site is necessarily a potential site for tourism development. It may be an area, which requires strict protection or is intended for minimal conservation actions. While one site may be under great pressure, often due to the proximity of an urban area, another site may receive few visitors and hope to attract new tourists thanks to the Natura 2000 designation."

- Identify the potential of a site carefully in order to determine how appropriate tourism development is and define the desired level of development. Measure existing flows and work on targeting the most appropriate types of visitor for the site's characteristics.
- Seek a balance, at all times, between tourism and the protection of habitats and species. Establish precise limits between protecting the natural heritage and landscape and favouring economic development and the needs of the visitors.

Develop services which reflect the ecological characteristics of the site

- Work in partnership with the tour operators from the beginning who market products promoting habitats and species to the types of visitor you would like to attract (conservationists, visitors interested in participating in conservation projects...).
- Emphasise cultural, agricultural and industrial activities, which conform to certain conditions and environmental standards.

Develop and encourage different ways for tourism to contribute to the management of sites

- Consider different ways of raising support for conservation from visitors. Various approaches are analysed in the EU publication " Visitor Payback ". Refer to experiences in the following examples of good practice, which highlight collaboration with the private sector - " Discovery Initiatives " and the Lake District National Park's " Pathway Appeal ".
- Develop partnerships with local tourism operators and other private sector companies (sportswear companies, transport companies…) which are likely to be interested in becoming involved in the conservation of a site. Do so from the moment the site is designated, especially if the site does not benefit from any existing management system (sites which are not already part of a protected area).
- Use a diversity of forms of contribution and partnership. These can be financial (professional taxes, ecotaxes.), in kind (donation of material, voluntary work..), or intellectual (contribution of advice and know-how).
- On the basis of these contributions, contract with tourism partners to make the signature of a charter of sustainable tourism one of the prerequisites for obtaining a label or becoming certified. Let the visitors know about this type of initiative.
- Make sure that the tour operators with whom you work are involved in operations such as UNEP's " Tour operators' initiative " (cf. Part 2).

. *COMMUNICATION, PROMOTION, AWARENESS*

Become informed and keep your partners informed and up-to-date about the Natura 2000 procedure

- Disseminate Part 1 of this document widely. It can be used as a brief introduction to Natura 2000 from a sustainable tourism perspective.
- Send off for documents produced by the administrations in charge of implementing the directive and Natura 2000 in your country (usually the Ministry of the Environment) and in neighbouring countries ("documents d'objectifs" in France.).
- Make good use of the documents available on the European Union internet site (the Natura 2000 newsletter, examples of good practice, the LIFE Nature procedure).
- Produce your own documents on Natura 2000, which are adapted to your particular situation.
- Refer to Natura 2000 and the Habitats Directive frequently, in any documents you produce.

Be proud to belong to a European network and make it known

- Use the Natura 2000 designation as an advantage. It shows the importance of your site and its interest at the European level.
- Make it known that your site was identified and designated a site of community importance.

Develop communication and interpretation tools specific to the characteristics of your site

- Create or refer to codes of conduct and codes of ethics which concern particular habitats or threatened species or activities which are likely to cause disturbance (photography, nature observation, canyoning, climbing...).
- Make knowledge about your site and the inventories that were carried out for its designation as SCI accessible to the public. Turn them into interpretation and nature discovery tools.
- Distribute local existing documents widely or develop your own educational tools to promote understanding of the sites and the species and raise awareness about nature conservation.
- Make documents on discovering nature and cultural heritage and codes of conduct for improving nature protection available to visitors.
- Use the guidelines and general principles developed in Part 2 and 3, and on Internet sites, which develop good practice, such as ECOTIP and ECOTOUR, to raise awareness and develop training material, particularly for tour operators.

Work with eco-label schemes as appropriate, to encourage good practice

- Consider the range of existing schemes to promote and identify good sustainable tourism practice in destinations and enterprises in Europe and contact those that appear most relevant and appropriate to your Natura 2000 site. Look at the table comparing European eco-labels from the Internet site ECOTIP in annex.
- Consider joining the eco-labelling initiatives that are currently being developed for protected areas (such as EUROPARC and PAN Parks) if the size and character of your site make it eligible and appropriate. Where it is not, but you are part of a larger protected area, draw these to the attention of the wider protected area management.
- Encourage local service providers on or near your site to join existing regional and national eco-labels aimed at accommodation, restaurants, sites and activities. Look at the following examples of good practice; the FFPNR “Nature Hotels”, ECEAT farm accommodation, the Luxembourg eco-label.
- Study the possibility of developing your own eco-label on a local and regional level to help encourage good practice and formalise partnerships with local suppliers of tourism services. Consider with others how this might relate to the concept of a label for Natura 2000 nationally and at a European level.
- In assessing criteria for an eco-label relating to Natura 2000 sites, emphasise environmental management, renewable energies, reducing the consumption of traditional energy sources (electricity, water, fuel), waste management, the maintenance of traditional landscapes, the restoration of degraded sites, the protection of native species, the creation of private voluntary nature reserves, and the promotion of natural heritage. (cf. the Guadeloupe National Park Mark of Confidence).

. *EVALUATE AND MANAGE IMPACTS, DEVELOP AN INTEGRATED APPROACH, ENCOURAGE CO-OPERATION*

Carry out Environmental Impact Assesment systematically for all tourism projects

" Any project likely to affect the site, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. It shall not adversely affect the integrity of the site concerned." art. 6.3.

- Ask for an Environmental Impact Assesment to be carried out systematically for all projects concerning tourism infrastructure.
- Ask for Environmental Impact Assesment to apply to development projects which are located in the periphery of Natura 2000 areas at the first suspicion that they would have an impact on the site itself.
- Get hold of and study Environmental Impact Assesment methods for tourism projects, which are available at the European level.

Evaluate, limit and manage impacts and disturbances related to tourism

" While waiting for the publication of the list of the SIC selected to be designated as SAC, the Member State must avoid any activity likely to deteriorate the sites which it has selected and submitted to the Commission "
" The Member States shall take appropriate steps to avoid, in the SAC, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated. " Art. 6.2.

- Develop indicators of impact to measure any disturbance or deterioration of the habitats and species and the effects of activities, visitor flows and existing infrastructure on natural sites.
- Encourage eco-audits and self-assessment based on these indicators and criteria for eco-labels.
- Measure impacts regularly and develop appropriate management tools (limiting visitor numbers, authorisations, bookings, guided visits, traffic flow plans, nature observation areas, and restricted zones…). These make it possible to control, assess and limit impacts, which can cause species to become scarce, and habitats to disappear.
- Encourage tourism developers to restrict or to avoid development in sensitive natural areas.
- Encourage the owners of tourist establishments to participate in the rehabilitation and the restoration of the degraded natural habitats (planting native plant species, eradicating pervasive or exotic plant species…).

Set up zoning and differentiated management systems in your site from the very beginning

Natura 2000 sites can be small. They can be isolated and not form part of an existing protected area. They can be highly visited and very exposed to the development of leisure activities. Zoning must respect the conservation objectives of Natura 2000, while, at the same time, meet the needs of visitors in terms of nature and other leisure activities (cf. the experience of Terschelling in Holland). Administrative and contractual legal measures, which the Member

States have to establish should include the definition of restricted access zones and sanctuaries.

- Develop a zoning system and detail it in the management plan. It should treat each type of zone separately; intensively used zones (sports activities), vulnerable zones (nesting, reproduction...), zones for interpretation and nature observation, zones for research.

Develop all types of soft and non-motorised transport

- Develop innovative and non-motorised forms of transport, on the basis of 0 " cars ". Develop cycle tracks, shuttle services...
- In sites, which receive a significant number of visitors, include these forms of transport in a traffic flow and transport management plan.

Develop an IQM (Integrated Quality Management) approach which is specific to Natura 2000

- Look at ways of improving the quality of the site to achieve a range of tourism, community and biodiversity objectives in an integrated way. Pursue an integrated quality management approach, which involves checking and improving all aspects of visitor experiences and impacts, obtaining regular feedback from visitors, enterprises and local people. The EU publication " IQM in rural tourist destinations " explains the approach and provides examples of good practice.

Participate in the creation of a network of sites in your area or country

- Ask for the list of other people who are in charge of Natura 2000 sites. Contact them and exchange information.
- Seek out collaboration between sites, which have the same characteristics.
- Take joint and concerted action with other Natura 2000 sites for conservation and economic development.
- Request the means to carry out workshops, field visits, training, and to exchange know-how.
- Ask local and regional authorities to bring the Natura 2000 network to life through co-ordination and regional events.

Develop transborder co-operation with Eastern European countries

- Set up twinning and transborder co-operation projects between Natura 2000 sites. Contribute to the establishment of a similar network in Eastern European countries.
- Exchange experiences, good practice and other information with other countries or areas interested in this type of action in order to widen your knowledge and understanding of tools used in other areas.

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for the establishment of the Natura 2000 network in the marine environment. Application of the Habitats and Birds Directives



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This document aims to reflect the views of the Commission services on this issue and is not of a binding nature.

NATURA 2000

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1. INTRODUCTION AND BACKGROUND

Why the need for a guidance document?

The need to fully apply the Habitats[1] and Birds[2] Directives to the offshore marine environment of the European Union, especially with regards to the establishment of the Natura 2000 network, represents a key challenge for EU biodiversity policy in the coming years.

The establishment of a marine network of conservation areas under Natura 2000 will significantly contribute, not only to the target of halting the loss of biodiversity in the EU, but also to broader marine conservation and sustainable use objectives.

To date there have been relatively few Natura 2000 sites identified for the offshore marine environment and this represents the most significant gap in the Natura network. Implementation of the Birds and the Habitats Directives in the marine environment presents substantial challenges, especially in relation to the offshore (as opposed to the coastal) marine environment due to the lack of scientific knowledge on the distribution/abundance of species and habitat types.

At a meeting of the Nature Directors' of Member States, which took place in October 2002, it was agreed that further work was needed to develop a common understanding of the provisions for designating and managing marine Natura 2000 sites. The European Commission was asked to establish an *ad hoc* working group under the Habitats Committee, with a view to providing guidance on this subject.

Since March 2003, a Marine Expert Group has been working to "develop a common understanding of the provisions of Natura 2000 relating to the marine environment in order to facilitate the designation and future management of these areas". As such, it should help the Member States to achieve this important task and to provide useful reference material for other stakeholders. The document will also be of value to the Commission services in the contemplation of any action in this field. It will also provide principal stakeholders with valuable information and more security for planning and development as the Commission opinion on several key aspects of the implementation of Birds and Habitats Directives in the marine environment will be more widely known.

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[1] COUNCIL DIRECTIVE 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

[2] COUNCIL DIRECTIVE of 2 April 1979 on the conservation of wild birds (79/409/EEC)

Scope of the guide

The guide responds to an immediate need to make progress in establishing Natura 2000 in the marine environment. As such its primary focus is on marine species and habitat types that are covered by the site based provisions of the Birds and Habitats Directives. These are the habitat types listed in Annex I and species listed in Annexes II of the Habitats Directive and bird species listed in Annex I as well as migratory bird species covered by the Birds (79/409/EEC) Directive for which marine Natura 2000 sites need to be designated, protected and managed.

The guide aims to explain the relevant legal and technical concepts needed to underpin the establishment of Natura 2000 throughout the marine area of application of the (79/409/EEC) Birds and (92/43/EEC) Habitats Directives. It covers both the inshore and offshore marine environments.

For the purposes of this document, "inshore marine environment" is that which occurs in the internal waters and the territorial sea, as defined by UNCLOS[3], of a coastal Member State; "offshore marine environment" is that which occurs in marine zones extending beyond territorial sea limits where Member States exercise some type of sovereignty rights.

The conservation of the marine habitats and species of European conservation concern will not be achieved solely through designation and good management of Natura 2000 sites. There will also be a need to deal with human pressures on the marine environment beyond such sites as part of a broader marine conservation strategy.

Structure of the guide

The guide contains the following elements and follows the same logic as the implementation process necessary for the construction of the marine component of Natura 2000:

- Chapter 2 considers the process for establishing Natura 2000 in the broader context of EU environmental policies. It provides information about Community and international legislation that is relevant for the establishment of Natura 2000 in the marine environment.
- Chapter 3 clarifies definitions of marine habitat types of Annex I of the Habitats Directive and provides more general information on marine habitats and species, including their occurrence in inshore and offshore waters of Member States.
- Chapter 4 provides information on the best means of locating and assessing marine habitats and species as well as a rationale for site selection.
- Chapter 5 provides guidance on management issues relevant to marine Natura 2000 sites.
- Chapter 6 looks more closely at the relationship between fisheries management and the *"Birds"* and *"Habitats"* Directives.

[3] *UNCLOS, United Nations Convention on the Law of the Sea* http://www.un.org/Depts/los/index.htm

Limits of the guide

The guide is intended to be bound by and faithful to the text of the Birds and Habitats Directives and the wider principles underpinning Community environmental law. It is not legislative in character (not making new rules but providing guidance on the application of those that exist). As such, the document reflects only the views of the Commission services and is not of a binding nature.

It should be stressed that it rests with the EU Court of Justice to provide definitive interpretation of Community law. Therefore, the guidance provided will need to evolve in line with any emerging jurisprudence on this subject.

The guide intends to fully respect the existing case law of the Court. This determines aspects of the guide, especially where clear positions have already been established by the Court. The guide also aims to explain some legal aspects of the law of the sea and other different principles that support the designation process and future management of the marine component of the Natura 2000 network.

It is not possible for this guide to be exhaustive on all the issues related to Natura 2000 in the marine environment, especially as regards the management and protection of the sites. However, it aims to focus on the key issues related to the establishment of the network using available information. Further guidance may be necessary for specific topics at a later stage.



**Caretta Caretta* [4]

Photo: M. Melodia. LIFE99 NAT IT/006271

[4] *Caretta caretta*: is a priority species of Community Importance listed in annexes II and IV of the Habitats Directive. EN: loggerhead turtle; FR: tortue de carouane; ES: tortuga boba; DE: Unechte Karettschildkröte

2. BROADER CONTEXT

2.1. The context of EU marine biodiversity and protected areas policy

EU policy for marine biodiversity, including protected areas, is developing in the context of commitments at global, EU and regional levels.

At the EU level, EU Heads of State and government have made a commitment 'to halt the loss of biodiversity [in the EU] by 2010'. And at the global level, they have joined some 130 world leaders in making a commitment 'to significantly reduce the current rate of biodiversity loss [worldwide] by 2010.' Faced with evidence of the continuing and even accelerating loss of biodiversity and of critical ecosystem goods and services – as recently highlighted in the Millenium Ecosystem Assessment - the European Council has repeatedly called for accelerated efforts to meet these commitments.

The 6th Environmental Action Programme of the European Community identifies 'nature and biodiversity' as one of the priority themes for action. Objectives and priority areas for action on nature and biodiversity laid down by the European Parliament and the Council in the 6th Community Action Programme[5] include:

- Establishing the Natura network and implementing the necessary technical and financial instruments and measures required for its full implementation and for the protection, outside the Natura 2000 areas, of species protected under the Habitats and Birds Directives (Art 6.2.a. 7th indent)

- Further promote the protection of marine areas, in particular with the Natura 2000 network as well as by other feasible Community means (Art. 6.2.g. 4th indent)

As a contracting party to the Convention on Biological Diversity (CBD) the European Community has prepared an EU Biodiversity Strategy and Biodiversity Action Plans which aim, *inter alia*, to integrate biodiversity considerations into other Community policies. Marine biodiversity issues are addressed by both the Biodiversity Action Plan (BAP) for Natural Resources, and the BAP-Fisheries. Marine issues have also been raised in relation to the impact of European fishing fleets in international waters.

A 2003-2004 review of EU Biodiversity Policy assessed the implementation, effectiveness and appropriateness of the EC Biodiversity Strategy and Action Plans, in particular within the context of the 2010 targets. The review culminated in the Malahide conference on Biodiversity and the EU, held in May 2004 under the Irish Presidency[6] of the Council of Ministers. The resulting 'Message from Malahide' achieved a broad degree of consensus on priorities towards meeting the 2010 targets. These include completing the Natura 2000 network at sea by 2008, and agreeing and instigating management for all Natura 2000 sites by 2010.

Acting on many of the priorities identified in the Message from Malahide, the Commission adopted in May 2006 a Communication on *Halting the Loss of Biodiversity By 2010 — And*

[5] Decision No. 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme (OJ L 242, 10.9.2002, p.1)

[6] http://ec.europa.eu/environment/nature/biodiversity/develop_biodiversity_policy/malahide_conference/index_en.htm

Beyond [COM(2006) 216 final][7], which sets out an ambitious policy approach to halting the loss of biodiversity by 2010. In particular, it provides an EU Action Plan with clear prioritised objectives and actions to achieve the 2010 target and outlines the respective responsibilities of EU institutions and Member States. In coherence with the above process, the first action identified in this EU Biodiversity Action Plan[8] is to accelerate efforts to finalise the Natura 2000 network. This states: "complete marine network of Special Protection Areas (SPA) by 2008; adopt lists of Sites of Community Importance (SCI) by 2008 for marine; designate Special Areas of Conservation (SAC) and establish management priorities and necessary conservation measures for SACs [by 2012 for marine]; establish similar management and conservation measures for SPAs [by 2012 for marine]". This Action Plan also specifies indicators to monitor progress, and a timetable for evaluations.[9]

This Biodiversity Communication has been broadly welcomed by other Community Institutions, including December 2006 Environment Council, which invited the Commission and Member States to proceed urgently with implementation of the Biodiversity Action Plan.

The Communication and Action Plan take account of various existing international commitments relating to marine protected areas including:

- The World Summit on Sustainable Development commitment to establish a globally representative system of marine and coastal protected areas by 2012.

- decisions on marine and coastal ecosystems and protected areas arising from conferences of the CBD, in particular the COP7 decision to establish (by 2012) and maintain a network of marine and coastal protected areas that are effectively managed, ecologically based, consistent with international law and based on scientific information.

- for the Atlantic and Baltic seas the Commitment of the Joint Ministerial Meeting of the Helsinki and OSPAR Commissions (Bremen 2003) to complete by 2010 a joint network of well-managed marine protected areas that, together with the Natura 2000 network, would be ecologically coherent. Both, HELCOM and OSPAR agreed that the marine Natura 2000 sites qualify for the inclusion into the OSPAR/HELCOM network of marine protected areas.

- for the Mediterranean Sea the 1995 Protocol of the Barcelona Convention Concerning Mediterranean Specially Protected Areas and Biological Diversity in the Mediterranean which provides for the establishment of a List of Specially Protected Areas of Mediterranean Interest (SPAMI List)

- in the Black Sea, the Biodiversity and Landscape Conservation Protocol to the Convention on the Protection of the Black Sea against Pollution was signed in Sofia, Bulgaria in 2003 (ratification process is ongoing). This protocol aims *inter alia* to maintain the Black Sea ecosystem in a good ecological state and its landscape in the favourable conditions, to protect, to preserve and to manage in a sustainable way the biological and landscape diversity of the Black Sea in order to enrich its biological resources.

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7 See Communication from the Commission. Halting the Loss of Biodiversity By 2010 - and beyond http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0216en01.pdf

8 See action A1.1.1 of Annex 1 to the Biodiversity Communication http://ec.europa.eu/environment/nature/biodiversity/current_biodiversity_policy/biodiversity_com_2006/pdf/sec_2006_621.pdf

9 See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/667&format=HTML&aged=0&language=EN&guiLanguage=en

As regards sites to be protected under the Birds Directive a major conference held under the Netherlands presidency in November 2004 at Bergen-op-Zoom identified significant gaps in designation marine protected areas for birds and consistent with Malahide, recommended the full extension of the SPA network to the marine environment (2008), establish an effective protection regime, put management objectives into place and initiate these for all sites by 2010. DG Environment webpage hosts the report of the Bergen op Zoom conference and other important documentation produced as part of the celebrations or relevant to them. [10]

2.2. The Strategy for the Protection and the Conservation of the Marine Environment: an ecosystem-based approach to ensure conservation of biodiversity and sustainable use of natural resources

The 6th Environmental Action Programme of the Community[11] considered the conservation and the protection of the marine environment a complex issue that required a broad and multidimensional approach and requested the Commission to prepare a Thematic Strategy dealing with it. The Commission adopted the Marine Thematic Strategy, including a proposal for legislative action, in 2005.[12]

The Strategy adopted is based upon an ambitious new approach to the protection and management of marine ecosystems and promotes sustainable use of marine resources. It addresses major threats that were already identified in a previous Communication: [13] an inadequate framework for the management of the seas, given institutional and legal complexities and the number of actors concerned; insufficient basic knowledge, due to insufficient links between research areas in need of action and priorities; and lack of a dedicated policy.

The vision proposed by the Strategy is to protect and restore Europe's oceans and seas and ensure that human activities are carried out in a sustainable manner so that current and future generations enjoy and benefit from biologically diverse and dynamic oceans and seas that are safe, clean, healthy and productive. This new approach develops an integrated policy towards the implementation of a single, integrated and coherent set of measures for the conservation and protection of the marine environment.

The Commission proposes to implement progressively an ecosystem-based approach for the management of human activities affecting the marine, including goals and targets, to ensure biodiversity conservation and sustainable use of marine resources. This approach takes into account the concepts of favourable conservation status and good ecological status as required by the Habitats and Birds Directives and the Water Framework Directive.

Council and Parliament had supported the approach proposed by the Strategy, and have now the responsibility of adopting the proposed legal instrument. Thereafter, Member States will have to ensure that good environmental status in the marine environment is achieved by the year 2021 at the latest, and to continue the protection and preservation of that environment and the prevention of its deterioration.

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10 See http://ec.europa.eu/environment/nature/nature_conservation/focus_wild_birds/25year_birds_directive/index_en.htm

11 DECISION No 1600/2002/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 July 2002 laying down the Sixth Community Environment Action Programme, *Official Journal L 242 , 10/09/2002 P. 0001 - 0015*

12 COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND TO THE EUROPEAN PARLIAMENT. Thematic Strategy on the Protection and Conservation of the Marine Environment and Proposal for a Marine Strategy Directive, COM(2005)504 and COM(2005)505

13 COMMUNICATION FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT "Towards a strategy to protect and conserve the marine environment", COM(2002)539

According to the proposed Directive, actions to be taken by Member States to deliver good environmental status have to be based on sound and reliable assessments of the impact of human activities on the marine. The proposal makes every effort to ensure that proper systems of monitoring and assessment are set. These systems will include current monitoring obligations defined by the Habitats and the Birds Directives.

ECOSYSTEM APPROACH

The elaboration of guidelines for the implementation in the marine environment of the so-called Ecosystem Approach has been one of the activities undertaken under the aegis of the European Commission during the preparation of the Environmental Marine Strategy.

In this context, the Ecosystem Approach is embedded in the concept of sustainable development, which requires that the needs of future generations are not compromised by the actions of people today. The Ecosystem Approach puts emphasis on a management regime that maintains the health of the ecosystem alongside appropriate human use of the marine environment, for the benefit of current and future generations.

The Convention on Biological Diversity[14] defines the Ecosystem Approach as "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way" and the ecosystem can be defined as "an interacting complex of living communities and the environment, functioning as a largely self sustaining unit." It recognizes that humans, with their cultural diversity, are an integral component of ecosystems".

To provide greater specificity for the purposes of the European Marine Strategy the Ecosystem Approach is described as 'a comprehensive integrated management of human activities based on best available scientific knowledge about the ecosystem and its dynamics, in order to identify and take action on influences which are critical to the health of the marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.' This description clearly places humans as part of natural ecosystems, and stresses that human activities in these ecosystems must be managed so that they do not compromise ecosystem components that contribute to the structural and functional integrity of the ecosystem.

HELCOM and OSPAR Conventions have adopted other more specific interpretation of the Ecosystem Approach. Full text of this interpretation can be found in
http://www.helcom.fi/stc/files/BremenDocs/JointEcosystemApproach.pdf

2.3. EU Maritime Policy

The above-referred European strategy for the protection and the conservation of the marine environment referred in point 2.2 is to be seen within the broader context of the development of a new EU Maritime Policy.

On 7 June 2006, the European Commission adopted a Green Paper[15] on a Future Maritime Policy for the European Union. This Green Paper is the result of over a year of consulting with stakeholders, identifying gaps between sea-related sectoral policy areas and attempting to adopt best practice and learn from obstacles and challenges. The need for such a policy stems from the economic, social, and environmental importance of the maritime dimension in Europe. The vision is that of a Europe with a dynamic maritime economy in harmony with the marine environment supported by excellence in marine science.

[14] http://www.biodiv.org/programmes/cross-cutting/ecosystem/default.asp
[15] http://ec.europa.eu/maritimeaffairs/policy_en.html

The strategy for the protection and the conservation of the marine environment referred to in point 2.2 will directly contribute to the work on the future EU Maritime Policy.

2.4. Links between the marine coastal environment and the EU Water Framework Directive

The EU Water Framework Directive[16] (WFD) establishes a framework to enhance the protection and to improve the aquatic environment of continental, transitional, and coastal waters.

Coastal waters are defined as a one nautical mile strip extending from the baseline used to define the breadth of territorial waters. The general objectives of the WFD are to prevent any further deterioration in status and to achieve "good status" of all waters by 2015. The concept of water status comprises both "ecological status" and "chemical status". As regards chemical status the scope of WFD is extended to cover all territorial waters.

In these water bodies Member States shall achieve compliance with any standards and objectives by 2015, unless otherwise specified in the Community legislation under which the individual protected areas have been established. Where more than one of the objectives relates to a given body of water, the most stringent shall apply.

In order to achieve the environmental objectives, the WFD foresees the development of a programme of measures as part of a wider river basin management plan. The first of such plans is due in 2009. The planning scale is the river basin district, which comprises one or several neighbouring river basins together with their associated coastal waters. In drawing up the management plans, active public participation from all stakeholders should be encouraged by the competent authorities.

The WFD classification scheme for water quality includes five status categories: high, good, moderate, poor and bad. 'High status' is defined as the conditions associated with no or very low human pressure. This is also called the 'reference condition' as it is the best status achievable - the benchmark. These reference conditions are type-specific, so they are different for different types of rivers, lakes or coastal waters so as to take into account the broad diversity of ecological regions in Europe. Assessment of quality is based on the extent of deviation from these reference conditions, following the definitions in the Directive. 'Good status' means 'slight' deviation, 'moderate status' means 'moderate' deviation, and so on. These definitions are expanded in Annex V to the WFD.

The assessment of water status is based on biological, chemical and hydromorphological quality elements. In case of transitional and coastal waters, the biological elements that should be taken into account include phytoplankton, aquatic flora, benthic invertebrate fauna and fish fauna. Hydromorphological quality elements include features such as wave exposure, structure of the intertidal zone or depth variation. Transparency, oxygenation conditions or nutrients are examples of chemical elements that should be included in the assessment.

[16] DIRECTIVE 2000/60/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L327/00, 23.12.2000. http://eur-lex.europa.eu/pri/en/oj/dat/2000/l_327/l_32720001222en00010072.pdf

This framework Directive establishes that as regards Natura 2000 protected areas and all other areas requiring special protection by specific Community legislation their environmental objectives have to be integrated into the relevant River Basin Management Plans. These Plans will include the transitional and coastal areas for which the River Basin Authority is competent.

2.5. The challenge of constructing the Marine Natura 2000 Network. Planning a system of marine protected areas

The marine component of the Natura 2000 network will be an integral component of the overall Natura 2000 European ecological network. As for the terrestrial environment, the marine network will aim to protect sites of European conservation importance for (i) natural habitat types listed in Annex I and (ii) the habitats for the species listed in Annex II of the Habitats Directive, in order to ensure that these features can be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The marine component of Natura 2000 network will also need to include a coherent network of Special Protection Areas (SPAs) classified pursuant to the Birds Directive. These will be the most suitable territories in number and size for the conservation of marine birds listed in annex I of Birds Directive as well as migratory marine birds, taking into account their protection requirements.

Whereas the species scope of the Birds Directive is already comprehensive for the marine it is recognised that the present Annexes of the Habitats Directive have limited focus on marine species and habitat types, especially those that occur in the offshore marine environment. Notwithstanding, an important first step in protecting the marine environment will be the full implementation of the existing marine Natura 2000 commitments.

This work may need to be complemented in the near future with the listing of additional marine habitat types and species, which would provide a legal basis for extending the scope of the marine network. In the framework of the Marine Strategy, the Commission has proposed a framework for the development of a rational approach for the full implementation of Natura 2000 at sea with a view to consider potential proposals for adapting the annexes to the Habitats Directive to strengthen them with regard to marine habitats and species.

This process is intended to provide the basis for the protection of other relevant habitat types and species. This challenging problem needs to be solved in a cooperative manner at EU level. There are a number of marine habitat types and species of European conservation concern that are not covered at present by the Habitats and Birds directives but which need protection to ensure their favourable conservation status. Many of these habitats and species are identified and listed by regional organisations such as OSPAR, The Helsinki Convention and the Barcelona Convention. Further scientific knowledge and evaluation will be needed to complement these listings.

2.6. Different marine zones. Application of Nature legislation in the European seas.

Member States have an obligation to apply nature legislation in waters under their jurisdiction and, outwards, in waters where they exercise sovereign rights. The Habitats and Birds Directives apply in the European territory of the Member States[17]. Therefore, waters adjacent

[17] see Birds Directive, Art 1

to the French overseas departments (DOM) and to the territories mentioned in Annex II to the Treaty establishing the European community[18] are excluded.

2.6.1. Definition of different marine zones

Under international law coastal states establish several jurisdictional marine zones as the Territorial Sea, the Exclusive Economic Zone (EEZ) and the Continental Shelf. Some coastal states establish other areas in which they claim exclusive sovereignty rights over natural resources such as "fishing protection zones", "environment protection zones"…

The European Community itself accepted the international rules on maritime zones adopted in the 1982 of the United Nations Convention on the Law of the Sea (UNCLOS).

The **Territorial sea** is the adjacent belt of sea where the sovereignty of a coastal State extends, beyond its land territory and internal waters. Under article 3 of UNCLOS all states have the right to establish the breath of the territorial sea up to a limit of 12 nautical miles.[19]

The **Territorial sea** is the adjacent belt of sea (up to 12 nautical miles) where the sovereignty of a coastal State extends, beyond its land territory and internal waters.

Marine waters on the landward side of the baseline of the territorial sea form part of the **internal waters** of the State (see detailed definition of internal waters in UNCLOS, article 8)[20] In the internal waters and the territorial sea, jurisdiction extends to the air space, the water column, its bed and subsoil.

The **exclusive economic zone (EEZ)** is defined by the UNCLOS[21] as an area beyond and adjacent to the territorial sea (from 12 to 200 nautical miles[22]) in which the coastal State has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. The coastal state also jurisdiction with regard to marine scientific research and the protection and preservation of the marine environment in the EEZ.

The Continental Shelf [23]

Under international law, coastal states also exercise sovereign rights over the non-living resources and sedentary living organisms in the 'continental shelf'.

The term 'continental shelf' is used by marine geologists generally to mean that part of the continental margin which is between the shoreline and the shelf break or, where there is no noticeable slope, between the shoreline and the point where the depth of the superjacent water is approximately between 100 and 200 metres.

Furthermore, this term is defined in Article 76 of UNCLOS according to a complex formula. According to it, "*the continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural*

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18 Official Journal C 325 , 24/12/2002. http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/c_325/c_32520021224en00010184.pdf

19 A nautical mile is 1' of arc on the equator; 40.000 km/360/60= 1 nautical mile=1,852km; 12nm= 22,2km

20 http://www.un.org/Depts/los/index.htm

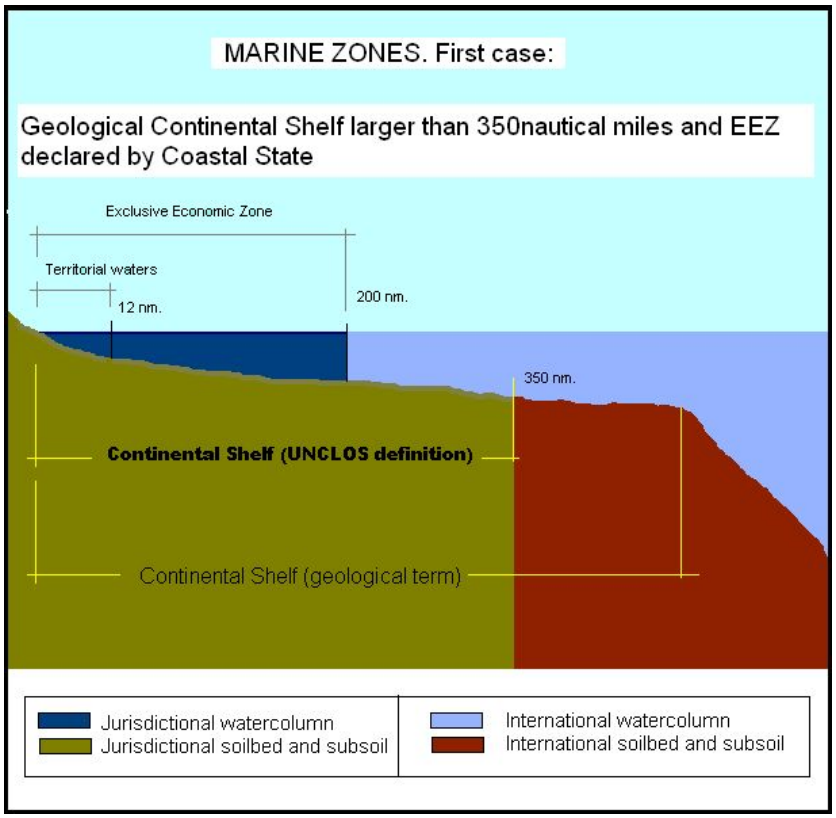
21 *UNCLOS, United Nations Convention on the Law of the Sea, Article 55.* The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. (UNCLOS, article 56) http://www.un.org/Depts/los/index.htm

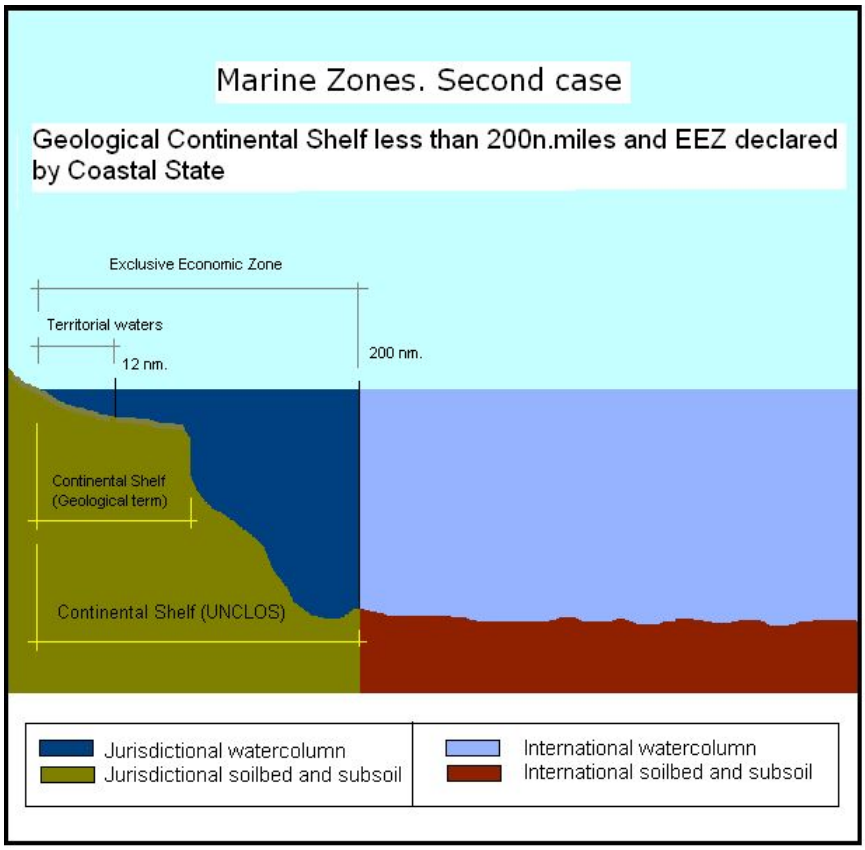
22 From 22,2 to 370,4km

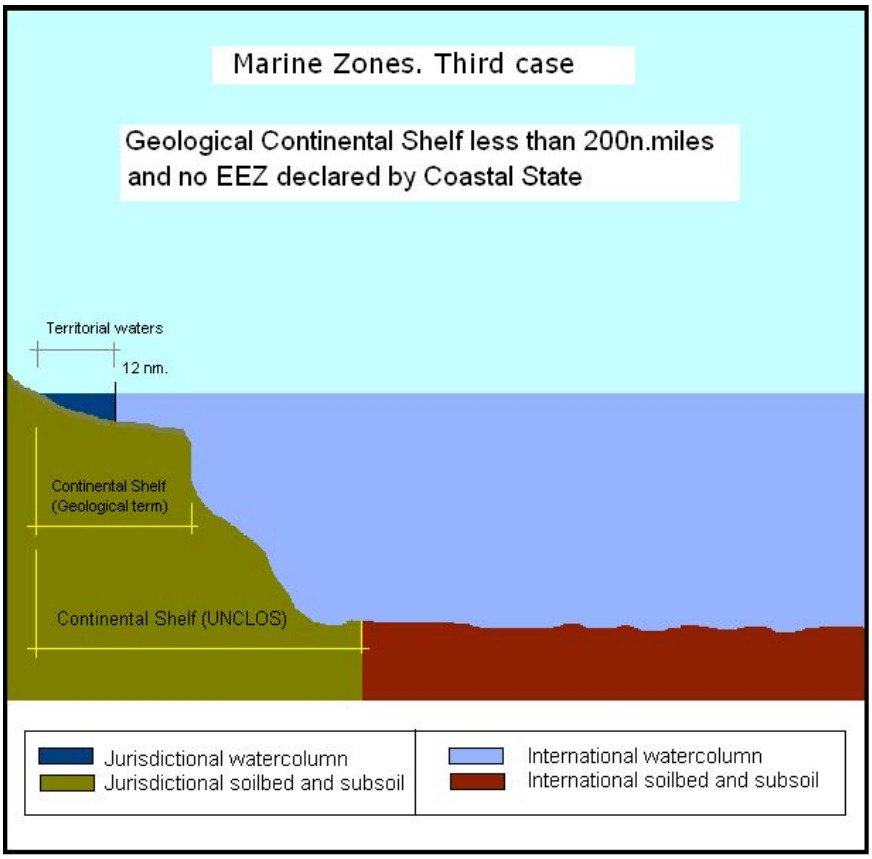
23 Note that Continental Shelf is distinct from the EEZ

prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance".

Therefore, Continental Shelf extends for at least 200nm in the open sea. It may not extend beyond 350nm. The Continental Shelf is the seabed and the subsoil, not the superjacent water column. The term Continental Shelf used in this document is the legal term as defined in the previous paragraph (UNCLOS definition).




Marine Zones. Second case
Geological Continental Shelf less than 200n.miles and EEZ declared by Coastal State
Exclusive Economic Zone
Territorial waters
12 nm.
200 nm.
Continental Shelf (Geological term)
Continental Shelf (UNCLOS)
Jurisdictional watercolumn
Jurisdictional soilbed and subsoil
International watercolumn
International soilbed and subsoil


Marine Zones. Third case
Geological Continental Shelf less than 200n.miles and no EEZ declared by Coastal State
Territorial waters
12 nm.
Continental Shelf (Geological term)
Continental Shelf (UNCLOS)
Jurisdictional watercolumn
Jurisdictional soilbed and subsoil
International watercolumn
International soilbed and subsoil

A detailed case by case Coastal State database can be founded in UNCLOS website: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/index.htm, with all legal references. Several illustrative maps of marine areas are included in: http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MAPS/

2.6.2. Applicability of Nature Directives in the Sea. To what extent do Habitats and Birds directives apply?

History of discussions about geographical scope of the directives

The initial position of a number of Member States was to see their obligations restricted to territorial waters, i.e. up to 12 nautical miles from the baselines. The Commission has consistently challenged this, arguing for a more extensive scope since, clearly, the protection of marine habitats and species, which are included in the annexes of the Directives, cannot be adequately achieved in such a limited area. After a number of years of debate and following discussions between the Legal Services of the Commission and Council, the Council recognised the need for implementation of the nature directives in the EEZ as a key element for the protection of the marine ecosystem (See Fisheries Council conclusions Luxembourg, 2001[24]). This acknowledgement supports the application to the exclusive economic zone which in the case of the Atlantic seaboard extends up to 200 nautical miles (370,4km) from the coastline for different Member States.

This opinion was confirmed by the position of the European Court of Justice delivered in the judgment of case C-6/04 of 20 October 2005, and other Member States Courts' positions (e.g.: the UK Case nºCO/1336/1999 The Queen -v- The Secretary of State for Trade and Industry ex parte Greenpeace Limited[25])

Legal principle

In relation to the exploitation and the conservation of the natural resources, the opinion of the Commission is that recognition by a coastal state of exclusive rights in a maritime zone brings not only rights but obligations. Exclusive right to exploit natural resources implies a similar duty to preserve natural resources. Therefore, community law relative to the conservation of natural resources applies in all maritime areas where Member States exercise such rights. That includes the following maritime areas:

- The internal waters and the Territorial Sea,
- The Exclusive Economic Zone (EEZ) and/or to other areas where Member States are exercising equivalent sovereign rights (fishing protection zones, environmental protection zones…)
- The Continental Shelf.

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[24] Extract from the Annex to Council Conclusions on the Strategy for the Integration of Environmental Concerns and Sustainable development into the Common Fisheries policy, -Luxembourg, 25 April 2001: Point *15. The Habitats and Birds Directives(5), and specially the associated network of protected sites in the marine environment "Natura 2000", constitute a key element for the protection of the marine ecosystem which may have consequences on fisheries. Member States are encouraged, in co-operation with the Commission, to continue their work towards the full implementation of these directives in their exclusive economic zones.*

REF: *http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/agricult/ACF20DE.html*

[25] http://www.defra.gov.uk/wildlife-countryside/ewd/rrrpac/marine/06.htm#fn

This principle is in line with:

- Council Regulation 2913/92 "Customs Code" (Art 23) in which the definition of *"goods wholly obtained or produced in one country "* includes products taken from the sea-bed or beneath the sea-bed outside territorial waters, if that country has, for the purposes of exploitation, exclusive rights to such soil or subsoil. This regulation incorporates the same definition of goods wholly obtained in a country as previous Council regulation 802/1968. At this early stage, the Community already included into its scope of application the continental shelf that does not belong to the territory of the Member States. The common definition of the origin of goods which provides that produced goods and other products extracted from the sea-bed beyond the territorial sea are goods which are entirely produced in one country provided that the country exercised exclusive rights over the sea-bed for the purpose of its exploitation. Thus, according to this interpretation, the Community Law is applicable in the continental shelf and the EEZ of the EU Member States.

- Council Conclusions on the Strategy for the Integration of Environmental Concerns and Sustainable development into the Common Fisheries policy, -Luxembourg, 25 April 2001, which include the following considerations (Point 15): *The Habitats and Birds Directives (5), and specially the associated network of protected sites in the marine environment "Natura 2000", constitute a key element for the protection of the marine ecosystem which may have consequences on fisheries. Member States are encouraged, in co-operation with the Commission, to continue their work towards the full implementation of these directives in their exclusive economic zones.*[26]

- Jurisprudence of the European Court of Justice (mainly Court case judgement C-6/04[27] and other Member States Court's position delivered in different Court Cases (e.g.: UK: The Queen -v- The Secretary of State for Trade and Industry ex parte Greenpeace Limited, Case no: CO/1336/1999[28])

Duties for Member States

Member States have the duty to apply Community law in the above-mentioned areas, which includes the application of the Habitats and Birds Directives. Therefore, it is expected that Member States propose in the coming years the necessary sites to complete the marine component of Natura 2000 by application of the Birds and the Habitats Directives in their internal waters, Territorial Sea, as well as in their EEZ or other similar declared zones and in their Continental Shelf area.

For management purposes, Member States will take measures for the regulation of activities falling under their responsibility. For other activities, Member States will take the necessary actions to request the appropriate competent authority to take action. In particular cases where the need to regulate fishing activities is necessary to protect a Natura 2000 site in maritime areas under Member States sovereignty or jurisdiction is dealt with in extent in Chapter 6 of this Guidelines document. The general principle is that actions are to be taken in the context of the Common Fisheries Policy and in accordance with its rules. The relevant basic rules are enshrined in Regulation 2371/2002.

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[26] *See: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/agricult/ACF20DE.html*

[27] See Judgement articles 115-120 (http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-6%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

[28] http://www.defra.gov.uk/wildlife-countryside/ewd/rrrpac/marine/06.htm#fn

In areas beyond Member States sovereignty or jurisdiction, the Community shall, where appropriate, promote actions to be taken through appropriate international fisheries conventions.

There is a special case where the Continental Shelf extends beyond the EEZ or where no EEZ has been declared. In this case, the soil and subsoil, which are covered by Community law, are lying under an International water column. In this case, the duty to protect the marine environment of the seabed needs to be made compatible with the need to respect the international legislation of the upper water column (mainly regulated by the UNCLOS framework).

It is necessary to clearly distinguish in that particular case what natural resources are subject to community law and what are subject to international law. The natural resources of the continental shelf to which Member States have sovereign rights are defined in Part VI of UNCLOS relative to the Continental Shelf (art 77.4): *The natural resources referred to in this Part consist of the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil*.

Therefore, it appears that where the continental shelf is lying under an international water column only the provisions of Habitats Directive as regards habitats and sedentary species would apply, as Community law applies only to the seabed but not to the water column or surface. For the same reason the Birds Directive and provisions of the Habitats Directive related to conservation of non-sedentary species[29] do not apply in this case.

This is particularly relevant in the Mediterranean Sea where Member States -except Cyprus- have not declared an EEZ. It may also be relevant in some parts of the Atlantic Ocean where a coastal Member States claims a Continental Shelf going beyond 200 nautical miles.

In the case of the Mediterranean Sea, any action aiming at the regulation of fisheries activities beyond territorial waters should be taken in line with the policy declaration of the "Declaration of the European Community ministerial conference for the sustainable development of fisheries in the Mediterranean" Venice 25-26 November 2003.

This declaration recognizes that the creation of fisheries protection zones permits the improvement of conservation and control of fisheries and thus contributes to better resource management. However, it is considered that the process for designation of these protected zones should follow a concerted and regional approach. In order to progress in this direction, the Mediterranean States shall cooperate at the appropriate regional level.

In this context, it is useful to also mention several fisheries regulatory measures taken by international organizations as the ICCAT with regard to the Mediterranean Sea and easter Atlantic[30] (e.g.: Recommendations by the ICCAT to establish a multi-annual recovery plan for some fish species as the bluefin tuna…)

[29] which includes *swimming* species of turtles, cetaceans or fish

[30] See http://www.iccat.es/

Maritime zones in the Mediterranean Sea[31]

The situation of different maritime areas in the Mediterranean Sea is particularly complex.

The European Community as well as all its Member States have ratified UNCLOS. Most third States riparian to the Mediterranean Sea[32] have also ratified it (All except Turkey, Morocco, Libya, Israel and Syria)

Cyprus is the only Member State to have declared an EEZ in the Mediterranean. However, France, Spain and Malta have declared different types of protection zones that extend beyond their territorial waters (fishing protection zones, environmental protection zones…)

Tunisia has also declared an EEZ in the Mediterranean Sea in June 2005. Croatia has declared equivalent sovereign rights regrading the exploitation and conservation of living resources beyond its territorial waters.

2.7. Some legal aspects related to the implementation of environmental legislation to marine environment. Some Management issues in the context of different competencies and responsibilities

There is no legal difference between marine and terrestrial environments as regards duties of Member States in relation to the implementation of the Birds and Habitats Directive. The final obligation of delivering a favourable conservation status for species and habitat types of Community Importance is the same in both environments. The obligations of Member States are also the same in relation to the need to ensure that the site designation process is exclusively based on scientific criteria.

As regards areas to be protected under the Birds Directive, the Court of Justice has emphasised that the selection of sites and the delimitation of boundaries should be carried out on the basis of exclusively ornithological criteria[33].

As regards the Habitats Directive, case law confirms that site selection by Member States should be exclusively based on the ecological criteria of Annex III of the directive[34].

Therefore, future management challenges should not be a determining element in this process.

Potential effects on marine species and habitats from human activities that are regulated at the Community or International level are greater in the marine than in terrestrial environment. In such a scenario, it is particularly relevant to consider in which marine zone the protected site is situated, in order to identify the appropriate management approach, as different legal regimes are to be considered for the three above mentioned marine zones *(point.2.6; territorial sea, Exclusive Economic zone, Continental shelf*).

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31 References: i) "*Gobernanza en el Mar Mediterráneo. Estatus legal y perspectives"*. IUCN 2005. ii) *"Marine Specially protected areas, the General aspects and the Mediterranean Regional Sysytem"* Tullio Scovazzi 1999

32 A complete regularly updated data base on ratifications may be found at http://www.un.org/Depts/los/reference_files/status2006.pdf

33 (judgement of 2 August 1993, Commission v Spain, C-355/90 ECJ reports, p.4221, especially points 26-27; judgement of 11 July 1996, Regina v Secretary of State for the Environment, ex parte: Royal Society for the Protection of Birds, C-44/95, ECJ reports, p.3805, especially point 26)

34 (judgement of 11 September 2001, Commission v France, C-220/99, ECJ reports, p.5831; judgement of 11 September 2001, Commission v Ireland, C-67/99, ECJ reports, p.5757; judgement of 11 September 2001, Commission v Germany, C-71/99, ECJ reports, p.5811)

For each marine site, the responsible National Authority[35] has to establish the necessary conservation measures to ensure the favourable conservation status of the species and habitats types for which the site is designated. Depending on the site location and the type of action, the responsibility for the implementation of those measures can be different. These measures may have to be taken at Federal, National, European Community or International levels.

Actions to be taken at national and at Community level to regulate human activities in marine Natura 2000 sites will be in accordance with UNCLOS and other relevant international legislation. This is particularly relevant for the offshore marine environment.

Therefore, National Authorities have to identify the necessary conservation measures and the subsequent actors responsible for their implementation and enforcement. Each National Authority shall implement all measures of its own competencies and ask other responsible bodies to take action for measures falling under their own competencies.

A clear example is the Common Fisheries Policy, which is an exclusive Community competency. Point 6 below of this document is dedicated to this issue, given its relevance in relation to the management of the Natura 2000 sites in the marine environment. Shipping is another sector in which competencies also depend on site location.

Limits of competencies

A coastal State has different competencies in different sea zones. In global terms, the further offshore one goes, the less the Coastal State's exclusive competencies are to legislate and/or to enforce legislation. Some of the competencies are shared at Community level. Commercial fishing is a relevant policy where the Community has exclusive legislative jurisdiction. Some activities like military, mining or petrol prospecting/exploitation fall under national competencies over the entire Continental Shelf. Other sectors such as marine transport have different regulatory regimes for different marine zones, with different regulatory authorities. The international legal framework is defined by the *United Nations Convention on the Law of the Sea (UNCLOS).* Relevant bodies in this sector are the *International Seabed Authority (ISA)* and the *International Maritime Organization (IMO).*

2.8. Links with Regional and International Organisations and Agreements

Regional environmental marine organisations and agreements like the Helsinki Convention, OSPAR, Barcelona, and Bucharest Conventions are developing different networks of marine protected areas. The Commission welcomes all these initiatives that concur with EU nature conservation policy developments. Looking for a coherent and complementary approach in the identification process of Natura 2000 sites and other networks of marine protected areas would be a favourable measure that would enhance the global coherence of the network.

As described above (point 2.5), work being carried out by these Regional Organisations / Agreements on marine habitats and species of conservation concern will be relevant inputs to be considered in the first stages of the process of possible future adaptations of the Habitats Directive annexes in terms of the marine environment.

The Helsinki Commission (HELCOM) and the Commission for the Protection of the Marine Environment of the North East Atlantic (OSPAR) have adopted a joint work programme on the

[35] The National Authority responsible for the management of a Natura 2000 site is the administrative body designated in the Standard Data Form that Member States transmit to the Commission for each Natura 2000 site in accordance with 97/266/EC Commission Decision of 18 December 1996 *(Official Journal L 107 , 24/04/1997).*

creation of a network of marine protected areas. This programme aims to ensure that by 2010 there is an ecologically coherent network of well-managed marine protected areas for the maritime areas of both the Helsinki Convention and OSPAR. To this end, they have agreed several actions, which include the development of a common proposal for a programme aimed at enhancing the protection of species and habitats in European marine waters, in order to produce suggestions for consideration by the European Community for amendments to the annexes to the Habitats and Birds Directives. (Full information is to be found in report documents -annex 7- of the first joint ministerial meeting of the Helsinki and OSPAR Commissions, Bremen: 25 - 26 June 2003 http://www.ospar.org/eng/html/welcome.html; **Joint HELCOM/OSPAR Work Programme on Marine Protected Areas**)

The parties of the Barcelona Convention agreed a protocol in 1995 concerning specially protected areas and biological diversity in the Mediterranean establishing common criteria for the choice of protected marine and coastal areas to be considered as specially protected areas of Mediterranean importance (SPAMI, http://www.rac-spa.org/index1.htm). The conservation of the natural heritage by the protection of threatened species and their habitats is the basic aim that must characterize a SPAMI[36]. The listed SPAMI and their geographical distribution will have to be representative of the Mediterranean region and its biodiversity.

2.9. Trans frontier issues for site designation and management

As the conservation of habitat types and habitats for species can have a trans-frontier dimension, it will also be necessary to ensure the coherence of proposed *Sites of Community Importance (SCI)* and *Special Protection Areas (SPA)* designated by different Member States to be incorporated into the Natura 2000 network. This task will be undertaken by the Commission in partnership with the Member States concerned and with the scientific support of the European Environment Agency.

Any future protection of a feature having an international dimension under the Habitats Directive would require the designation of different SACs in the different EEZs, each country being responsible for its own area. This will be determined by an appropriate assessment to be carried out by each MS for their areas. The appropriateness to propose its part of the feature as Site of Community Importance will be determined by:

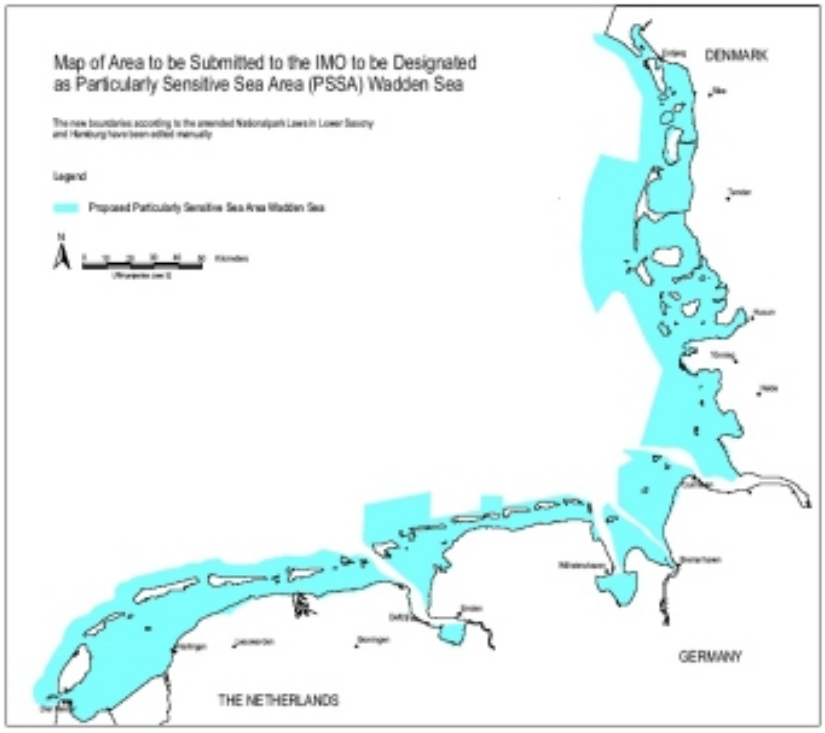
- The assessment criteria of Annex III of Habitats Directive (including sufficient representation of this Habitat type in the network and ensuring representatively of the site at national level)

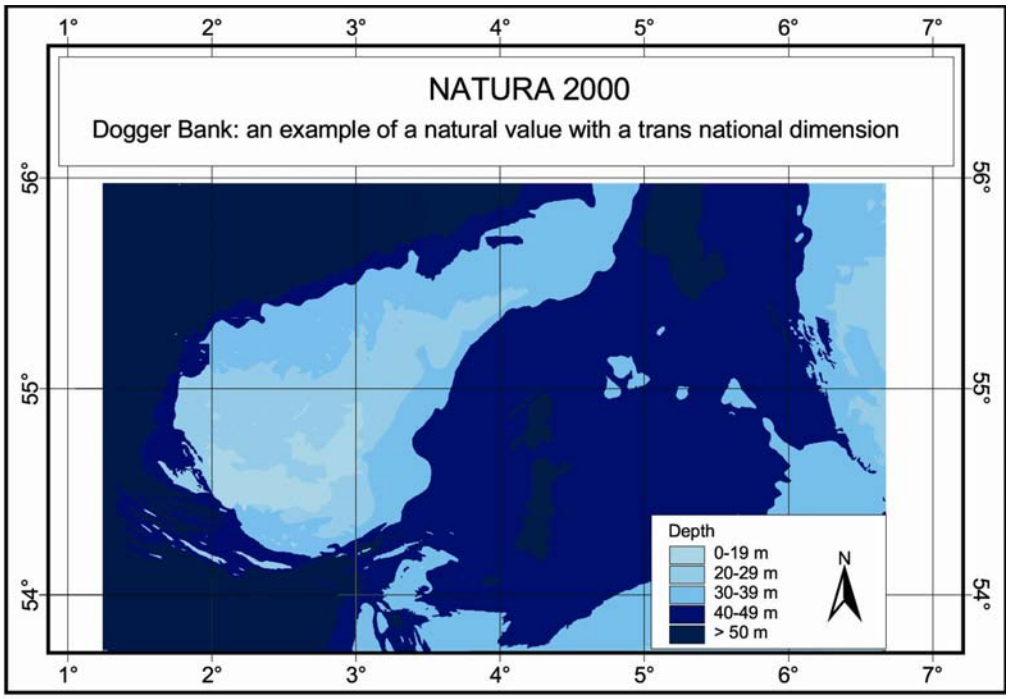
- The interest in ensuring the overall integrity of natural features of Community interest that have a trans-border dimension.

The aim is to ensure that a common approach is taken where a feature has a transboundary dimension to ensure that the sites proposed/designated by the Member States concerned adequately protect this feature in Natura 2000. Such an approach (involving common recognised features and coherent boundary shapes) will favour better management schemes, ensuring the protection of the sites by the implementation of more simple and effective measures.

[36] Protocol concerning specially protected areas and biological diversity in the Mediterranean, art 8

The Wadden Sea is a typical example of a coastal/inshore natural area of international dimension hosting species and habitats types of Community Importance. Shared by Denmark, Germany and the Netherlands, it is one of Europe's largest marine wetlands. It contains numerous features that require protection under the Birds and the Habitats Directive including habitats necessary for species protection: Wild birds listed in Annex I of the Birds Directive as well as migratory bird species, Marine mammals and fish species listed in Annex II of the Habitats Directive. Protection is also required for habitats types included in Annex I of the Habitats Directive: sandbanks which are slightly covered by sea water all the time, estuaries, mudflats, salt marshes and sand dunes...





The Dogger Bank, in the North Sea, is a natural feature that extends through the EEZ of several Member States. The top of the feature is at less than 20 metres depth and is found in UK waters close to the EEZ boundary with NL. The feature continues in a North-Easterly direction stretching through Dutch and German waters and with the water depth progressively increasing.

2.10. Implementation of the Natura 2000 network. Administrative steps from identification to designation of marine Natura 2000 sites.

Marine sites of the Natura 2000 network will provide protection to some of the following natural values:

1. Marine birds in accordance with the provisions of the Birds Directive: bird species listed in Annex I (article 4.1) and other migratory birds (article 4.2).

2. Habitats listed in annex I of the Habitats directive: including all habitats types classified under code 11*("Open seas and tidal areas") and 12* ("Sea cliffs and shingle or stony beaches") and habitat type 8330 (Submerged or partially submerged caves). Four habitat types relevant to marine designation of sites are listed in annex I and present in offshore waters: 1110 Sandbanks which are slightly covered by sea water all the time , 1170 reefs, 1180 structures made by leaking gases and 8330 Submerged caves

3. Species listed in annex II (18 marine species, including fish, reptile, cetacean, and seal species)

4. Marine species listed in annex IV of the Habitats Directive. Sites are not designated based on the presence of annex IV species. However, they will also need to be protected under the provisions of Article 12 of Habitats Directive.

5. Marine species listed in annex V of the Habitats Directive. As above, sites are not designated based its presence. Nevertheless, they will also need to be protected under the provisions of Article 14 and 15 of Habitats Directive.

Sites designated in accordance with Birds Directive provisions

Special Protection Areas (SPA) are identified and designated in accordance with the provisions of the Birds Directive. In Article 4 of this Directive, it is established that Member States shall classify in particular the most suitable territories in number and size as SPAs for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies. Not withstanding the fact that the identification and designation of SPAs is a Member State responsibility, it must be carried out on the basis of ornithological criteria and result in the selection of all the most suitable territories[37].

Once a site is designated as an SPA the legal protective requirements defined in Article 6 (2) (3) and (4) of the Habitats Directive apply to it.

Member States must send to the Commission all relevant information so that it may take appropriate initiatives to ensure that the SPA network forms a coherent whole.

Sites designated in accordance with the Habitats Directive provisions

First step: elaboration of a list of Sites of Community Importance. The criteria for selecting sites eligible for identification as Sites of Community Importance (SCI) are in accordance with annex III of the Habitats Directive and relevant scientific information. Member States will identify and carry out an assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species contained in Annex II (including priority natural habitat types and priority species). On that basis, each Member State proposes a list of SCI. The list, including appropriate information for each site, is transmitted to the European Commission[38].

Second step: adoption of the list of pSCI. The list of proposed SCI is to be adopted by the Commission in accordance with a procedure laid down in article 21 of the Habitats Directive. This step gives formal legal effect to the protective safeguards defined in Article 6 (2) (3) and (4) of the Habitats Directive.

Third step: designation of special areas of conservation (SAC). Once a site of Community importance has been adopted, the Member State concerned shall designate that site as a special area of conservation (SAC) as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, to a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

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[37] See key conclusions of the Court of Justice in its landmark judgement, delivered on 19 May 1998, in this important test case for the implementation of the directive.

[38] a map, its name, location, extent and the data resulting from application of the criteria specified in Annex III provided in a standard format (c.f..: Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites *Official Journal L 107 , 24/04/1997).* This format also applies to sites designated under the Birds Directive.

In the marine environment, obligations of Member States are the same as in the terrestrial environment. Therefore, the provisions of the Habitats Directive related to the site designation process are the same: the site designation process is exclusively based on scientific criteria. Future management challenges (related to any future activity such as fisheries, energy generation or distribution…) should not be a determining element in this process.

More information on this topic can be found on the Nature Conservation and Biodiversity webpage of the Commission http://ec.europa.eu/environment/nature/home.htm

2.11. Update on implementation of Natura 2000 network in marine areas. An overview of existing marine SPA and SCI

By June 2006, Member States had designated 480 sites which contain marine waters- (64.754 km^2) as SPAs under the Birds' Directive and 1249 sites (77.784km2) as pSCIs under the Habitats' Directive.

An updated Natura 2000 barometer may be found at the following address: http://ec.europa.eu/environment/nature/nature_conservation/useful_info/barometer/index_en.htm

Most existing marine designated/proposed sites are located in territorial waters. Therefore, present and future efforts of Member States will need to mainly focus on the completion of the Natura 2000 network in the offshore environment.

In this regard, Germany has already proposed a significant contribution to the marine component of Natura 2000 in its offshore environment (10 new sites). Two of these areas have been designated as SPAs and are also protected since September 2005 under German national legislation as nature reserves.[39]

Other Member States are in the process of identifying sites for protection under both Directives. For example in the United Kingdom the Joint Nature Conservation Council (JNCC) has delivered scientific advice to the national authorities (DEFRA) to support *'the identification of offshore marine Special Areas of Conservation and Special Protections Areas'* in the offshore UK waters. This relevant document contains a useful approach and rationale for the identification and future selection of Natura 2000 sites (It may be found in the following address. http://www.jncc.gov.uk/page-2412)

[39] An overview and detailed descriptions of the German process leading to the actual nominations are given in English language by a website (www.habitatmarenatura2000.de) and in the book "Progress in marine Conservation in Europe" (von Nordheim et al. (eds.) 2006). Habitat marenatura2000" http://www.habitatmarenatura2000.de/en/aktuelles-summary-nature-conservation.php

3. HABITAT TYPES AND SPECIES REQUIRING MARINE NATURA 2000 SITES.

3.1. Marine Habitat types' definitions. Update of "Interpretation Manual of European Union Habitats".

At present, only nine marine habitat types are listed in Annex I of the Habitats Directive as natural habitats types of community interest whose conservation requires the designation of special areas of conservation (SAC's).

92/43 Habitats Directive. Annex I ***Open sea and tidal areas natural habitats types of community interest whose conservation requires the designation of special areas of conservation (SAC's)***	
1110	Sandbanks which are slightly covered by sea water all the time
1120 *	Posidonia beds (*Posidonion oceanicae*)
1130	Estuaries
1140	Mudflats and sandflats not covered by seawater at low tide
1150 *	Coastal lagoons
1160	Large shallow inlets and bays
1170	Reefs
1180	Submarine structures made by leaking gases
8330	Submerged or partially submerged sea caves

One of the objectives of the Marine Working Group has been to review the applicability of the existing definitions of marine habitats to the offshore environment and adapt these, where necessary, as a basis for extending the network of protected areas across all the European maritime areas where Member States exercise jurisdiction.

From a first review, it was considered that only three of the above listed habitat types needed a more complete definition in the Interpretation Manual of European Union Habitats[40]. The work of the experts therefore focused on these habitats types:

- 1110 "*sandbanks which are slightly covered by sea water all the time*"
- 1170 "*Reefs*", and
- 1180 "*submarine structures made by leaking gases*"

[40] The Interpretation Manual of European Union Habitats - EUR25 is a scientific reference document adopted by the Habitats Committee.

The main elements in relation to the definitions for each of the habitat types are indicated below. There are also substantial additions to the background information supporting these definitions (see Appendix 1 of this document).

3.1.1. Habitat type 1110 "sandbanks which are slightly covered by sea water all the time"

Based on previous work of the Marine Expert Group, an independent panel of marine experts, co-ordinate by the European Environment Agency (EEA), reviewed the definition of this habitat type in June 2006. The EEA did this with the support of European Topic Centre on Biological Diversity[41], the ICRAM[42] and several other experts on this topic. As a final output of this process, the EEA submitted the following definition, in accordance with the opinion of the above scientific panel.

1110 Sandbanks which are slightly covered by sea water all the time

Definition:

Sandbanks are elevated, elongated, rounded or irregular topographic features, permanently submerged and predominantly surrounded by deeper water. They consist mainly of sandy sediments, but larger grain sizes, including boulders and cobbles, or smaller grain sizes including mud may also be present on a sandbank. Banks where sandy sediments occur in a layer over hard substrata are classed as sandbanks if the associated biota are dependent on the sand rather than on the underlying hard substrata.

"Slightly covered by sea water all the time" means that above a sandbank the water depth is seldom more than 20 m below chart datum. Sandbanks can, however, extend beneath 20 m below chart datum. It can, therefore, be appropriate to include in designations such areas where they are part of the feature and host its biological assemblages.

This definition is based on the best available science and is consistent with the approach already established in the habitats interpretation manual. In delivering this opinion, the above-referred independent panel had full regard of the need for a definition that is valid and operational for all marine waters covered by the EU nature directives. Further to the review of the definition, the panel of experts made several recommendations, which include:

- When identifying and defining sandbanks in inshore and offshore environments, it is likely that Member States will need to use different scales, as variations in natural conditions occur at a much larger scale in offshore than in coastal environments. Sandbanks are generally larger natural features in offshore than in coastal environments.
- It is worth underlining that further expert judgment will be needed when appraising this habitat type at national level.

[41] The European Topic Centre on Biological Diversity. A Topic Centre of the European Environment Agency. See http://biodiversity.eionet.europa.eu/ .

[42] ICCRAM (Istituto Centrale per la Ricerca scientifica e tecnologica applicata al Mare, Roma, Italy) is part of the ETC consortium) http://www.icram.org/

- Section 4 of this guidance provide further examples of the means and methods that can be used to identify the sandbank feature, including with regard to the top level and slopes.

- As for most other habitat types in the interpretation manual, the examples contained in the section 2 on 'characteristic animal and plant species' do not represent an exhaustive list and are not necessarily restricted to this habitat type (See complete definition of this Habitat type in Appendix 1)

In the offshore environment, most of the sandbanks are elevated features arising from the seabed. A sandbank consists predominantly of sandy sediment mainly within a defined range of grain sizes[43]. Larger grain sizes, including boulders and cobbles as well as smaller grain sizes, including mud, may be found on the sandbank, but only in small quantities.

For considering a sandbank as being a feature "slightly" covered by water, it has been decided to define the arbitrary depth of 20 meters below chart datum for the top of the sandbank: other parts of the feature may be found at deeper depths. Effectively, it is appropriate to also include sections of the sandbank extending below 20m in depth where these are an integral part of the overall sandbank feature.

Such features may cover a substantial area, and some of them have a trans-frontier dimension. The Doggerbank in the North Sea is a typical case of a sandbank feature that extends across the marine zones of several Member States.

3.1.2. Habitat type 1170 "Reefs"

In relation to **reefs**, the following definition has been agreeded:

1170 "Reefs"

Definition of the habitat:

Reefs can be either biogenic concretions or of geogenic origin. They are hard compact substrata on solid and soft bottoms, which arise from the sea floor in the sublittoral and littoral zone. Reefs may support a zonation of benthic communities of algae and animal species as well as concretions and corallogenic concretions.

Clarifications:

- *"Hard compact substrata"* are: rocks (including soft rock, e.g. chalk), boulders and cobbles (generally >64 mm in diameter).
- *"Biogenic concretions"* are defined as: concretions, encrustations, corallogenic concretions and bivalve mussel beds originating from dead or living animals, i.e. biogenic hard bottoms which supply habitats for epibiotic species.
- *"Geogenic origin"* means: reefs formed by non biogenic substrata.
- *"Arise from the sea floor"* means: the reef is topographically distinct from the surrounding seafloor.
- *"Sublittoral and littoral zone"* means: the reefs may extend from the sublittoral uninterrupted into the intertidal (littoral) zone or may only occur in the sublittoral zone, including deep water areas such as the bathyal.
- Such hard substrata that are covered by a thin and mobile veneer of sediment are classed as reefs if

[43] For the application of this definition, sand includes grains having a diameter in the range of 1/16mm (= 0.0625mm) to 4.76 mm (passing U.S. standard sieve no. 4). This size range is in accordance with most common geotechnical standard classifications on this field.

the associated biota are dependent on the hard substratum rather than the overlying sediment.

- Where an uninterrupted zonation of sublittoral and littoral communities exist, the integrity of the ecological unit should be respected in the selection of sites.
- A variety of subtidal topographic features are included in this habitat complex such as: Hydrothermal vent habitats, sea mounts, vertical rock walls, horizontal ledges, overhangs, pinnacles, gullies, ridges, sloping or flat bed rock, broken rock and boulder and cobble fields.

Previous interpretation considered "reefs" as basically "*rocky substrates and biogenic concretions which arise from the sea floor"*. Given the importance of this habitat type for the designation of offshore Sites of Community Importance under the Habitats Directive, a clarification was needed to include all existing different types of reefs in EU waters.

Rocky substrates include complex habitats such as seamounts or hydrothermal vents. Biogenic concretions includes encrustations, corallogenic concretions and bivalve mussel beds originating from dead or living animals, i.e. biogenic hard bottoms which supply habitats for epibiotic species.

3.1.3. Habitat type 1180 "submarine structures made by leaking gases"

In relation to **1180 *"submarine structures made by leaking gases"***, the new interpretation distinguishes more clearly two subtypes of such a structure known as "bubbling reefs" and "structures within pockmarks".

1180 "submarine structures made by leaking gases"

Definition of the habitat

Submarine structures consist of sandstone slabs, pavements, and pillars up to 4 m high, formed by aggregation of carbonate cement resulting from microbial oxidation of gas emissions, mainly methane. The formations are interspersed with gas vents that intermittently release gas. The methane most likely originates from the microbial decomposition of fossil plant materials.

The first type of submarine structures is known as "bubbling reefs". These formations support a zonation of diverse benthic communities consisting of algae and/or invertebrate specialists of hard marine substrates different to that of the surrounding habitat. Animals seeking shelter in the numerous caves further enhance the biodiversity. A variety of sublittoral topographic features are included in this habitat such as: overhangs, vertical pillars and stratified leaf-like structures with numerous caves.

The second type are carbonate structures within "pockmarks". "Pockmarks" are depressions in soft sediment seabed areas, up to 45 m deep and a few hundred meters wide. Not all pockmarks are formed by leaking gases and of those formed by leaking gases, many do not contain substantial carbonate structures and are therefore not included in this habitat. Benthic communities consist of invertebrate specialists of hard marine substrata and are different from the surrounding (usually) muddy habitat. The diversity of the infauna community in the muddy slope surrounding the "pockmark" may also be high.

To facilitate better use of this document, a complete definition of the marine habitats types from 1110 to 1180 and 8830 is enclosed in Appendix I.

3.2. Identification of existing marine Habitat types and Species of European importance for different Member States.

The Marine Working Group has compiled general information related to the occurrence of habitats types and species which require protection through the elaboration for the three European Seas of the EU (Baltic, Atlantic and Mediterranean), of different tables showing presence per Member State of:

1. Marine Habitat types listed in Annex I of 92/43 Habitats Directive
2. Marine species listed in Annexes II 92/43 of Habitats Directive
3. Marine birds Listed in Annex I and migratory species.

These lists also distinguish between presence in offshore and inshore waters (internal waters and territorial sea). Draft lists have now been compiled. Those lists are enclosed in Appendix 2 of this document. Once they will be completed, these lists will be considered as reference elements to be submitted to the Habitat + Ornis Scientific Working Groups for their consideration. Member States that have not yet provided the necessary information may send it to the Commission for a future revision of the text.



* *Monachus monachus* [44]

Photo: M.Om. LIFE96 NAT GR/003225

[44] *Monachus monachus* is a priority species of Community Importance listed in annexes II and IV of the Habitats Directive. EN: Monk seal; FR: phoque moine; ES: Foca monje;

4. AN APPROACH FOR LOCATING AND SELECTING MARINE NATURA 2000 SITES.

This chapter has two main objectives:

1. To propose the best means of locating and assessing Habitats Directive Annex I habitat types and Annex II species, AND Annex I and migratory bird species under the Birds directive, for which marine Natura 2000 sites should be considered

2. To propose a site selection rationale(s).

The guidance on designation and information provided in the following sections focuses primarily on habitats and species found away from the coast and in offshore waters, as many Member States have already identified coastal and inshore Natura 2000 sites, along with guidance and information on their designation. The aim of this chapter is to reflect best available guidance on the methods for locating and selecting marine Natura 2000 sites. It does not provide details on the amount of information required, nor on how to assess the completeness of the resulting network of Natura sites.

4.1. Locating and assessing Annex I Habitats

Given the lack of more detailed biological data than, the identification of Natura 2000 sites in marine areas away from the coast has to be based on more general geological, hydrological, geomorphological and biological data than is the case for coastal or terrestrial areas. For all of the marine habitats on Annex I to the Directive, methodology exists for identifying the location and undertaking physical and ecological assessment of the areas required, although existing data may be sparse or absent in some sea areas (particularly in deep waters hundreds of miles from the coast).

Where the location of sub-littoral Annex I habitat types is not already known, they can be located in two steps using available data. Broad scale geophysical or oceanographic information is often available for large sea areas, and can be used as the first step in the selection of Natura 2000 sites by helping to identify the location of potential Annex I habitats. Step two then involves focussed information gathering or new surveys, directed to those specific areas where existing information indicates that an Annex I habitat is present or is likely to be present. This approach is particularly useful for Member States with large sea areas and deep waters, where detailed biological information is likely to be sparsely distributed. The two steps involve:

1. Using available physical information mapped at a regional scale, such as modelled geological seabed data, bathymetric data (e.g. IOC *et al.* 2003), physical oceanographic data, navigation or naval charts (where they show seabed type), to predict the location of potential Annex I habitat. Table 1 shows the general availability of such data for each Member State, Table 2 indicates which type of broad scale data may be suitable for locating each Annex I habitat type, and Section 4.2.1 describes data sources in more detail;

2. Refine and add to this information using more localised remote sensing datasets such as side scan sonar, acoustic ground discrimination system (AGDS) surveys, multibeam bathymetric survey, aerial photography or satellite images (for some habitats in very shallow water only, such as seagrass beds or maerl). Such remote sensed data will need to be validated in the field (ground truthed) by direct sampling of sediment

and/or biota (grab/core sampling, diver survey, benthic trawls) or by remote observation (video, photography, ROV [Remote Operated Vehicle]). As well as ground validation, data obtained from direct sampling will also be used to assess the biota of the Annex I habitat directly. Section 4.2.2 below gives more detail of methods, and a summary of suitable methods for each habitat type is presented in Table 3.

4.1.1. Regional scale physical data

Potential Annex I habitat types can be identified using existing, broad-scale, physical seabed information. This approach will enable those Member States with large sea areas and deep waters, where detailed biological information is likely to be absent or sparsely distributed, to focus in on a more limited number of areas for the collection/collation of more detailed data. Broad-scale physical data are available in many Member States, but with varying spatial resolution and varying coverage. Table 1 shows, in very general terms, the availability of broad scale datasets for each Member State.

Examples of such datasets which can be used include geological maps of the seabed, bathymetry data (including data from navigational charts, although note that for areas of potential conservation interest outside important navigation areas bathymetry may be very generalised), oceanographic data (such as temperature, salinity, stratification, water currents, turbidity etc.) to enable the identification of different water masses, and in some cases, satellite images. Regional scale datasets used for this purpose tend to be at a scale of approximately 1:250,000 to 1:1,000,000 to cover wide areas, and are generally produced by modelling of data from point samples, seismic tracks, etc. Regional scale data have generally been collected for purposes other than identification of biotopes or habitats, and so may use classification systems which do not fit exactly with the Annex I habitat definitions, therefore, there are limitations to their use, which depend on the habitat or sub-habitat being considered. For example, use of satellite imagery and aerial photography to identify habitats such as *Posidonia* beds is limited to shallow waters (down to approx. -15m water depth under good conditions). Broad scale data may not always be publicly available at a national level (e.g. Spain), or may only be available in paper form, however some digital data is available for wide areas such as the General Bathymetric Chart of the Oceans http://www.ngdc.noaa.gov/mgg/gebco/gebco.html . Table 2 gives an overview of which types of regional scale data can be used in the first step of locating different types of marine Annex I habitat.

Table 1 Availability of broad scale seabed habitat data for each Member State

Table 1 Type of data	Broad scale data availability or coverage throughout most of Member State's waters (out to EEZ/200nm or Continental Shelf)																	
	B	CY	D	DK	E	EST	F	FIN	UK	GR	I	IRL	LT	LV	M	NL	PL	P	S
Geological seabed maps (approx. 1:250,000 scale)			Yes[4]	Yes[5]			Yes[6]	Scarce	Yes[2]		Yes			Yes[1]		Yes			Yes[3]
Bathymetry >200m depth (GEBCO)			Yes	Yes			Yes	Yes	Yes		Yes			N/A		N/A			Yes
Bathymetry <200m depth			Yes	Yes			Yes	Yes	Yes		Yes			Yes		Yes			Yes
Satellite images				?			Yes	Yes	?		Yes			No		Yes			Yes
Other (see notes)			Yes[4]																

Notes:

1 LV: Gulf of Riga: 100%; Baltic Proper: 63% of Territorial waters (or 16% of Continental Shelf), (1:200,000 scale)

2 UK: approx. 95% of inshore waters and out to Continental Shelf designated area

3 SE: less than 50%

4 DE: Geological seabed maps approx. 75% coverage. Also Navy charts, historical and recent fishing charts

5 DK: Geological seabed maps approx. 60% coverage.

6 FR: Partially

Table 2 Type of broad scale data	Broad scale data useful to identify and locate habitat or habitat sub-type?							
	1110 Shallow sandbanks	1170 Reef (bedrock)	1170 Reef (stony)	1170 Reef (biogenic)	1170 Reef (Hydro-thermal)	1180 Submarine structures	8330 Sea caves	1120 Posidonia beds
Geological seabed maps/data	Yes	Yes	Partially	No	Yes	Partially	Partially	Partially
Bathymetry	Yes	Partially (won't distinguish between some sub-types of reef)				Partially	No	Partially
Oceanographic data (temp, currents, turbidity etc)	No	No	No	Partially	Partially	No	No	Partially
Satellite images & aerial photography (shallow waters only)	Partially	Partially (won't distinguish between sub-types of reef)			No	No	No	Partially

NOTE: Point or line sampling data, such as benthic grab, dredge, video or photographic sampling can also be used in conjunction with geostatistical analyses to identify habitats.

4.1.2. Local or regional scale remote sensed and physical and biological sample data

The second step to identify and locate Annex I habitat, is to collate any existing physical and biological information on both known areas of Annex I habitat, and on those areas of potential Annex I habitat identified in step 1. Where existing information on habitats is lacking, new survey can be focussed on areas of Annex I habitat identified in step 1, thus avoiding the need to survey vast areas of seabed. Collation of data should involve examination of scientific archives and data from relevant academic, government, NGO, and industry stakeholders. This information can include historical charts of relevant seabed features and fishing grounds.

As well as physical information on the location and extent of an area of Annex I habitat, biological data with which to assess the flora and fauna of a potential site is essential, however, the quantity and quality of data required is difficult to define. As a guide, the information required to be able to complete the Natura 2000 data form[45] must be regarded as the minimum level required. Commission Decision 97/266/EC summarises the information, which must be collected by Member States, and defines the data format for the transmission of information for Natura 2000 sites. There are obligatory fields in the Natura 2000 data form that must be completed: 4.1 "General site character" and 4.2 "Quality and importance". Inclusion of other relevant site-specific biological information is desirable for Section 3.3 "Other important species of flora and fauna". Information necessary to complete these fields would include information on the presence of Red Data book species and species listed on

[45] Standard Data Form. Is defined by 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites *Official Journal L 107, 24/04/1997. See* http://ec.europa.eu/environment/nature/nature_conservation/natura_2000_network/standard_data_forms/index_en.htm

international conventions as well as key and typical species present on the site. Information that is confined to a few easily observed and widespread or common species is generally not sufficient to make an evaluation.

Collated data from archives, existing maps and data from a variety of sources, including from stakeholders, are likely to exist in a wide variety of formats and at different levels of detail. All biological data relevant to marine Annex I habitats should be collated and can be plotted in a geographic information system (GIS) and overlain upon the maps of seabed type or other broad scale physical or hydrographic data. Existing results of benthic mapping programmes using the EUNIS classification should be used, to the highest possible level, to help in characterising habitats biologically (Dahl et al 2004). Historical maps and charts (e.g. of fishing grounds) may also be used to help provide information for certain habitats. Marine habitat survey and mapping has become increasingly common and widespread over the past 5-10 years, spurred on by both improvements in technology and the increasing demand for this type of information. Whilst the purpose for doing the mapping varies considerably (e.g. industry environmental assessments, conservation, fisheries, planning), the underlying techniques and type of data collected have a great deal in common. Table 3 gives examples of the type of data likely to exist and be useful to help in both locating the position of habitat types, estimating the geographical extent of the habitat, and assessing biodiversity.

In Table 3, data obtainable from different types of survey method are shown against different marine habitat types and sub-types likely to be found in offshore waters. In the table, a note is included to indicate whether each type of data could be used:

- to determine the location on the seabed of Annex I habitat types or habitat sub-types ('locate');

- to map the extent on the seabed of the Annex I habitat or habitat sub-type ('extent'); or

- to provide information on the biodiversity of that habitat or habitat sub-type ('biodiversity').

In practice, different types of survey method may be used to provide information on different types of habitat depending on various factors including the financial and time resources available and the depth and area of sea to be covered. Remote sensing methods can be used to cover large areas of seabed, but will need validation by direct sampling such as photographic or grab sampling. Some methods (e.g. satellite images or aerial photography) are only suitable for use in very shallow waters. A few of the direct sampling methods (those which dig-in to the seabed) can be destructive of fragile habitats such as biogenic reefs or seagrass beds, and therefore their use should be restricted to where obtaining a sample (for example to examine infauna) is necessary, and such methods should not be used to determine the extent of a sensitive habitat. For such destructive sampling methods, existing data obtained using these methods may be used to help provide information on areas of seabed, but if new survey is planned, then less destructive survey methods should be used.

Various publications and references give further details of useful methods for mapping and characterising marine habitats. Bäck et al 1996 and 1998 describe methods used for mapping and monitoring marine habitats in the Baltic Sea. Davies et al 2001 provide information on techniques for monitoring marine SACs in the UK, including consideration of the approximate costs of different techniques, and many of the methods can also be used for locating subtidal Annex I habitats and assessing their biodiversity as potential SACs.

Table 3 Type of data	Data useful to locate, determine extent and assess biodiversity of habitat or habitat sub-type?							
	1110 Shallow sandbanks	1170 Reef (bedrock)	1170 Reef (stony)	1170 Reef (biogenic)	1170 Reef (Hydro-thermal)	1180 Submarine structures	8330 Sea caves	1120 Posidonia beds
Remote methods:								
Side scan sonar[1]	Locate, extent?	Locate, extent	Locate, extent	Locate, extent	?	Locate, extent	Not applicable	Applicable
Multibeam bathymetry[1]	Locate, extent	Locate, extent	Locate, extent	Locate, extent	Locate, extent	Locate, extent	Not applicable	Applicable under conditions
AGDS (acoustic ground discrimination systems)[1]	Locate, extent	Locate, extent	Locate, extent	Locate, extent	?	Locate, extent?	Not applicable	Locate, extent
Satellite images[1, 2]	Locate, extent	Locate, extent (won't distinguish between sub-types of reef)			? Locate, extent	Not applicable	Not applicable	Locate, extent
Aerial photography[1, 2]	Locate, extent				Not applicable	Not applicable	Not applicable	Locate, extent
Direct sampling or observation methods:								
Grab/core sampling[3]	Extent Biodiversity	Not applicable	Biodiversity (limited application)	Biodiversity (not recommended)	Not applicable	Biodiversity (limited application	Not applicable	Biodiversity (not recommended)
Diver sampling	Biodiversity	Biodiversity	Biodiversity	Biodiversity	Biodiversity	Biodiversity	Biodiversity	Biodiversity
Towed video[3]	Extent	Extent	Extent Biodiversity (not	Extent	Not recommended	Biodiversity (limited	Not applicable	Extent

	Biodiversity	Biodiversity	recommended	Biodiversity		application		Biodiversity
Drop-down video/photo-graphy/ROV	Extent Biodiversity	Extent Biodiversity	Extent Biodiversity	Extent Biodiversity	Extent Biodiversity	Extent Biodiversity	Biodiversity	Extent Biodiversity
Epibenthic trawls/dredges[3]	Biodiversity (limited application)	Not applicable	Not recommended[3]	Not recommended[3]	Not applicable	Not recommended[3]	Not applicable	Not recommended

Notes:

[1] For all remote sensing, distinguishing habitats from each other and from the surrounding seabed depends on the resolution of the sampling method – higher resolution will provide better data to distinguish habitats, but covers smaller areas and is more expensive to collect and process than lesser resolution data.

[2] Aerial photography and satellite images are restricted in use to shallow waters (6-7m depth), depending on water clarity and other factors.

[3] Grab/core sampling and benthic trawling/dredging are relatively destructive sampling methods. These methods can provide useful data, but extensive use of these methods is not recommended for assessment of habitats sensitive to physical damage (e.g. biogenic reef, seagrass and maerl beds), and should not be used to identify their extent. Towed video can also be destructive of fragile habitats , if it impacts with the seabed, and is not recommended in these cases.

4.2. Site selection rationale for SACs/SCIs for Annex I Habitats

Article 3.1 of the Directive (92/43/EEC) states that "a coherent European ecological network of special areas of conservation shall be set up", and that "This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range". The network shall also include special protection areas classified by Member States under the Birds Directive (79/409/EEC).

As set out in Article 4.1 of the Habitats Directive, site selection criteria for Annex I habitats are prescribed by Annex III of the Directive text. Stage 1 assessment criteria (listed below for habitats) and are applied at a national level to assess the relative importance of sites for each habitat listed on Annex I to the Directive, as amended in 1997 and 2004.

Stage 1A:

a) "Degree of representativity of the natural habitat type on the site;

b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within the national territory;

c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities;

d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

Each of these criteria is discussed below.

Once sites are identified by Member States at Stage 1, their Community Importance is assessed, as set out in Article 4.2 and using the Stage 2 criteria included in Annex III to the Directive, by the Commission, with the help of the European Environment Agency and others, and in agreement with each Member State. This assessment is applied to the lists of sites irrespective of whether they have been identified for Annex I habitats or Annex II species or a combination of both. Assessment of the Community Importance of the sites included on the national lists using the Stage 2 criteria for Annex II habitats will take account of :

a) "Relative value of the site at a national level;

b) Geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

c) The total area of the site;

d) The number of natural habitat types in Annex I [and species in Annex II] present on the site; and

e) The global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic of unique aspect of its features and the way they are combined."

The assessment at Stage 2 has been carried out for terrestrial and inshore sites so far with reference to the biogeographical regions listed in Article 1(c)(iii) of the Directive. The terrestrial boundaries of these regions were derived based on terrestrial ecology. However, for the marine environment it appears reasonable to consider an approach based on the major sea areas. Therefore, when assessing at stage 2 the global ecological value of the proposed marine sites, the marine areas (Internal waters, Territorial Sea, EEZ and Continental Shelf) to consider for each biogeographical region could be the following:

- Marine areas surrounding the three European Macaronesian archipelagos to the Macaronesian biogeographical region
- North East Atlantic Ocean and the North Sea to the Atlantic biogeographical region
- Baltic Sea to the continental and the boreal biogeographical regions.
- Mediterranean sea to the Mediterranean biogeographical region.

The adhesion of Bulgaria and Romania, and future potential adhesion of Turkey, requires considering the Black Sea separately. For management purposes, borders between seas and oceans should be established in accordance with existing borders of regional marine organizations. Division between Baltic and Atlantic will be as defined by HELCOM[46].

4.2.1. Representativity of the natural habitat type on the site

This criterion is a measure of how typical a site is for a particular habitat. The explanatory notes to the Natura 2000 data form (EC 1995) specifically state that it should be linked to the Interpretation Manual of Annex I habitats (EC 1999), as this provides a definition, list of characteristic species and other relevant information for each habitat. The additional information on habitat interpretation for marine habitats provided in Section 3 of these guidelines should also apply. In considering the degree of representativity of Annex I habitat types on individual sites, Member States should take account of the best examples in extent and quality of the main type and its main variants (Hopkins and Buck 1995).

According to Article 3.2 of the Directive, sites should be selected to represent the range of habitat types present within the territory of the Member State. The meaning of territory of the Member State applied to the marine environment is explained in section 2.6 of this document. It includes all marine areas areas where Member States exercise sovereignty or jurisdictional rights (internal waters, territorial sea, Exclusive Economic Zone (EEZ) and/or to other areas where Member States are exercising equivalent sovereign rights and the Continental Shelf.

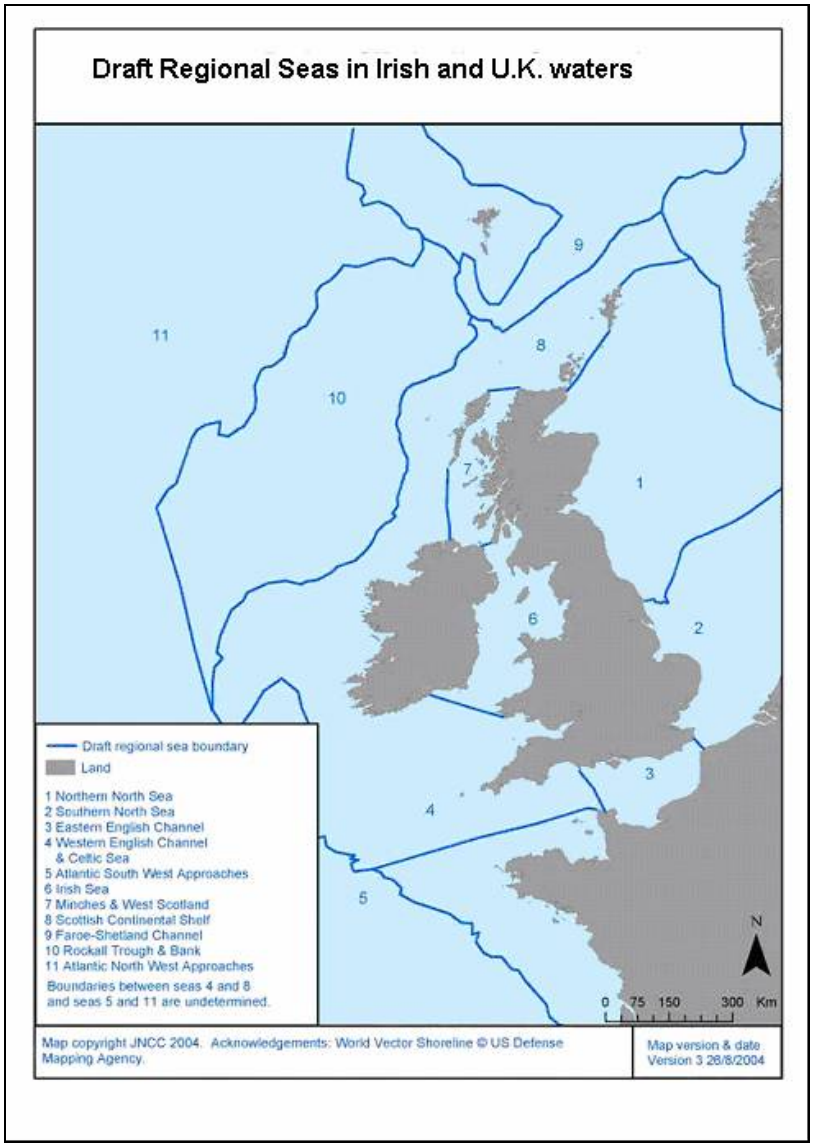
Because the marine habitat types listed in Annex I to the Directive are very broad, a number of different habitat 'sub-types' may be present within the jurisdiction of a Member State. The range of sites selected for a particular habitat may be selected to represent the range of habitat sub-types present, as well as the geographical natural range of the habitat itself. For example, within the habitat type 1170 reef, sub-types of bedrock reef, stony reef and biogenic reef (constructed by various species) are likely to occur.

In order for the suite of sites identified by each Member State for each Annex I habitat type to represent both the ecological and geographical range of variation present in the marine part of its territory, possible sites, can be identified firstly in terms of the geographic location of areas

[46] (This comment has been supported by representatives of Sweden and Denmark in the Scientific working group of Habitats Committee, February 2006)

of habitat types in national waters, and secondly in terms of their physical and ecological characterisations. For possible sites in offshore waters, note should also be taken of possible sites in neighbouring Member State waters where an area of habitat may straddle national boundaries.

Major marine biogeographical regions can be further sub-divided into regional seas or sub-regional seas as an aid to assess representativity in terms of geographic location. These sea areas should be based on physical and ecological characteristics of seabed and water masses, using topographic form, structural character and substratum type as well as oceanographic characteristics such as depth, water temperature, stratification, salinity, etc. A draft example (Figure 1) has been produced for Regional Seas within the Atlantic biogeographic region, centred on Irish and UK waters (Vincent *et al.* 2004), and sub-regions have also been developed for the Baltic region. Any specifically marine regions developed should be ecologically based, not based on administrative or national boundaries.



4.2.2. Area of habitat types

The Explanatory Notes to the Natura 2000 Standard Data Form (EC 1995) explain that one needs to measure the surface covered by the habitat type on the site, and the total surface of the national territory that is covered by the same habitat type, to be able to select a suitable proportion of the habitat type as SAC/SCI. Although this is evident, it can be extremely difficult to make these measurements, especially those concerning the reference national surface. EU decision 97/266/EC recognises the difficulties in using all the criteria, especially those criteria referring to national territory. For this reason, data entries can be made in broad classes e.g. for the estimation of the relative surface of habitats in an SAC/SCI three classes are sufficient (A: 100>p>15%, B: 15>p>2% and C: 2>p%). A rough estimate of the total surface of the relevant habitats for offshore waters can be obtained where geological maps of the seabed exist, supplemented by other data sources.

When using these classes for broad habitat types such as 1170 reef and 1110 shallow sandbanks, which may be widely distributed in Member State waters with large sea areas (such as UK) most offshore sites are likely to fit into class C, and even very large sites (of the order of 50,000ha) may only fall into category B.

Consideration of area of habitat for candidate site selection is related to other principles used for site selection, for example, structure and functions (see below) are most often best conserved in sites that are extensive (McLeod *et al.* 2002).

With regard to selection of sites at Community level, the Commission has provided a reference document (Hab 97/2 rev4) to assist this process. This indicates certain percentage thresholds for examination of Member States proposals in biogeographic seminars. Where a proposal covers less than 20% of the resource this would normally be considered inadequate. Where it covers more than 60% it would normally be considered sufficient. For proposals that cover between 20 – 60%, the conclusions would need to be based in expert judgement in relation to the particular habitat or species concerned. Priority habitats and species would normally be expected to have the biggest level of representation in the network. However, document Hab 97/2 rev 4 is not a specific reference document for the marine environment, and the figures mentioned are not specific targets for national contribution to the Natura 2000 network, which need to be assessed on a case by case basis.

Different methods used for identification of Natura 2000 sites in the marine environment are described in detail in the book "Progress in marine Conservation in Europe" (von Nordheim et al. (eds.) 2006).[47]

[47] http://www.habitatmarenatura2000.de/en/aktuelles-summary-nature-conservation.php

Swedish practices on selecting Marine Protected Areas, including Natura 2000 sites

in the marine environment

The practice for selecting MPAs and marine Natura 2000 sites in Sweden is a modification of the system suggested by IUCN (Kelleher and Kenchington, 1992). Some conclusions:

Marine biological systems are different in certain respects from systems on land, and therefore criteria for selecting MPAs/Natura 2000 sites may differ from those used to select areas for protection on land. Marine systems also tend to be more open than terrestrial systems and this is why marine protected areas tend to be directed more towards protecting habitats, biotopes or ecosystem functions, rather than individual species.

MPAs and marine Natura 2000 sites are usually not well known to the public, or have little aesthetic value. Therefore, the information to the public about these areas is of the utmost importance.

In the management of a MPA/Natura 2000 site zonation is a way to set management practices and regulations for different activities in different parts of a MPA. (More details in Appendix 4.1)

4.2.3. Conservation of structure and functions

Article 1e to the Habitats Directive refers to conservation status of a natural habitat type, including structure and functions. The Explanatory Notes to the Natura 2000 Standard Data Form (EC 1995) explain that this criterion comprises three sub-criteria:

1. Degree of conservation of structure
2. Degree of conservation of functions
3. Restoration possibilities

Although these sub-criteria could be evaluated separately, they should nonetheless be combined for the requirements of selection of sites as they have a complex and interdependent influence on the evaluation process (EC 1995). Sites selected (and their boundaries) should take into account the structure and function requirements of the particular habitat.

In general, knowledge of the structure and functions of marine habitats is sparse and incomplete. For marine habitats which depend on certain aspects of the wider marine environment for maintenance of their structure (for example, biogenic reef formed by *Sabellaria* spp. depends not only on the presence of the species itself, but on tidal conditions and sediment supply), site selection (and in particular boundary definition) should take account of this.

An indirect method to estimate conservation of structure and functions is to assess the naturalness of the habitat using information on location and intensity of damaging activities, and by comparison with historical data for certain habitats. Use of models can be an effective tool if correlation between pressure factors and important elements of structure and function is established (Dahl et al. 2004). All available data on natural variability and likelihood of damage or vulnerability of the habitat need to be taken into account for assessing the conservation status.

4.2.4. Global assessment

This criterion is used to assess the previous three criteria in an integrated way, and to take into account the different weights they may have for the habitat under consideration (EC 1995).

4.2.5. Additional selection principles

Additional selection principles, such as those outlined below, may be used to assist in the site selection process.

- Priority/non-priority status (see Habitats Directive Article 1 (d));
- Geographical range (see Articles 1 (e) and 3.1);
- Special responsibilities (see Article 3.2);
- Multiple interest (Annex III Stage 2.2(d));
- Rarity;
- Ecological coherence of the Natura 2000 network(Annex III Stage 2.2)

EXAMPLE OF SITE SELECTION FOR ANNEX I HABITAT TYPE REEF (CODE 1170) IN THE GERMAN EEZ
"(BOEDEKER ET AL. 2006)"

SELECTION PRINCIPLES

(1) The first step in achieving a complete suite of potential reef sites in the German EEZ was to produce the following national mapping guidance and explanations for the habitat type:

> "Elevations permanently submerged or at low tide emerging, consisting of hard substrates like rocks, littoral rock beds, till (moraine material), biogenic hard substrates (e.g. mussel beds and Sabllaria-reefs), including also fields of boulders and blocks on submarine moraine-ridges. Due to the specific glacial and postglacial development in the North Sea and Baltic Sea complex mosaics with habitat type 1110 (sandbanks) frequently occur. Elevations of mixed substrates (e.g. sands, mud, marl, till) are also classed as habitat type 1170, if hard substrates dominate".

(2) The second step was to identify where the Annex I reef habitat type is present within the North Sea (Atlantic Biogeographic Region) and the Baltic Sea (Continental Biogeographic Region). The following steps were carried out to produce a GIS map of potential reef habitats:

- Identification of potential reefs through analysis of existing maps on sediment distribution, fishery charts, and an evaluation of scientific archives.
- Verification of potential reef sites using sidescan-sonar and/or video profiles.
- Assessment of grain sizes of cobble fields with underwater video recordings (laser measurement), and in some areas scientific diving.
- Ascertainment of biological features through bottom dredge trawls (benthic samplings), and/or video profiles, and in some areas scientific diving.
- Photo and video documentation of habitat types by video profiling and scientific diving.

(3) The third step was to achieve a complete suite of ecologically valuable reefs within pSCI-proposals, which also reflect the different ecological forms and features of the habitat types in a representative way. The following forms of reef habitats occur in the German EEZ:

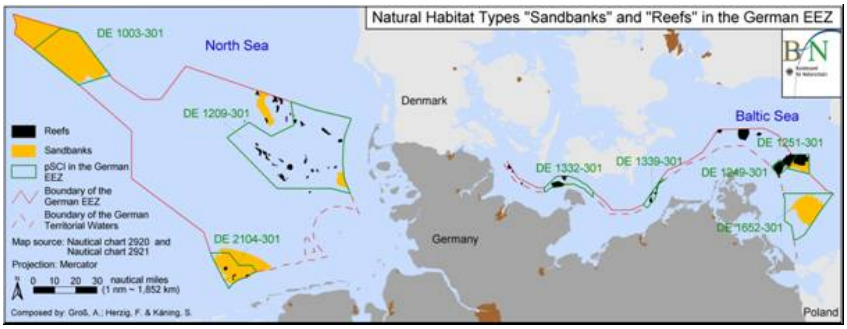
a. North Sea (Atlantic Biogeographic Region):

- Reefs in the form of boulder or cobble fields, which arise from the sea floor in the central part of Amrum Bank. stony reef bands along the slope of the glacial Elbe Valley and scattered stony reefs (Borkum-Riffgrund).

b. Baltic Sea (Continental Biogeographic Region):

- Stony reefs and mussel beds at the slope of Fehmarn Belt with high salinity (up to 25 psu) and with macrophyte vegetation.

- Stony reefs and mussel beds on and along the slopes of the Darss Sill representing “deeper reefs” with a medium salinity of 10 – 18 psu with macrophyte vegetation. Stony reefs and mussel beds on a deeper bank with low salinity and without macrophyte vegetation (Rönne Bank).
- Reefs in the form of boulder or cobble fields, which arise on the top of a shallow bank with low salinity and rich macrophyte vegetation (Adler Grund).



4.3. Locating and assessing Annex II species

Article 3.1 of the Habitats Directive states that a coherent European ecological network of sites hosting the habitats of species listed in Annex II shall be set up. However, Article 4.1 of the Habitats Directive also states that for aquatic species which range over wide areas, SACs will be proposed only where there is a “clearly identifiable area representing the physical and biological factors essential to their life and reproduction”.

For those Annex II species which spend time in recognised areas on land to breed or moult, e.g. seals and turtles, such areas clearly represent areas essential to the life and reproduction of the species’ concerned, and should therefore be considered for SAC selection. This section of the guidance focuses on the identification of sites at sea away from the coast for marine Annex II species, especially for those species which range over wide sea areas in part or all of their life cycle or geographical range.

For species such as cetaceans or fish which do not spend time on land, and for parts of the life cycle of those species that do, it can be difficult to identify areas of sea “essential to their life and reproduction”. This is partly because such species are mobile within the water column and difficult to observe, and partly because data concerning their distribution patterns while at sea are sparse, and such research is expensive and needs to be conducted over long time periods. However, data are available for some Annex II species in some sea areas, and further research including relatively new methods such as use of PODs (porpoise detectors) and satellite tracking of individual animals (seals, cetaceans and turtles) can provide data on aggregation patterns which may be used to identify areas for consideration as SACs. Geo-statistical techniques, similar to those proposed for identification and delimitation of aggregations of birds at sea (see Section 4.6) may also be used to identify densities and distribution centres in space and time for mobile species such as cetaceans (Schieidat et al 2002). These methods have been used for the identification and delineation of concentrations of harbour porpoise and shad in territorial and offshore waters.

- To assist with identifying SAC sites for migratory species such as harbour porpoise (*Phocoena phocoena*), an *ad hoc* meeting was convened by the European Commission on 14 December 2000 (EC (2001) Habitats Committee, Hab. 01/05) The meeting concluded

that "it is possible to identify areas representing crucial factors for the life cycle of this species" (see below). These areas would be identifiable on the basis of:

- The continuous or regular presence of the species (although subject to seasonal variations);
- good population density (in relation to neighbouring areas);
- high ratio of young to adults during certain periods of the year.

Additionally, other biological elements are characteristic of these areas, such as very developed social and sexual life."

In addition to any protection provided within SACs, or where SACs cannot be identified for these species, Articles 12 and 14 of the Habitats Directive provide mechanisms for the protection of those mobile marine species listed in Annexes IV and V (which include those listed also under Annex II) in the wider sea area.

4.3.1. Data availability for Annex II species

The availability of data at a regional scale on the distribution of Annex II species is very sparse, and data are not available for all marine areas. Types of data which may be used for identification of sites for Annex II species may include:

- Records of cetacean sightings from Seabirds at Sea surveys (in the North Sea and Skagerrak and Kattegat, e.g. Reid *et al.* 2003);
- SCANS survey for parts of the North Sea, Skagerrak and Belt sea (Hammond *et al.* 2002) and additional areas for SCANS II (see box);
- Specific aerial surveys (e.g. Scheidat *et al.* 2004);
- Stationary acoustic device (POD) surveys (for cetaceans, Verfuß *et al.* 2004);
- Satellite tracking of individual animals (for seals e.g. McConnel *et al.* 1999, turtles, Matthiopoulos *et al.* 2004, and cetaceans e.g. Dietz *et al.* 2003, Teilmann *et al.* 2004);
- Statistics from national fish surveys (often data for non-commercial fish are obtainable, but not collated or analysed);
- Incidental sightings and strandings data;
- Satellite images and ice cover maps (specifically for those species such as Baltic ringed seal using sea ice for breeding or moulting);
- Data from dataloggers with capability for reconstruction of movement in space by dead-reckoning (running calculation of estimated position from measurements of speed and travel direction); Ref. Adelung and Wilson, Univ. Kiel, and
- Passive acoustic dataloggers, either as towed arrays behind survey ships or hull-mounted systems on ferries etc. Towed array e.g. Gillespie and Chappell (2002). Hull mounted system not yet developed.

Small Cetaceans in the European Atlantic and North Sea (SCANS I and II)

SCANS I generated the first large-scale abundance estimates for the harbour porpoise, and other small cetaceans throughout the North Sea, Kattegat, Skagerrak and Celtic Sea, in 1994. These estimates were relatively precise and unbiased due to the extensive survey area and methodology used. Using the abundance estimates for harbour porpoise, bycatch levels in the North Sea and Celtic Sea were calculated and shown to be unsustainable by the IWC criteria. This project was largely a success due to the coordinated effort between UK, Denmark, France, Germany, Ireland, Sweden, Norway and the Netherlands.

A follow up on this project is the presently ongoing **SCANS II**, which benefits from the participation of twelve countries. Its three principle objectives are:



- to determine the absolute abundance of small cetacean populations, namely the harbour porpoise (*Phocoena phocoena*), bottlenose dolphin (*Tursiops truncatus*) and common dolphin (*Delphinus delphis*). In addition to the area previously surveyed, SCANS II will also **cover continental shelf waters** to the west of Britain, Ireland, France, Spain and Portugal.

- to develop and test methods to monitor cetacean populations. SCANS-II will develop and test potential methods and recommend a suite of monitoring protocols tailored by species and area.

- to develop a framework for management of by-catch. SCANS-II will develop a management framework based on abundance estimates and other available information to enable conservation objectives to be met in the short and long-term.

First results came in June 2006 and the final report in December 2006 including management recommendation. In 2007 an offshore surveys west of the existing survey area will be started. Results form this project are expected in 2008.

See http://biology.st-andrews.ac.uk/scans2/

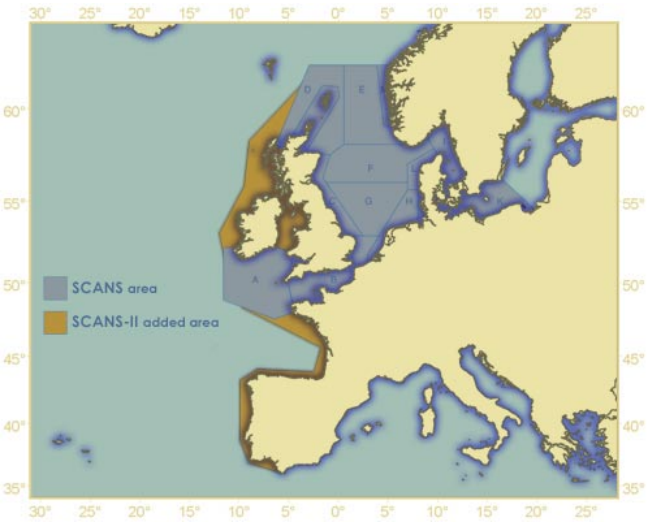


Table 4 Availability of broad scale data on distribution of marine species at sea for each Member State

Type of data	Broad scale data availability or coverage throughout most of Member State's waters (out to EEZ/200nm or Continental Shelf)																		
	B	CY	D	DK	E	EST	F	FIN	GB	GR	I	IRL	LT	LV	M	NL	PL	P	S
Specific aerial and boat surveys of animals at sea (sightings)			Yes	Yes[10]	Yes	Yes[2]	Yes[4]	Yes[2]	Yes[4]							Yes			Yes[2]
SCANS survey for parts of the North Sea (Hammond *et al.* 2002);			Yes	Yes	Yes[5]		Yes[4]		Yes[4]							Yes			
European Seabirds at Sea (ESAS) survey cetacean sightings (Reid *et al.* 2003)				Yes					Yes							Yes			
Stationary acoustic device (POD) surveys (for cetaceans, Scheidat *et al.* 2004);			Yes	Yes[10]					?							Yes[8]			
Satellite telemetry (tracking)			Yes	Yes[11]	Yes[6]	Yes[3]	Yes[4]	Yes[3]	Yes[4]							Yes[9]			Yes[2]
Incidental sightings or strandings				Yes	Yes				Yes[4]							Yes			
Satellite images	n/a	n/a	?	n/a	Yes[7]		n/a		n/a	n/a	n/a	n/a			n/a	n/a		n/a	
Ice cover maps	n/a	n/a	?	n/a	n/a		n/a	Yes[1]	n/a	n/a	n/a	n/a			n/a	Yes		n/a	

Notes: n/a = not applicable

1 Fin: In Finnish waters, ringed seals breed on sea ice in open sea rather than on land. The location and extent of the sea ice varies.
2 Fin: For grey and ringed seal
3 Finland and Estonia: for ringed seal, sporadic in Finland
4 UK and FR: Limited data for few areas and data available for a small number of animals.
5 E. Data related to SCANS II in Atlantic sea areas - Gulf of Cádiz (south-western Spain) and Cantabric Sea (northern Spain).
6 E: For beaked whale in the central-east Atlantic Sea (Canary Islands) and sea turtles in the Mediterranean Sea (south-eastern Spain).
7 E: Specific data for the habitats selection for cetaceans and sea turtles in the Mediterranean Sea (south-eastern Spain).
8 NL: Limited to potential wind park areas
9 NL: Harbour (common) and grey seals
10 DK: Systematic surveys for porpoises in western Baltic. Small-scale systematic surveys for monitoring at offshore wind farms and other developments.
11 DK: For porpoises, harbour and grey seals in areas of inner Danish waters, Skagerrak, Danish Waddensee and other areas.

Member States that have not yet provided the necessary information, may send it to the Commission for a future revision of the text

Table 5

Type of data	Data useful to assist in site identification for Annex II species at sea			
	Seals	**Cetaceans**	**Turtles**	**Fish**
Specific aerial surveys of animals at sea (sightings)	No[1]	Yes	Yes	No
Specific boat surveys of animals at sea (sightings)	No[1]?	Yes	Yes	No
SCANS surveys for parts of the North Sea (Hammond *et al.* 2002) and Atlantic;	No	Yes	Yes	No
European Seabirds at Sea (ESAS) survey cetacean sightings (Reid *et al.* 2003)	Partly useful (no possible differentiation at species level)	Yes	No	No
Stationary acoustic device (POD) surveys (for cetaceans, Scheidat *et al.* 2004);	No	Yes	No	No
Satellite telemetry (tracking)[2]	Yes	Yes	Yes	?
Incidental sightings or strandings[3]	Supplementary information only	Supplementary information only	Supplementary information only	Supplementary information only
Satellite images/ice cover maps[3]	Yes (ringed seal breeding areas only)	Yes Supplementary information only	No	No
Fishing catch/bycatch records	Supplementary information only	Supplementary information only	Supplementary information only	Yes ?
National fish surveys	Supplementary in some countries	Supplementary in some countries	Supplementary in some countries	Partly

Notes:

[1] Aerial survey provides site exact location for ringed seals on ice only during their moulting season (in Finland). Aerial survey is very reliable, but resource costly with a limited number of repeats. Boat surveys are cheaper and can cover longer periods and have more repeat surveys, but give less precise records.

[2] Very exact but costly method for a limited number individual animals, but may provide estimates of habitat use through predictive use of spatial models.

[3] Information may be used to supplement data used for identification of a site (e.g. identification of high productivity sea areas), but cannot be used to determine the extent of a species aggregation nor to identify a site for that species.

4.4. Site selection rationale for SACs/SCIs for Annex II species

As noted in Section 4.3 of these guidelines, Article 3.1 of the Directive (92/43/EEC) states that "a coherent European ecological network of special areas of conservation shall be set up", and that "This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range". The network shall also include special protection areas classified by Member States under the Birds Directive (79/409/EEC).

As set out in Article 4.1 of the Directive, site selection criteria for Annex II species are prescribed by Annex III of the Directive text. Stage 1 assessment criteria (listed below for species) and are applied at a national level to assess the relative importance of sites for each species listed on Annex II to the Directive, as amended in 1997 and 2004.

Stage 1B:

a) Size and density of the population of the species present on the site in relation to the population present within the national territory;

b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities;

c) Degree of isolation of the population present on the site in relation to the natural range of the species;

d) Global assessment of the value of the site for conservation of the species concerned.

Each of these criteria is discussed below. Once sites are identified by Member States at Stage 1, their Community Importance is assessed, as set out in point 4.2 and using the Stage 2 criteria included in Annex III to the Directive, by the Commission, with the help of the European Environment Agency and others, and in agreement with each Member State. This assessment is applied to the lists of sites irrespective of whether they have been identified for Annex I habitats or Annex II species or a combination of both. Assessment of the Community importance of the sites included on the national lists using the Stage 2 criteria for Annex II species will take account of:.

a) "Relative value of the site at a national level;

b) Geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

c) The total area of the site;

d) The number of [natural habitat types in Annex I and] species in Annex II present on the site; and

e) The global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic of unique aspect of its features and the way they are combined."

Further guidance on interpretation of the above criteria, which includes some relevant to marine species, has been developed during Biogeographical Region meetings from 1994 to

2004[48].Site selection for species should include sites or areas important for different aspects of the life cycle of the species (EC 1995). These categories relate primarily to birds, but are also applicable to marine species:

- Resident (to be found throughout the year on the site);
- Breeding/reproducing (uses the site to nest and raise young);
- Staging (site used on migration or for moulting outside breeding grounds); and
- Wintering (uses the site during the winter).

This information must be included in the Standard Data Form (97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites Official Journal L 107, 24/04/1997). Explanatory comments on this form may be found in section 4.1.2 of this document

4.4.1. Proportion of Member State population

Where population estimates are available for a species, the proportion of the national population present on the site (or within the area) can be estimated. Defining boundaries for 'sites' in offshore waters which support a given percentage of the national population of some mobile species may be difficult due to the lack of obvious natural boundaries (such as coast, topographical boundaries, etc.) in the open sea. This criterion is also challenging to use in the offshore marine environment where populations may often be distributed across several national boundaries. However, recent progress in the use of geo-statistical techniques to identify densities and distribution centres in space and time for mobile species such as cetaceans (Scheidat et al 2002) and birds (Garthe & Skov 2004, Skov et al 1995 and 2000) can support the site selection process for mobile species. Use of these techniques can normally provide data of sufficient resolution to estimate which of the three population size classes applies: A: 100%>p>15%; B: 15%>p>2%; C: 2%>p>0% (EC 1995)

Where Annex II species populations are too small to be naturally viable, or where they occur only as vagrants, Member States may exclude them from consideration for site selection.

4.4.2. Conservation of features of habitat important for species and restoration

This criterion comprises the two sub-criteria:

- Degree of conservation of the features of the habitat important for the species; and
- Restoration possibilities.

To define sites using this criterion it is necessary to understand which habitat features are of importance for the species being considered. For wide ranging marine species, identifiable sites used for breeding and feeding are obviously important to that species' life and reproduction. There may also be identifiable sites used for other purposes (e.g. moulting) which may be important for the species. However, whether any such site is "a clearly identifiable area representing the physical and biological factors essential to the life and

[48] Additional 'guiding principles' to aid in interpretation of the Stage 1A criteria were produced by UK following the 1994 Atlantic biogeographical region meeting, and these are reproduced in Hopkins & Buck.

reproduction" of the relevant species (Habitats Directive Article 4.1) will need to be determined, for example, by expert opinion.

If a site's features are seen to be in average or partially degraded condition then an evaluation of how possible it would be to restore the features to a well conserved condition needs to be made.

Monk Seal *Monachus monachus* – **Example of site selection rationale**

A Life-Nature project conducted fieldwork in four areas recognised as important strongholds for the monk seal population in Greece. Monitoring actions and fieldwork were undertaken enabling an estimation of the population size, an inventory of biotic and abiotic factors, an identification of threats and an assessment of the importance of each site.

Of these four sites, **two key sites** were identified on the islands of *Kimolos-Polyaigos* and *Karpahos-Saria.* Together these sites represent over **10% of the world population** and therefore are important conservation areas both nationally and internationally.

Based on these results, the island of *Kimolos* was included into the neighbouring Natura 2000 site of *Polyaigos* due to its importance for monk seal breeding habitats. The *Karpathos-Saria* island complex has now also been designated as a Natura 2000 site

See Appendix 4 for more details.





source: www.alonissos.com/ monk_en.htm

Example of site selection for Harbour porpoises (*Phocoena phocoena*) in the German EEZ of the North Sea

(Krause et al. 2006)

In application of the criteria of Art. 4.1 of the Habitats Directive only one pSCI in the German EEZ of the North Sea was identified and in major parts delineated for Harbour porpoises. The identification and demarcation was possible using the three criteria of the "ad hoc" meeting convened by the EC (EC 2001) (see text) and one additional: high proportion of sensitive behaviour, i.e. resting.

Selection Principles:

(1) **Data collection**: Harbour porpoises occurrence, distribution and behaviour was studied by quasi synoptical aerial transect surveys. In areas with higher occurrence of harbour porpoises additional flights with a higher resolution of line transects were carried out.

These data were completed and verified by long time data sets from the observations in the seabird-at-sea database (SAS), observations of local aerial data collections for environmental impact assessments, data from SCANS I, and data from porpoise detectors (POD). The last method was used successfully in the Baltic Sea only.

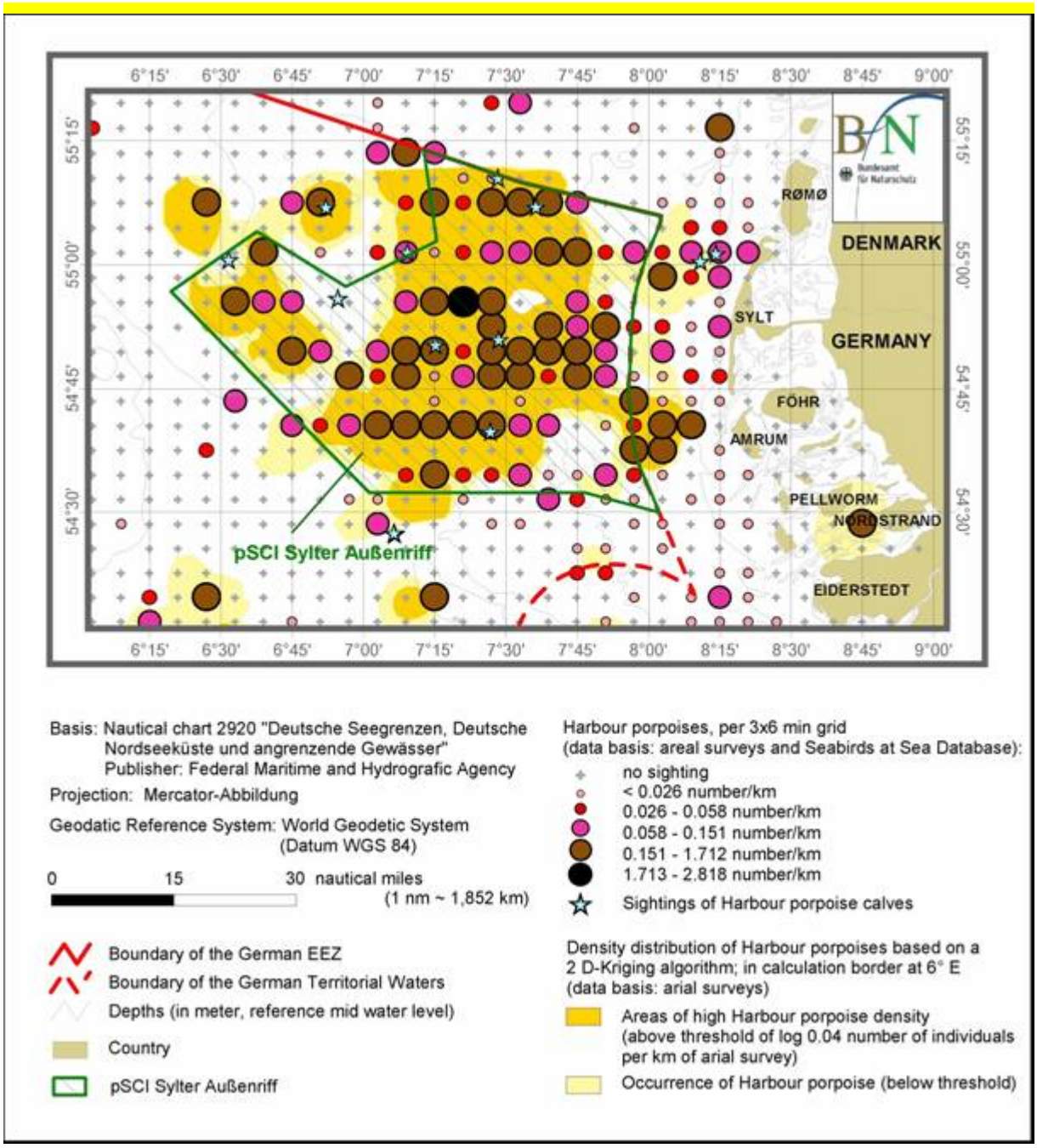
(2) **Species distribution maps.** Harbour porpoise concentrations from May to August (reproduction time) were modelled by geo-statistical methods, based on variogram analysis and ordinary kriging, and were visualised as distribution maps in a GIS:

(3) **Concentration areas:** Concentration boundaries were identified by using density threshold suggested by a marine mammals expert (log 0.04 per km² transect).

(4) **Population size estimation:** Within the pSCIs and for the whole German North Sea the population size was calculated and the proportion of harbour porpoises within given borders was estimated.

(5) **Selection and demarcation:** Only one concentration site with an up to 10 fold higher population density of harbour porpoises during the important time span for reproduction was selected. Demarcation of this pSCI was mainly according to the density gradient of harbour porpoises. However, also the distribution of the habitats "sandbanks" and "reefs" were important delineation criteria.

Finally the boundary lines were simplified and straightened in order to ensure simple and secure marking of sites at sea. In most of the other German pSCIs harbour porpoises occur regularly, but were registered in EU data forms as "present" only, because their population density do not fulfil the criteria named in Art. 4.1.



4.4.3. Isolation of species populations

This is an approximate measure of the contribution of a given population to the genetic diversity of the species and of the fragility of the specific population at the site being considered (EC 1995). Using a simplistic approach, the more isolated a population is, the greater its contribution to genetic diversity of the species concerned. Consequently, the term 'isolation' should be considered in a wider context, applying equally to strict endemics, to subspecies, varieties or races, as well as sub-populations of a meta-population (97/266/EC). In this context, the following grading should be used:

A: population (almost) isolated;

B: population not isolated, but on margins of area of distribution;

C: population not isolated within extended distribution range (EC 1995).

Where Annex II species populations are too small to be naturally viable, or where they occur only as vagrants, Member States may exclude them from consideration for site selection.

4.4.4. Global assessment

This criterion is used to sum up the previous criteria and also to assess other features of the site thought to be relevant for a given species using best expert judgement (EC 1995). Such other features may vary from species to species and might include human activities on the site or in nearby areas which are capable of influencing the conservation status of the species, land management, the statutory protection of the site, ecological relations between the different types of habitats and species, etc. (97/266/EC).

4.4.5. Additional selection principles

Additional selection principles, such as those outlined below which were developed at Biogeographical Region meetings[49], may be used to assist in the site selection process.

- Priority/non-priority status (see Habitats Directive Article 1 (d) and Annex II);
- Geographical range (see Articles 1 (e) and 3.1);
- Special responsibilities (see Article 3.2);
- Multiple interest (Annex III Stage 2.2(d));
- Rarity;
- Ecological coherence of the Natura 2000 network(Annex III Stage 2.2)

These criteria are in principle very useful, but in practice it is often very difficult to compare different areas on a quantitative level, as there may be lack of data from some areas, and more importantly, data collected by different methods (ship-based and aerial surveys, incidental sighting, passive acoustic monitoring etc.) and under different conditions (time of year, sea state, trained vs. untrained observers etc.). There is a great need for coordinated efforts in the direction of collecting quantitatively comparable data, such as SCANS and SCANSII. Coordination needs to be at both national and trans-national levels.

4.5. Identifying Special Protection Areas for seabirds and other waterbirds

Articles 4.1 and 4.2 of the Birds Directive require Member States to classify "the most suitable territories in number and size as special protection areas" for those bird species included in Annex I of the Directive and also for regularly occurring migratory species of bird, taking account of their protection requirements at sea as well as on land.

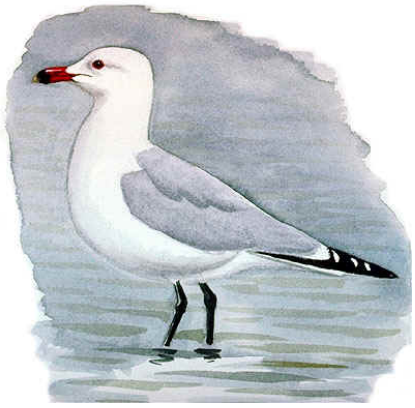
Breeding colonies of seabirds and coastal, wintering or resting areas for waterbirds on migration are clearly among the 'most suitable territories', and are relatively easy to identify. However, a variety of Annex I and migratory birds use benthic and pelagic habitats, from the sea bed through the water column to the sea surface, in areas near and distant from the coast, for a variety of purposes, including feeding, resting, and moulting. Such usage occurs throughout the year, and areas of particular importance need to be considered for inclusion in the Natura 2000 network as Special Protection Areas (SPAs).

[49] E.g: Hopkins JJ & Buck AL 1995 The Habitats Directive Atlantic Biogeographical Region. Report of Atlantic Biogeographical Region Workshop, Edinburgh, Scotland, 13-14th October 1994. Joint Nature Conservation Committee Report 247, Peterborough, 31pp

Box A. A complementary approach to the identification of SPAs.

BirdLife International (2004) has prepared a document proposing a general approach to the identification of marine areas that are important for the conservation of birds in Europe. It is included in appendix 4.1 of this guidance document.

Relevant issues for the identification of IBAS as boundary definitions and the use of Marine Classification Criterion are well covered.



Birds are observable on the sea surface for much longer time periods than is the case for those marine species accorded special protection under the Habitats Directive. However, some of the scientific problems encountered when attempting to identify sites for wide-ranging marine mammals at sea are very similar to those that arise when attempting to identify non-coastal marine sites for seabirds and other waterbirds. These relate largely to the scarcity of suitable data for many areas, and of how to robustly determine specific areas ("most suitable" for birds, or "essential to the life and reproduction" of Habitats Directive Annex II species) for species that are highly mobile and may be very widely distributed. In practice, some areas identified for marine species under the Habitats Directive and for seabirds under the Birds Directive are likely to overlap, for example, where they exploit the same food resources or use the same habitats.

For these and other reasons, approaches adopted for the identification of SPAs on land are not easily transferable to the marine environment. Marine habitats, for example, have a greater three dimensional quality. Habitat boundaries are often unseen, may be much more dynamic, both spatially and temporally, and may extend across small to very large scales. Consequently, it can be extremely difficult to define discrete sites, to estimate bird numbers within them, and thereby assess their relative or absolute importance to the birds.

However, seabirds, and other birds that use the sea, distribute themselves in a non-random way when at sea, often showing strong associations with habitat features. These could be the distribution of other birds, marine mammals or other taxa, but also physical and/or biological processes and features. The distribution of prey will clearly be a major determinant of the distribution of feeding birds. Such factors governing bird distribution at sea, along with the biology and ecology of the birds themselves, will also determine the spatial nature of bird concentrations; for example, birds may form large, dense flocks or be more loosely aggregated. The nature of important aggregations will in turn determine the attributes of SPAs such as size and boundary locations.

Therefore, the scales at which seabird and other waterbird dispersion occur in the marine environment vary from very small, tens of metres for example in some non-breeding concentrations of seaduck, to tens or even hundreds of kilometres, such as the dispersion of some procellariids. Nevertheless, at whatever scale, bird distribution will be associated with the distribution of physical habitat features, such as water depth, sea substrate, and other dynamic features such as fronts, as well as biological features such as food resources. So it is

important that where possible, ecosystem processes and functioning be considered when distinguishing such areas because, even if birds use them transitorily (perhaps spending significant periods travelling or at breeding colonies or terrestrial roosts), they may be essential for the survival and reproduction of their populations. That such areas might be used only seasonally or for a short time does not diminish their importance. If Annex I or migratory species occur in numbers that satisfy site selection criteria (see below), then this should be sufficient to determine qualification of the site for SPA status, irrespective of whether the species are accorded special protection under any other international instruments.

However, the process of identifying SPAs in the marine environment will vary among Member States, although the general principles to be applied will be very similar. Application of these guidelines will be determined *inter alia* by the physical and biological nature of the sea territory of each Member State and the bird complement it hosts.

4.5.1. Designation of SPAs: Court of Justice clarifies some Member States' duties

Member States are obliged to classify as Special Protection Areas (SPAs) all the sites, which applying ornithological criteria, appear to be the most suitable for the conservation of bird species listed in Annex I of the Birds Directive. This is the key conclusion of the Court of Justice in its landmark judgement, delivered on 19 May 1998[50], in this important test case for the implementation of the directive. It upheld the Commission's claim that a Member State had clearly failed to classify a sufficient number and area of SPAs.

This case focused on the key duty under Article 4(1) of the directive for the protection of endangered and vulnerable bird species. This requires Member States to '*classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this directive applies*'. It was the first time that the Court was confronted with a case relating to the overall nature of the duty to classify SPAs.

This and other judgements have confirmed the importance of ornithological criteria. Scientific criteria for identifying important bird sites had already been elaborated as early as 1981 when the first inventory of important bird areas in the European Community was prepared. During the 1980s the European Commission had also set up a working group, which led to the identification of Community-wide criteria for the selection of SPAs.

The Commission, whilst fully recognising that other conservation measures are required for many Annex I birds, including wider land or waterside measures for dispersed species, argued that these cannot be a substitute for classifying the most suitable territories as SPAs. This failure to classify effectively meant that such areas would not be subject to the protection regime, now defined in Article 6 of the Habitats Directive2, that applies to all SPAs.

[50] Case C-3/96, Commission v Netherlands, supported by Germany. http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-3%2F96&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100

Main conclusions of the Court

The judgement of the Court of Justice in case C-3/96 includes the following key elements:

- Article 4(1) of the directive requires Member States to classify as SPAs the most suitable territories in number and size for the conservation of the species mentioned in Annex I, an obligation which it is not possible to avoid by adopting other conservation measures
- economic requirements mentioned in Article 2 of the directive may not be taken into account when selecting an SPA and defining its boundaries.
- the margin of discretion that Member States have in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I of the directive .
- consequently Member States are obliged to classify as SPAs all the sites, which applying ornithological criteria, appear to be the most suitable for conservation of the species in question
- the IBA inventory, though not legally binding on the Member States concerned, represents a list of sites of great importance for the conservation of wild birds in the Community.
- in this case the IBA 89 had proven to be the only document containing scientific evidence making it possible to assess whether the defendant State had fulfilled its obligation to classify as SPAs the most suitable territories in number and area for the conservation of the protected species.



Sterna dougallii:[51]

Photo: Bretagne Vivante. LIFE98 NAT F 005250

[51] *Sterna dougallii* is a Bird species listed in Annex I of the Birds Directive ES: Charrán rosado FR: sterne de Dougal; DK: Dougalisterne; DE: Rosenseeschwalbe EN: Roseate tern

CRITERIA USED FOR THE 1989 Inventory of Important Bird Areas (IBA)

Breeding sites

1. Sites supporting 1% or more of the breeding pairs of the biogeographic population.
2. If 1) is not appropriate (e.g. the biogeographic population not known, 1% criterion too high to select important sites), criteria have been based on the specific characteristics of dispersion and habitat preferences of the species
3. If 2) also impossible, all sites with proved breeding (this applied to six very poorly known seabirds only: *Bulweria bulwerii, Puffinus puffinus mauretanicus, Puffinus assimilis, Pelagodroma marina, Oceodroma leucorhoa*, and *Oceodroma castro*)
4. Sites of particular importance for marginal or isolated breeding populations, with criteria based on specific characteristics of dispersion and habitat preferences of the species
5. All regular sites of rare or endangered species or sub-species; or small or endangered distinct biogeographical populations: c.2,500 pairs. (for some colonial species a level of five pairs is used to exclude irregular breeding sites).
6. For widely dispersed species, sites are selected on the basis of high densities or good numbers
7. Regular sites for significant numbers of three or more Annex I species

Sites other than breeding sites

8. Sites having 1% (at least 100 individuals) of the flyway or biogeographical population of one species
9. Sites having (at least) 20,000 waterfowl or 5,000 birds of prey on passage during a migration season
10. Sites with particular importance for marginal populations, with criteria based on specific characteristics of dispersion and habitat preferences of the species
11. Sites which hold 5 (gregarious species 25) individuals of rare and endangered species or sub-species or small and endangered biogeographic populations (less than 10,000 individuals in number).
12. Sites regularly holding significant numbers of three or more Annex I species

Sites were also included if they were amongst the 100 most important in the Community, or among the five most important in a region of the Community for Annex I species or sub-species.

4.5.2. Species for which SPAs should be considered

Broadly, there are two categories of Annex I and migratory species for which SPAs should be considered – seabirds and waterbirds. In Europe, seabirds include species in the following families:

Procellariidae (fulmars, petrels, shearwaters)
Hydrobatidae (storm-petrels)
Sulidae (gannets)
Phalacrocoracidae (cormorants)
Stercorariidae (skuas)
Lariidae (gulls)
Sternidae (terns)
Alcidae (auks)

Waterbirds comprise species in the following families:

Gaviidae (divers)
Podicipedidae (grebes)
Anatidae (ducks)

In addition, it may be necessary to consider Phalaropodinae (phalaropes), whose members make significant use of the marine environment.

A list of species that occur in European marine waters for which SPAs need to be considered is presented in Appendix 2 of this Guidelines document (Table 3). Most, if not all, of these species may be considered to be migratory, thereby justifying their consideration for SPAs at sea. The dispersion scales at which these species migrate seasonally will vary both among and within species. Table 3 of appendix 2 indicates those species included in Annex I of the Birds Directive, and also attempts to indicate the scales over which these species might typically be aggregated when not migrating. Every species potentially might be dispersed from small to very large scales, depending on various environmental and other conditions. In highlighting likely dispersion scales, the Table merely attempts to allow some preliminary assessment of the types of SPA that might be appropriate for the species; a comprehensive assessment in the context of the species ecological requirements and known dispersion patterns must be undertaken in order to fully identify potential types of SPA.

Of course, the list of species in Appendix 2, table 3 may not be exhaustive, and it does not preclude from consideration other potential qualifying seabird or waterbird species that use the marine environment.

4.5.3. Types of SPA

Sites selected as SPAs should be clearly identifiable, which renders it necessary to identify discrete aggregations of seabirds and waterbirds, or indeed discrete patches of habitat that are essential for the survival and reproduction of the species. As these aggregations are scale-dependent (spatially and/or temporally), governed by the species' ecology and biology, various types of bird aggregation may be identifiable. Table 3 in Appendix 2 indeed suggests that different sorts of SPAs are necessary for certain species of seabird and waterbird. Similarities in ecological requirements across species, perhaps within families or other taxonomic groups (but not necessarily), enable the identification of four broad types of possible SPA:

i) Extensions of existing terrestrial SPAs into the marine environment. In many cases, it is appropriate to extend existing coastal and island seabird colony SPAs into the marine environment because the birds already protected within these SPAs make extensive use of the waters adjacent to colonies (out to varying distances from the colony) for a wide range of purposes. This may include important inshore feeding areas in the breeding season for species such as divers, and species-specific seasonal concentrations, such as "rafting" Manx and Cory's shearwaters *Puffinus puffinus* and *Calonectris diomedea* in the breeding season;

ii) Areas hosting concentrations of certain species of birds usually, but not necessarily, in the non-breeding seasons, typically in shallow, coastal and inshore waters. For example, many species such as seaduck, divers and grebes form large aggregations outside the breeding season at predictable locations for resting, moulting and feeding. In some cases aggregations of these species may be catered for by extensions of existing terrestrial SPAs supporting assemblages of non-breeding waterbirds;

iii) Offshore areas hosting concentrations of seabirds. Throughout the year seabirds use the seas around Europe for many purposes, notably feeding. If important foraging areas for pelagic species, which might include highly productive fronts, currents, shelf-break areas, gyres and eddies, and upwellings, can be defined then these should be considered for SPA classification. Such areas might be quite distant from breeding colonies and it could be that such concentrations of birds are aggregated at scales too large to allow identification of discrete sites. However, the extent to which these (large-scale) aggregations of birds occur

regularly and comprise sufficient numbers of birds and species to merit SPA status requires considerable attention; few relevant analyses of existing data have been conducted;

iv) Migration hotspots. For some species, it may be necessary to consider areas where birds gather or travel in significant and regularly occurring concentrations during migration. Such areas could be migration staging posts, bottlenecks or pathways that are crucial for the survival of the species.

4.5.4. Data sources for SPA identification

In common with SACs under the Habitats Directive, analytical aspects of the SPA identification process, including issues of data quality, must be considered with respect to the final outcome of that process. Conclusions need to be sound, as far as possible objectively determined, robust to challenge, and reached using repeatable methods.

Identification of marine SPAs should always be at least partly data-driven, and very often will be entirely determined by analysis of (survey) data. For many species of pelagic seabirds, limited information exists on their habitat requirements and other factors governing their fine scale distribution, thereby rendering it difficult to predict where birds occur. However, many appropriate survey data have already been collected in the seas of north-west Europe and the sorts of data needed to enable a range of approaches to be adopted are relatively easy to collect. It is likely that data will derive from sampling and that further manipulation and analysis will be required to inform SPA identification (see below).

As in the terrestrial environment, the best available data should always be used for the SPA identification process, and treatment of these data should follow as far as possible strict scientific protocols. Site determination may be derived in a variety of ways, from *ad hoc* analyses of existing data to customised analyses of especially collected data. The quality of data needs to be assessed. Several factors are pertinent to the assessment of data quality, among them:

i) experience of observers to minimise errors in the estimation of numbers of birds and in species identification;
ii) survey/study design; data from systematic as opposed to casual or opportunistic surveys and observations are likely to be of higher quality, for example in avoiding over- or undercounting arising from bird movement;
iii) spatial and temporal extent of survey; an assessment of whether all parts of an area suitable for the birds should be made in order to identify possible bias or incompleteness, and allow proper determination of site boundaries. This assessment should include whether the count was made from land, aircraft or ship;
iv) sampling bias; an assessment may be required of the representativeness of samples; for example biased sampling of an area will result if surveying follows transect lines that are oriented parallel to important linear habitats, such as elongated banks, river channels, or some oceanographic fronts;
v) survey or recording conditions; some study results might have been affected by unusual events such as poor weather or a pollution incident;
vi) atypical behaviour of birds; it is important that the behaviour or dispersion of birds is not affected by survey platforms, such as low-flying aircraft, or by invasive techniques such as transmitter or logger attachment;

and the results of early manipulations of the data also need to be treated equally cautiously, for example in:

vii) derivation of population estimates; whether a population estimate derives from a complete count or from sampling may affect the likely accuracy of the estimate;
viii) robustness of population estimates; it may be possible to derive more than one population estimate from a single survey. When this is the case, the most robust population estimate should be used.

Any data considered inadequate for population estimation or for determining dispersion patterns must be treated as such, although it may still be useful in determining the need for more detailed or structured survey work in a particular area. Again, it is difficult to be prescriptive here; there are probably limitations attached to most studies. For example, a well-planned and well-executed aerial sampling survey using experienced observers and distance estimation should yield good population estimates, but additional information may be needed from land-based or boat-based surveys to supply accurate species identification or to count inconspicuous species or those close to the shore. In some situations (e.g. small or enclosed sites), boat-based or systematic land-based surveys might provide better population estimates.

As far as possible data should derive from systematic data collection conducted at appropriate scales, over appropriate time periods, and using robust methods. If lower quality data only are available, they must be used with appropriate caution. To reiterate, the quality of all data must be assessed and the degree to which they are appropriate for SPA determination should always be formally assessed; consideration should be given to the collection of new, better-quality data. However, a careful balance will need to be struck between seeking 'perfect data' and ensuring an area of known importance is afforded SPA protection as soon as practicable. Lack of 'perfect data' should not be argued to delay. Opportunities should be identified to make use of existing surveys to supplement data gaps.

The following table indicates the possible sources of data suitable for the identification of different types of SPA outlined above. Table on next page summarises the availability of data on the dispersion of seabirds and waterbirds in Member States.

Sorts of data that might typically be used in the identification of different types of marine SPAs.

Type of SPA / **Type of data**	**Marine extensions to existing colony SPAs**	**Inshore aggregations of birds usually outside the breeding season**	**Offshore aggregations of seabirds**	**Migration hotspots**
Customised aerial transect	Yes	Yes	Possibly (highly clumped aggregations)	No
Customised boat transect	Yes	Yes	Yes	Possibly
Existing at-sea survey data (e.g.	No	Yes (offshore)	Yes	No

European Seabirds at Sea data)				
Telemetry (radio/satellite)[1]	Yes	Yes	Yes	Yes
Bio-logging	No	Possibly	Yes	Yes[5]
Radar	No	Possibly (inshore)	No	Yes[2]
Land-based sightings	Yes	Supplementary information only[3]	Supplementary information only	Yes (partially)[4]

[1] The relative costs of different methods vary, but satellite or other tracking of individuals provides good data for (typically) few birds at considerable cost, so should not be considered unless other methods prove unsuitable. However, for certain species and specific questions this may be a very apt technique.

[2] Radar surveys can provide specific information on migration pathways, but this is a labour intensive and costly method suitable only for use in certain types of areas.

[3] May be a principal source of data for some enclosed coastal sites or where the broad distribution of target species is confirmed by boat or aerial survey to be within the range of land-based surveyors.

[4] As for Inshore aggregations.

[5] GPS loggers are capable of establishing migration corridors or bottlenecks

The availability of data on the dispersion of seabirds and water birds in each Member State.
Broad scale data availability or survey coverage throughout most of Member State's waters (out to EEZ/200nm or Continental Shelf)

Type of data	B	CY	D	DK	E	EST	F	FIN	GB	GR	I	IRL	LT	LV	M	NL	PL	P	S	SL
Customised aerial transect	Yes		Yes	Yes			Yes[8]		Yes[1]							Yes		Yes		
Customised boat transect	Yes		Yes	Yes	Yes[7]		Yes		Yes[1]							Yes		Yes		
Existing at-sea survey data (e.g. European Seabirds at Sea data)	Yes		Yes	Yes			Yes[9]		Yes[2]							Yes		Yes		
Telemetry (radio/satellite)	No		No	No	Yes[7]		Yes[10]		Yes[3]							No		Yes		
Radar	Yes		Yes	Yes[6]					No							Yes[5]		Yes		
Land-based sightings	Yes		Yes	Yes	Yes[7]		Yes		Yes[4]							Yes		Yes		

[1] UK: only for areas of known wintering bird concentrations; survey is ongoing
[2] UK: database collated for North Sea and parts of Atlantic ocean, database contains data over 25 years
[3] UK: only for a small number of species (Manx shearwater *Puffinus puffinus*, red-throated diver *Gavia stellata*)
[4] UK: from popular coastal areas
[5] NL: near potential windfarms
[6] DK: near potential windfarms
[7] ES: Occasional data from previous survey. Recently survey is ongoing.
[8] FR: the most efficient technique for large areas
[9] FR: Data available for the south-west of France
[10] FR: only for very small number of few species (Cory's shearwater)

4.5.5. Data treatment for SPA identification

SPA identification will most likely be made using distribution and abundance data of birds within study areas. Much of the time these will be existing data, and this will apply largely in those Member States where there is a long history of data gathering. Typically, however, the data will have been collected for purposes other than SPA identification, so they will demand to be analysed in support of SPA identification differently from the ways originally envisaged (and often in novel ways). Similarly, existing data may often be sample data that do not readily act as indicators of total population sizes. In addition, the resolution at which these data have been collected will usually be at a scale too coarse to readily determine site boundaries. Of course, where appropriate data exist these should be used. Care should be taken to ensure the scale at which boundaries are determined reflects the spatial scale at which the qualifying species use marine habitats over time – spatial distribution can vary greatly diurnally, seasonally and between seasons.

Provided existing data are of sufficient quality and quantity, however, it is appropriate that they be used as the basis for further modelling and analysis in order to assess site qualification (in terms of numbers of birds present), as well as boundary determination. Statistical and spatial modelling techniques may also be enhanced by the inclusion of habitat and other environmental data as co-variates within models of bird dispersion. However, if simple count and localised data are adequate to determine the boundary of a site, additional modelling may not be required.

Several modelling techniques exist or may be readily adapted to further interpret bird dispersion data, from simple geographical, through statistical and spatial modelling, or a combination of two or more techniques. In addition to assessing data quality (see above), it is imperative that the data requirements of all statistical and modelling tools applied, including assumptions regarding the underlying distribution of the data, be observed. Whether estimating population size or determining the spatial extent of bird distribution (see below), violations of all test and other methodological constraints should be avoided. However, if it proves necessary to relax test requirements, through lack of data for example, this should be explicitly recognised and the possible consequences for the analysis identified.

Any analysis of marine bird dispersion data should aim to identify potentially suitable areas of high density (or 'hotspots'). In the absence of co-variate data, spatial interpolation methods of various kinds, which apply the inherent spatial structure of observed bird dispersion at a finer resolution throughout the area surveyed, such as kriging (see Boxes E, F), are appropriate Where co-variate data are available, for example habitat information, other modelling tools would also be appropriate, tools that might allow extrapolation of the bird dispersion data to areas outwith the area surveyed.

Whereas most data on the distribution of birds at sea comes from boat-based and aerial surveys, increasingly more data derives from remote (radio and satellite) tracking and biologging. Protocols for the application of such data need to be developed (see Box B). Although methods for the identification of core areas of use have been outlined in BirdLife (2004), some of them, such as kernel analysis, need to be applied with care (Hemson *et al*. 2005) and certainly in consistent ways across relevant research in support of SPA identification. Analytical techniques should be applied at all stages in the determination of site qualification and boundary definition.

Box B. Important Bird Areas for seabirds (marine IBAs) in Spain and Portugal – a multi-faceted approach using novel methods


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Between 2004 and 2008, BirdLife International partners in Spain (SEO) and Portugal (SPEA) are conducting two strategic Life-Nature projects to contribute to the implementation of the Birds Directive in the marine environment. The projects will develop a methodology for the analysis of the spatial distribution of offshore and pelagic species. This will be based on the newest methods in marine ornithology (BirdLife International 2004) deriving from telemetry data, density distribution maps, and kernel analysis to identify the areas that birds use most intensively

The projects are carrying out detailed inventories, using objective methodological criteria to determine Important Bird Areas (IBA) at sea for those seabird species listed in Annex I of the Birds Directive that occur in Spanish and Portuguese marine waters, which includes some of Europe's rarest bird species, such as the globally threatened *Puffinus mauretanicus, Pterodroma madeira and Pterodroma feae*, and many seabird species that are of conservation concern, e.g. *Calonectris diomedea*, *Puffinus assimilis, Larus audouinii* and *Sterna sandvicensis*.

The inventory will include a characterisation of the Portuguese and Spanish EEZs, and a detailed characterisation for each IBA, with GIS geo-referenced cartography, and a description of the main threats affecting it. To achieve this, the relationship between oceanographic data and the presence/absence of seabirds will be studied. Monitoring of certain species will be carried out through satellite (*Calonectris diomedea* and *Larus audouinii*) and radio tracking (*Bulweria bulwerii*, *Puffinus assimilis*, *Oceanodroma castro),* survey of coastal waters, analysis and mapping of ringing recoveries in Spain and Portugal, and the creation of a database of beached birds. The identification and generic sampling of the most favourable areas is being carried out based on the oceanographic characteristics of the areas concerned.

The combination of these methods will provide evidence on the key areas for seabird conservation (e.g. as foraging grounds). In contrast to gregarious coastal species, pelagic seabirds may depend on less clearly defined areas for their survival. Those areas need to be identified through mostly indirect methods such as telemetry as traditional methods of counting bird aggregations (e.g. Skov *et al.* 1995) cannot be used for these species.

All European globally threatened seabird species live in Portuguese and Spanish waters. Their behaviour at sea is poorly known and the methodologies used to track them are still under development. Both the SPEA and SEO projects will cross-check data from direct observations at sea (boats, plane surveys) with the seabird-tracking data. However, seabird densities at sea may be far lower than those recorded in the northern seas. A standard methodology for the identification and delimitation of IBAs at sea, based on standardized and quantitative criteria, will be developed; this could be used to identify IBAs off other countries, thereby improving the protection at sea for truly pelagic seabirds.

4.6. Site selection rationale for SPAs

While Article 4 of the Birds Directive does not offer precise criteria for SPA selection, some Member States have produced specific guidance for SPA selection. Selection guidelines should be clearly defined, based on scientific principles, agreed judgements, and easily applied. The aim here is to offer guidelines for the identification of marine SPAs and not to offer prescriptive rules to be applied among all Member States. However, application of selection guidelines within individual Member States should follow a procedure as prescriptive as is feasible, one that is tailored to the individual Member State's requirements.

Present guidelines for the establishment of SPAs in the marine environment aim to be consistent with established guidelines for the terrestrial environment, and be formulated with regard to the overall aim of achieving ecological coherence of the SPA and wider Natura networks as a whole.

The achievement of ecological coherence is likely to be an iterative process, both within and among Member States. The principles of coherence should be based upon knowledge of the ecology of all Annex I and regularly occurring migratory species and should also aim to include consideration of functional assemblages of species.

Understanding the protective requirements of the species (as required by Article 4) is an essential step in deciding what level of contribution the SPA network should make to the conservation of each of the species covered by the Directive requiring SPA designation.

Stroud et al (2001) suggest that the species for which the highest proportions of species' populations should be located within a protected area network are those which:

- occur locally in high densities (congregatory species);
- occur, to a large extent, on natural or semi-natural habitats;
- show predictable occurrence at particular sites regularly between years (i.e. species that are not irregular or dispersive);
- have restricted national or international ranges; or
- have small national or international population sizes.

It will be essential to understand the ecological requirements of each species before deciding on the best approach to adopt for each stage of its life cycle. This is particularly true of some seabird species that do not congregate in the same way some waterbird species do, but are likely to occur at sea in higher densities at predictable spatial and/or temporal scales. In respect of foraging birds from seabird colonies, care should be taken to ensure they do not have to qualify twice for SPA designation i.e. once for the breeding colony and once for foraging areas during the breeding season.

Foraging seabirds from a breeding colony are a good example of where traditional percentage thresholds e.g. 1%, should be applied with care, as they may not always give the best indication of whether a particular seabird species is amenable to a site-based approach for part of its life cycle. For example, only one-third of a breeding guillemot colony typically forages at any one time and so may never form congregations of 1% or more of its biogeographic or national population. Yet, it may form feeding concentrations that are spatially stable and predictable in occurrence between years that merit protection to ensure the ecological requirements of a particular breeding colony SPA are secured.

Therefore, assessing the protective requirements of each seabird species will require careful consideration of its ecological requirements and its behavioural characteristics during the different stages of its life cycle.

For example, in the UK, site selection follows a two stage process (Stroud *et al*. 2001). The initial stage, Stage 1, aims at the identification of suitable territories through the application of selection principles based on the objective assessment of the relative numerical importance of the bird populations under consideration. If application of Stage 1 guidelines fails to identify an adequate suite of sites for the conservation of a species, then, Stage 2 judgements must be applied.

Stage 1 Guidelines

Application of Stage 1 guidelines depends on the availability of adequate data for the relevant populations and species being considered for protection within SPAs. If sufficient data are available then important populations should be identified by placing them in an appropriate context.

UK example of Stage 1 guidelines for qualification of areas as SPA

An area qualifies as an SPA if:

(1) it is used regularly by 1% or more of the Great Britain (or all-Ireland) population of a species listed in Annex I of the Birds Directive in any season;
(2) it is used regularly by 1% or more of the biogeographical population of a regularly occurring migratory species (other than those listed in Annex I) in any season;
(3) it is used regularly by more than 20,000 waterfowl (as defined by the Ramsar Convention) or 20,000 seabirds in any season.

Again, Denmark applies very similar Stage 1 guidelines that suggest that an area qualifies if:

(1) it is used regularly by 1% or more of the national population of an Annex I species,
(2) it holds a density of an Annex I species that is more than three times the national average for that species;
(3) it is used regularly by 1% or more of the flyway population of a migratory species;
(4) it holds a density of a migratory species that is more than three times the national average for that species;
(5) it is used regularly by more than 20,000 waterbirds in any season.

In these contexts, "regularity" should be operationally defined. For the most part, the Ramsar definition has been applied:

(1) the requisite number of birds is known to have occurred in two thirds of the seasons for which adequate data are available, the total number of seasons being not less than three; or
(2) the mean of the maxima of those seasons in which the site is internationally important, taken over at least five years, amounts to the required level (means based on three or four years may be quoted in provisional assessments only).

In certain cases, for example for species that are particularly rare or in very remote areas (such as might particularly apply in the marine environment), hotspots might be identified on the basis of fewer data (see Stroud *et al*. 2001).

Population estimates used in the assessment of the importance of potential SPAs should ideally be derived from robust censuses and/or analyses (see above). The basis for designation will naturally be based upon the best available data. Preferably these will be those covering the most recent five years in each appropriate season, but it may be necessary to consider longer series of data (for example 25 years of UK/ Netherlands/ Denmark/ Germany/ Belgian North Sea seabird dispersion data, or 10 years of Belgian nearshore waterbird data). Use of longer time-series can help address the potential problem of long-term (but possibly cyclical) shifts in distribution. This emphasises the need for adequate marine bird monitoring systems to improve understanding of spatial and temporal variations in distribution.

Overall, such Stage 1 approaches offer repeatable and, as far as possible, objective protocols that result in a consistency of solution that might be important in avoiding or countering subsequent challenge.

Stage 2 guidelines

If application of Stage 1 guidelines does not enable the identification of a suitable series of SPAs for any species, for whatever reason, then Stage 2 judgements have to be made. An area

that meets the requirements of one or more Stage 2 guidelines should be considered for SPA classification. These guidelines may (and do in various Member States) accord favoured consideration on the basis of:

(1) Relative population size and density. Areas that host relevant species of birds in greater numbers or higher densities than others should be favoured for selection;
(2) Species range. Areas selected should provide the widest geographical coverage across the range of a species;
(3) Breeding success. Areas of higher breeding success than others should be favoured for selection;
(4) History of occupancy. Areas of known longer history of occupancy should be favoured for selection;
(5) Multi-species areas. Areas holding the larger number of qualifying species under Article 4 of the Birds Directive;
(6) Naturalness. Areas comprising natural or semi-natural habitats should be favoured for selection over those that do not;
(7) Adverse environmental conditions. Areas used at least once every 10 years by significant proportions of the biogeographical population of a species in periods of severe weather or of other unfavourable conditions in any season and which are vital to the survival of a viable population should be favoured for selection.

4.6.1. Alternative approaches to site selection

An alternative approach that combines Stage 1 and Stage 2 judgements is offered by BirdLife International (BirdLife 2005). This approach aims to identify Important Birds Areas in the marine environment. The relevant criteria are presented in Box D.

Box D. Criteria applied by BirdLife International that are pertinent to the identification of Marine Important Bird Areas (see also Box A)

(1) The site regularly holds significant numbers of a globally threatened species, or other species of global conservation concern;

(2) The site is known or thought to hold, on a regular basis, 20.000 waterbirds or 10.000 pairs of seabird of one or more species;

(3) The site is known or thought to hold 1% or more of a flyway population or other distinct population of a waterbird species;

(4) The site is known or thought to hold 1% or more of a distinct population of a seabird species

(5) The site is one of the 'n' most important sites in a country for a species with an unfavourable conservation status in Europe, and for which the site-protection approach is thought to be appropriate; ("*n" to be defined per country for a given species*)

(6) The site is one of the 'n' most important sites in a country for a species with a favourable conservation status in Europe but with its global range concentrated in Europe, and for which the site protection approach is thought to be appropriate;

(7) The site is known to regularly hold at least 1% of the flyway or EU population of a species considered to be threatened in the EU;

(8) The site is known to regularly hold at least 1% of a flyway population of a migratory species that is not considered to be threatened in the EU;

(9) The site is one of the five most important in the European region in question for a species or subspecies considered threatened in the European Union.

4.7. Site boundaries

While the terrestrial model provides a good basis for the identification and classification of Natura 2000 sites, in the marine environment it must be recognised that there are important differences between the two approaches. These relate to:

Site size The boundaries of a potential Natura 2000 site must be defined to ensure that they provide the basis for adequate protection of the features of conservation interest. Where the protected species primarily occurs should be considered the core area of the site, and should be included within the site boundary. Particularly in the case of designation of SPA, where the nature or scale of the species dispersion results in more loose aggregations, resulting in smaller concentrations disjunct from the core aggregation, the decision whether to include such satellite concentrations within a boundary should be made by reference to the overall size of the qualifying interest. It may also be determined by formal rules relating to the regularity with which the satellites qualify as important over several surveys. All concepts introduced here must of course be defined operationally. For the UK working definitions of "satellite", "regularity" of importance, and "importance", see (Webb *et al*. 2004a, b, c; McSorley *et al*. 2004).

Member States might wish to consider the value of identifying buffer zones around Natura 2000 sites. They are not a legal requirement under the Birds Directive of Habitats Directive, although any activities or developments that are harmful to the qualifying feature and which take place outside the site are still subject to the protection and procedural safeguards of Article 6 of the Habitats Directive[52].

Site Shape. In the marine environment, where sites may be far from the coast, it is preferable to have simple site boundaries, based on "straight" lines and convex polygons, which 'box' the qualifying interests. This approach will simplify future management of the site survey and monitoring, and notification of duties to be carried out by other responsible authorities.

4.7.1. Boundary determination for SPAs

The spatial extent of hotspots or bird interest features for which protection is being established must be defined as far as possible by application of objectively defined criteria. Seaward boundaries of sites, may be defined in various ways, but ideally based on the application of "objective", well-established analytical techniques to species dispersion data, and ideally mapped within a Geographical Information System. For example, they may be delimited by isolines that separate regions where the gradient in bird density meets an agreed or operationally defined threshold (e.g. Garthe and Skov 2004; see Box E).

Example of site selection for seabirds in the German EEZ of the Baltic Sea (Krause et al. 2006)

The identification and selection process of Special Protection Areas in the German EEZ of the Baltic Sea results in a single large SPA of ca. 2.000 km² designated and transmitted to Commission in May 2004. This area is defined by overlapping concentrations of more than half a million seabirds, primarily by the distribution and abundance of divers, Slavonia grebe, red-necked grebe, great crested grebe, black guillemot, red-breasted merganser, long-tailed duck, black scoter, velvet scoter, common scoter and common eider.

[52] ICES report on *Distribution of cold-water corals in the North Atlantic and the relation to fisheries in the North East Atlantic. Cooperative research report Nº262. December 2003*

Selection principles:

(1) **Bird species selection for SPA delineation:** Seabird distribution in the Baltic Sea has been studied by aerial transect surveys and from ships. From the total list of 33 species to be considered for the selection of marine SPAs, eleven species of Annex I and migratory bird species were found to occur regularly in offshore areas of the German Baltic Sea and use distinct aggregation areas.

(2) **Species distribution maps:** These bird species concentrations were modelled by geo-statistical methods, based on variogram analysing and ordinary kriging, and were visualised as distribution maps in a GIS.

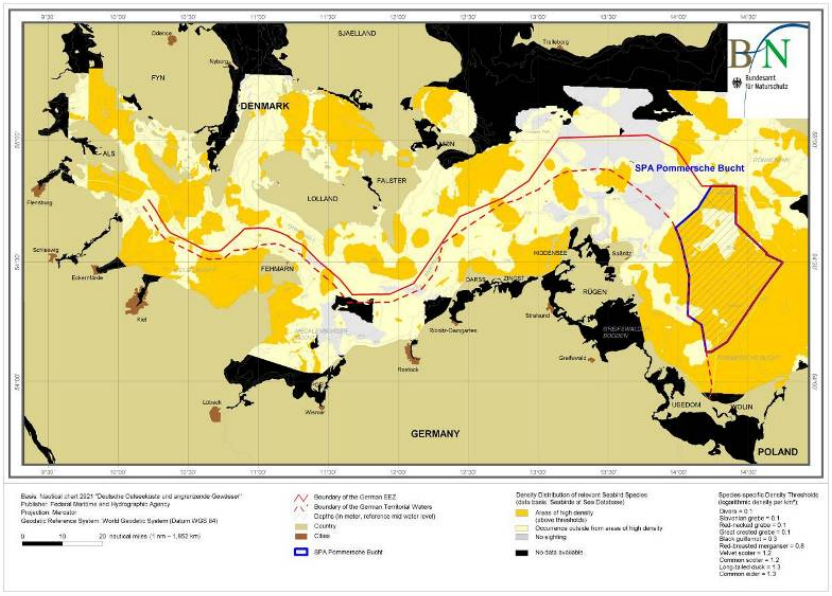
(3) **Definition of important seabird concentrations:** For each of these species, concentration boundaries were identified by gradient analysis (Species-specific density thresholds (logarithmic density per km²) divers 0.1, slavonian grebe 0.1., red-necked grebe 0.1, great crested grebe 0.1, black guillemot 0.3, red-breasted merganser 0.8, velvet scoter 1.2, common scoter 1.2, long-tailed duck 1.3 and common eider 1.3). The density value of the borderlines were used as the species- and season-specific minimum density for each relevant seabird concentration.

(4) **Converting single-species data into multi-species data:** By overlaying the concentration areas of each single species, the most important areas were identified. The respective areas and contour lines were then combined so that a set of areas of potential conservation areas were identified.

(5) **Population size estimation:** Within each concentration area, the mean density and population size for each species were calculated.

(6) **Selection and assessment of SPAs in the German Baltic Sea:** Finally the most suitable areas in number and size for the protection and conservation of species of wild birds that are listed in Annex 1 of the Directive, and of regularly occurring migratory species were chosen. In case of the German EEZ in the Baltic Sea a single large site was sufficient to nominate adequate populations numbers of the relevant Annex I and migratory bird species.

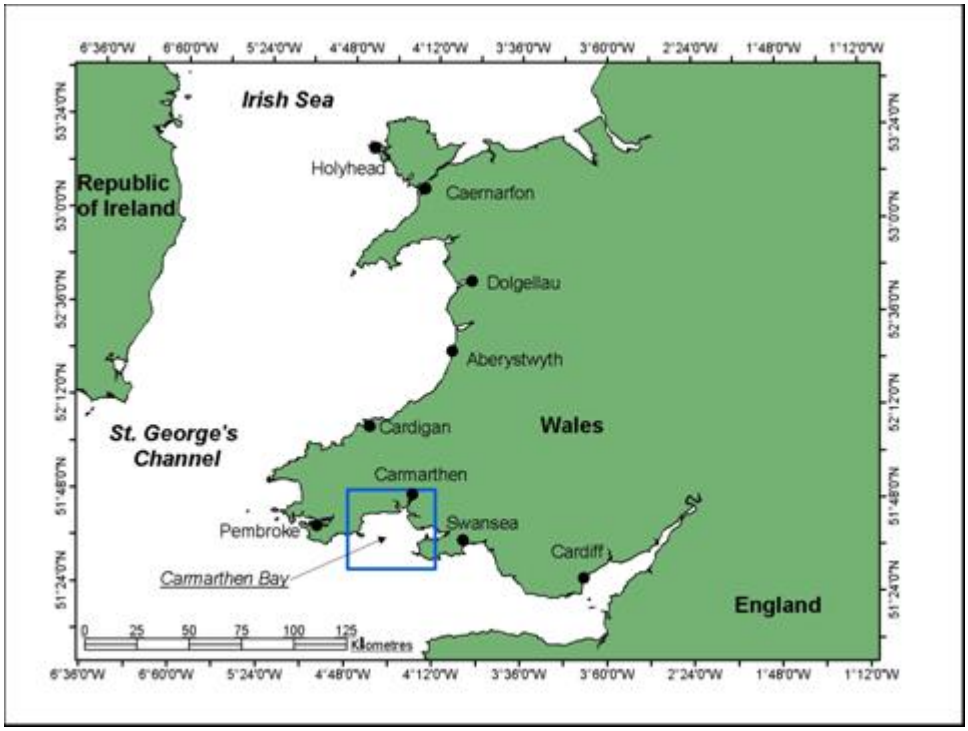
see also : www.habitatmarenatura2000.de



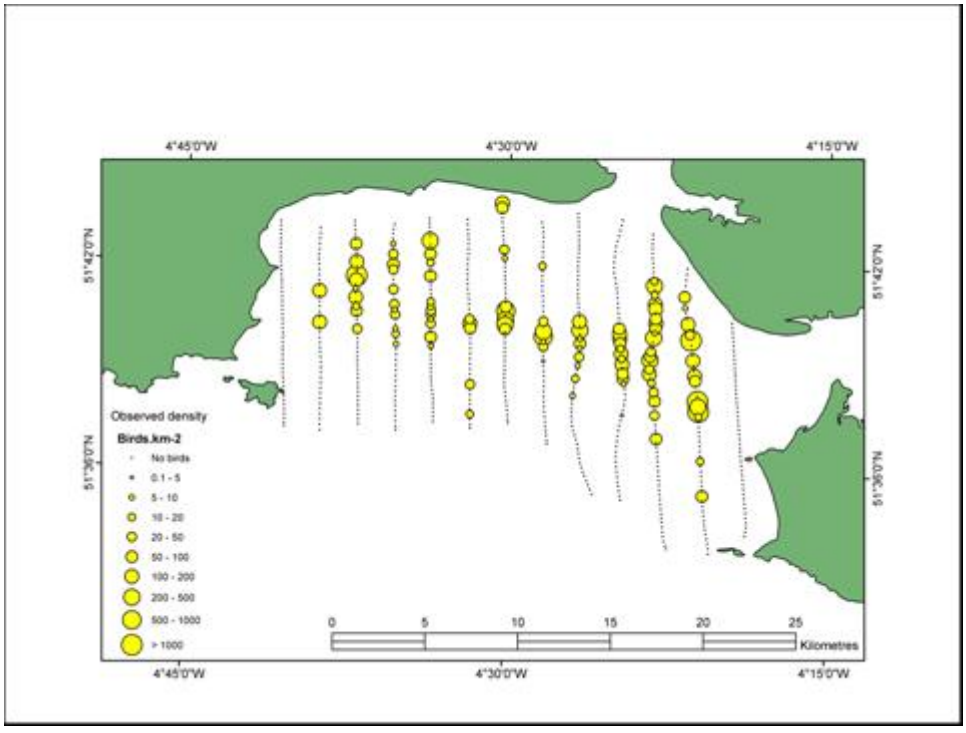
Alternatively, marine SPA boundaries may be identified by that part of the distribution that hosts a similarly agreed or operationally defined threshold of total or total estimated/modelled numbers of birds (e.g. Webb *et al*. 2004a, see Box F).

Box F. Determining the boundary of Carmarthen Bay SPA

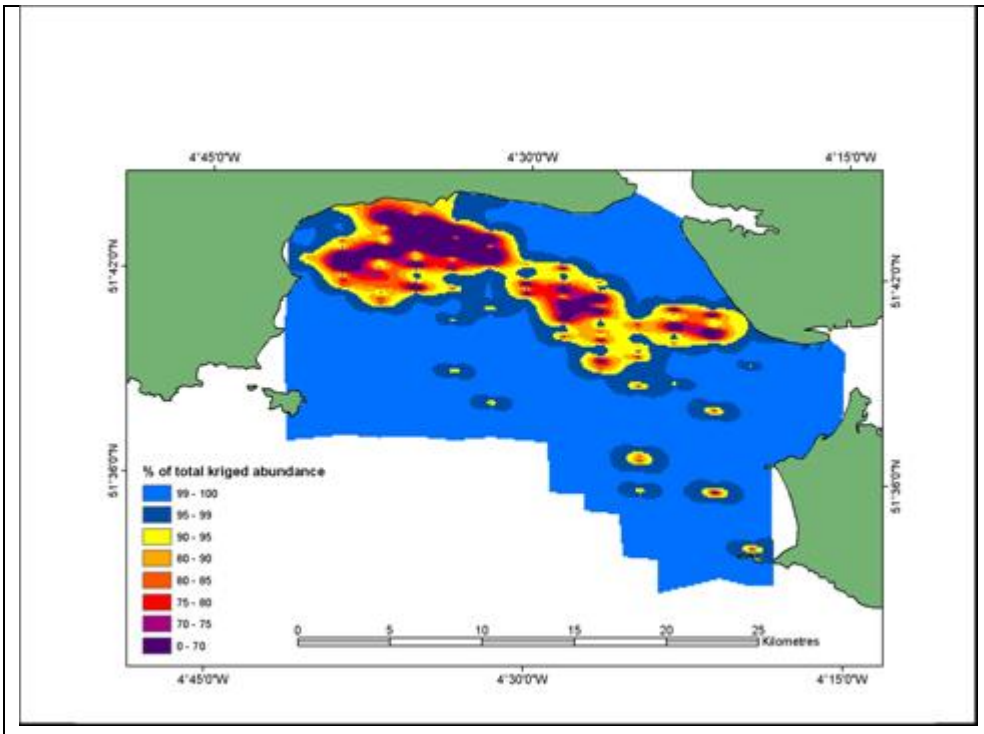
Carmarthen Bay, south Wales, hosts internationally important concentrations of Common scoter *Melanitta nigra* outside the breeding season.



Aerial surveys, deploying a atandardised methodology (Kahlert *et al*. 2000) were undertaken over the area in winter 2001/02. Sampled densities of scoter were converted into total population size using distance methodology (Buckland *et al*. 2001).



Scoter density was modelled throughout the survey area using kriging, a spatial interpolation method based on variography (Cressie 1991).



Recommendations for the seaward boundary of the SPA were made, such that 95% of the modelled population was contained within the boundary. See Webb *et al*. (2004a) for full details of this case study. See also McSorley *et al*. (2004) and Webb *et al*. (2004b,c) for further details of the methods applied in identifying sites and boundaries for inshore concentrations of waterbirds outside the breeding season, including rules for the inclusion of satellite aggregations disjunct from the core aggregation.

Again, boundaries might be identified through analyses of the areas of sea that birds use to a "significant" degree (again operationally defined; see Box G).

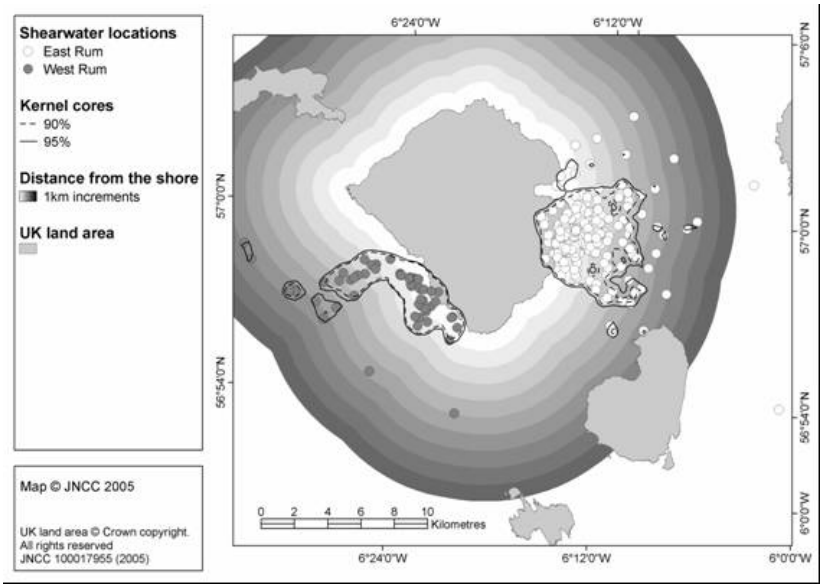
Box G. Determination of possible SPAs for Manx shearwaters *Puffinus puffinus* using radio telemetry.

Radio transmitters were attached to breeding Manx shearwaters at three existing terrestrial breeding colony SPAs in the UK – Bardsey, west Wales, Skomer, south-west Wales, and Rum, west Scotland. These birds form dense flocks ("rafts") on the sea before dusk before entering the breeding colony.





In order to identify likely boundaries for an extension of the existing SPAs into the marine environment, the results from radio-tracking birds in rafts were analysed using kernel analysis. This method aims to define the home range or area of greatest use of animals (Powell 2000).



Recommendations for seaward extensions to the SPA boundaries at these three colonies have been made based on the areas within which the birds appear to spend 95% of their time (McSorley *et al*. 2005). Although an arbitrary proportion 95% seemed a sensible one for three reasons:
a) there was little difference between the 90% and 95% kernels at all three colonies;
b) 95% is a useful analogy with statistical significance (though it should not be confused with that);
c) it accords with other studies.

Of course, site boundaries may be identified with reference to known boundaries of habitats important for the species under consideration, which clearly depends on the availability of such data. Investigations incorporating two or more of these approaches might be particularly fruitful and lead to more robust solutions.

Where SPAs abut the terrestrial environment then the landward boundary placement may be determined by other, more practical considerations that are peculiar to the site.

Clearly, qualifying numbers of birds (see above) will be present in any area of the sea if that area is sufficiently large, so in order to identify more discrete areas, or the most important hotspots for each species, other optimisation techniques may be applicable to dispersion data from surveys, for example an appropriate formulation of the Marine Classification Criterion (Skov *et al.* 1995). The MCC ensures that qualifying numbers of birds are contained within appropriately sized (i.e with regard to the species' dispersive abilities) potential SPAs.

4.7.2. Cross-border SPA boundaries

Boundaries for any SPA that extends into the maritime zones of two or more Member States will require to be the subject of co-operation between neighbouring Member States in order to ensure the integrity of the site and to avoid discontinuities in the boundary of a single feature. There will need to be agreement on the extent of the feature concerned at the junction of the Member State jurisdiction, as well as co-operation between policy makers of the individual States to aim to achieve some consistency of approach on boundary determination. Similarly, co-operation with non-Member States may be necessary, for example in the Baltic with Russia, in the Atlantic with Iceland and Norway, and in the Mediterranean Sea with several non-EU countries

5. MANAGEMENT MEASURES TO PROTECT MARINE NATURA 2000 SITES.

The management of marine Natura 2000 sites may present particular challenges due to the complexity of some sites as well as costs of working in this environment. The decision process of some actions to be implemented beyond the territorial sea may also be complex as more Community or international institutions are involved. On the other hand, the total number of stakeholders in these areas is normally less than in those close to the coast or on land. Adequate management schemes to address the threats and to ensure that conservation objectives are achieved have to be supported by appropriate monitoring systems.

This chapter considers the general management issues that frequently need to be addressed for marine Natura 2000 sites. It outlines the legal context for such management and protection of the sites, as defined in Article 6 of the Habitats Directive and for which the Commission has already provided interpretative and methodological guidance. A possible structure and content format for management plans is presented as a tool to assist in the management of sites and the management planning cycle considered. Different types of pressures on Marine Natura 2000 sites, relevant to the management and protection of sites, are identified and major human activities potentially affecting Natura 2000 sites are considered. This chapter is not exhaustive. Management issues related to fishing activities and Natura 2000 are considered in the following chapter. Several marine management case studies are given in this chapter. More examples and details are provided in Appendix 4.

5.1. The legal basis for protection. Community legislation's provisions in relation to management of ongoing activities and governing plans and projects for future developments.

The 'Conservation of natural habitats and habitats of species' section of the 92/43/CEE Habitats Directive addresses the establishment and conservation of the Natura 2000 network. Within this chapter, Article 6 sets out provisions which govern the conservation and management of Natura 2000 sites. This article has three main sets of provisions

- Article 6(1) makes provision for the establishment of the necessary conservation measures, and is focused on positive and proactive interventions. The main objective is the maintenance or restoration of habitats and species at "favourable conservation status". Article 6(1) complements Article 4(4) of the Directive, which requires that, within six years from the adoption of EC lists of Sites of Community Importance (SCI), Member States designate SCI as SAC and establish conservation priorities. Within the same deadline, Member States must establish the necessary conservation measures involving, where necessary, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural values present on the sites. As for terrestrial based SACs and SPAs, management plans are a useful tool in managing the marine sites and facilitating the achievement of the objectives of Natura 2000.

- Article 6(2) makes provision for avoidance of habitat deterioration and significant species disturbance. Its emphasis is therefore preventative.

- Article 6(3) and (4) set out a series of procedural and substantive safeguards governing plans and projects likely to have a significant effect on a Natura 2000 site.

Within this structure, it can be seen that there is a distinction between Article 6(1) and (2) which define a general protection and management regime and Article 6(3) and (4) which define a procedure applying to specific circumstances.

The protection requirements regarding Special Protection Areas (SPAs) are given in Article 4(4) of Directive 79/409/EEC which provides that, for those areas, '… *Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article …'.*

After the entry into force of Directive 92/43/EEC the above obligations are replaced pursuant to Article 7 of Directive 92/43/EEC which provides as follows: '*Obligations arising under Article 6(2), (3) and (4) of this directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof…'* Thus, the provisions of Article 6(1) do not apply to special protection areas (SPAs). However, analogous provisions apply to SPAs by virtue of Article 4(1) and (2) of Directive 79/409/EEC. As regards the provisions of Article 6(2), (3) and (4), it is clear from the terms of Article 7 that these now apply to already classified SPAs.

The European Commission has published two reference documents on management of human activities in relation to Natura 2000 sites[53]. The first one is entitled *Managing Natura 2000 sites, the provisions of Article 6 of the 'Habitats' Directive 92/43/CEE*. This document aims at providing guidelines to the Member States on the interpretation of key concepts of Article 6 of the 'Habitats' Directive[54]. The second document *Assessment of Plans and Projects Significantly Affecting Natura 2000 sites* provides methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC in relation to assessment of plans and projects significantly affecting Natura 2000 sites (same rules for marine or terrestrial).

Impact assessment: Other relevant legislation governing the process of future development plans or projects likely to have effects on a Natura 2000 site is that relating to the assessment of the environmental effects of these activities. These Directives are:

- Council Directive 85/337/EEC of 27 June 1985 *on the assessment of the effects of certain public and private projects on the environment*[55] (EIA Directive). The EIA procedure ensures that environmental consequences of projects are identified and assessed before authorisation is given. The public and environmental authorities must be consulted on the application for development consent and the environmental information, and the results of these consultations must be taken into account in the authorisation procedure of the project. The public must be informed of the decision afterwards. The Directive defines which project categories shall be made subject to an EIA, the procedure to be followed and the content of the assessment. It has been amended in 1995 and in 2003 (references in footnote)[56]

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53 http://ec.europa.eu/environment/nature/nature_conservation/eu_nature_legislation/specific_articles/art6/index_en.htm

54 Relevant Appendixes include i) Considerations on management plans ii) Considerations of plans and projects affecting Natura 2000 sites, iii) Standardized forms for submission of information to the European Commission according to Article 6(4), iv) Court case references and v) Examples of LIFE-Nature projects that have involved management

55 Official Journal NO. L 175 , 05/07/1985 P. 0040 - 0048

56 a): Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment. Official Journal L 073 , 14/03/1997 P. 0005 - 0015
b): Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC

- Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 *on the assessment of the effects of certain plans and programmes on the environment*[57] (SEA Directive). This Directive requires the environmental effects of certain plans and programmes to be identified and assessed during the preparation of the plan or programme and before its adoption. As with EIA, the public and environmental authorities must be consulted and their comments as well as the environmental report must be taken in to account in the preparation of the plan or programme. Certain information must be provided when the plan is adopted, including details of the arrangements for monitoring the implementation of the plan or programme. A plan which has been determined to require an assessment under Article 6 or 7 of Directive 92/43/EC automatically also requires assessment under Directive 2001/42/EC but in appropriate cases arrangements can be made to combine these assessments into a single procedure complying with both Directives.

- Both Directives 85/337/EEC as amended and 2001/42/EC require consultation with any other Member State that might be affected by the project, or plan or programme as the case may be.

The Commission website[58] provides further information on the European Community's laws on Environmental Impact Assessment of projects and the Environmental Assessment of certain plans and programmes together with other related information, including guidance documents on both the EIA and SEA Directives. As regards Directive 85/337/EEC as amended, guidance documents are available in relation to screening, scoping, the review of environmental information and the assessment of indirect and cumulative impacts, as well as impact interactions. Commission Guidance on the implementation of Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment can also be downloaded from this webpage.



Tursiops truncatus[59]

Photo: GECEM. LIFE03 NAT F/000104

57 Official Journal L 197 , 21/07/2001 P. 0030 - 0037

58 http://ec.europa.eu/environment/eia/home.htm

59 *Tursiops truncatus*: is a species of Community Importance listed in annexes II and IV of the Habitats Directive. EN: Bottlenose dolphin; FR: Grand dauphin; ES:delfin mular; DE: Großer Tümmler

5.2. Conservation objectives

Conservation measures to be established will aim at maintenance or restoration of species and habitat for which the site has been designated, to favourable conservation status. The following box includes the definition of "favourable conservation status" concept, as established in the Habitats Directive provisions.

Favorable conservation status (Habitats Directive provisions, art1)

Conservation status of a natural habitat, in accordance with the Habitats Directive, is considered as the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species. It will be taken as 'favourable' when:

- its natural range and areas it covers within that range are stable or increasing, and
- the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and
- the conservation status of its typical species is favourable.

Conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations. The *conservation status* will be taken as 'favourable' when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

Possible natural features present in a marine Natura 2000 site, for which conservation objectives have to be defined, are found among the following:

1. Marine birds listed on according with Articles 4.1 and 4.2 of the Birds Directive
2. Habitat types listed in annex I of the Habitats directive (codes 11*, 12* and 8330)
3. Species listed in annex II (18 marine species, including fish, reptile, cetacean, and seal species)
4. Marine species listed in annex IV of the Habitats Directive. Sites are not designated on the basis of annex IV species presence basis but, if they are present in the site, they also will have to be protected under the provisions of Article 12 of Habitats Directive.
5. Marine species listed in annex V of the Habitats Directive. As above, sites are not designated based its presence. Nevertheless, they will also need to be protected under the provisions of Article 14 and 15 of Habitats Directive.

These features are identified in the Standard Data Form that Member States send to the Commission by the competent national authority via the national Permanent Representation for special protection areas (SPA), for sites eligible for identification such as Sites of

Community Importance (SCI) and for special areas of conservation (SAC) in accordance with the 97/266/EC Commission Decision of 18 December 1996.[60]

From this point it is the responsibility of the competent authorities in each Member State to define the objectives to be reached in terms of conservation status for these features[61]. A clear definition on conservation objectives with measurable indicators and an appropriate monitoring programme are major elements for the successful management of a Natura 2000 site.

Questions to be answered will include: What is the global objective? What are the specific objectives? What is to be protected and/or restored? What is the final agreed target protection level? What is to be done? Who will do it? In what timeframe? Some of these questions may appear obvious. Nevertheless, they are not always easy to respond to in a clear and operational way.

As for terrestrial based SACs and SPAs, management plans are a useful tool in managing marine sites, facilitating achievement of the Natura 2000 objectives. This is an important tool to help effective management decisions, including those aimed at avoiding significant disturbance.

5.3. Definition of conservation measures

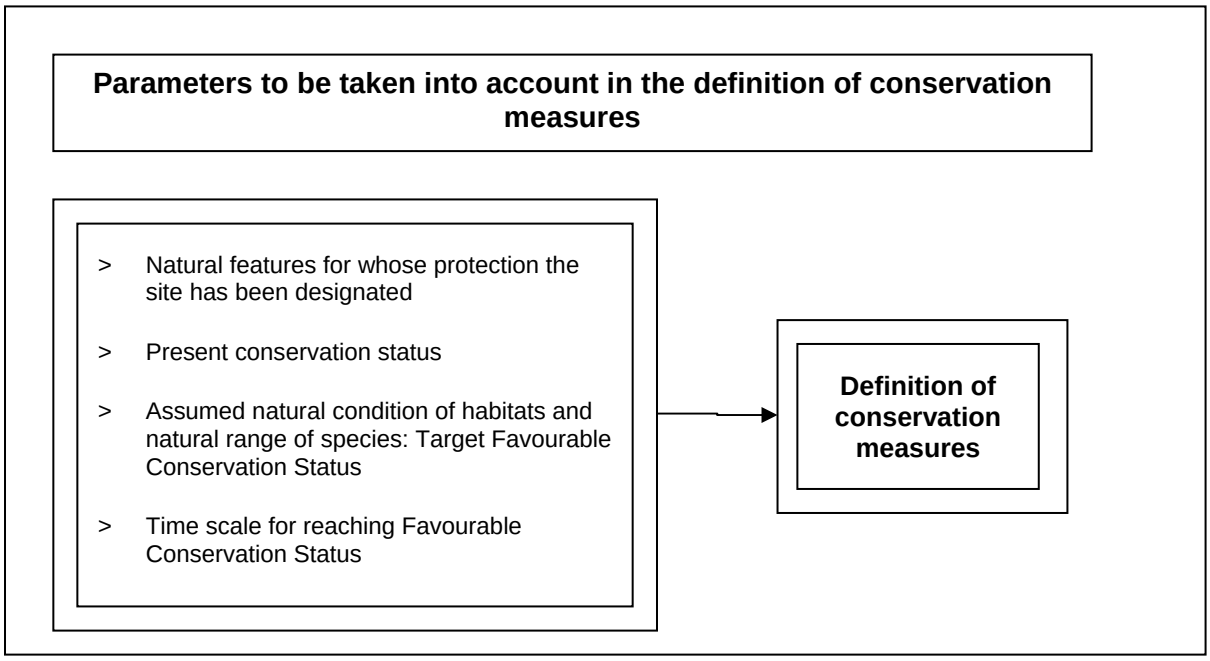
Data from surveillance[62] and monitoring programmes should allow Member States to identify the conservation status of species and habitats present in the sites. Member States will also need to identify potential pressures. Thereafter, they will need to define appropriate maintenance and/or conservation measures to deliver favourable conservation status. In fulfilment of Article 6.1 of the Habitats Directive, they will need to establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites.

For the different features subject to protection in a given site, their conservation status at present, their target status and the time scale to reach it, are the driving elements for the definition of conservation measures to be taken.

[60] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31997D0266:EN:NOT

[61] Competent national authority designated responsible for the management of the Natura 2000 site, as transmitted by Members States in accordance with the 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites *Official Journal L 107 , 24/04/1997. Standard data form in section* 1.6 "RESPONDENT(S):"

[62] According to Article 11 of the Habits Directive, "Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species."



5.4. Application of measures

Measures have to be applied by the relevant competent authorities. The identification of the competent authority depends on the type (e.g.: is it related to transport, geological exploitation, fisheries, tourism…) and the location of the measure to be taken -territorial waters or offshore–

Natural protected features subject to similar pressures need similar protection. Nevertheless, depending on the site location and the type of action, the responsibility for the implementation of these measures may be different. These responsible actors can be federal, national, European community or international institutions.

Therefore, the competent authority[63] in charge of the site has to identify the necessary conservation measures and the subsequent actors responsible for its implementation and enforcement. This Authority has to implement all measures under its competence and ask other responsible bodies to take action in areas for which they are competent. (See point 2.7)

5.5. Management plans-contents

While the Habitats Directive does not specify the content of a management plan, there is already a lot of experience on this subject, which Member States are applying to Natura 2000 sites. In this regard, it is potentially an effective tool to help reach the conservation objectives of the site. Several regional organisations and NGOs have developed useful guidance tools to this end, outlining the structure of a management plan for a Marine Protected Area. One useful example of an outline Structure for a Management Plan is that proposed by OSPAR for

[63] National competent authority responsible for the management of the Natura 2000 site, as defined in the 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites *Official Journal L 107 , 24/04/1997. Standard data form, section 1.6 "RESPONDENT(S):"*

its network of marine protected areas. This is reflected in the following box. It is based on the IUCN model developed for this purpose[64].

Example of a Management Plan:

Outline structure for an MPA of the OSPAR and HELCOM Networks

1. **Executive Summary**
2. **Introduction**
   - 2.1 Purpose and scope of plan
   - 2.2 Legislative authority for the plan (national and international)
3. **Description of the site and its features**
   - 3.1 Regional setting: location and access
   - 3.2 Resources (facts pertinent to management; other data in an appendix or separate document)
     - 3.2.1 Physical: e.g., marine landscape features, currents, bathymetry, hydrology
     - 3.2.2 Biological: ecosystems (e.g., cold water coral reefs, seagrass beds); critical habitats (e.g., feeding, spawning); species (e.g., endangered, commercial, charismatic)
     - 3.2.3 Cultural: archaeological, historical, religious
   - 3.3 Existing uses (description, facilities, etc.)
     - 3.3.1 Recreational
     - 3.3.2 Commercial
     - 3.3.3 Research and education
     - 3.3.4 Traditional uses rights, and management practices
   - 3.4 Existing legal and management framework
   - 3.5 Existing and potential threats and implications for management (i.e. analysis of compatible or incompatible uses, solutions
   - 3.6 Existing gaps of knowledge
4. **The Plan**
   - 4.1 Goals and objectives (general and specific)
   - 4.2 Management tactics
     - 4.2.1 Advisory committees
     - 4.2.2 Interagency agreements (or arrangements with private organizations, institutions or individuals)
     - 4.2.3 Boundaries
     - 4.2.4 Zoning plan
     - 4.2.5 Regulations
     - 4.2.6 Social, cultural, and resource studies plan
     - 4.2.7 Resource management plan
     - 4.2.8 Education and public awareness
   - 4.3 Administration
     - 4.3.1 Staffing
     - 4.3.2 Training
     - 4.3.3 Facilities and equipment
     - 4.3.4 Budget and business plan, finance sources
   - 4.4 Surveillance and enforcement
   - 4.5 Monitoring and evaluation of plan effectiveness
   - 4.6 Time table for implementation
5. **Appendices (Proforma for the OSPAR MPAs Network, etc.)**
6. **References**

As regards Natura 2000 sites, the following considerations are relevant to such a plan structure.

[64] Guidelines for the Management of Marine Protected Areas in the OSPAR Maritime Area (Reference Number: 2003-18). http://www.ospar.org/eng/html/welcome.html. http://www.ospar.org/documents/dbase/decrecs/agreements/03-18e_Guidelines%20management%20MPA.doc. Marine and Coastal Protected Areas. IUCN, Gland: 370pp. and Kellerher, G. 1999.

Purpose and scope (Outline structure, point 2.1),

A clear identification and description of the features for which the area has been selected is a key element of a management plan. The key features for SPA designation are birds listed in annex I of the Birds Directive and migratory birds. The key features for SACs are habitat types listed in Annex I and/or habitats for species listed in Annex II of Habitats Directive. Species listed in Annex IV, if they are present in the site, should also to be taken into consideration in the SAC management requirements[65]. This information should be contained in the Standard Natura 2000 data form[66].

In the case of the marine environment, it would be a good and strategically useful management measure to consider, in addition to the key Natura 2000 features, habitat types and species covered in regional agreements protection lists, and areas containing habitat types and species of conservation concern that may, reasonably, be included in a further adaptation of the Habitats Directive annexes. Clearly, this consideration is not a mandatory obligation that Member States have under Community legislation. However, identification of all these complementary features, during the first marine geological survey campaigns carried out as part of the future SCI selection process, might be a relevant task to avoid duplication of works to be carried out in future. This approach will also favour the coherence of future marine protected areas under Natura 2000 and other sets of protected areas.

This approach will also contribute to enhancing the compatibility between Natura 2000 and other networks established under regional agreements/conventions (OSPAR, HELCOM or Barcelona). It will also facilitate the process of selection and management of future sites resulting from a more complete application of the Habitats Directive in the marine environment.

Legislative authority for the plan (Outline structure, point 2.2)

The Legislative authority ultimately responsible for the elaboration of a Natura 2000 site Management Plan is the National Authority[67]. It has a duty to establish the necessary conservation measures to ensure the favourable conservation status of the site. However, as outlined in point 2.7, responsible actors for the implementation of management measures can be Federal, National, European community or International institutions[68].

The responsible authority implements all measures under its competence and asks other bodies to take action in areas for which they are in charge. Management plan objectives and specific measures to be taken have to be agreed by all relevant actors.

Description of the site and its features (Outline structure, Point 3)

One of the key steps for the management of a Natura 2000 site will be the description and assessment of the conservation status of each of the identified features in the Standard Data Form, ideally with quantitative indicators. The definition of this "base line" is a major element for the definition of measures to be taken and for assessing their future effectiveness to ensure favourable conservation status.

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65 (Sites are not designated on annex IV specie's presence basis but, if they are present in the site, they also will have to be protected under the provisions of Article 12 of Habitats Directive).

66 As defined in the Standard Data Form. (97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites *Official Journal L 107, 24/04/1997).*
http://ec.europa.eu/environment/nature/nature_conservation/natura_2000_network/standard_data_forms/index_en.htm

67 Legal basis: 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites *Official Journal L 107 , 24/04/1997*

68 E.g.: Defence, mining, offshore prospecting, research, tourism are national competencies. Fisheries are a community competency. Some aspects of shipping regulation are dealt at international level by the International Maritime Organization (IMO)…

Another key element of a management plan is to understand the nature and interactions of potentially positive and negative external pressures and influences that will affect the global evolution of the conservation status of the features. The use of an impact matrix can be a useful way to gain better understanding of this problem (see chapter 5.8 below).

Summary of LIFE co funded UK marine SACs Project

The UK Marine SACs Project was set up to establish management schemes for selected marine Special Areas of Conservation (SACs). It focused on a selection of twelve coastal marine SACs around the UK and on developing specific areas of knowledge needed for the management and monitoring of European marine sites.

The website (http://www.ukmarinesac.org.uk/index.htm) communicates the experience and knowledge and outputs from the UK Marine SACs Project to a wider audience. All the documents and background information that have been published can be accessed through this site (http://www.ukmarinesac.org.uk/publications.htm). Details in appendix 4



Monitoring and evaluation of plan effectiveness (Outline structure, point 4.5)

Once the site has been designated, Member States will take the necessary measures to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora for which the site has been designated. (Birds Directive Art. 1 and 4; Habitats Directive, arts.1 & 2)

For this purpose, a monitoring programme is necessary to assess the present condition of the site and to inform appropriate maintenance and/or restoration measures. National Authorities[69] are ultimately responsible for monitoring of sites (Habitats Directive, Article 11). Assessment of the effectiveness and appropriateness of enacted measures will permit the Authority responsible for the site to plan new activities to achieve conservation targets and to report on the conservation status of the site in accordance with the requirements of the Habitats Directive (Articles 11, 17…) and Birds Directive (Articles 4, 12..).

After thorough discussions with Member States, the Commission sent a document (DocHab-04-03/03 rev.3) to the Habitats Committee proposing a framework for assessment, monitoring and reporting of conservation status in view of preparing the 2001-2007 report under Article 17 of the Habitats Directive. This document was approved by the Habitats Committee on 20th

[69] National Authority responsible for the management of the Natura 2000 site, as defined in the 97/266/EC Commission Decision of 18 December 1996 concerning a site information format for proposed Natura 2000 sites *OJ L 107 , 24/04/1997.*

on April 2005. It proposes a reporting format, evaluation matrices, definitions of key terms and a process between Member States and the Commission to accompany that process. More information may be found at: http://forum.europa.eu.int/Public/irc/env/monnat/home

WWF and the World Bank have developed a planning tool for management of protected areas entitled "*Score Card to Assess Progress in Achieving Management Effectiveness Goals for Marine Protected Areas. 2004*"[70]. The following table is included in this document. It has been built to provide some overall guidance in the development of assessment systems and to encourage standards for assessment and reporting.

TABLE 1
Summary of the WCPA Framework

Elements of evaluation	Explanation	Criteria that are assessed	Focus of evaluation
Context	**Where are we now?** Assessment of importance, threats and policy environment	Significance Threats Vulnerability National context	Status
Planning	**Where do we want to be?** Assessment of protected area design and planning	Protected area legislation and policy Protected area system design Reserve design Management planning	Appropriateness
Inputs	**What do we need?** Assessment of resources needed to carry out management	Resourcing of agency Resourcing of site Partners	Resources
Process	**How do we go about it?** Assessment of the way in which management is conducted	Suitability of management processes	Efficiency appropriateness
Output	**What were the results?** Assessment of the implementation of management programmes and actions; delivery of products and services	Results of management actions Services and products	Effectiveness
Outcome	**What did we achieve?** Assessment of the outcomes and the extent to which they achieved objectives	Impacts: effects of management in relation to objectives	Effectiveness appropriateness

Source: Hockings et al. (2000)

Wadden Sea – transboundary or international management



The Wadden Sea is one of Europe's largest marine wetlands and is shared by **Denmark, Germany and the Netherlands.**

It holds numerous habitats that require protection under the Habitats Directive Annex I including:

• sandbanks, estuaries, mudflats, salt marshes and sand dunes

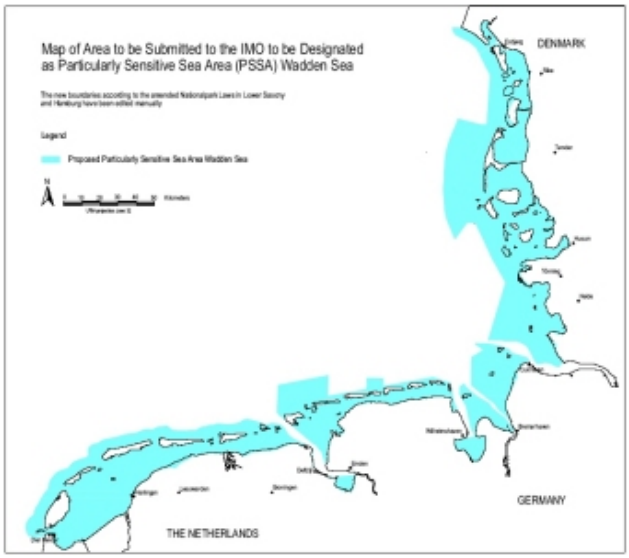
[70] http://www.icriforum.org/mpa/SC2_eng_nocover.pdf. (see Annex V)

These habitats are important areas for conservation as they represent nursery grounds for fish species, feeding areas for migratory birds and support many marine mammals (Harbour Porpoise *Phocoena phocoena*, harbour seal *Phoca vitulina*).

At the 1982 Wadden Conference, where the three concerned governments met, an Agreement was signed that they would consult each other and coordinate efforts in order to implement relevant EU Directives and other international legal intruments such as the Ramsar and Bonn Conventions.

Many conservation actions have been undertaken trilaterally since. The Seal Management Plan (SMP) is an example of a conservation project that arose from this cooperation and was strengthened by it. Among other actions, a number of seal reserves have been set up throughout the Wadden Sea. The SMP has been recognised as having played a big part in saving the harbour seal population and remains a useful tool for conservation.

See Appendix 4 for more information



http://www.waddensea-secretariat.org/news/publications/maps

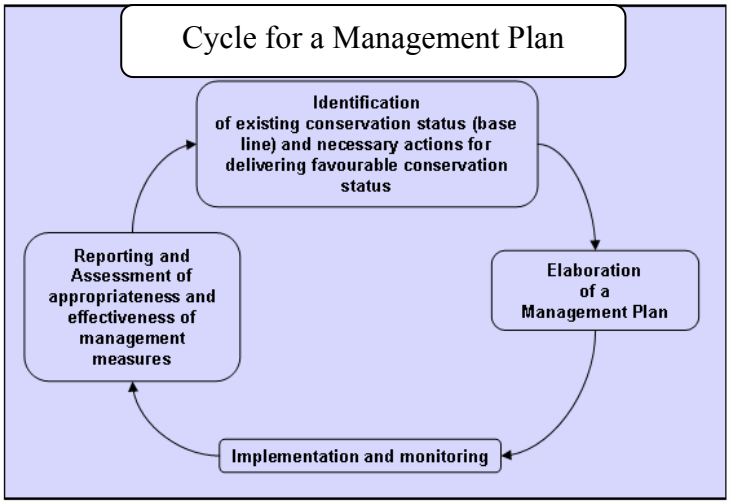


5.6. Time Scale for a Management Plan

Measures considered at the present time as being the most appropriate to maintain or to restore the favourable conservation status of a site will not necessarily be the same in the future. Nature, external forces acting on nature, scientific knowledge and conservation management techniques change over time.

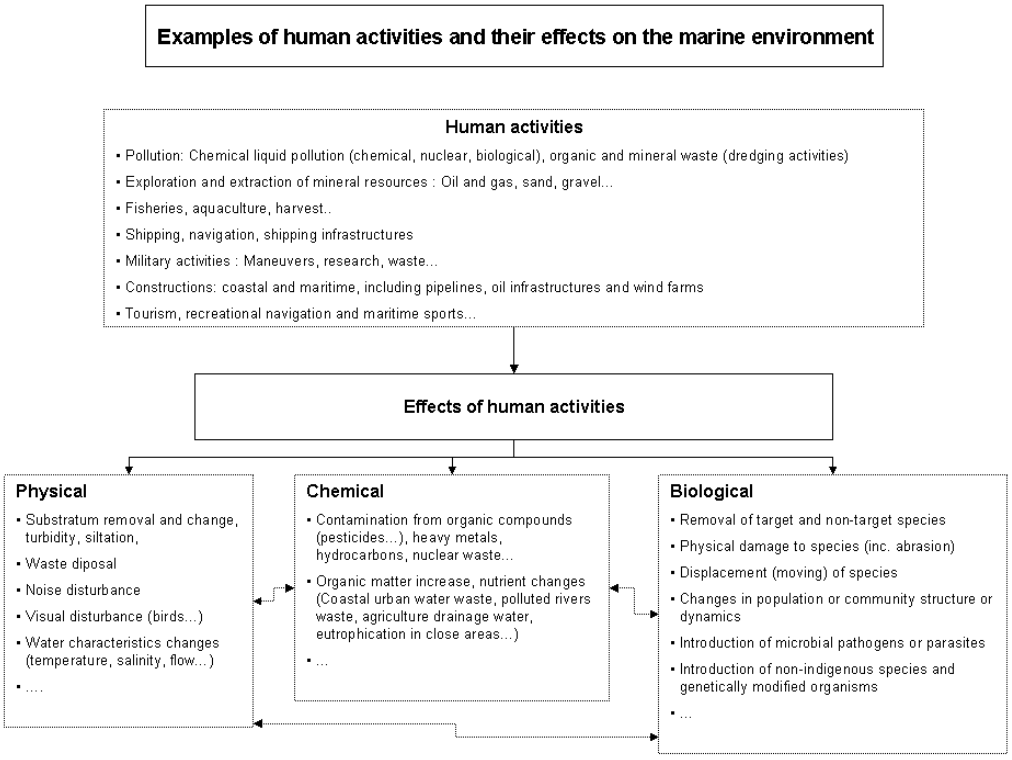
Therefore, management plans have to be revised and/or updated in an appropriate time scale taking full account of changes that have occurred in the site. The plan should have a clear time horizon. Some Member States consider 10 years as a reference period for Management Plans of Nature Protected Areas. Regular monitoring of activities and more periodical assessment of their effectiveness will allow for the taking of intermediate decisions to adapt the action plans.

In general terms, climate change related impacts may be important for the evolution of marine protected Areas. This could be a relevant issue from long term management issues. Environmental changes related to climate change will need to be monitored and management decisions taken with an adaptive approach.



5.7. Pressures and impact of human activities.

A wide range of human activities may affect the marine environment. Several regional seas conventions have developed interesting listings of activities and some of the main effects that they might have on marine habitats and species[71]. The National authority responsible for the Natura 2000 site may need to regulate these activities to ensure the favourable conservation status of the features for which the site has been selected. Some examples of human activities and possible effects are:



[71] http://www.ospar.org/documents/dbase/decrecs/agreements/03-18e_Guidelines%20management%20MPA.doc Adapted from Guidelines for the Management of Marine Protected Areas in the OSPAR Maritime Area (Reference Number: 2003-18)

Habitat restoration in the Azores supported by a Management Plan

The Azores seabird assemblage is characterised by a transition between tropical and temperate birds and for this reason important for biodiversity conservation.

The following Azorian bird species are covered by the Birds Directive:

Madeiran storm petrel (*Oceanodroma castro*), Roseate tern (*Sterna dougallii*), Cory's shearwater (*Calonectris diomedea borealis*), Common tern (*S.hirundo*), Little shearwaters (*Puffinus assimilis*).

These species are threatened by introduced predators, disturbance from tourism, soil erosion and vegetation degradation which has led to a **loss of nesting habitat** and consequently breeding pairs.

Measures taken to increase populations:

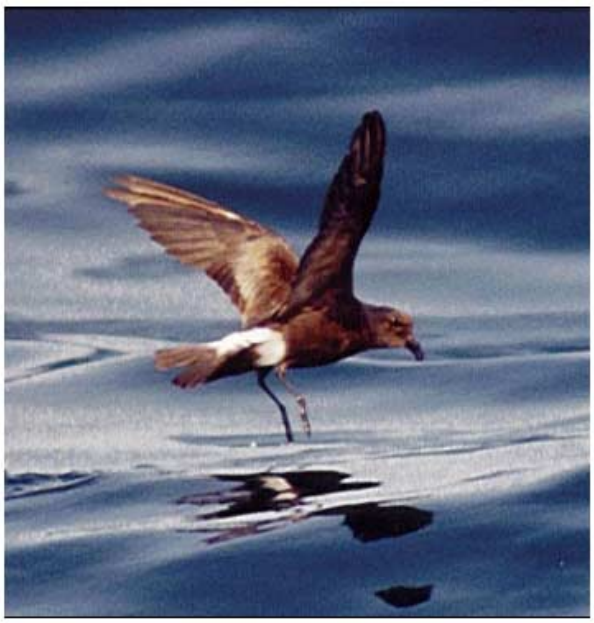
- **Eradication** of the non-native rabbit
- Erosion control and **replantating of native vegetation**
- Contruction of **nest boxes** and artificial nests
- Information panels and nature warden to **raise awareness**.

Breeding numbers are now increasing as a result of these actions.

Praia islet now holds the **largest Common Tern colony in the Azores** with over 1000 pairs.

See Appendix 4 for more details.





Source: Steve McConnell(EEA website)

5.8. Impact assessment. The basic technique of the construction of matrices

Section 5.1, above, describes existing legal instruments concerning the process of assessment of the impact of development activities on the environment. Environmental Impact

Assessment (EIA) is a key instrument of European Union environmental policy. Since the passage of the first EIA Directive in 1985 (Directive 85/337/EEC) both the law and the practice of EIA have evolved. An amending Directive was published in 1997 (Directive 97/11/EC) and the European Commission have published three guidance documents reflecting current EU legislation and the current state of good practice. These documents concern three specific stages in the EIA process: Screening, scoping and EIS Review.

The aim of the above mentioned guidance is to provide practical help to those involved in these stages in the EIA process, drawing upon experience from around Europe and worldwide. By following the screening and scoping guidance, it is hoped that better decisions will be made on the need for EIA and on the terms of reference for the studies that are required, thus starting the EIA process off on a better footing. The EIS Review guidance aims to help developers and their consultants prepare better quality Environmental Impact Statements and competent authorities and other interested parties to review them more effectively, so that the best possible information is made available for decision making. Full information on this is found on the website of the Commission at:
http://europa.eu.int/comm/environment/eia/home.htm

In order to develop a systematic approach to management, it is useful to identify the sort of activities that could have "a priori" significant negative impacts on the site, including listing the activities (e.g: shipping, fisheries, wind parks, oil and gas exploration…) that could interact with the protected features of the site and effect the conservation status of the habitats types and species of community importance.

In such a context, several Member States use matrices as a tool for decision making. Each matrix should clearly show whether different external human activities are expected to have significant effects on specific conservation features. The following matrix is aimed to be considered as an example only. Real cases should be elaborated with existing Natura 2000 site features and foreseen human activities. Such matrices should be worked out and completed by specialists, preferably with the participation of stakeholders and ensuring that appropriate specialised knowledge is represented.

The matrices should contain all ecological features subject to protection and all users. Only relevant uses for that particular area/sub-area have to be indicated. The first dimension of the matrices concerns the ecological features for which the site has been designated.

In some cases it may also be relevant also to include elements (habitats or species) which are necessary for the favourable conservation status of the protected features under the Birds and Habitats Directives (e.g.: fish stock status needed for protected seals or birds…).

Not all individual marine habitats or species from the annexes of the Birds and Habitats Directives need to appear in the matrix, as they may be grouped according to similar sensitivities. Many species are sensitive to similar activities, and many activities have similar effects. For example, all shellfish species may be impacted by a dredger, beam trawl or other sediment disturbing activity.

The second dimension concerns human activities in relation to the specific sensitivity of the ecosystem.

Different activities/ users or stakeholders should be listed and grouped according to their possible interaction with habitats and species. Only relevant uses for that particular area/sub area have to be indicated. When describing the uses and their impacts it is important that specialists from different regions and backgrounds are involved. It is important to underline

that possible interactions refer to tangible (present or planned) activities rather than different economic sectors/ industries considered in global terms.

A matrix showing the two dimensions could look as follows (this is not filled in. For completed examples showing potential effects, see Annex 3 of this guidance document.)

An example of the use of the matrix Site NNN											
Activities related to	**Habitats**			**Species**				**Other elements of conservation concerns but not listed in EC Directives**			
	1110 sandbanks	1170 reefs	1180 leaking	Cetaceans	Birds eating	Birds eating	Phoca vitulina	Large fish	Large moluscs	Natural physical processes	selected species xx
SPACE											
windmills											
Harbours											
Art. islands											
Oil and gas exploration											
Oil and gas exploitation											
Shipping channels											
Pipelines/cables											
Military practice											
Tidal energy											
FISHERIES											
Bottom trawling											
Shell fishery/dredging											
Collection biogenic structures											
Pelagic fishery											
Seines, driftnet, line fisheries											
Set nets											
MINING/DREDGING											
Sand mining											
Gravel mining											
Channel dredging											

Appendix 3 illustrates several examples of the technique of the use of matrices as a management tool for decision making in a Natura 2000 marine protected area.

5.9. Human activities in marine Natura 2000 sites

Human activities in marine Natura 2000 sites are regulated by the same provisions of the Habitats Directives as for the terrestrial areas. The provisions of Article 6 of the Habitats Directive apply if the effect of an activity, or a combination of them is likely to be significant.

The Communication from the Commission to the Council and the European Parliament of 24 October 2005, "Thematic strategy on the protection and conservation of the marine environment"[72] is also a relevant policy document in which different pressures to the marine environment are identified.

This communication takes into account the environmental quality of the seas and oceans, giving a summary and a more extensive description of the situation. It highlights that the marine environment is under a series of pressures. These include loss or degradation of biodiversity, changes in the ecosystem structure, loss of habitats, contamination by dangerous substances and nutrients, and the potential consequences of climate change.

Related pressures include commercial fishing, oil and gas exploration, shipping, water-borne and atmospheric deposition of dangerous hazardous substances and nutrients, waste dumping including dumping of dredged contaminated sediments, under water noise pollution and physical degradation of habitats due to dredging and extraction of sand and gravel.

Without being comprehensive, some possible effects of human activities on the marine environment are illustrated in the following paragraphs.

5.9.1. Alien Species

Invasive alien species are identified as one of the key causes of loss in biodiversity for the EU and the world at large. Alien species can deteriorate natural habitats and disturb natural species found locally, changing natural conditions that can drive to significant economic and social impacts. In some cases, possible effects of alien species will have to be considered by competent national authorities when establishing management measures for a Natura 2000 site or planning future developments. Effectively, provisions of the Habitats Directive state that Member States are responsible:

- to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the area has been designated (Art 6.2),

- to agree to plans or projects only after having ascertained that they will not adversely affect the integrity of the Natura 2000 site (Art 6.3)

A relevant provision in this area is Article 22 of the Habitats Directive, which requires Member States to *"ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction"*. However, the accidental, non-deliberate introductions and the introductions into non-wild environments would benefit from a more specific legislation.

Furthermore, under the Habitats Directive difficulties might arise if a species protected under a directive is native in one part of the Community but harmful or potentially problematic

[72] [COM(2005)504] http://europa.eu/scadplus/leg/en/lvb/l28164.htm

elsewhere. This was not envisaged when the Habitats Directive was adopted in 1992, but it could be an issue within the enlarged EU.

Ballast water from shipping, species travelling stuck to ship hulls, aquaculture activities are some of the most significant vectors for introduction of alien species in the marine environment.

Ballast water: The International Maritime Organization has adopted in February 2004 the International Convention for the Control and Management of Ships' Ballast Water and Sediments ("Ballast Water Convention"). This Convention is open for signature by Member States from June 2004. Parties to this convention are required to prevent, minimize, and ultimately eliminate the transfer of harmful aquatic organisms and pathogens through the control and management of ships' ballast water and sediments.

The Convention provides an international framework for the management of ballast water and sediments, while allowing for regional interests to introduce additional measures to meet specific standards or requirements, consistent with international law. All ships designed to carry ballast water will be obliged to implement a Ballast Water Management Plan approved by the Administration (Flag State) and taking into account Guidelines to be developed by the IMO. By July 2005, three Member States (Finland, The Netherlands and Spain) have signed the Ballast Water Management Convention. More information can be found on the website: http://globallast.imo.org/index.asp.

Aquaculture: In the framework of the Biodiversity Action Plan for fisheries, (COM(2001)162, Vol. IV[73]), the Commission has taken initiatives to evaluate the potential impact of non-indigenous species in aquaculture. It supports the application of the International Council for the Exploration of the Sea (ICES) Code of Practice on introductions and transfer of marine organisms and the European Inland Fisheries Advisory Commission (EIFAC) Code of Practice and Manual of procedures for consideration of introductions and transfers of marine and freshwater organisms.

The Commission has prepared a proposal for management rules on the introduction of alien species in aquaculture in the framework of the Strategy for the sustainable development of European Aquaculture (COM(2002)511)[74], which takes into account the above mentioned considerations. This proposal for a Council Regulation (COM (2006) 154[75]) aims to introduce a permit system to regulate the movement tin aquaculture of alien and locally absent species (absent from a zone within the species' natural range). This proposal is expected to be adopted by the Council in the first half of 2007.

5.9.2. Pollution (including noise)

Pollution of the seas is one of the biggest global threats to the marine environment and biodiversity conservation. It may also be a significant threat at local level. Therefore, the Authority responsible for the conservation status of the Natura 2000 site has to deal with this issue when establishing the necessary conservation measures for the site. In most of the cases, this will imply the involvement of external administrations responsible for management of continental waters, maritime traffic…

[73] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001DC0162(04):EN:NOT
[74] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002DC0511:EN:NOT
[75] http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0154en01.pdf

In the European environment, most pollution from the sea derives from land-based sources. Therefore, the implementation of the provisions of the Water Framework Directive will play a major role in enhancing the conservation status of the marine environment. This directive deals with all continental, transitional, and coastal water bodies. The global objective of EU Water Policy is to get polluted waters clean again, and to ensure that clean waters are kept in this state. More detailed information can be found on the website of the Commission[76].

Several relevant regional seas conventions, like the OSPAR, Helsinki Convention, Barcelona or Bucharest Convention, have developed strategies to reduce pollution in the sea. These strategies (e.g: Hazardous Substances Strategy adopted by OSPAR) set the objective of preventing pollution of the maritime area by continuously reducing discharges, emissions and losses of hazardous substances.

Pollution types and causes

Pollution can be categorized as *(i)* organic, *(ii)* microbiological, *(iii)* chemical, *(iv)*nutrients *(v)* radioactive and *(vi)* physical (waste disposal, noise pollution…).

Pollution of the sea, the coastal zone and its wetlands by solid and liquid domestic/industrial products is a major problem in many countries as the lack of appropriate treatment is still common among Member States and third riparian countries sharing the same sea with the EU27. In particular, chemical and petrochemical industries concentrated around major coastal cities are a major source of pollution. Agricultural pollution from run-off containing high concentrations of nutrients -fertilizers-, pesticides and other agrochemicals also needs to be taken in consideration. Their combined impact on the health of habitats and on species can be extremely high in some marine areas. However, it should be noted that this is not always an irreversible effect, and biodiversity can be re-established to a considerable degree after the removal of the sources of pollution.

The Commission provides further information on the *Europa* web site[77] on the different pieces of water legislation (and related policies) in the European Community.

The International Convention for the Prevention of Pollution from Ships (MARPOL)[78] is the main international convention covering prevention of pollution of the marine environment by ships from operational or accidental causes. The MARPOL Convention was adopted on 2 November 1973 at IMO covering pollution by oil, sewage, garbage, chemicals and harmful substances in packaged form.

When planning future management measures, it may be relevant in some cases to address some pollution problems from shipping activities. In such a case, site managers may consider some useful tools provided by the London Convention (the Convention on the Prevention of Marine Pollution by Dumping of Wastes, 1972). The purpose of this Convention is to control all sources of marine pollution and prevent pollution of the sea through the regulation of dumping of waste materials. A so-called "black- and grey-list" approach is applied for waste, which can be considered for disposal at sea according to the hazard presented to the environment. For the blacklisted items dumping is prohibited. Dumping of the grey-list materials requires a special permit from a designated national authority to be undertaken under strict control and only after certain conditions are met. Other materials or substances can be

[76] http://ec.europa.eu/environment/water/water-framework/overview.html

[77] http://ec.europa.eu/environment/water/index.html

[78] http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#1

dumped after a general permit has been issued. However, this approach, adopted in 1973, will be replaced by the 1996 Protocol (pending four more signatories) which has no such differentiation. This revision is guided by the precautionary approach generally assuming that dumping of any substances could be harmful, unless proven otherwise. The 1996 Protocol has already been signed by many European coastal states. (see http://www.londonconvention.org/; http://www.londonconvention.org/documents/lc72/PROTOCOL.pdf)

Dumping is a human activity that may be considered as a plan or project. Therefore, ad-hoc permits would have to be delivered in accordance with the provisions of article 6 (3) and (4) of the Habitats Directive if it is likely that such a plan or project would have a significant effect on a Natura 2000 site.

Noise pollution

For the United Nations Convention on the Law of the Sea [UNCLOS, Art.1.1(4)] "pollution of the marine environment" means *the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities*. Noise is therefore to be considered as a form of pollution, being an energy, which is introduced in the environment.

Noise in the marine environment may be defined as the deliberate or incidental introduction of acoustic energy into the water column, from point sources or from those of diffuse origin.

There is a growing body of evidence that noise represents a significant pressure in the marine environment. Scientists affirm that low-frequency ambient marine noise levels have increased in the northern hemisphere by more than a hundred times over the last 60 years.[79] Undersea noise pollution comes from a variety of sources including propeller noise of ships, underwater exploration (hydro-acoustic methods), mining seismic operations, underwater constructions (piling, etc.), and various sonar techniques. Some of the key sources of anthropogenic undersea noise are activities in the following areas:

- Oil and gas research and exploitation: e.g Seismic airgun surveys (or similar techniques) to find fossil fuel deposits
- Active sonar systems for military or civilian purposes (e.g.: loud, medium, and low-frequency sounds produced by sonar devices that can travel for hundreds of miles).
- Supertankers cruise the oceans creating a sound pulse of 190 decibels or more at or below the 500Hz range; smaller boats such as tugs and ferries typically create a soundwave of 160-170 decibels[80]

[79] (a) low-frequency (< 1000 Hz) ambient noise levels that have increased in the northern hemisphere by two orders of magnitude over the last 60 years (3dB/decade). http://www.iwcoffice.org/_documents/sci_com/SCRepFiles2004/56SCrep.pdf. DOLMAN, S.J. and SIMMONDS, M.P. Note of some recent developments in the field of marine noise pollution, including controlled exposure experiments.

[80] Supertankers generate sound pressures of 190 dB relative 1 uPa at 1 meter. Decibels (dB) are always relative to a reference (Values in water cannot be compared directly to values in air, and the reference value should always be included to avoid confusion).

- So called "pingers" are devices that emit a shrill sound to scare away marine mammals (and other species) from fishing gears and aquaculture installations.

The above-mentioned different activities need to be regulated in accordance with the provisions of article 6 (3) and (4) of the Habitats Directive if they are likely to have a significant effects on protected features at a Natura 2000 site. Furthermore, the provisions of article 12 of the Habitats Directive, which includes an obligation to avoid deliberate disturbance, are also particularly relevant in such situation, as all cetaceans' species, being listed in Annex IV, benefit from a strict protection regime under the Habitats Directive.

Four zones of influence are commonly adopted in all work on impact of noise on marine animals[81]. This zonation may be relevant when planning the authorisation of some human activities in relation to Natura 2000 sites:

Zone of audibility

This zone is the largest and covers the area over which the noise source can be heard by a particular species. The fact that a sound is audible does not in itself imply that the animal is influenced by the noise. The zone of audibility is often used as a first approximation in determining possible impact, as it can be calculated with reasonably good accuracy, in contrast to the three other zones. However, this approach is likely to considerably overestimate the impact of the noise.

Zone of behavioural disturbance

This zone is the area where behaviour of a particular species is altered by the noise. The change in behaviour can be negative (avoidance), positive (attraction) or neutral (e.g. change of own sounds to reduce influence from noise). This zone is very difficult to estimate, as behavioural reactions (or lack of) may depend greatly on context and individual differences. It is often in this zone, that the significant impact on the animals are found, e.g. deterrence from important resources. It is thus critical to get good estimates of this zone for relevant species and relevant types of noise.

Zone of masking

Masking is a process where the addition of noise to the ever present background noise makes it more difficult for the particular animal to detect a particular sound (communication sounds, echolocation sounds, sounds from prey or predators etc.). Inside the zone of masking communication distances among individuals of a certain species may be smaller than outside the zone.

Zone of physical injury

This zone is only relevant for very high intensity sound sources, such as seismic air guns, explosions, pile driving, and sonars

In general, there is agreement on three main sources of noise in the ocean on a global/regional scale: motorized shipping, seismic exploration and the use of sonar devices for military or civilian purposes (not listed by priority). On a local scale, many other sources may be more significant than the three big ones. It is fundamental to realize that especially low frequency

[81] Richardson et al (1995). Small Takes of Marine Mammals Incidental to Specified Activities; Seismic Hazard Investigations in Washington State [Federal Register: February 7, 2002 (Volume 67, Number 26)] [Page 5792-5796] http://www.epa.gov/fedrgstr/EPA-IMPACT/2002/February/Day-07/i2998.htm.

sound travels very well in water and that loud low-frequency sounds may be audible to animals over very large areas (up to the scale of entire ocean basins).

This may have important implications in relation to management of protected areas, as noise sources imposing significant negative impact on animals inside the protected area could be located tens or hundreds of kilometers away.

5.9.3. Exploration and extraction of Oil and Gas resources

Member States and regional seas conventions have been working for many years regulating oils and gas extraction activities in order to minimise any adverse effects on the marine environment. In June 1988 the then Paris Commission adopted guidelines for monitoring methods to be used in the vicinity of platforms in the North Sea. These guidelines were based on the overall objective of environmental monitoring, namely to assess the effects and extent of discharges of oil-based drilling fluids made at that time.

Since then, the use and discharge of oil-based drilling fluids, the discharge of drill cuttings containing drilling fluid and the discharge of produced water have all been regulated. New field developments have occurred and new production technologies have been introduced. Some installations have turned into biologically diverse and productive reefs, both in terms of biomass and fish. A coordinated chemical and biological effects monitoring programme is essential in identifying the nature and extent of potential environmental impacts.

Several monitoring studies have been carried out and published at national level. Some regional organisations have also developed useful documents providing Guidance for Monitoring the Environmental Impact of Offshore Oil and Gas Activities (e.g.: OSPAR[82]).

For the Mediterranean Sea, it is relevant to note that the Barcelona Convention has given rise to the *Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil* (Pending ratification, not yet in force)[83]

As for other sectoral activities, the effects of new programmes or projects related to oil and gas sector developments need to be evaluated in accordance with the Article 6 provisions of the Habitats Directive. Article 6 (3) and (4) of the Directive provide a balanced framework to ensure that the development of the oil and gas sector activities takes place in a framework which is compatible with the protection needs of the Natura 2000 network. Therefore, the inclusion of a site into the network Natura 2000 does not, a priori, exclude its future economic use.

Negative potential effects of visual impact, noise, disposal of waste material, etc. need to be taken into consideration. Effects of noise produced during research activities also need to be addressed in an appropriate way. Paragraph 5.1 above provides more detailed information related to these provisions of the Habitats Directive.

5.9.4. Fisheries.

In March 2001 the Commission produced a Communication [COM(2001) 143 final] to the Council and the European parliament presenting relevant Elements of a Strategy for the Integration of Environmental Protection Requirements into the Common Fisheries Policy.[84]

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82 http://www.ospar.org/eng/html/welcome.html

83 http://www.unepmap.org/Archivio/All_Languages/WebDocs/BC&Protocols/BCP_originals/ProtocolOffshore94_Eng.pdf

84 http://eur-lex.europa.eu/lex/LexUriServ/site/en/com/2001/com2001_0143en01.pdf

This document illustrates how different fishing activities, including aquaculture, interact with the marine environment in various ways:

- directly, by removing both target and by-catch species, which may lead to an unfavourable conservation status of some of them, possibly leading to their extinction or local extirpation;
- indirectly, by modifying the energy flow through the food web, which may affect the conservation status of other species of the ecosystem (e.g.: the removal of prey items may pose conservation problems to predatory species);
- directly (e.g. bottom trawling) or indirectly (e.g.: sediments or waste from some aquaculture installations) by modifying the physical environment and threatening the diversity of habitats which may in turn have an effect on their potential to host both commercial and non-commercial species;
- environmental changes, either due to natural causes or to human intervention, which in turn affect the productivity of marine ecosystems and hence fisheries.

Many examples of these effects illustrate why there is a need for full integration of environmental considerations into fisheries management. Beyond the legal obligation derived from the Treaty, there is an ethical obligation to ensure that these effects do not become large, unmanageable, or irreversible[85]. The effects of aquaculture may also include:

- Impact related to the transfer of anti-biotic and anti-fouling substances, excess organic matter, nutrients and pathogens between aquaculture facilities and the wild.
- Introduction in the wild of individuals as escapees which are genetically different from the local populations of the same species.

5.9.5. Shipping

The greater part of the world's trade by volume is carried by ships. Shipping is one of most energy efficient and least environmentally damaging forms of commercial transport[86]. Nonetheless, when major shipping casualties occur these can have extremely damaging consequences to the marine environment. Worldwide, there have recently been serious incidents involving oil tankers the *Nakhodka* (1997), *Erika* (1999) and *Prestige* (2002). To deal with such eventualities, States can prepare themselves to protect the waters for which they are responsible by taking a range of actions in advance:

- preparing national contingency plans, consistent with the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 (the OPRC Convention)[87]. These contingency plans should include protection measures to prevent/ minimise effects of oil pollution in marine protected areas, in line with the provisions of Art 6.(1) and (2) of Habitats Directive;
- participating in international assistance and co-operation arrangements of a bipartite (e.g. the Manche plan, which is a joint maritime contingency arrangement involving France and the UK), multipartite or regional nature (e.g. the Bonn Agreement, which

[85] http://eur-lex.europa.eu/lex/LexUriServ/site/en/com/2001/com2001_0143en01.pdf, Point 2.
[86] Considering the unitary impact on the environment (e.g.: environmental effects of transporting 1m3 for 1km by ship in relation to rail, road or air transport)
[87] http://www.imo.org/Conventions/mainframe.asp?topic_id=258&doc_id=682

is the regional co-operation agreement of the States bordering the North Sea), again consistent with the OPRC Convention Routing measures;

- achieving agreement in the forum of the International Maritime Organization (IMO) on ships' routing measures to reduce the risk of groundings or collisions;[88]
- establishing shore-based stations to monitor vessel traffic,
- ensuring that powerful tug boats ("emergency towing vessels") are available, so that they can go out and assist vessels which lose motive power; establishing arrangements under which a ship which requires assistance, and whose condition needs to be stabilised, can be brought in to a place of refuge.

All of these actions are valuable as a means of reducing the risk of pollution from a major shipping casualty. Such major accidental ship-source pollution incidents are mercifully rare. However, there are a number of small pollution incidents of an operational nature that are statistically more significant. The key actions that States can take to prevent operational pollution are:

- ensuring that, in their ports, reception facilities are available for the types of waste which are generated on board ship – thereby leaving no excuse for ships to resort to illegally discharging their waste at sea;
- carrying out surveillance (either aerial or satellite) to identify ships carrying out acts of pollution;
- having an effective enforcement regime in place, so that ships identified as carrying out acts of pollution are prosecuted.

The impact on marine life from oil pollution goes beyond the visible effects, such as oiled birds and beaches. Some areas act as spawning or nursery grounds for fish or as harvesting grounds for wildlife populations and human economic activities. By oiling marine and coastal habitats, even temporarily, there can be a significant impact on fish stocks, migratory birds and local human communities that depend on fishing and tourism.

Several maritime areas in Europe [e.g. the Danish straits, Baltic Sea, the English Channel (including the Brittany coast), the Galician coasts, the Straits of Gibraltar and the Aegean Sea] have some of the densest maritime traffic in the world. During recent decades the levels of shipping traffic have not only increased, but the nature of the traffic has also changed. The number of tankers has increased and their size has grown.

There will be areas of overlap between marine Natura 2000 sites and dense maritime traffic areas (some already designated sites are there). In such cases, Member States will have to pay particular attention to ensuring the necessary measures are taken to protect these sites from potentially damaging activities linked to shipping, through preventive programmes and emergency action plans to minimise the negative effects in case of accidental or deliberate ship-source oil spills.

[88] For IMO, creating the conditions in which international shipping can operate safely, securely and with a minimal impact on the global environment remains the Organization's mission.

HELCOM launches the Maritime Accident Response Information System (MARIS)



The MARIS system is used to display available data on response, emergency and aerial surveillance capacities; on the sensitivity of the coastline to oil pollution; on ship traffic and other relevant issues.

MARIS is considered to be a useful tool for the collection and display of information, as well as for risk assessment in the response field. The system can be used to view different oil spill risks and response related datasets over a common background map and indifferent combinations. MARIS also allows officials and other experts in each country to make accurate assessments of maritime risks and response resources in their own areas, based on their knowledge and expertise of local conditions MARIS is now available through the HELCOM web site

(http://www.helcom.fi/gis/maris/en_GB/main/).

Courtesy: HELCOM Press office

In these areas, it may also be appropriate to regulate vessel traffic. In such cases, Member States should ask the International Maritime Organization (IMO[89]) to consider designating a "Particularly Sensitive Sea Area" (PSSA) to include this Natura 2000 site (or group of sites) thus decreasing the harmful effects of international shipping.

A Particularly Sensitive Sea Area (PSSA) is an area that needs special protection through designation by IMO because of its significance for recognized ecological, socio-economic or scientific reasons and which has been demonstrated to be vulnerable to damage by international maritime activities. PSSA status can be used to protect valuable marine and coastal habitats as well as marine wildlife, and to improve maritime safety. Guidelines on designating a "particularly sensitive sea area" (PSSA) are contained in IMO resolution A.927(22). *Guidelines for the Designation of Special Areas under MARPOL 73/78 and Guidelines for the Identification and Designation of Particularly Sensitive Sea Areas.*[90]

A significant policy measure taken by the European Community to increase the marine security has been the establishment in March 2004 of the European Maritime Safety Agency[91].

This Agency will provide Member States and the Commission with technical and scientific assistance in the field of accidental or deliberate pollution by ships and provide additional support, on request, to the pollution response mechanisms of Member States, without prejudice to the responsibility of coastal States to have appropriate pollution response mechanisms in place and respecting existing cooperation between Member States in this field.

89 The International Maritime Organization (IMO) is the international UN body regulating commercial shipping and maritime trade. The United Nations Convention on the Law of the Sea affirms the rights of a coastal State to take measures on the high seas to prevent mitigate or eliminate danger to its coastline from a maritime casualty.

90 http://www.imo.org/includes/blastDataOnly.asp/data_id%3D10469/927.pdf

91 Regulation (EC) No 724/2004 of the European Parliament and of the Council of 31 March 2004 amending Regulation (EC) No 1406/2002 establishing a European Maritime Safety Agency (Text with EEA relevance) Official Journal L 129 , 29/04/2004 P. 0001 – 0005. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0724:EN:NOT

5.9.6. Electricity power generation at sea: Wind farms and other infrastructure types

Electricity power generation at sea has already been studied for decades in European waters. After some initial experiences on coastal energy generation techniques, based on intertidal energy[92], there is now a growing interest in the development of offshore wind-power installations. Experiments are also underway on wave-power and undersea marine current generators.

Wind energy is an important potential source of energy in the context of the EU's target, under Directive 2001/77/EC[93], to ensure that the increase of the overall share of renewable energy in electricity generation rises from 14% in 2000 up to 21% in 2010.

For wind farm development projects, efforts are focused on finding convenient sites with sufficient wind energy and low human population. Wind-power generation is generally cost-effective when average wind speeds exceed 5 – 6 m/s. Problems with this technology include the space required as well as visual and noise impacts[94]. In addition, there may also be the risk to biodiversity specially to birds from collisions, arising from such installations. Some countries (e.g.: Denmark, Spain, Portugal…) have also developed a significant number of terrestrial wind farms some of which are built in coastal areas.

There are plans in several countries to construct offshore wind parks. Denmark, Germany, the Netherlands, UK, Spain and other Member States have significant programmes in this area (with up to 400 turbines per farm) to be built within the next five years.

The effects of these infrastructures need to be properly evaluated in accordance with the provisions of Article 6 of the Habitats Directive for any potential significant effect on species and habitats of Natura 2000 sites. Potential effects, including visual impact, collision, noise, electro-magnetic consequences need to be taken into account.

At present, there is no evidence that noise levels coming from existing wind farms have a significant effect on seals and porpoises (Madsen et al, 2005), but future taller and larger turbines could be noisier. However, important noise intensity levels may be reached during wind farm construction activities. They are of the same nature as those from other off-shore construction activities and are thus not specifically linked to the wind turbines as such.

An *ad hoc* working group on Wind energy and biodiversity has been set up by DG Environment and DG Energy and Transport Commission services with the view to produce a guidance document to help ensure that wind energy developments are compatible with the nature conservation requirements of the EU and other relevant international nature legislation applicable in Europe.

5.9.7. Military activities

Some military activities may significantly effect the marine environment. The most widespread current concerns are about the impact of sonar activities on marine mammals. The military technological sector is developing more and more sophisticated and powerful active sonar systems to identify the increasingly silent submarines. The sound produced by lower frequencies can travel hundreds of kilometres under water. As cetaceans (dolphins and whales) have very sensitive audition, echolocation and vascular systems, the utilisation of

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92 An example of tidal power station (240 MW) is located on the Rance estuary, near St Malo in Brittany; it commenced operation in 1967.

93 Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market. Official Journal L 283 , 27/10/2001 P. 0033 - 0040

94 Kruckenberg and Jaene, 1999. (Zucco and Merck, Ökologischer Effekt von Offshore-Windkraftanlgen, 2004)

powerful sonar systems can be harmful for these species. These sonar sounds may also have an impact on fish and fish behaviour.

All cetacean species, listed in Annex IV of the Habitats Directive, benefit from a strict protection regime under Community legislation in European waters. Therefore, the provisions of article 12 apply to the protection of cetaceans, including the obligation to avoid deliberate disturbance in all EU waters (inside and outside Natura 2000 sites). Different Member State navies have developed policy initiatives for the use of military sonar taking into account the need to minimise potential environmental effects. Several precautionary actions have been carried out on this issue, launching appropriate studies and creating precautionary zones where use of these sonar activities[95] is restricted.

In relation to the protection of Natura 2000 sites, it is to be considered that for new military plans or projects that might have significant negative effects on them, Article 6 (3) and (4) of the Habitats Directive provides a balanced framework to solve possible conflicts of interest between military activities and nature protection issues.

The relevant duties for Member States when applying the Birds and Habitats Directives in the sea are covered in section 2.6.2 and 5.1 above.

Actions to protect the marine environment should be carried out respecting existing international legislation mainly regulated under the UNCLOS framework. This includes specific provisions in relation to particular rights and obligations of warships. Some legal aspects of this section are complex and go beyond the purpose of this document.

LIFE-Nature has financed two large projects where management planning in areas subject to military activities is being developed in a strategic manner and with Natura 2000 in mind. More information on this topic can be found on
http://europa.eu.int/comm/environment/life/infoproducts/lifeandmilitary_en.pdf

5.9.8. Coastal developments. Integrated Coastal Management

Compared with other continents, Europe has a large continental shelf and a relatively long coastline (89 000 km) in comparison to its land area. More than 50% of the European population live within 100km from the coast. Large parts of the coastal zone of Europe have been (or are now being) rapidly converted from a natural to an urbanised state, through housing expansion, construction of economic/recreational and other facilities, and technical infrastructure, such as harbours, airports and road networks.

This results in total destruction and fragmentation of valuable habitats. Most of the constructed and planned infrastructures are devoted to supplying facilities requested by the tourist industry. However, this degrades the very resource on which they rely: the beauty and attraction of a pristine natural environment. In addition, unregulated land use changes generate further problems of conflict with tourist activities.

These infrastructures cause the modification of sedimentary coastal dynamics, affecting the marine environment. This can result in the destruction of large areas of valuable marine coastal habitats, such as *Posidonia oceanica* meadows and maërl beds. Special mention should be made to some unregulated sand extraction activities for the needs of civil works or to build artificial beaches; the potential deleterious effects of this on sensitive marine ecosystems have been repeatedly demonstrated in the Mediterranean littoral. Another case of

[95] (German Symposium on noise disturbance -June 2003; Spain Defence Ministry and Canary Athorities agreement for avoidance of noise disturbance/behaviour modifications of Cuvier's beaked whale -*ziphius cavirostris*- OJ 102 27/04/2004, page16.643 *http://www.boe.es/boe/dias/2004-04-27/pdfs/A16643-16645.pdf*).

the physical alteration of the sea bottom is the effect of installing pipelines and sewage discharge outfalls.

The EU Recommendation on integrated coastal zone management (ICZM) recognises the threat posed to Europe's coastal zones by increasing urbanisation and invites Member States to control additional urbanisation and to ensure that exploitation of the non-urban areas respects the natural features of the coastal environment. In more general terms, the EU ICZM recommendation introduces principles and strategic aspects upon which coastal management should be based. These include:

- the protection of the coastal environment, based on an ecosystem approach and preserving its integrity and functioning, and sustainable management of the natural resources of both the marine and terrestrial components of the coastal zone;

- working with natural processes and respecting the carrying capacity of ecosystems, which will make human activities more environmentally friendly, socially responsible and economically sound in the long run[96].

In relation to tourism in particular, carrying capacity assessment has been developed as a tool to contain development within sustainable limits[97]. Environmental assessment constitutes a major tool to achieve integration of environment concerns into specific development projects, programmes or plans. Coastal zones are among the sensitive areas specified by the Environmental Impact Assessment Directive (Annex III) which need to be taken into account in determining whether project must undergo EIA. The Strategic Environmental Assessment Directive comprises in its scope plans and programmes relating to spatial and land-use planning, tourism, transport, energy, industry and fisheries.[98]

Appropriate assessment and the EIA and SEA Directives are tools in which interference with sedimentary processes can be addressed. The pan-European project *EUrosion* provided for guidance on EIA and coastal erosion.[99]. This Shoreline Management Guide is an initiative that aims at providing coastal managers at the European, National and - most of all - regional and municipal levels with a state-of-the-art of coastal erosion management solutions in Europe. It is based on the review of 60 case studies, deemed to be representative of the European coastal diversity. It illustrates some of the major issues that may be encountered in deciding which coastal erosion management design is best suited to an area.

5.9.9. Dredging. Gravel and sand extraction

Dredging of shipping lanes or extraction of gravel and sands for construction or beach nourishment purposes are human activities that need to be assessed, as regards the possible impacts on and near the place of operations and, in some cases, also as regards possible coastal erosion aspects.

Dredging is recognised as having the potential for significant environmental impact. Whether in the dredging operation or in the disposal stage, care must be taken to minimise disturbance to marine life. Also, the dredged material should not be regarded simply as waste. Consideration has to be given to the potential beneficial use of the material in some cases. With increasing environmental awareness and tightening legislative control, finding a suitable site to relocate the dredged material can be a major constraint on the implementation of a dredging project.

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96 2002/413/EC, OJ L 148, 6.6.2002, p.6 ; Chapter I (a), Chapter II (e), Chapter IV.3 b(i).

97 http://ec.europa.eu/environment/iczm/home.htm ; http://www.pap-thecoastcentre.org/publications.html

98 http://ec.europa.eu/environment/eia/home.htm

99 http://ec.europa.eu/environment/iczm/home.htm; www.eurosion.org

As many of the European ports are located in estuaries that are protected under Natura 2000 there is particular interest in the issue of developing guidance on the management of dredging activities and conservation of this habitat type. The Commission services have undertaken work with Member States and key stakeholder groups to help reconcile these objectives.

In relation to the Natura 2000 network, it is to be considered that possible effects of these human activities need to be properly evaluated in accordance with provisions of Article 6 of the Habitats Directive for their potential significant effect on species and habitats in Natura 2000 sites.

In the last decade, advice by HELCOM, OSPAR and ICES was given on sustainable extraction practices, environmental impact assessment, monitoring and restrictions for the granting permits in sensitive areas. In 1998 HELCOM adopted Recommendation 19/1 on marine sediment extraction in the Baltic Sea (BSEP No. 76, 1999). The ICES working group on the effects of marine sediment extraction (WG EXT) recommended a code of practice, which was updated in 2001 (ICES Coop. Res. Rep No. 247, 2001). The contracting parties of OSPAR agreed in 2003 to adopt the ICES guidelines (OSPAR 03/17/1, reference number: 2003-15).

The Barcelona Convention has adopted in 1994 a *Protocol for the Protection of the Mediterranean Sea against Pollution Resulting from Exploration and Exploitation of the Continental Shelf and the Seabed and its Subsoil*. [100]

5.9.10. Tourism, recreational navigation, maritime sports, diving…

More than 200 million tourists per year visit the European coasts (most of them the Mediterranean Sea), leading to huge and often uncontrolled development of recreational activities, mainly in coastal areas and shallow water, in particular during summer.

Over-exploitation by tourists of natural, well-conserved sites constitutes a real problem in some coastal plains by their action of trampling, noise, lighting, etc., or more specific issues, such as disturbing turtle nests due to off-road 4x4 vehicles…. In the marine environment, the main problems are the destruction of intertidal and shallow subtidal bottoms, and the presence of divers at unsustainable levels, causing erosion of sensitive ecosystems, such as coral reefs, or the modification of fish behaviour due to feeding practices.

In recent years, the growing success of sea-watching activities is becoming a potential source of impact for whale and other cetacean populations and such activities need to be carefully managed. More information and references may be found in a guidance document published by ACCOBAMS *"Guidelines for commercial cetacean-watching activities in the ACCOBAMS area"* [101].

Tourism and marine nature conservation. Good practices example: **Whalewatching in Ireland.**
Irish waters are among Europe's richest for cetaceans, with

[100] http://www.unepmap.org/homeeng.asp

[101] See the "Guidelines for commercial cetacean-watching activities in the ACCOBAMS area" (available at http://www.accobams.mc/).

24 species recorded to date.



Whalewatching is one of the fastest growing tourism industries in the word and the potential in Ireland is considered hugely under-developed.

The Irish Whale and Dolphin group (IWDG) supports the development of responsible whalewatching in Irish waters.

Whalewatching can bring economic benefits to coastal communities and can enhance the conservation status and public awareness of whales and dolphins. However, as all whale and dolphin species in Ireland are protected (by national and Community legislation), thus in order to achieve the development of responsible whalewatching, which brings positive benefits to people and whales and dolphins, a development plan is necessary.

Whalewatching is one of the most rapidly expanding tourism products in the world and Ireland with its rich diversity and great abundance of whales and dolphins is well placed to exploit this new tourism product.

The IWDG are encouraging national, regional, and local tourism and development agencies to embrace the opportunities for whalewatching and ensure it is developed sustainably and has a positive impact on whales and dolphins as well as coastal communities. A relevant whalewatching policy document may be downloaded in http://www.iwdg.ie/downloads/WWPolicyDocument_final.pdf

6. LINKS BETWEEN COMMUNITY POLICY ON FISHING AND THE *"HABITATS"* AND *"BIRDS"* DIRECTIVES.

In response to a request of the Fisheries Council, a Communication from the Commission [COM (2002) 186 final[102]] was issued in May 2002, setting out a Community Action Plan to integrate environmental protection requirements into the Common Fisheries Policy (CFP). This Action Plan defines guiding principles, management measures and provides a work programme, aimed at promoting sustainable development. It identifies several priority management actions; a number of which support objectives and requirements of the Habitats and Birds Directives. (e.g.: reducing incidental bycatch, impact on habitats…)

This Communication also encourages Member States to fulfil their obligations under the nature protection Directives within the shortest possible period, in particular those relating to the designation and management of marine sites forming part of the Natura 2000 network.

The EC Regulation for conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (CFP[103]) provides an important tool to improve the protection of nature in the marine environment and the attainment of objectives of the Birds and Habitats Directive. Section 2 above covers other relevant instruments of environmental policy for the improving of the marine environment. These include the Water Framework Directive[104], Environmental Impact Assessment Directive (EIA)[105]…

6.1. The Common Fisheries Policy

Since 1 January 2003, the European Union has a new Common Fisheries Policy. The principal text is Council Regulation (EC) N° 2371/2002 of 20/12/2002 mentioned above. The integration of environmental protection requirements into the Fisheries Policy, pursuant to Article 6 of the EC Treaty, was one of the major objectives of the Community legislator while adopting this Regulation.

The aim of the new Common Fisheries Policy (CFP) is to ensure exploitation of living aquatic resources in a way that provides sustainable economic, environmental, and social conditions. For this purpose, the precautionary principle is introduced, the progressive implementation of an eco-system approach to fisheries management is foreseen[106], as well as the need for the adoption of coherent measures concerning the limitation of the environmental impact of fishing.[107]

In the context of this legal framework, a number of measures have been taken to improve the conservation status of habitats and species in the marine environment during the last few years. These include:

In 2003, the Council adopted the shark finning Regulation ((EC) 1185/2003). It is intended to prevent catches of sharks for the sole purpose of trading the fins.

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102 http://ec.europa.eu/fisheries/doc_et_publ/factsheets/legal_texts/docscom/en/com_02_186_en.pdf

103 CFP: Council Regulation (EC) N° 2371/2002 of 20/12/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L358, p. 59 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32002R2371:EN:NOT

104 http://ec.europa.eu/environment/water/index.html

105 http://ec.europa.eu/environment/eia/home.htm

106 Article 2 (1) of Regulation 2371/2002.

107 Article 1 (2), point b of Regulation 2371/2002.

- The three-year sandeel closure in force off the Firth of Forth (Scotland) since 2000 was renewed in 2003 following an expert consultation meeting convened by DG FISH. A study had been completed suggesting that the closure be extended for three more years until new evidence is gathered on the effects of the fishery on the survival of predator populations (birds, marine mammals, large fish).

- In 2003 and 2004 the Commission adopted under the emergency procedure two Commission Regulations ((EC) 1475/2003 and 263/2004) on the protection of deep- water coral reefs from the effects of trawling in the Darwin Mounds (North West of Scotland). These measures were made permanent in 2004 (Council Regulation ((EC) 602/2004)

- In 2004 legislation was put in place on incidental catches of cetaceans in fisheries (Regulation No 812/2004) including compulsory use of acoustic deterrent devices in certain gear and setting up a Community observer programme designed to provide data on by-catch in a large number of fisheries.

- In 2005 legislation was adopted to protect vulnerable habitats such as coral reefs, thermal vents and carbonate mounds from the effects of fishing around the Macaronesian Isles (Council regulation (EC) No 1568/2005). An amendment to the 2004 TAC and Quota Regulation was approved to ensure temporary protection of these habitats in the meantime.

- In 2006 the Council adopted the Mediterranean Regulation ((EC) 1967/2006) which includes measures to protect sensitive habitats such as Posidonia beds and coral aggregations and to ban fishing practices that may damage the physical environment, such as the use of explosives and pneumatic hammers. It includes new technical measures on fishing gear, protection zones and minimal sizes.

- Legislation regulating the use of driftnets in Community fishing vessels (Council Regulations (EC) No 894/97 as amended by Regulation (EC) No 1235/98, (EC) No 812/2004, (EC) No 2187/2005)

- Legislation implementing fisheries restrictive areas to protect vulnerable deep sea habitats in the Mediterranean and in the North East Atlantic is included in Council Regulation (EC) No 41/2006 .

(All the above legislation may be consulted in detail at http://eur-lex.europa.eu/en/index.htm)

The current CFP allows for better integration of environmental protection requirements into fisheries management. It therefore contributes directly to the achievement of the objectives of both the Birds and Habitats Directives. Furthermore, it provides for a system of protection for marine habitats and species from the harmful effects of fishing activities even in cases where the provisions of Natura 2000 do not apply. This is particularly relevant in situations such as the following:

a.) For the protection of nature features not listed in Annexes of the Habitats Directive

b.) For the protection of features that are listed in the Annexes, but occur in areas outside the jurisdiction of Member States.

c.) For the protection of those listed features, located in marine areas under the jurisdiction of Member States but not included in a SCI/SAC (because they are located out of a SCI or waiting for a proposal/designation)

As shown above, the CFP allows for the implementation of fisheries management measures for the protection of the marine environment may already be taken under CFP provisions..

They may be aimed at the protection of sites that are qualified to be designated as SACs or SPA. Fisheries measures may be decided regardless of the stage in which the site designation process would be, as they are not necessarily linked to the implementation of the Habitats or Birds Directives.

However, pressures on the marine environment do not only come from fisheries. Subsequently, designation of Natura 2000 sites is necessary to ensure a global and coherent protection scheme to address the effects produced by other human activities (some of them illustrated in section 5.9.)

Council Regulation (EC) No 1967/2006 of 21 December 20061626/94 of 27 June 1994 lays down certain technical measures for the conservation of fisheries resources in the Mediterranean. This is another example of Community action taken in the context of the Common Fisheries Policy to achieve environmental objectives. Article 43.3 of this Regulation prohibits the use of bottom trawls, seines or similar nets above the Posidonia beds (*Posidonia oceanica*) or other marine phanerogams (it includes some derogations). Posidonia beds are listed as a "priority" habitat type under Annex I of the Habitats Directive	
Full text of the Council Regulation in Eur-Lex: http://europa.eu.int/eur-lex/en/search/search_lif.html Image Courtesy from WWF/ES. More details in: http://www.wwf.es/descarga/informe_posidonia.pdf	

The above examples show how the use of provisions of Common Fisheries Policy plays an important role in marine nature protection, addressing relevant environmental concerns.

Member States have agreed to delegate their national responsibilities in fisheries management to the Community establishing the Common Fisheries Policy as an exclusive Community competence. Therefore, there is a legal obligation to implement measures under the CFP whenever fishing restriction measures at EU level are required in order to address important conservation problems in the marine environment. This is a significant advantage as such measures for conservation purposes may be addressed by a single EU level decision.

A decision taken at Community level will be more efficient than the addition of separate national decisions that would otherwise need to be taken. However, the adoption of Community legislation requires enhanced coordination between Member States, the Commission, and the Council.

 Image from WWF	Taking into account considerations that include relevant provisions of 1) Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, and 2) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, Council regulation (EC) No 812/2004 laid down measures concerning incidental catch of cetaceans in fisheries. This regulation sets out that driftnet fishing will be phased out in the Baltic as from 1 July 2004 until a total gear ban enters into force on 1 January 2008. At the same time, the regulation lays down measures aimed at mitigating by-catch. It advocates the use of acoustic devices and at-sea observer schemes as well as providing technical specifications and conditions of use.
Full text of the Council Regulation: http://eur-lex.europa.eu/pri/en/oj/dat/2004/l_150/l_15020040430en00120031.pdf More details in: http://www.panda.org/about_wwf/where_we_work/europe/where/baltics/threats/fishing.cfm	

6.2. Fisheries management measures

The process of establishment, monitoring and conservation status assessment of Natura 2000 has been developed in previous chapters. The assessment of monitoring data may show, in some cases, the necessity to regulate certain fishing activities in order to avoid the deterioration of the site[108]. In such cases, given that fisheries is an exclusive Community competence, fisheries management measures should be decided in the context of the Common Fisheries Policy and according to its rules. The basic rules are enshrined in the Regulation 2371/2002.

Fisheries management measures must be taken in consultation with stakeholders and, in particular, with the Regional Advisory Councils (RACs) which are becoming an essential instrument of the CFP.

Fishery management measures under the CFP could also be implemented in marine areas once the MS (or MSs) has proposed the relevant area as Site of Community Importance and is waiting for the area to be declared as Natura 2000 site after adoption of appropriate Commission's decision. In such cases, MSs must provide the necessary information justifying the need for temporary protection of the area.

To ensure consistency, non discrimination, and best implementation of regulatory measures, whenever possible, MSs sharing a vulnerable marine feature should coordinate and make proposals of Sites of Community Importance covering the entire valuable feature at the same time. In line with the Habitats Directive, the approach should be regional and not national: the final objective is the establishment of a coherent ecological network of protected areas by marine regions that often extend across several Member States. In order to avoid displacement

[108] 92/43 Directive: Art 6.2*: Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive*. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:NOT

of fishing effort to neighbouring areas, management measures should be the same for the entire marine region.

MSs shall ensure effective control inspection and enforcement of the rules of the CFP. Therefore, fisheries management measures proposed in Natura 2000 areas must be controllable in a cost-effective way and should be accompanied by the relevant monitoring and control measures as well as an estimation of the cost of controlling such areas. VMS is the more efficient monitoring tool in the EEZ. Small and scattered areas are very difficult to monitor and should be avoided.

The definition of possible measures regulating fishing activities in a particular site will depend on the combination of many different parameters such as the number and nature of the features to be protected, their conservation status, time scales, the location of the marine site, etc. By combining these parameters, it is possible to find a large number of different nature conservation cases needing some regulation of fisheries activities.

For this reason, it is not possible to develop in this document an exhaustive catalogue of all possible actions to be taken under the CFP, which need to be determined on a case by case basis for which specific technical and legal advice would be required. The information contained here is therefore of general nature.

On the basis of article 37 of the EC Treaty, it is for the Council, based on a proposal from the Commission, to adopt measures regulating fisheries. This applies also to measures regulating fishing activities in order to protect a Natura 2000 site. Measures under the CFP are non discriminatory and permanent and are therefore the best option. However, Articles 8, 9 and 10 of Regulation 2371/2002 delegate some limited powers to the Member States to regulate fisheries.

More specifically, Article 8 allows Member States to take emergency measures, the maximum duration of which is 3 months, if there is evidence of a serious and unforeseen threat to the marine ecosystem resulting from fishing activities. However, due to their limited duration such measures will only exceptionally be considered in the framework of establishment of conservation measures addressing an environmental concern of a more permanent character.

On the basis of Article 9, Member States can take non-discriminatory measures to minimise the effect of fishing on the conservation of the marine ecosystems within 12 nautical miles of their coast if the Community has not adopted measures specifically for this area. If these measures are liable to affect the vessels of another Member State, a consultation procedure with the Commission, other Member States and Regional Advisory Councils concerned is necessary before the adoption of the measures.

Finally, Member States can take measures in waters under their sovereignty or jurisdiction if they apply solely to their fishing vessels (Article 10).

In cases where a Member State considers that a fishing activity has to be regulated in order to protect a Natura 2000 site, but it has not the competence to do so on the basis of the Regulation 2371/2002, it is for the Community to finally take fisheries measures. In practice, the Member State concerned will provide the data at its disposal to the Commission, indicating the measures that it considers appropriate. However, neither the Commission's right of initiative in proposing fisheries measures, nor the Council's broad legislative discretion in adopting such measures, can be legally restricted by the request of the Member State. Nevertheless, the Commission and the Council while exercising their legislative discretion in the fisheries sector have to comply with article 6 of the EC Treaty obliging the integration of environmental protection requirements in all Community policies.

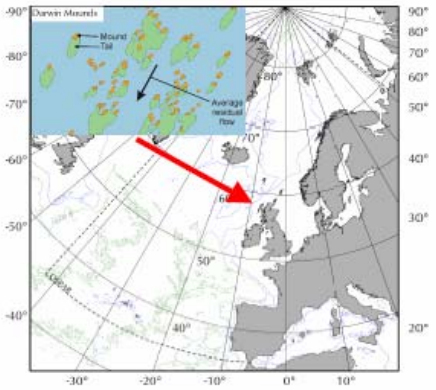
As indicated above, measures taken in the framework of the Common Fisheries Policy (CFP) are decided in a coordinated manner at Community level, which should enhance their coherence and effectiveness.

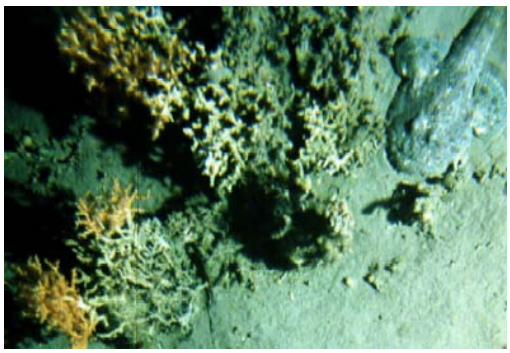
The Darwin Mounds is a deep cold coral reef formation, discovered in 1998, in the offshore waters of North Scotland. The United Kingdom has declared its intention to propose this area as a future Special Area of Conservation in fulfilment of its obligation under the Habitats Directive.

With this intention in mind, and en response to a request from the UK, the European Community adopted a Regulation [(EC) No 602/2004 of 22 March 2004] to prohibit the use of bottom trawls and similar gear, in order to avoid damage to corals, in the area surrounding the Darwin Mounds.

This is an example of Community action taken in the context of the Common Fisheries Policy (CFP) aimed at achieving environmental objectives. Integration of environmental protection requirements into the CFP has spurred this Community measure to be taken in anticipation of future SCI/SAC designation

(Details in Annex 5, EC press release on http://ec.europa.eu/fisheries/press_corner/press_releases/archives/com03/com03_36_en.htm)





Lophelia Pertusa colonies and associated bentic fauna photographed on the Darwin Mounds

(Courtesy of WWF/ DEEPSEAS Group, © Southampton Oceanography Centre).

In February 2006, ICES initiated a new project entitled "Environmentally Sound Fishery Management in Protected Areas" to develop fisheries management plans for each of the ten German NATURA 2000 areas[109]. For each of the ten pSCI/SPA the central questions to be answered are:

- To what extent do the fishing activities in the MPA represent a significant interference with the NATURA 2000 concept and objectives?
- To what extent do the fisheries activities need to be regulated?
- How can such regulations provide a balance between the requirements of NATURA 2000 and fisheries?

[109] See http://www.ices.dk/marineworld/protectedAreas.asp

The answers to these questions will be based on existing and, where appropriate, newly collected data – in particular from cooperation with fishers and the fishing industry. The project intends to significantly improve the data used for evaluation of the potential conflicts between fisheries and nature conservation interests in German waters and will require an analysis of fishing activities of all fishing vessels operating in (and around) the MPAs.

Appendix 1. **Marine Habitat types definitions. Update of "Interpretation Manual of European Union Habitats".**

Appendix 2. **Lists of existing marine Habitat types and Species for different Member States**

Appendix 3. **Examples of the technique of the use of matrix as a management tool for decision making.**

Appendix 4. **Good experiences and examples of implementation of Natura 2000 in the marine environment, including Life-fund projects.**

Appendix 5. **Bibliography**

Appendix 1

Marine Habitat types definitions.

Update of “Interpretation Manual of European Union Habitats”

COASTAL AND HALOPHYTIC HABITATS

Open sea and tidal areas

1110 Sandbanks which are slightly covered by sea water all the time

PAL.CLASS.: 11.125, 11.22, 11.31

1. Definition:

Sandbanks are elevated, elongated, rounded or irregular topographic features, permanently submerged and predominantly surrounded by deeper water. They consist mainly of sandy sediments, but larger grain sizes, including boulders and cobbles, or smaller grain sizes including mud may also be present on a sandbank. Banks where sandy sediments occur in a layer over hard substrata are classed as sandbanks if the associated biota are dependent on the sand rather than on the underlying hard substrata.

"Slightly covered by sea water all the time" means that above a sandbank the water depth is seldom more than 20 m below chart datum. Sandbanks can, however, extend beneath 20 m below chart datum. It can, therefore, be appropriate to include in designations such areas where they are part of the feature and host its biological assemblages.

2. Characteristic animal and plant species

2.1. Vegetation:

North Atlantic including North Sea:

Zostera sp., free living species of the *Corallinaceae* family. *On many sandbanks macrophytes do not occur.*

Central Atlantic Islands (Macaronesian Islands):

Cymodocea nodosa and *Zostera noltii*. On many sandbanks free living species of *Corallinaceae* are conspicuous elements of biotic assemblages, with relevant role as feeding and nursery grounds for invertebrates and fish. *On many sandbanks macrophytes do not occur*.

Baltic Sea:

Zostera sp., *Potamogeton* spp., *Ruppia* spp., *Tolypella nidifica*, *Zannichellia* spp., carophytes. *On many sandbanks macrophytes do not occur*.

Mediterranean:

The marine Angiosperm *Cymodocea nodosa*, together with photophilic species of algae living on the leaves (more than 15 species, mainly small red algae of the *Ceramiaceae* family), associated with *Posidonia* beds. *On many sandbanks macrophytes do not occur*.

2.2. Animals:

North Atlantic including North Sea:

Invertebrate and demersal fish communities of sandy sublittoral (e.g. polychaete worms, crustacea, anthozoans, burrowing bivalves and echinoderms, *Ammodytes* spp., *Callionymus* spp., *Pomatoschistus* spp., *Echiichtys vipera, Pleuronectes platessa, Limanda limanda*).

Central Atlantic Islands (Macaronesian Islands):

Fish, crustacean, polychaeta, hydrozoan, burrowing bivalves, irregular echinoderms.

Baltic Sea:

Invertebrate and demersal fish communities of sandy sublittoral (fine and medium grained sands, coarse sands, gravely sands), e.g. polychaetes: *Scoloplus armiger, Pygospio elegans, Nereis diversicolor, Travisia* sp., e.g. bivalves: *Macoma balthica, Mya arenaria, Cerastoderma* sp., e.g. crustaceans: *Crangon crangon, Saduria entomon, e.g. fish species: Platichthys flesus, Nerophis ophidion, Pomatoschistus* spp., *Ammodytes tobianus*.

Mediterranean:

Invertebrate communities of sandy sublittoral (e.g. polychaetes). Banks are often highly important as feeding, resting or nursery grounds for sea birds, fish or marine mammals.

3. Corresponding categories:

French classification ZNIEFF-MER:

“Biocénose des sables fins de haut niveau”, “Biocénose des sables fins bien calibrés”.

German classification:

“Sandbank der Ostsee (ständig wasserbedeckt)(040202a)”, “Sandbank der Nordsee (ständig wasserbedeckt)(030202a)“.

Barcelona Convention:

“Biocenosis of fine sands in very shallow waters (III. 2. 1.) with facies with *Lentidium mediterraneum* (III. 2. 1. 1.)”, “Biocenosis of well sorted fine sands (III. 2. 2.) with associations with *Cymodocea nodosa* on well sorted fine sands (III. 2. 2. 1.) and with *Holophila stipulacela* (III. 2. 2. 2), the latter considered determinant habitat in C. B.”, “Biocenosis of coarse sands and fine gravels mixed by the waves (III. 3. 1.) with association with rhodolithes (III. 3. 1. 1), considered determinant habitat in the C. B.”, “Biocenosis of coarse sands and fine gravels under the influence of bottom currents (also found in the Circalittoral) (III. 3. 2.). It is possible to find a facies and an association which are determinant habitats for C. B.: the maërl facies (= Association with *Lithothamnion corallioides* and *Phymatoliton calcareum*), also found as facies of the biocenosis of coastal detritic (III. 3. 2. 1), and the association with rhodolithes (III. 3. 2. 2.)”, “Biocenosis of infralittoral pebbles (III. 4. 1.) with facies with *Gouania wildenowi* (III. 4. 1. 1.), small teleostean which lives among pebbles.”

Nordic classifications:

Vegetationstyper i Norden, Påhlsson (ed.) 1994:

> “*Zostera marina*-typ (4.4.1.1)”, “*Ruppia maritima*-typ (4.4.1.2)”, “Chara-typ (6.3.3.1)”, “Potamogeton pectinatus (6.3.2.2)”.

Kustbiotoper i Norden, Nordiska Ministerrådet 2001:

> “Sandbottnar (7.7.1.2; 7.8.1.2; 7.8.4.2; 7.8.5.2; 7.8.6.7; 7.8.6.8; 7.8.6.9; 7.8.7.9; 7.8.7.10; 7.8.7.11; 7.9.1.1.; 7.9.2.1; 7.9.3.1; 7.9.4.1).”

HELCOM classification:

> “Sublittoral gravel bottoms. Banks with or without macrophyte vegetation (2.4.2.3)”, “Sublittoral sandy bottoms. Banks with or without macrophyte vegetation (2.5.2.4)”.

The National Marine Habitat Classification for Britain and Ireland Version 03.02:
Relevant types within “Sublittoral coarse sediments (SCS), Sublittoral sands (SSA) and Sublittoral macrophytes communities (SMP)”.

EUNIS classification:
Relevant types within "A4.4, A4.55, A4.1, A4.2, A4.51, A4.5, A4.53, A4.1, A4.2, A4.51, A4.5, A4.53, A4.4, A4.55, A7.32, A4.51, A4.53, A4.552, 4.521, A4.521, A4.513, A6.22, A4.51, A4.141, A4.13, A8.13".

4. Associated habitats:

Sandbanks can be found in association with mudflats and sandflats not covered by seawater at low tide (1140), with Posidonia beds (1120) and reefs (1170). Sandbanks may also be a component part of habitat 1130 Estuaries and habitat 1160 Large shallow inlets and bays.

5. Literature:

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1120 * Posidonia beds (*Posidonion oceanicae*)

PAL.CLASS.: 11.34

1) Beds of *Posidonia oceanica* (Linnaeus) Delile characteristic of the infralittoral zone of the Mediterranean (depth: ranging from a few dozen centimetres to 30 - 40 metres). On hard or soft substrate, these beds constitute one of the main climax communities. They can withstand relatively large variations in temperature and water movement, but are sensitive to desalination, generally requiring a salinity of between 36 and 39‰.

2) Plants: *Posidonia oceanica*.
Animals: Molluscs- *#Pinna nobilis*; Echinoderms- *Asterina pancerii, Paracentrotus lividus*; Fish- *Epinephelus guaza, Hippocampus ramulosus.*

5) **Belsher, T. *et al* (1987).** *Livre rouge des espèces menacées de France - tome 2, espèces marines et littorales menacées,* Ed. F. de Beaufort. Museum National d'Histoire Naturelle - Paris.

1130 Estuaries

PAL.CLASS.: 13.2, 11.2

1) Downstream part of a river valley, subject to the tide and extending from the limit of brackish waters. River estuaries are coastal inlets where, unlike 'large shallow inlets and bays' there is generally a substantial freshwater influence. The mixing of freshwater and sea water and the reduced current flows in the shelter of the estuary lead to deposition of fine sediments, often forming extensive intertidal sand and mud flats. Where the tidal currents are faster than flood tides, most sediments deposit to form a delta at the mouth of the estuary.
Baltic river mouths, considered as an estuary subtype, have brackish water and no tide, with large wetland vegetation (helophytic) and luxurious aquatic vegetation in shallow water areas.

2) Plants: Benthic algal communities, *Zostera* beds e.g. *Zostera noltii* (*Zosteretea*) or vegetation of brackish water: *Ruppia maritima* (= *R. rostellata* (*Ruppietea*)); *Spartina maritima* (*Spartinetea*); *Sarcocornia perennis* (*Arthrocnemetea*). Both species of fresh water and brackish water can be found in Baltic river mouths (*Carex* spp., *Myriophyllum* spp., *Phragmites australis*, *Potamogeton* spp., *Scirpus* spp.).
Animals: Invertebrate benthic communities; important feeding areas for many birds.

3) Corresponding categories
German classification : "D2a Ästuare (Fließgewässermündungen mit Brackwassereinfluß u./od. Tidenhub eingeschlossen werden", "050105 Brackwasserwatt des Ästuare an der Nordsee", "050106 Süßwasserwatt im Tideeinfluß des Nordsee".

4) An estuary forms an ecological unit with the surrounding terrestrial coastal habitat types. In terms of nature conservation, these different habitat types should not be separated, and this reality must be taken into account during the selection of sites.

5) **Brunet, R. et al.** *Les mots de la géographie-dictionnaire critique*. Ed. Reclus.
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1140 Mudflats and sandflats not covered by seawater at low tide

PAL.CLASS.: 14

1) Sands and muds of the coasts of the oceans, their connected seas and associated lagoons, not covered by sea water at low tide, devoid of vascular plants, usually coated by blue algae and diatoms. They are of particular importance as feeding grounds for wildfowl and waders. The diverse intertidal communities of invertebrates and algae that occupy them can be used to define subdivisions of 11.27, eelgrass communities that may be exposed for a few hours in the course of every tide have been listed under 11.3, brackish water vegetation of permanent pools by use of those of 11.4.
Note: Eelgrass communities (11.3) are included in this habitat type.

1150 * Coastal lagoons

PAL.CLASS.: 21

1) Lagoons are expanses of shallow coastal salt water, of varying salinity and water volume, wholly or partially separated from the sea by sand banks or shingle, or, less frequently, by rocks. Salinity may vary from brackish water to hypersalinity depending on rainfall, evaporation and through the addition of fresh seawater from storms, temporary flooding of the sea in winter or tidal exchange. With or without vegetation from *Ruppietea maritimae, Potametea, Zosteretea* or *Charetea* (CORINE 91: 23.21 or 23.22).

- Flads and gloes, considered a Baltic variety of lagoons, are small, usually shallow, more or less delimited water bodies still connected to the sea or have been cut off from the sea very recently by land upheaval. Characterised by well-developed reedbeds and luxuriant submerged vegetation and having several morphological and botanical development stages in the process whereby sea becomes land.
- Salt basins and salt ponds may also be considered as lagoons, providing they had their origin on a transformed natural old lagoon or on a saltmarsh, and are characterised by a minor impact from exploitation.

2) Plants: *Callitriche* spp., *Chara canescens, C. baltica, C. connivens, Eleocharis parvula, Lamprothamnion papulosum, Potamogeton pectinatus, Ranunculus baudotii, Ruppia maritima, Tolypella n. nidifica*. In flads and gloes also *Chara* ssp.(*Chara tomentosa*), *Lemna trisulca, Najas marina, Phragmites australis, Potamogeton* ssp., *Stratiotes aloides, Typha* spp.
Animals: Cnidaria- *Edwardsia ivelli;* Polychaeta- *Armandia cirrhosa*; Bryozoa- *Victorella pavida*; Rotifera - *Brachionus* sp.; Molluscs- *Abra* sp., *Murex* sp.; Crustaceans- *Artema* sp.; Fish- *Cyprinus* sp., *Mullus barbatus*; Reptiles- *Testudo* sp.; Amphibians- *Hyla* sp.

3) Corresponding categories
German classification : "0906 Strandsee", "240601 Brackwassersee im Ostseeküstenbereich".

4) Saltmarshes form part of this complex.

5) **Bamber et al. (1992).** On the ecology of brackish lagoons in Great Britain. *Aquatic conservation: marine and freshwater ecosystems*, 2, 65-94.
Barnes, R.S.K. (1988). The faunas of landlocked lagoons: chance differences and problems of dispersal. *Estuarine and Coastal Shelf Science*, 26, 309 - 18.
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1160 Large shallow inlets and bays

PAL.CLASS.: 12

1) Large indentations of the coast where, in contrast to estuaries, the influence of freshwater is generally limited. These shallow [1] indentations are generally sheltered from wave action and contain a great diversity of sediments and substrates with a well developed zonation of benthic communities. These communities have generally a high biodiversity. The limit of shallow water is sometimes defined by the distribution of the *Zosteretea* and *Potametea* associations.
Several physiographic types may be included under this category providing the water is shallow over a major part of the area: embayments, fjards, rias and voes.

2) Plants: *Zostera* spp., *Ruppia maritima*, *Potamogeton* spp. (e.g. *P. pectinatus*, *P. praelongus*), benthic algae.
Animals: Benthic invertebrate communities.

3) Corresponding categories
German classification : "B31 naturnaher Boddengewässerkomplex", "B32 Boddengewässerkomplex, geringe Belastung", "A2a Flachwasserzonen der Nordsee (Meeresarme u. -buchten, incl. Seegraswiesen)".

5) **Luther, (1951).** Verbreitung und Ökologie der höheren Wasserpflanzen im Brackwasser der Ekenäs-Gegend in Süd-Finnland. I. Allgemeiner Teil. ABF 49, 1-232. II Spezieller Teill. ABF 50, 1-370.

[1] National experts consider inappropriate to fix a maximum water depth, since the term 'shallow' may have different ecological interpretations according to the physiographic type considered and geographical location.

1170 Reefs

PAL.CLASS.: 11.24, 11.25

1. Definition of the habitat:

Reefs can be either biogenic concretions or of geogenic origin. They are hard compact substrata on solid and soft bottoms, which arise from the sea floor in the sublittoral and littoral zone. Reefs may support a zonation of benthic communities of algae and animal species as well as concretions and corallogenic concretions.

Clarifications:

- "*Hard compact substrata"* are: rocks (including soft rock, e.g. chalk), boulders and cobbles (generally >64 mm in diameter).
- "*Biogenic concretions"* are defined as: concretions, encrustations, corallogenic concretions and bivalve mussel beds originating from dead or living animals, i.e. biogenic hard bottoms which supply habitats for epibiotic species.
- "*Geogenic origin"* means: reefs formed by non biogenic substrata.
- "*Arise from the sea floor"* means: the reef is topographically distinct from the surrounding seafloor.
- "*Sublittoral and littoral zone"* means: the reefs may extend from the sublittoral uninterrupted into the intertidal (littoral) zone or may only occur in the sublittoral zone, including deep water areas such as the bathyal.
- Such hard substrata that are covered by a thin and mobile veneer of sediment are classed as reefs if the associated biota are dependent on the hard substratum rather than the overlying sediment.
- Where an uninterrupted zonation of sublittoral and littoral communities exist, the integrity of the ecological unit should be respected in the selection of sites.
- A variety of subtidal topographic features are included in this habitat complex such as: Hydrothermal vent habitats, sea mounts, vertical rock walls, horizontal ledges, overhangs, pinnacles, gullies, ridges, sloping or flat bed rock, broken rock and boulder and cobble fields.

2. Examples for typical reef species

2.1 Reef vegetation:

North Atlantic including North Sea and Baltic Sea:

A large variety of red, brown and green algae (some living on the leaves of other algae).

Atlantic (Cantabric Sea, Bay of Bizcay): *Gelidium sesquipedale* communities associated with brown algae (*Fucus*, *Laminaria*, *Cystoseira*), and red algae (Corallinaceae, Ceramiceae, Rhodomelaceae).

Central Atlantic Islands (Macaronesian Islands) and Mediterranean:

Cystoseira/*Sargassum* beds with a mixture of other red algae (*Gelidiales, Ceramiales*), brown algae (*Dictyotales*) and green algae (*Siphonales, Siphonacladales*).

2.2. Examples for typical reef animals:

2.2.1 Examples for animals forming biogenic reefs:

North Atlantic including North Sea:

Polychaetes (*e.g. Sabellaria spinulosa, Sabellaria alveolata, Serpula vermicularis*), bivalves (e.g. *Modiolus modiolus, Mytilus sp.*) and cold water corals (e.g. *Lophelia pertusa*).

Atlantic (Gulf of Cádiz): Madreporarians communities: *Dendrophyllia ramea* community (banks), *Dendrophyllia cornigera* community (banks); white corals communities (banks), (*Madrepora oculata* and *Lophelia pertusa* community (banks). *Solenosmilia variabilis* community (banks). Gorgonians communities: Facies of *Isidella elongata* and *Callogorgia verticillata* and *Viminella flagellum*; Facies of *Leptogorgia* spp.; Facies of *Elisella paraplexauroides*; Facies of *Acanthogorgia* spp. and *Paramuricea* spp. *Filigrana implexa* formations.

Central Atlantic Islands (Macaronesian Islands):

Warm water corals (*Dendrophilia, Anthiphates*), serpulids, polychaetes, sponges, hydrozoan and briozoan species together with bivalve molluscs (*Sphondillus, Pinna*).

Baltic Sea: Bivalves (e.g. *Modiolus modiolus, Mytilus* sp., *Dreissena polymorpha).*

Mediterranean: Serpulid polychaetes, bivalve molluscs (e.g. *Modiolus sp. Mytilus sp.* and oysters). Polychaetes (*e.g. Sabellaria alveolata).*

South-West Mediterranean: Dendropoma *petraeum* reefs (forming boulders) or in relation with the red calcareous algae *Spongites* spp or *Litophyllum lichenoides*. *Filigrana implexa* formations. Gorgonians communities: Facies of holoaxonia gorgonians (*Paramuricea clavata* "forest", *Eunicella singularis* "forest"), mixed facies of gorgonians (*Eunicella* spp, *P. clavata, E. paraplexauroides, Leptogorgia* spp). Facies of *Isidella elongata* and *Callogorgia verticillata*; Facies of scleroaxonia gorgonians (*Corallium rubrum*). Madreporarians communities: *Cladocora caespitosa* reefs, *Astroides calycularis* facies. Madreporarians communities: *Dendrophyllia ramea* community (banks); *Dendrophyllia cornigera* community (banks); white corals communities (banks): *Madrepora oculata* and *Lophelia pertusa* community (banks).

West Mediterranean: Polychaetes (exclusively *Sabellaria alveolata).*

2.2.2 Examples for non reef forming animals:

North Atlantic including North Sea:

In general sessile invertebrates specialized on hard marine substrates such as sponges, anthozoa or cnidaria, bryozoans, polychaetes, hydroids, ascidians, molluscs and cirripedia (barnacles) as well as diverse mobile species of crustaceans and fish.

Central Atlantic Islands (Macaronesian Islands):

Gorgonians, hydrozoans, bryozoan and sponges, as well as diverse mobile species of crustacean, molluscs (cephalopoda) and fish.

Baltic Sea: Distribution and abundance of invertebrate species settling on hard substrates are limited by the salinity gradient from west to east. Typical groups are: hydroids, ascidians, cirripedia (barnacles), bryozoans and molluscs as well as diverse mobile species of crustaceans and fish.

Mediterranean: Cirripedia (barnacles), hydroids, bryozoans, ascidians, sponges, gorgonians and polychaetes as well as diverse mobile species of crustaceans and fish.

3. Corresponding categories:

German classification:

„Benthal der Nordsee mit Hartsubstrat (010204)“, “Riffe der Nordsee (010204a)“, „Benthal der Flachwasserzone der Nordsee mit Hartsubstrat, makrophytenarm (030204)“, „Benthal der Flachwasserzone der Nordsee mit Hartsubstrat, makrophytenreich (030206)“, “Miesmuschelbank des Sublitorals der Nordsee (030207)“, “Austernbank des Sublitorals der Nordsee (030208)“, “Sabellaria-Riff des Sublitorals der Nordsee (030209)”, „Felswatt der Nordsee (050104)“, “Miesmuschelbank des Eulitorals der Nordsee (050107)“;

“Benthal der Ostsee mit Hartsubstrat (020204)“, “Riffe der Ostsee (020204a)“, „Benthal der Flachwasserzone der Ostsee mit Hartsubstrat, makrophytenarm (040204)“, „Benthal der Flachwasserzone der Ostsee mit Kies- und Hartsubstrat, makrophytenreich (040206)“, „Miesmuschelbank des Sublitorals der Ostsee (040207)“, „Vegetationsreiches Windwatt mit Hartsubstrat (060203) (Ostsee)“.

Barcelona Convention:

“Biocenosis of supralittoral rock (I.4.1.)”, “Biocenosis of the upper mediolittoral rock (II.4.1.)”, “Biocenosis of the lower mediolittoral rock (II.4.2.)”, “Biocenosis of infralittoral algae (III.6.1.)”, “Coralligenous (IV.3.1.)”, “Biocenosis of shelf-edge rock (IV.3.3)”, “Biocenosis of deep sea corals present in the Mediterranean bathyal (V.3.1.)”.

The National Marine Habitat Classification for Britain and Ireland Version 03.02:

“Littoral rock and other hard substrata (biotopes beginning with LR)”, “Infralittoral rock and other hard substrata (biotopes beginning with IR)”, “Circalittoral rock and other hard substrata (biotopes beginning with CR)”, “Littoral biogenic reefs (biotopes beginning with LBR)” and “Sublittoral biogenic reefs (biotopes beginning with SBR)”.

EUNIS classification :

Relevant types within “A1.1, A1.1/B-ELR.MB, A1.2, A1.2/B-MLR.MF, A1.3, A1.3/B-SLR, A1.4, A1.5, A1.6, A2.8, A3.1, A3.2, A3.2/M-III.6.1.(p), A3.2/H-02.01.01.02.03, A3.2/H-02.01.02.02.03, A3.3, A3.4, A3.5, A3.6, A3.6/B-MCR.M, A3.7, A3.8, A3.9, A3.A, A3.B, A3.C, A4.6, A5.1, A5.6”, A6.2, A6.3.

HELCOM classification:

"Sublittoral soft rock reefs of the photic zone with little or no macrophyte vegetation (2.1.1.2.3)", "Hydrolittoral soft rock reefs with or without macrophyte vegetation (2.1.1.3.3)", "Sublittoral solid rock reefs of the photic zone with or without macrophyte vegetation (2.1.2.2.3)", "Hydrolittoral solid rock reefs with or without macrophyte vegetation (2.1.2.3.3)", "Sublittoral stony reefs of the photic zone with or without macrophyte vegetation (2.2.2.3)", "Stony reefs of the hydrolittoral zone with or without macrophyte vegetation (2.2.3.3)".

Trilateral Wadden Sea Classification (von Nordheim et al. 1996):

"Sublittoral (old) blue mussel beds (03.02.07)", "Sublittoral oyster reefs (03.02.08)", "Sublittoral sabellaria reefs (03.02.09)", "Eulittoral (old) blue mussel beds (05.01.07)", "Benthic zone, stony and hard bottoms, rich in macrophytes, incl. artificial substrates (03.02.06)", "Benthic zone, stony and hard bottoms, few macrophytes (03.02.04)".

Nordic classification (Kustbiotoper i Norden, Nordiska Ministerrådet 2001):

"Klippbottnar (7.7.1.3; 7.7.2.3; 7.7.3.3; 7.7.4.3; 7.7.5.3; 7.8.1.3; 7.8.2.3; 7.8.3.4; 7.8.4.3; 7.8.5.3; 7.8.6.13; 7.8.7.16)", "Sublittorale samfund på sten- och klippebund (7.9.1.2)", "Sublittorale samfund på stenbund (7.9.2.2; 7.9.3.2)".

4. Associated habitats:

Reefs can be found in association with "vegetated sea cliffs" (habitats 1230, 1240 and 1250) "sandbanks which are covered by sea water all the time" (1110) and "sea caves" (habitat 8830). Reefs may also be a component part of habitat 1130 "estuaries" and habitat 1160 "large shallow inlets and bays".

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1180 Submarine structures made by leaking gases

PAL.CLASS.: 11.24

1. Definition of the habitat

Submarine structures consist of sandstone slabs, pavements, and pillars up to 4 m high, formed by aggregation of carbonate cement resulting from microbial oxidation of gas emissions, mainly methane. The formations are interspersed with gas vents that intermittently release gas. The methane most likely originates from the microbial decomposition of fossil plant materials.

The first type of submarine structures is known as “bubbling reefs”. These formations support a zonation of diverse benthic communities consisting of algae and/or invertebrate specialists of hard marine substrates different to that of the surrounding habitat. Animals seeking shelter in the numerous caves further enhance the biodiversity. A variety of sublittoral topographic features are included in this habitat such as: overhangs, vertical pillars and stratified leaf-like structures with numerous caves.

The second type are carbonate structures within “pockmarks”. “Pockmarks” are depressions in soft sediment seabed areas, up to 45 m deep and a few hundred meters wide. Not all pockmarks are formed by leaking gases and of those formed by leaking gases, many do not contain substantial carbonate structures and are therefore not included in this habitat. Benthic communities consist of invertebrate specialists of hard marine substrata and are different from the surrounding (usually) muddy habitat. The diversity of the infauna community in the muddy slope surrounding the “pockmark” may also be high.

2. Characteristic species:

“Bubbling reefs”

Plants: If the structure is within the photic zone, marine macroalgae may be present such as *Laminariales*, other foliose and filamentous brown and red algae.

Animals: A large diversity of invertebrates such as Porifera, Anthozoa, Polychaeta, Gastropoda, Decapoda, Echinodermata as well as numerous fish species are present. Especially the polychaete *Polycirrus norwegicus* and the bivalve *Kellia suborbicularis* are associated species of the “bubbling reefs”.

“Pockmarks”

Plants: Usually none.

Animals: Invertebrate specialists of hard substrate including Hydrozoa, Anthozoa, Ophiuroidea and Gastropoda. In the soft sediment surrounding the pockmark Nematodae, Polychaeta and Crustacea are present.

3. Associated habitats:

“Bubbling reefs” can be found in association with the habitat types ”sandbanks, which are covered by sea water all the time (1110)” and “reefs (1170)”.

4. Geographical distribution and regional varieties:

Shallow water examples of “bubbling reefs” colonised by macroalgae and/or animals are observed in Danish waters in the littoral and sublittoral zone from 0 to 30 m water depth. They are present in the northern Kattegat and in the Skagerrak and follow a NW SE direction parallel to the Fennoscandian fault line.

“Pockmarks” are found in many areas of the European shelf seas. Deep water examples of pockmarks with benthic fauna communities exists at approximately 100 m water depth in the UK part of the North Sea as depressions in areas of predominantly muddy seabed. Examples of extensive areas with pockmarks are found on the Galician coast (Spain) at the bottom of Rias at a more shallow water depth compared to the pockmarks in the North Sea. Present emission of gas has been reported, as well as other inactive pockmarks filled by more modern sediments. Another difference with the “bubbling reefs” of the Danish coast is that gas stocks are closer to the present bottom surface.

5. Corresponding categories:

HELCOM classification:

All subtypes under “Bubbling reefs (2.10)”

EUNIS:

Relevant types under A3.C.

6. Literature :

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Other rocky habitats

8330 Submerged or partially submerged sea caves

PAL.CLASS.: 12.7, 11.26, 11.294

1) Caves situated under the sea or opened to it, at least at high tide, including partially submerged sea caves. Their bottom and sides harbour communities of marine invertebrates and algae.

Appendix 2

Lists of existing marine Habitat types and Species

for different Member States

MARINE HABITATS

Habitats type		Distribution	Belgium		Denmark		Finland		France		Germany	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1110	Sandbanks	Baltic sea			P	?	P	?			P	P
		Atlantic / North sea	P	P	P	P			P	P	P	P
		Mediterranean sea							P	?		
1120	Posidonia Beds	Mediterranean sea							P	A		
1130	Estuaires	Baltic sea			P		P				P	
		Atlantic / North sea	P		P				P		P	
		Mediterranean sea							P			
1140	Mudflats and sandflats not covered by sea water at low tide	Baltic sea			P		P				P	
		Atlantic / North sea	P		P				P		P	
		Mediterranean sea							P			
1150	Coastal Lagoons	Baltic sea			P		P				P	
		Atlantic / North sea	A		P				P		P	
		Mediterranean sea							P			
1160	Large shallow inlets and bays	Baltic sea			P		P				P	
		Atlantic / North sea	A		P				P		P	
		Mediterranean sea							P			
1170	Reefs	Baltic sea			P	?	P	?			P	P
		Atlantic / North sea	A	A	P	A			P	P	P	P
		Mediterranean sea							P	P		
1180	Submarine structures made by leaking gases	Baltic sea			P	?	A	A			A	A
		Atlantic / North sea	A	?	A	?			A		A	A
		Mediterranean sea							A	?		
8330	Submerged or partially submerged caves	Baltic sea			P	?	A	?			A	A
		Atlantic / North sea	A	?	A	?			P	?	A	A
		Mediterranean sea							P	?		

P= Habitat PRESENT

A= Habitat ABSENT

? = No data

MARINE HABITATS

Habitats type		Distribution	Greece		Ireland		Italy		Netherlands	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1110	Sandbanks	Baltic sea								
		Atlantic / North sea			P	P			P	P
		Mediterranean sea	P	?			P	?		
1120	Posidonia Beds	Mediterranean sea	P	A			P	A		
1130	Estuaires	Baltic sea								
		Atlantic / North sea			P				P	
		Mediterranean sea	P				P			
1140	Mudflats and sandflats not covered by sea water at low tide	Baltic sea								
		Atlantic / North sea			P				P	
		Mediterranean sea	P				P			
1150	Coastal Lagoons	Baltic sea								
		Atlantic / North sea			P				A	
		Mediterranean sea	P				P			
1160	Large shallow inlets and bays	Baltic sea								
		Atlantic / North sea			P				P	
		Mediterranean sea	P				P			
1170	Reefs	Baltic sea								
		Atlantic / North sea			P	P			A	A
		Mediterranean sea	P	?			P	P		
1180	Submarine structures made by leaking gases	Baltic sea								
		Atlantic / North sea			A	?			A	?
		Mediterranean sea	A	?			A	?		
8330	Submerged or partially submerged caves	Baltic sea								
		Atlantic / North sea			P	?			A	?
		Mediterranean sea	P	?			P	?		

P= Habitat PRESENT
A= Habitat ABSENT
? = No data

MARINE HABITATS

TABLE 1

Habitats type		Distribution	Portugal		Spain		Sweden		United Kingdom	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1110	Sandbanks	Baltic sea					P	?		
		Atlantic / North sea	P	P	P	?			P	P
		Mediterranean sea			P	?			?	
1120	Posidonia Beds	Mediterranean sea			P	A			?	
1130	Estuaires	Baltic sea					P			
		Atlantic / North sea	P		P				P	
		Mediterranean sea			P				A	
1140	Mudflats and sandflats not covered by sea water at low tide	Baltic sea					P			
		Atlantic / North sea	P		P				P	
		Mediterranean sea			P				?	
1150	Coastal Lagoons	Baltic sea					P			
		Atlantic / North sea	P		P				P	
		Mediterranean sea			P				?	
1160	Large shallow inlets and bays	Baltic sea					P			
		Atlantic / North sea	P		P				P	
		Mediterranean sea			P				?	
1170	Reefs	Baltic sea					P	?		
		Atlantic / North sea	P	P	P	P			P	P
		Mediterranean sea			P	P			P	
1180	Submarine structures made by leaking gases	Baltic sea					A	?		
		Atlantic / North sea	A	?	?	?			A	?
		Mediterranean sea			?	?			?	
8330	Submerged or partially submerged caves	Baltic sea					P	?		
		Atlantic / North sea	P	?	P	?			P	?
		Mediterranean sea			P	?			?	

P= Habitat PRESENT
A= Habitat ABSENT
? = No data

MARINE HABITATS

TABLE 1

Habitats type		Distribution	Estonia		Latvia		Lithuania		Poland	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1110	Sandbanks	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1120	Posidonia Beds	Mediterranean sea								
1130	Estuaires	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1140	Mudflats and sandflats not covered by sea water at low tide	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1150	Coastal Lagoons	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1160	Large shallow inlets and bays	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1170	Reefs	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1180	Submarine structures made by leaking gases	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
8330	Submerged or partially submerged caves	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								

P= Habitat PRESENT
A= Habitat ABSENT
? = No data

MARINE HABITATS

TABLE 1

Habitats type		Distribution	Malta		Slovenia		Cyprus	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1110	Sandbanks	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1120	Posidonia Beds	Mediterranean sea						
1130	Estuaires	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1140	Mudflats and sandflats not covered by sea water at low tide	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1150	Coastal Lagoons	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1160	Large shallow inlets and bays	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1170	Reefs	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1180	Submarine structures made by leaking gases	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
8330	Submerged or partially submerged caves	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						

P= Habitat PRESENT
A= Habitat ABSENT
? = No data

MARINE SPECIES

TABLE 2

Species		Distribution	Belgium		Denmark		Finland		France	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1349	Tursiops truncatus	Baltic sea			A	A	A	A		
		Atlantic / North sea	P	P	P	P			P	P
		Mediterranean sea							P	P
1351	Phocoena phocoena	Baltic sea			P	P	A	A		
		Atlantic / North sea	P	P	P	P			P	P
		Mediterranean sea							A	A
1364	Halichoerus grypus	Baltic sea			P	P	P	P		
		Atlantic / North sea	P	P	P	P			P	P
1365	Phoca vitulina	Baltic sea			P	P	A	A		
		Atlantic / North sea	P	P	P	P			P	P
1366	Monachus monachus	Atlantic / North sea	A	A	A	A			A	A
		Mediterranean sea							A	A
1938	Phoca hispida bottnica	Baltic sea			A	?	P	P		
1224	Caretta caretta	Atlantic / North sea	A	A	A	A			P	***P[1]***
		Mediterranean sea							P	P
1095	Petromyzon marinus	Baltic sea			P	?	A	A		
		Atlantic / North sea	P	P	P	?			P	P
		Mediterranean sea							P	***P[2]***
1099	Lampetra fluviatilis	Baltic sea			P	?	e	e		
		Atlantic / North sea	P	P	P	?			P	***A***
		Mediterranean sea							P	***A[3]***
1100	Acipenser naccarii	Mediterranean sea							A	A
1101	Acipenser sturio	Baltic sea			A	A	A	A		
		Atlantic / North sea	A	A	A	A			P	P
		Mediterranean sea							A	A
1102	Alosa alosa	Baltic sea			P	?	A	A		
		Atlantic / North sea	A	A	P	?			P	***A***
		Mediterranean sea							P	***A[4]***
1103	Alosa fallax	Baltic sea			P	?	A	A		
		Atlantic / North sea	A	A	P	?			P	***A***
		Mediterranean sea							P	***A[5]***
1151	Aphanius iberus	Atlantic / North sea	A	A	A	A			A	A
		Mediterranean sea							A	A
1152	Aphanius fasciatus	Mediterranean sea							P	***A***
1153	Valencia hispanica	Mediterranean sea							A	A
1154	Pomatoschistus canestrini	Mediterranean sea							A	A
1992	Valencia letourneuxi	Mediterranean sea							A	A

P=Specie PRESENT
A= Specie ABSENT

? = No data
e = except the Finnish and/or Sweden populations

[1] Il existe des données mais cette espèce n'est pas habituelle des zones. Source l'atlas des reptiles d'europe J. Lescure
[2] espèce démersale source fish base, les cahiers d'espèces et P Keith
[3] Sp d'eau saumâtre pas d'observation en dessous de 10 m (fish base) confirmée par P Keith et les cahiers d'sp.
[4] sp non rencontrée en dessous de 5 m (fish base)
[5] sp non rencontrée en dessous de 1 m (fish base)

MARINE SPECIES

TABLE 2

Species		Distribution	Germany (*)		Greece		Ireland	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1349	Tursiops truncatus	Baltic sea	A	A				
		Atlantic / North sea	P	P			P	P
		Mediterranean sea			P	P		
1351	Phocoena phocoena	Baltic sea	P	P				
		Atlantic / North sea	P	P			P	P
		Mediterranean sea			P	P		
1364	Halichoerus grypus	Baltic sea	P	P				
		Atlantic / North sea	P	P			P	P
1365	Phoca vitulina	Baltic sea	P	P				
		Atlantic / North sea	P	P			P	P
1366	Monachus monachus	Atlantic / North sea	A	A			A	A
		Mediterranean sea			P	P		
1938	Phoca hispida bottnica	Baltic sea	A	A				
1224	Caretta caretta	Atlantic / North sea	A	A			A	A
		Mediterranean sea			P	P		
1095	Petromyzon marinus	Baltic sea	P	P				
		Atlantic / North sea	P	P			P	?
		Mediterranean sea			A	A		
1099	Lampetra fluviatilis	Baltic sea	P	P				
		Atlantic / North sea	P	P			P	?
		Mediterranean sea			A	A		
1100	Acipenser naccarii	Mediterranean sea			A	A		
1101	Acipenser sturio	Baltic sea	P	?				
		Atlantic / North sea	A	A			A	A
		Mediterranean sea			P	P		
1102	Alosa alosa	Baltic sea	P	?				
		Atlantic / North sea	P	?			P	?
		Mediterranean sea			A	A		
1103	Alosa fallax	Baltic sea	P	P				
		Atlantic / North sea	P	P			P	?
		Mediterranean sea			P	P		
1151	Aphanius iberus	Atlantic / North sea	A	A			A	A
		Mediterranean sea			A	A		
1152	Aphanius fasciatus	Mediterranean sea			P	P		
1153	Valencia hispanica	Mediterranean sea			A	A		
1154	Pomatoschistus canestrini	Mediterranean sea			A	A		
1992	Valencia letourneuxi	Mediterranean sea			P	?		

(*) Also, presence on inshore German Baltic waters of: 1355 Lutra lutra, 1149 Cobitis taenia, 1130 Aspius Aspius

MARINE SPECIES

TABLE 2

Species		Distribution	Italy		Netherlands		Portugal	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1349	Tursiops truncatus	Baltic sea						
		Atlantic / North sea			P	P	P	P
		Mediterranean sea	P	P				
1351	Phocoena phocoena	Baltic sea						
		Atlantic / North sea			P	P	P	P
		Mediterranean sea	A	A				
1364	Halichoerus grypus	Baltic sea						
		Atlantic / North sea			P	P	A	A
1365	Phoca vitulina	Baltic sea						
		Atlantic / North sea			P	P	A	A
1366	Monachus monachus	Atlantic / North sea			A	A	P	P
		Mediterranean sea	P					
1938	Phoca hispida bottnica	Baltic sea						
1224	Caretta caretta	Atlantic / North sea			A	A	P	P
		Mediterranean sea	P	P				
1095	Petromyzon marinus	Baltic sea						
		Atlantic / North sea			P	?	P	?
		Mediterranean sea	P	?				
1099	Lampetra fluviatilis	Baltic sea						
		Atlantic / North sea			P	?	P	?
		Mediterranean sea	P	?				
1100	Acipenser naccarii	Mediterranean sea	P	?				
1101	Acipenser sturio	Baltic sea						
		Atlantic / North sea			A	A	P	?
		Mediterranean sea	P	?				
1102	Alosa alosa	Baltic sea						
		Atlantic / North sea			P	?	P	?
		Mediterranean sea	?	?				
1103	Alosa fallax	Baltic sea						
		Atlantic / North sea			P	?	P	?
		Mediterranean sea	P	?				
1151	Aphanius iberus	Atlantic / North sea			A	A	A	A
		Mediterranean sea	A	A				
1152	Aphanius fasciatus	Mediterranean sea	P	A				
1153	Valencia hispanica	Mediterranean sea	A	A				
1154	Pomatoschistus canestrini	Mediterranean sea	P	A				
1992	Valencia letourneuxi	Mediterranean sea	A	A				

MARINE SPECIES

TABLE 2

Species		Distribution	Spain		Sweden		United Kingdom	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1349	Tursiops truncatus	Baltic sea			A	A		
		Atlantic / North sea	P	P			P	P
		Mediterranean sea	P	P			?	
1351	Phocoena phocoena	Baltic sea			P	P		
		Atlantic / North sea	P	P			P	P
		Mediterranean sea	P	P			?	
1364	Halichoerus grypus	Baltic sea			P	P		
		Atlantic / North sea	A	A			P	P
1365	Phoca vitulina	Baltic sea			P	P		
		Atlantic / North sea	A	A			P	
1366	Monachus monachus	Atlantic / North sea	A	?			A	A
		Mediterranean sea	P	P			?	
1938	Phoca hispida bottnica	Baltic sea			P	P		
1224	Caretta caretta	Atlantic / North sea	P	P			A	A
		Mediterranean sea	P	P			?	
1095	Petromyzon marinus	Baltic sea			e	e		
		Atlantic / North sea	P	?			P	P
		Mediterranean sea	P	?			?	
1099	Lampetra fluviatilis	Baltic sea			e	e		
		Atlantic / North sea	A	A			P	P
		Mediterranean sea	A	A			A	
1100	Acipenser naccarii	Mediterranean sea	A	A			A	
1101	Acipenser sturio	Baltic sea			A	A		
		Atlantic / North sea	A	A			A	A
		Mediterranean sea	P	?			A	
1102	Alosa alosa	Baltic sea			A	A		
		Atlantic / North sea	P	?			P	P
		Mediterranean sea	P	?			?	
1103	Alosa fallax	Baltic sea			A	A		
		Atlantic / North sea	P	?			P	P
		Mediterranean sea	P	?			?	
1151	Aphanius iberus	Atlantic / North sea	P	A			A	A
		Mediterranean sea	P	A			?	
1152	Aphanius fasciatus	Mediterranean sea	A	A			A	
1153	Valencia hispanica	Mediterranean sea	A	A			A	
1154	Pomatoschistus canestrini	Mediterranean sea	A	A			A	
1992	Valencia letourneuxi	Mediterranean sea	A	A			A	

MARINE SPECIES

TABLE 2

Species		Distribution	Estonia		Latvia		Lithuania		Poland	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1349	Tursiops truncatus	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1351	Phocoena phocoena	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1364	Halichoerus grypus	Baltic sea								
		Atlantic / North sea								
1365	Phoca vitulina	Baltic sea								
		Atlantic / North sea								
1366	Monachus monachus	Atlantic / North sea								
		Mediterranean sea								
1938	Phoca hispida bottnica	Baltic sea								
1224	Caretta caretta	Atlantic / North sea								
		Mediterranean sea								
1095	Petromyzon marinus	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1099	Lampetra fluviatilis	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1100	Acipenser naccarii	Mediterranean sea								
1101	Acipenser sturio	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1102	Alosa alosa	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1103	Alosa fallax	Baltic sea								
		Atlantic / North sea								
		Mediterranean sea								
1151	Aphanius iberus	Atlantic / North sea								
		Mediterranean sea								
1152	Aphanius fasciatus	Mediterranean sea								
1153	Valencia hispanica	Mediterranean sea								
1154	Pomatoschistus canestrini	Mediterranean sea								
1992	Valencia letourneuxi	Mediterranean sea								

P=Specie PRESENT
A= Specie ABSENT

MARINE SPECIES

TABLE 2

Species		Distribution	Malta		Slovenia		Cyprus	
			Inshore	Offshore	Inshore	Offshore	Inshore	Offshore
1349	Tursiops truncatus	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1351	Phocoena phocoena	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1364	Halichoerus grypus	Baltic sea						
		Atlantic / North sea						
1365	Phoca vitulina	Baltic sea						
		Atlantic / North sea						
1366	Monachus monachus	Atlantic / North sea						
		Mediterranean sea						
1938	Phoca hispida bottnica	Baltic sea						
1224	Caretta caretta	Atlantic / North sea						
		Mediterranean sea						
1095	Petromyzon marinus	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1099	Lampetra fluviatilis	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1100	Acipenser naccarii	Mediterranean sea						
1101	Acipenser sturio	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1102	Alosa alosa	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1103	Alosa fallax	Baltic sea						
		Atlantic / North sea						
		Mediterranean sea						
1151	Aphanius iberus	Atlantic / North sea						
		Mediterranean sea						
1152	Aphanius fasciatus	Mediterranean sea						
1153	Valencia hispanica	Mediterranean sea						
1154	Pomatoschistus canestrini	Mediterranean sea						
1992	Valencia letourneuxi	Mediterranean sea						

A= Specie ABSENT

P=Specie RESENT

TABLE 3

Seabirds and waterbird species for which SPAs should be considered.

PL – pelagic, large-scale dispersion offshore, e.g. feeding or migratory aggregations; PM – pelagic meso-scale dispersion offshore, e.g. feeding or migratory aggregations; CS – smaller scale, coastal dispersion outside or during the breeding season, e.g. feeding or roosting aggregations; CM – smaller to meso-scale (principally over time perhaps), coastal dispersion in the breeding season, e.g. aggregations of birds engaged in maintenance activities adjacent to breeding colonies.

Species may exhibit all scales of dispersion across or within seasons and these categories are not exclusive ones (see point 4.6 of the guidelines main text).

Species	Annex I	Indicative scales of aggregation
Gavia stellata	✓	CS
Gavia arctica	✓	CS
Gavia immer	✓	CS
Podiceps cristatus		CS
Podiceps grisegena		CS
Podiceps auritus	✓	CS
Podiceps nigricollis		CS
Fulmarus glacialis		PL, PM, CM
Pterodroma feae	✓	PL, PM
Pterodroma madeira	✓	PL, PM
Bulweria bulwerii	✓	PL, PM
Calonectris diomedea	✓	PL, PM
Puffinus griseus		PL, PM
Puffinus assimilis	✓	PL, PM, CS
Puffinus puffinus		PL, PM, CS
Puffinus mauretanicus	✓	PL, PM, CS
Puffinus yelkouan	✓	PL, PM, CS
Hydrobates pelagicus	✓	PL, PM
Oceanodroma leucorhoa	✓	PL, PM
Oceanodroma castro	✓	PL, PM
Pelagodroma marina	✓	PL, PM
Morus bassanus		PL, PM, CS, CM
Phalacrocorax carbo		CS, CM
Phalacrocorax aristotelis		CS, CM
Phalacrocorax a. desmarestii	✓	CS, CM
Phalaropus lobatus	✓	PL
Phalaropus fulicarius		PL
Aythya marila		CS
Somateria mollissima		CS
Polysticta stelleri	✓	CS
Melanitta nigra		CS
Melanitta fusca		CS
Clangula hyemalis		CS
Bucephala clangula		CS
Mergus serrator		CS
Mergus merganser		CS
Stercorarius skua		PL, PM
Stercorarius pomarinus		PL, PM
Stercorarius parasiticus		PL, PM
Stercorarius longicaudus		PL, PM
Larus genei	✓	PL, PM
Larus ridibundus		CS

Larus canus		CS
Larus melanocephalus	✓	CS
Larus audouini	✓	CS
Larus marinus		CS, CM
Larus fuscus		CS
Larus argentatus		CS, CM
Larus michahellis		CS, CM
Larus hyperboreus		PL, PM
Larus glaucoides		PL, PM
Larus minutus	✓	CS
Rissa tridactyla		PL, PM, CM
Sterna caspia	✓	CS
Sterna albifrons	✓	CS, CM
Sterna nilotica	✓	CS
Sterna sandvicensis	✓	CS, CM
Sterna paradiseae	✓	CS, CM
Sterna hirundo	✓	CS, CM
Sterna dougallii	✓	CS, CM
Cepphus grylle		CS, CM
Fratercula arctica		PL, PM, CM
Alle alle		PL, PM
Alca torda		PL, PM, CM
Uria aalge		PL, PM, CM
Uria aalge ibericus	✓	PL, PM, CM

Appendix 3

Examples of the technique of the use of matrix as a management tool for decision-making.

An example of the use of the matrix
Site A (hypotetical)
(see point 5.5 of the main texte)

Users	**Habitats**			**Species**				**Other elements of conservation concerns but not listed in EC Directives**			
	1110 sandbanks	1170 reefs	1180 leaking gasses	Cetaceans	Birds eating Fish	Birds eating Benthos	Phoca vitulina	Large fish	Large moluscs	Natural physical processes	selected species xx
SPACE											
windmills				?	?						
Harbours											
Art. islands											
Oil and gas exploration											
Oil and gas exploitation											
Shipping channels				?							
Pipelines/cables											
Military practice											
Tidal energy											
FISHERIES											
Bottom trawling										?	
Shell fishery/dredging											
Collection biogenic structures											
Pelagic fishery											
Seines, driftnet, line fisheries											
Set nets											
MINING/DREDGING											
Sand mining											
Gravel mining											
Channel dredging											

not relevant
no impact
easy regulation
zoning of activity
conflict -> regulation

Site B

Users	Habitats		Species				Other elements of conservation concerns but not listed in EC Directives			
	reefs	leaking gasses	Cetaceans	Birds eating Fish	Birds eating Benthos	Phoca vitulina	Large fish	Large moluscs	Natural physical processes	Some other selected species
SPACE										
windmills				?						
Harbours										
Art. islands										
Oil and gas expl										
Shipping channels										
Pipelines/cables										
Military practice										
Tidal energy										
POLLUTION										
Oil										
Chemical										
Eutrophication										
FISHERIES										
Bottom trawling									?	
Shell fishery/dredging										
Collection biogenic structures										
Collection manganese knolls etc										
Pelagic fishery										
Seines, driftnet, line fisheries										
Set nets										
Whaling										
MINING/DREDGING										
Sand mining										
Gravel mining										
Channel dredging										
DISTURBANCE										
Shipping										
Sesmic surveys.										
Pipelines										
Cables (magnetic fields)										

not relevant
no impact
easy regulation
zoning of activity
conflict -> regulation

Examples of possible outcomes after evaluation of the different impacts of human activities on the ecosystem of the sites “A” and “B”

1. Wind parks

Wind parks can be accommodated in SAC’s based on bottom biotopes. The pylons and bottom protection (mostly stone) will have an impact on the sediment, but the area impacted is so small compared to the distance the turbines are from each other (600 -750 m) that the impact in the specific natural values could be regarded as non-significant. Installation of wind parks will need implementation of safety measures that will need regulation of other uses such as dredging or bottom disturbing fisheries.
For the bottom biotopes of Site «A» and Site «B» spatial regulations may be required in order to place the structures outside the hotspots. Therefore the squares are marked yellow.

Apart from the sediment the Site «A» is designated because of the occurrence of the guillemots in late summer, when adult males with their young swim there coming from XXX for moulting and growing up of the chicks. The birds are not able to fly in that period, so there is no danger for collisions with the turbines. However the turbines have a disturbing impact on the birds. Thereby reducing the value as a bird habitat. The disturbing impact on feeding and moulting guillemots is not known, and has to be studied before permission for establishing a park can be granted. The matrix squares dealing with impacts on species are grey or yellow (with some question marks)
In case a SAC such as Site «A» would contain small reefs (biogenic such as oyster, mussel or sabellaria reefs, or rocky outcrops or large stones (Ice age relics)), zoning regulations within the SAC can be applied in order to prevent impacts on these areas which are relatively small compared to the whole Site «A». Therefore the matrix square is yellow.

2. Oil and gas exploration

For offshore platforms partly the same reasoning is adopted as for wind turbines. The space occupied is relatively small, so there is no significant impact on the bottom ecosystem. There may be disturbing impact on birds, but the number of platforms and the distance between them is not comparable to the much higher density of turbines. For migrating birds, among which there may be species listed in the Annexes of the directives, platforms may have a negative impact on some nights or with fog when birds are disoriented by light or flares. This impact will be prevented by mitigation measures.
For both Site «B» and Site «A», very strict safety regulations in order to prevent release of lipophilic substances (oil or detergents) to the sediment or water surface have to be implemented.

3. Oil pollution

Oil slicks occur everywhere where shipping occurs or where wrecks are still lying at the bottom. Frequency, timing and location are almost unpredictable. For both Site «B» and Site «A» floating slicks will have little impact on the bottom community. Combating slicks with dispersing agents has to be prevented because these cause the oil to disperse into the water column where the small globules may be more toxic, or cause the oil to coagulate and sink to the bottom.
Because the Site «A» has a specific value for floating and foraging birds it should be prevented that oil slicks reach the area, especially in the period between July and November, when high densities of guillemot and razorbill are present. Combatment plans should be implemented and equipment and specialized manpower ready for action.Matrix squares related to oil pollution are all red

4. Beam trawl fisheries

Beam trawl fishery is detrimental for bottom dwelling organisms and therefore not compatible with SAC’s that are implemented because of these organisms or bottom habitats. This type of fishery should not occur in a SAC. For fishermen this means loss of fishing ground, but not necessarily measurable loss of catch. Most commercial fish species are rather mobile and migrate over such distances that at some stage they will be caught outside the SAC. It has been calculated that closure of areas up to several ICES quadrants (each approximately 55 x 55 km) in the Dutch EEZ will not result in significant lower catches for the Dutch fisheries sector. Because regulatory actions for fishery in the open sea are the responsibility of the EU, international agreements will be necessary.

5. Gravel mining

Gravel does not occur in the Site «A». If small patches had occurred, prevention of mining would be sensible because the gain for the sector would be minimal.
In the Site «B» gravel mining is proposed. Because the gravel is the reason for SAC implementation, this activity should not be allowed. There are no direct financial losses for the sector because there is no extraction yet, but it will prevent future opportunities.

An example of the use of the matrix

Site name: xx. Code: nn

Users	**Habitats**									**Species**					**Other elements of conservation concerns but not listed in EC Directives**			
	mudflats	saegrasses	sandbanks	reefs	leaking gasses	marine caves	Shallowinlets	estuaries	lagoons	Cetaceans	Turtles	Birds eating Fish	Birds eating Benthos	Eco-engineers	Large fish	Large molusc s	Natural physical processes	Kselected species
SPACE																		
windmills										?		?						
Harbours																		
Art. islands																		
Oil and gas expl																		
Shipping channels										?								
Pipelines/cables																		
Military practice																		
Tidal energy																		
POLLUTION																		
Oil																		
Chemical																		
Eutrophication																		
FISHERIES																		
Bottom trawling																	?	
Shell fishery/dredging																		
Collection biogenic structures																		
Collection manganese knolls etc																		
Pelagic fishery																		
Seines, driftnet, line fisheries																		
Set nets																		
Whaling																		
MINING/DREDGING																		
Sand mining																		
Gravel mining																		
Channel dredging																		
DISTURBANCE																		
Shipping																		
Sesmic surveys.																		
Pipelines																		
Cables (magnetic fields)										?								

not relevant
no impact
easy regulation
zoning of activity
conflict -> regulation

Appendix 4

Good experiences and examples of implementation of Natura 2000 in the marine environment including LIFE fund actions in the marine environment

INDEX
Good practices examples, positive experiences, contributions…

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Appendix 4.2 LIFE and the Marine Environment. Publication of December 2006

1. Towards the identification of marine IBAs in the EU: an exploration by the Birds and Habitats Directives Task Force

This paper is meant as a first step towards a general approach to the identification of marine areas (i.e. those beyond the coastline) that are important for the conservation of birds in the Europe Union. It is based on current knowledge on how birds (mostly waterbirds) are distributed and make use of the marine environment. It concerns truly marine specialists that only approach land in order to breed. These are the so-called 'pelagic' species, the whereabouts of which are still insufficiently known for the proper identification of the areas of highest importance at the European level. Methodological criteria to identify and set the limits to those areas are currently under development, both within (notably in Spain and UK by SEO and RSPB, respectively) and beyond Europe by the Partnership of BirdLife International.

The current paper will focus on the species and IBA categories for which sufficient information is available to warrant an objective proposal by BirdLife International. A separate (second) part of this paper will deal with dispersed pelagic species when solid criteria have been developed and tested for EU waters.

I. General introduction and coast related IBAs

1. In the last two decades, BirdLife International (and its forerunner ICBP) has been very successful in the identification of Important Bird Areas and subsequently getting general recognition that these sites represent prime sites for bird conservation. The European network of IBAs has formed an important scientific reference for the designation of special protection areas (SPAs) under the Wild Birds Directive of the European Union. It is now accepted BirdLife policy that in the EU, all IBAs should be classified as SPAs. Until now, the IBA programme of BirdLife International has been mainly focused on terrestrial and coastal habitats and the bird species using these habitats. Thanks to the increasing knowledge of the importance of inshore waters for waterbirds a number of inshore[1] sites have been identified particularly in the Baltic and North Sea area (note that many of these have been selected using different criteria to current IBAs). On the contrary, little attention has been paid so far to the identification of offshore areas important for predominantly marine species including pelagic species. Apart from lack of information this was due to the limited, if any, legal possibilities for site protection. IBA boundary selection guidelines say that an IBA should be an area which can in some way be managed. This has implications for the selection of areas at sea where ability to manage is severely curtailed.

2. The application of the Environmental Community law beyond territorial waters over which the MS exercises exclusive rights of exploitation and exploration of natural resources[2] was confirmed by a judgment of the European

[1] For practical reasons, inshore is here defined as the area of marine waters within 12 nm (about 22km) from the coastline, but excluding estuaries and intertidal mudflats; offshore concerns marine waters beyond 12 nm from the coastline. This distinction does not have an ecological meaning but is based on the maximum extent of territorial waters under UNCLOS (United Nations Common Law of the Sea, 1982).

[2] Other Member States have declared for this purpose Exclusive Economic Zones (EEZs) which extend at maximum 200 nautical miles from the coastline (the area may be limited by the presence of other countries)

Court of Justice (mainly Court case judgement C-6/04[3]). Apart from the EU perspective other instruments like the OSPAR convention[4], the Helsinki Convention[5] and the Barcelona Convention[6] cover the protection of species and habitats in the marine environment. Therefore, there is an urgent need to adapt criteria and to establish guidelines for the identification of marine IBA's. This paper prepared by BirdLife international for the Birds and Habitats Directives Task Force is meant as a starting point for the preparation of such guidelines. It takes account of work that has already been done in this field and considers the possibilities to extend the IBA concept to the marine environment.

3. Marine habitats

Marine habitats are normally defined by relevant topographical or oceanographical features. The EUNIS Habitat Classification[7] makes in the first place a distinction according to strata: the sea bed and the water column. Next the sea bed is divided in littoral habitats and habitats that are permanently water-covered[8]. The latter is subdivided in continental shelf[9] and the deep sea. The shelf break occurs at variable depth, but is generally over 200 metres. Another useful contour line is the 20 m depth line. The waters between this and the coastline are generally known as coastal waters and are not always considered truly marine. In many cases, coastal waters have already been included in land-based IBAs (e.g. next to breeding colonies). In this paper "pelagic" refers to the open sea beyond coastal waters.

Geographical scope

3. This paper is dealing with the identification of IBAs beyond the littoral zone in European Union waters although much may be applicable elsewhere in the Western Palearctic. It is mainly based on experience from the continental shelf (in particular Baltic Sea and North Sea) because few published data is available on seabird distribution patterns further away and elsewhere. The Birds and Habitats Directives are applicable where Member States claim sovereign rights or an EEZ (Exclusive Economic Zone) has been declared[10]. The latter consists of the continental shelf and the "superadjacent" waters up to a limit of 200 nautical miles from the baseline from which the territorial sea is measured. Although the OSPAR and Barcelona Conventions covering the entire NE. Atlantic (up to Greenland) and the Mediterranean respectively require also the protection and conservation of ecosystems and the biological diversity of the maritime area, these requirements are less specific (and partly dependent on soft law) than those of EU law of which the compliance can be effectively enforced. As far as the implementation of the EU Birds Directive is concerned BirdLife should presumably focus its attention now on the territorial waters and EEZ's of the Member States, including major parts of the North Sea and the Baltic Sea.

[3] See Judgement articles 115-120 (http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-6%2F04&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100)

[4] Convention for the Protection of the Marine Environment of the North-East Atlantic which entered into force in 1998 (threatened and declining species according to preliminary list indicated in table 3)

[5] Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992); entered into force in Jan 2000

[6] Convention for the Protection of the Mediterranean Sea against Pollution (1976) and its Protocol concerning Mediterranean specially protected areas (1982)

[7] A common European reference set of habitat units with a common description of all units and a common hierarchical classification. EUNIS is the European Nature Information System, developed and managed by the European Topic Centre for Nature Protection and Biodiversity (ETC/NPB in Paris) for the European Environment Agency (EEA) and the European Environmental Information Observation Network (EIONET).

[8] also referred to as pelagic waters: i.e. the open-water environment, or water column, as distinct from the bed or shore, inhabited by swimming marine or freshwater organisms.

[9] The gently seaward-sloping seabed surface that extends between the shoreline and the top of the continental slope at about 150 m depth. The average gradient of the shelf is between 1:500 and 1:1000 although it varies greatly, the average width is approximately 70km (North Sea and Baltic Sea are part of the continental shelf).

[10] Note that where EEZ's have not been declared (like in the Mediterranean) the application is restricted to the territorial zone which extends from 12 nm from the coastline.

What are IBAs?[11]

5. The aim of the Important Bird Areas (IBAs) programme is to identify and protect a network of sites at a biogeographic scale, critical for the long-term viability of naturally occurring bird populations, across the range of those bird species for which a site-based approach is appropriate. The network is considered the minimum essential to ensure the survival of these species. In essence it is BirdLife policy that, with some minor qualifications, all IBAs should be classified as SPAs under the Birds Directive. Four categories of species have been considered of which threatened and congregatory species concern the main categories (see table 6). To summarise, IBAs:

Some characteristics of IBA's

- are places of international significance for the conservation of birds at the global, regional or sub-regional levels;
- are practical tools for conservation;
- are chosen using standardised, agreed criteria applied with common sense;
- must, wherever possible, be large enough to support self-sustaining populations of those species for which they are important;
- must be amenable to conservation and, as far as possible be delimitable from surrounding areas;
- will preferentially include where appropriate, existing Protected Area Networks;
- are not appropriate for all bird species, and for some are only so in parts of their ranges; and
- should form part of a wider, integrated approach to conservation that embraces sites, species and habitat protection.

6. In addition to the above characteristics it also useful to refer to the definition of boundaries (underlined sentences that are problematic for marine areas):

Defining the boundaries of an IBA (from IBA2000)

- A site is defined so that, as far as possible, it:

i) is different in character or habitat or ornithological importance from the surrounding area;
ii) exists as an actual or potential protected area, with or without buffer zones, or is an area which can be managed in some way for nature conservation;
iii) is, alone or with other sites, a self-sufficient area which provides all the requirements of the birds (that it is important for) which use it during the time that they are present.

- Where extensive tracts of continuous habitat occur which are important for birds, only characteristics ii) and iii) apply. This definition is not applicable to migratory bottleneck sites.
- Practical considerations of how best the site may be conserved are the foremost consideration.
- Simple, conspicuous boundaries such as roads or rivers can often be used to delimit site margins, while features such as watersheds, ridge-lines and hilltops can help in places where there are no obvious discontinuities in habitat (transitions of vegetation or substrate). Boundaries of ownership are also relevant.
- There is no fixed maximum or minimum size for IBAs — the biologically sensible should be tempered with the practical. Neither is there a definitive answer on how to treat cases where a number of small sites lie near each other. Whether these are best considered as a series of separate IBAs, or as one larger site containing areas lacking ornithological significance, depends upon the local situation with regard to conservation and management.

What has been done so far?

Marine IBAs[12]

7. The marine environment[13] is important for birds in Europe. European seas support over 60 species of bird that either have an unfavourable conservation status in Europe (Tucker & Heath 1994) or are marine specialists which are highly dependent upon the continuing integrity and quality of marine ecosystems (Tucker & Evans 1997). These species include four species that are globally threatened or near-threatened with extinction. Many of these species

[11] Paragraph taken from "Identification and demarcation of marine IBAs and their relationship to the Birds Directive" prepared by Duncan Huggett and presented for BirdLife International at various conferences (see references).
[12] Paragraphs 4-5 largely taken from Heath & Evans (2000), page 51 (abbreviated as IBA2000)

[13] i.e. marine habitats below the low-tide mark (Tucker & Evans 1997) thus excluding intertidal areas

congregate at certain times of the year, such as seabirds at breeding colonies or loons (divers) and seaducks at favourable feeding grounds in winter. Yet despite its importance for bird conservation, the marine environment has, until recently, received relatively little attention in terms of the identification of Important Bird Areas. This is due primarily to the difficulty of defining, identifying and delineating priority sites in areas of homogeneous appearance, coupled with the difficulty of stimulating international co-operation to establish integrated protection and management schemes for important sites outside national territorial waters. This inventory identifies 470 IBAs in Europe that have some marine habitat, including 147 IBAs that have more than 50% marine habitat cover and at least 25 IBAs are solely marine. Within the scope of IBA2000 no specific attempt has been made, to provide complete listings of marine areas important for birds in Europe (see for situation in a number of countries Appendix I).

Previous inventories of marine areas that are internationally important for birds

8. Three major publications have attempted to define, identify and delineate important areas for birds in European seas: *Important bird areas for seabirds in the North Sea* (Skov *et al.* 1995), *Important marine areas for wintering birds in the Baltic Sea* (Durinck *et al.* 1994) , and *Important bird areas in the Baltic Sea* (Skov *et al.* 2000).[14] In SW. Europe a first attempt has been made to describe the methodology and identify marine areas in Spain: *Towards the identification of Important Bird Areas (IBAs) at sea -- Preliminary notes from Spain* (Carboneras & Viada in prep.).

North Sea The study area covered the entire North Sea, the Channel and the Kattegat, bounded by the coastlines of the United Kingdom, Norway, Sweden, Denmark, Germany, the Netherlands, Belgium and France (…). It included all territorial and international waters between the western Channel, the Northern Atlantic and the Kattegat. Data were analyzed from coastal and continental shelf seabird surveys during 1979–1994. The distribution of 30 species provided the basis for identifying important areas for birds. Twenty areas were identified as internationally important for birds in the area, of which the top six sites comprising less than 5 % of the region hold more than 80% of the cumulated sum of proportions for the species in question.

Baltic Sea The study area encompassed the Baltic Sea, the Danish Straits and the Kattegat (Durinck *et al.* 1994, Skov *et al.* 2000). Data were presented for 30 species for which 1% or more of their biogeographic population winters in the Baltic Sea. Thirty-nine areas were identified as internationally important for wintering birds in the region, of which the top 10 sites, which cover less than 5% of the region, hold about 90% of the total estimated number of wintering birds.

Spain The preliminary analysis by Carboneras & Viada (in prep.) was based on a number of physical and ecological characteristics which, when combined, helped identify important areas for seabirds in each of Spain's three distinct marine zones (Mediterranean, Atlantic and Macaronesia), and set their limits. They matched oceanographical criteria (topography, salinity, temperature, currents, upwellings, nutrients) against the regular use that seabirds made of those areas and obtained a preliminary list of 13 marine IBAs for seabirds in Spain. Their analysis mainly focused on birds which behave as strictly marine when they occur in Spanish waters (divers, petrels, shearwaters, storm-petrels, gannets, cormorants, skuas, gulls, terns and auks). The analysis was not only based on concentrations of seabirds but on the regular use that they made of certain areas, and the relevance of such areas for the conservation of seabird species. Thus, the identification of areas on which seabirds depend during part of their life cycle was key to the process. They included important foraging grounds, sites of importance along migration routes, waters where seabirds develop part of their breeding cycle as well as areas where significant aggregations occur (for resting, moulting, in winter, etc.).

9. The first three of those studies referred to above applied the so-called Marine Classification Criterion (MCC) that measures marine bird concentrations and their international significance. The methodology is dependent on having sufficiently large amounts of quantitative data available on bird distribution in marine areas. It enables the use of the 1%-threshold which is widely applied to waterbirds for the identification of wetlands of international importance under the Ramsar Convention (IBA criterion B1i). The MCC requires the quantification of three parameters (Skov *et al.* 2000):

- The size of the area based on the borders of a high-density aggregation of a waterbird or seabird species (parameter "A");
- The proportion of the total biogeographic or flyway population estimated to occur within the borders of the aggregation; and
- The degree of concentration displayed by the aggregation.

The border of the high-density aggregation has to be determined accurately by the use of robust and fine-scale interpolation techniques creating a minimum amount of false information. Important aggregations contain over 1% of

[14] Although two of these studies refer explicitely to "Important Bird Areas" standard data checking and validation procedures by the BirdLife Secretariat (Heath & Evans 2000: 10) were not adhered to (cf. critical review of Skov *et al.* 2000 and other reports, Ardea 89: 551-553).

the total biogeographic or fly-way population of the species in question. The degree of concentration is regarded as important where 1% or more of a population is concentrated in an area of no more than 3000 km^2. The application of the MCC requires the precise delineation of the borders of species aggregations by the use of standard GIS routines[15]. In the North Sea report all regularly occurring species were considered including divers, grebes, cormorants, fulmar, gannet, diving ducks, sea ducks, gulls, terns and auks. The Baltic Sea report (2000), which covers both inshore wetlands[16] and offshore marine areas, concerns mainly divers, grebes, cormorant, diving ducks, sea ducks, and auks (in relation to offshore areas).The areas considered of international importance for birds identified using the MCC method are shown for the North Sea in table 1 and figure 1 and for the Baltic in table 2 and figure 2.

Seaward extensions of breeding colony IBAs

10. When viewed together with the intensive use of coastal and continental shelf waters around some European coasts and the potential impacts of these activities on seabirds, it is clear that the conservation of seabirds needs actions to be targeted on both the terrestrial and marine environments. The Birds Directive provides the statutory incentive to establish marine protected areas for seabirds. RSPB has made a detailed study including specific recommendations on the extension of seabird colonies into the marine environment to include feeding areas (RSPB 2000, Huggett 2001).

11. The information brought together in that report confirms that while it would be desirable to have more information on how and where seabirds use the sea and on the significance of particular areas to seabirds, enough is known about seabird ecology to put forward some sound proposals on how the boundaries of SPAs could be extended to include marine feeding areas. It has been possible to develop and apply criteria to the SPAs holding seabird colonies in a way that conforms with the Birds Directive, is based on the importance of the areas to seabirds, is transparent, logical and systematic and which can be applied in spite of uncertainty or limited information. The following criteria were developed for the delimitation of boundaries of breeding seabird SPAs at sea:

- The boundary at sea should be drawn as a radius from points at the margins of the colonies and parallel to the shoreline where the colony extends along a stretch of coast.
- The distance to the seaward boundary should be determined on the basis of information on foraging range, feeding and surface use of breeding seabirds.
- The distance to the seaward boundary should be species-specific and refer to those breeding species at the site which fulfil the IBA criteria.
- When there is more than one breeding IBA species using the site, the highest recommended figure should be used to set the distance to the seaward boundary.
- Known and regularly used feeding areas adjacent to a recommended boundary should be incorporated within the site.
- Where known and regularly used feeding areas do not lie adjacent to recommended boundaries, these locations should be considered as sites in their own right.
- Where the recommended seaward boundaries of sites overlap they should be merged to form a single site for management purposes.

12. Three groups of seabird species have been identified suggesting boundaries 5, 15, and 40 km from the nesting colonies (table 3). This gives a reasonably detailed breakdown based on best interpretation of the data at the present time. A map of UK SPA's holding seabird colonies with suggested modifications taking into account of feeding areas is shown in figure 3. Species with extensive feeding ranges like Gannet, Fulmar and Storm Petrel, cannot be covered by this kind of seaward extensions of breeding colonies, although they will profit to a certain extent from extensions made for other seabird species.

[15] The numerical criteria applied for the drawing of the boundaries were not explained. The process is only described in technical terms: "In this inventory, the boundaries of Inshore and offshore IBAs were integrated and analysed by standard GIS routines. […] Delineation of the borders of species aggregations were defined by fine-scale linear interpolation (normal kriging) of corrected densities […].The boundaries were determined by density lines (polygons), which marked the plateau of higher densities following a density gradient" (Skov *et al.* 2000: 20).

[16] Note that the Ramsar definition of wetlands in the marine environment is restricted to "areas of marine water the depth of which at low tide does not exceed six metres" although designated sites may include "bodies of marine water deeper than six metres at low tide lying within the wetlands, especially where these have importance as waterfowl habitat".

13. In this approach generic, precautionary radii are defined for each species based on their known foraging ranges and then apply these to each of their colony IBAs. Its advantage is that it does not require a detailed assessment of sea use or colony-specific foraging ranges. It will be relatively robust to variations in marine distribution among colonies and across years. However, the draw-back of the radius-based approach is that it will often incorporate sea areas that seabirds seldom use. Ideally, site-specific radii should be estimated for each seabird species for which a site is designated at each of their colony IBAs, and the radius that encloses a certain proportion of the species' marine distribution selected as the outer boundary. However, reliable foraging radii are only available from a small number of colony IBAs in the UK and so site-specific criteria that encompass a given proportion of foraging trips for a species for which a site is designated, around each of it's colony IBAs, cannot be implemented. Obtaining this data would require considerable time and expenditure of limited conservation resources (Huggett 2001)[17].

Which species?

14. Bird species in the marine environment can be divided into two categories: seabirds and waterbirds (IBA2000). The term 'waterbird' is used in the same sense as that used for 'waterfowl' under the Ramsar Convention, and includes (in Europe) marine bird species in the following families: Gaviidae (divers), Phalacrocoracidae (cormorants), Anatidae (ducks), and Laridae (gulls and terns). By this definition waterbirds include, for example, cormorants, gulls and terns, which some authors have more traditionally considered as seabirds. Most of these have an inland and/ or coastal distribution but some of them notably gulls and terns also occur commonly on the continental shelf[18]. Species like Audouin's Gull, Kittiwake, Sandwich Tern, and Roseate Tern are exclusively marine during their entire life cycle. The term 'seabird' covers, in Europe, all bird species in the following families: Procellaridae (fulmars, petrels, shearwaters), Hydrobatidae (storm-petrels), Sulidae (gannets), Stercoraridae (skuas) and Alcidae (auks). For the purpose of this paper gull and tern species that are largely dependent on the marine environment during part of their annual cycle (e.g. the non-breeding season) are considered seabirds ("seabirds+").

15. During the non-breeding season many seabird species are largely pelagic. It should be noted that some of these species feed hundreds of miles from the breeding colony, including Fulmar, Leach's Petrel, Storm Petrel, Manx Shearwater and Gannet.

16. For the selection of IBA's in Europe twenty IBA criteria have been developed. These allow the identification, based on a site's international importance for (table 6): Threatened bird species, Congregatory bird species, Assemblages of restricted range species, and Assemblages of biome-restricted species. The latter two categories do not concern marine areas, so these are not relevant for this purpose. Threatened bird species refer to three categories: globally threatened species (5), Species of European Conservation Concern categories 2 and 3 (26) and (sub-)species included in Annex I of the Birds Directive (29[19]) (37 subspecies or species in total; table 4). Twenty-three marine species and subspecies which are not considered threatened at the European level or listed in Annex I, are listed in table 5[20]. In total both categories concern 60 (sub)species occurring in EU waters of which 27 have a largely non-coastal/ pelagic distribution outside the breeding season. Some predominantly inland species have been excluded (e.g. Larus ridibundus). The majority of these species are covered by the habitat conservation requirements of the Birds Directive either as Annex I species or as migratory species not listed in Annex I.

17. Outside the breeding season not all the species listed in tables 4 and 5 are relevant for the identification of marine IBA's in Europe, because (a) they do not winter in European waters and passage occurs rapidly (most petrels and

[17] In respect of the generic foraging radii approach, it might be worth noting UK Government criticism of this approach: "One of the difficulties with employing a generic radius approach encountered during work carried out by JNCC on extensions to bird breeding colonies, is that feeding locations for birds from a particular breeding colony appear to be specific to that colony, rather than determined by a generic foraging distance for each species" (Johnston et al. 2002, page 140; see also page 123). Apparently it is the UK Government view that the approach is not that helpful as it is felt insufficient data exists to define radii and much unutilised sea would be included.

[18] defined as marine waters from 20 to 200 metres in depth (see also footnote 33)

[19] including Polysticta stellerii, Larus minutus, and Puffinus yelkouan, which will be added to Annex I with the accession of new Member States in May 2004 (the latter species is already included in Appendix II of the Bern Convention).

[20] The (total) list of marine species largely taken from Tucker & Evans (1997), chapter Marine habitats, Table 3

skuas), and (b) species with a low conservation interest (some gulls). The from a conservation point of view most relevant species for the identification of marine IBA's have been tentavily indicated in tables 4 and 5 (set in bold type).

IBA2000 criteria

18. Seabirds are covered by the following IBA2000 criteria[21]:

A1. The site regularly holds significant numbers of a globally threatened species, or other species of global conservation concern
A4iii. The site is known or thought to hold, on a regular basis, ≥ 20,000 waterbirds or ≥ 10,000 pairs of seabird of one or more species

B1i. The site is known or thought to hold 1% or more of a flyway population or other distinct population of a waterbird species [includes global criterion A4i]
B1ii. The site is known or thought to hold 1% or more of a distinct population of a seabird species [includes global criterion A4ii]
B2. The site is one of the 'n' most important sites in a country for a species with an unfavourable conservation status in Europe (…), and for which the site-protection approach is thought to be appropriate.
B3. The site is one of the 'n' most important sites in a country for a species with a favourable conservation status in Europe but with its global range concentrated in Europe, and for which the site protection approach is thought to be appropriate.

C1. the same as criterion A1.
C2. The site is known to regularly hold at least 1% of the flyway or EU population of a species considered to be threatened in the EU.
C3. The site is known to regularly hold at least 1% of a flyway population of a migratory species that is not considered to be threatened in the EU.
C4. the same as criterion A4iii.
C6. The site is one of the five most important in the European region in question for a species or subspecies considered threatened in the European Union.

19. Within criterion category C (European Union importance) C2, C3 and C6 have been widely applied to identify breeding colonies of marine species. They could not be applied for non-migratory species which are not included on Annex I (e.g. Cepphus grylle and in temperate Europe, Larus argentatus). Outside the breeding season these criteria are less appropriate although the 1%-criterion has been applied for some waterbird species which winter in congregations like Melanitta nigra, Somateria mollissima, and Clangula hyemalis. However, the occurrence of such concentrations is dependent on shellfish banks (e.g. Spisula subtruncata) of which the locations may vary from year-to-year. IBA North Sea north of the Wadden Sea (Netherlands) along 150 km coast line[22] includes large concentrations of Melanitta nigra, but in some years the Spisula banks are located just south of this area. This example shows that even for highly congregatory seaducks the delimitation of marine sites may be difficult.

Four types of marine IBAs

20. Four types of bird distribution patterns can be distinguished in the marine environment:
a) Seaward extensions of breeding colonies IBAs: such extensions used in particular for feeding, resting and social interactions can be small or large but the total area is limited by the feeding range of the breeding birds concerned. The extent of the area is species dependent; the maximum distance from the breeding colony varies from several kilometres to over 30 km. These same areas may be important for sedentary species around the year;

[21] Note that criterion C7 has been exclusively applied to retain existing IBAs which did not qualify under the C1-C6

[22] Total area 187,000 hectares, seaward extension to the 20 meter depth line (3-5 nm wide); the Special Protection Area (2000) has a seaward boundary of three nautical miles and covers about two thirds of the IBA.

b) Non-breeding waterbird concentrations: coastal areas, which hold feeding and moulting concentrations of waterbirds[23] in particular divers, grebes and benthos feeding ducks;
c) Migration hotspots: sites where, because of their geographical position, seabirds fly over in the course of their regular migrations. These sites normally correspond to special land features (headlands, straits) and are identified by the number of birds passing by. In some cases, the area also holds rich feeding grounds or is the site of important concentrations where birds stop during their migrations;
d) Important areas for pelagic species: This type concerns marine areas which are completely unconnected to the coastline (i.e. not offshore islands and rocks). This type includes sites which pelagic seabirds use regularly to feed. Very often, other marine animals use them too and important fisheries occur in the same areas. These areas tend to have specific oceanographic features and their biological productivity is invariably high. It concerns also sites where seabirds regularly gather in large numbers although not necessarily to feed. They can be moulting, resting or courting grounds, during the breeding season or outside it. These areas are identified by the high number of birds that use them on a regular basis.

Similar categories (a, b, d) have also been recognised by JNCC (Johnston et al. 2002) as "three main types of functional concentrations of seabirds to enable the identification of marine SPAs"[24]. The first three types refer to areas which are related to the coastline, and they may include coastal areas and wetlands. The next paragraphs of this paper will be confined to these so-called "marine IBA's related to the coastline". The fourth type, marine IBA's that are rich feeding for pelagic species, will be dealt with in a separate part II of this paper that will be finalised at a later stage.

Towards marine IBA's related to the coastline

Setting marine boundaries

21. When it comes to defining the boundaries of a marine IBA, the guidelines given in para 6 need to be adapted to the particular characteristics of the marine environment. Any marine IBA should aim at covering the whole of the area that is regularly used by seabirds at critical moments of their lifetime. Those sites should, therefore, be homogeneous extensions of a given 'habitat' and be distinct from sorrounding areas. The identification of a marine 'habitat' is thus key to the process. Relevant oceanographic features which can be used to set the limits of marine IBAs are: the presence and extent of regular upwellings (upward currents that bring nutrient-rich bottom waters to the surface), sea currents, eddies, nutrient-outflows (such as rivers) and temperature / salinity anomalies (or disruptions), normally known as areas of convergence.

22. At the Natura 2000 in Offshore Waters seminar held in June 2002 (Turnbull et al. 2002) some general points were made. Boundaries need to be based on good science, focusing in the first place on the interest feature for sites. However, for all habitats (particularly extensive and patchy habitats, e.g. iceberg ploughmarks, cold water coral reef) boundaries should be wider rather than tight around habitats and should be pragmatic and bear in mind future management needs. Existing systems, e.g. ICES blocks, could be used so long as they are fully justified and appropriate. The precautionary principle should be used in setting boundaries around sites where uncertainty exists over the full extent of the interest feature. The management regime could be varied within the site and remain flexible to accommodate future information acquisition.

23. The common guidelines for defining the boundaries of IBAs need amendment (cf. para 6) having full regard to relevant European case law .The statement "Where extensive tracts of continuous habitat occur which are important for birds, only characteristics ii) and iii) apply" (see para 6) is very relevant for the marine environment. To which extent should the following characteristics be retained for marine IBAs:

ii) A site exists as an actual or potential protected area, with or without buffer zones, or is an area which can be managed in some way for nature conservation;
iii) A site is, alone or with other sites, a self-sufficient area which provides all the requirements of the birds (that it is important for) which use it during the time that they are present.

Condition iii) cannot apply to marine areas because sites not connected to land do not provide breeding sites during the breeding season. For some species they also not provide sheltered locations for roosting. Condition ii) does seem to be relevant for marine IBA's because we are aiming at "manageable" sites for which legal protection measures are

[23] note the definition of the term "waterbirds" in paragraph 11

[24] These have also been included in the "Concluding principles" of the European seminar "Natura 2000 in UK Offshore Waters: Implementation of the EC Habitats and Birds Directives in UK offshore waters" (Turnbull et al. 2002). The artificial split between inshore and offshore sites (category d confined to offshore waters, i.e. 15 km from the coastline and category b indicated as "coastal marine areas") was however not supported by BirdLife.

feasible. The general remark on the size of IBA's ("the biologically sensible should be tempered with the practical") is equally applicable for marine IBA's.

It is recommended to add the following guideline on defining boundaries of marine IBA's:

> In the case of marine areas beyond the sublittoral and inshore zones only characteristics i) and ii) apply. This definition is not applicable to migration hotspots.
> The guideline "where extensive tracts of continuous habitat occur …" should be confined to non-marine and inshore habitats.

Seaward extensions of breeding colony IBAs

24. The RSPB has developed an useful and simple methodology for defining boundaries of feeding areas around seabird colonies: the radius of the feeding range from points at the margins of the colonies and parallel to the shoreline where the colony extends along a stretch of coast (para 10-13). The minimum information necessary is an indication of the feeding ranges of the species for which the site was selected or designated. Feeding ranges differ widely from species to species and they may, to a lesser extent, also vary from colony to colony. If more precise data on feeding locations are available they should be used: this may lead to smaller or larger areas. Species which are feeding long distances away from the colony (like petrels) are less well protected but their dispersive nature and wide feeding range make them generally less vulnerable. Otherwise such areas have to be considered as "type d" areas (areas for pelagic species).

25. The main criticism refers to the risk of inclusion of areas which are not important for the birds concerned, so that unnecessary constraints are put on the human use (in particular fisheries) and new projects (e.g. oil exploration, wind parks) within such areas. However, the reverse situation (damage to SPA populations that should be protected) may result in a breach with the Directive and is equally unacceptable. In our view the precautionary principle should be applied, which in this particular case means that proof of evidence (important numbers of birds using the area or not) is moved from the designation process to the assessment procedures of article 6. In fact it really does not matter whether a certain marine area within the feeding range of a SPA designated for its colonial breeding seabirds is inside or outside the boundaries. In the latter case the obligation also exists to assess whether any human activity taking place or planned does not jeopardy the integrity of the SPA (including its seabird populations) concerned. If research indicates that the sea area concerned is not important for the SPA's seabirds the site's integrity is not affected and the human activity can continue (or started).

26. For this category of marine IBA's amendment or extension of the IBA2000 criteria is not necessary because it concerns only a methodology of delimiting the seaward boundaries of IBA's selected on the basis of the existing criteria (i.e. A4iii, Bii, C2, C3, C6).

Non-breeding waterbird concentrations

27. Some species of waterbirds stay in large numbers or even exclusively in shallow marine areas. These include benthos feeding ducks like Aythya marila, Melanitta nigra, Somateria mollissima, Clangula hyemalis and piscivorous species like Gavia stellata, Podiceps grisegena and Mergus serrator. In particular in the Baltic Sea quite a few other waterbird species are also using marine areas in important numbers: grebes Podiceps (3 species), swans Cygnus and geese Anser (6), dabbling ducks Anas (5), other ducks (9), and Coot Fulica atra (number of species refer to the German part, Gellermann et al. 2002). These species are not listed in tables 4 and 5 because they are not considered as species that are largely dependent on the marine environment during at least part of their annual cycle. Naturally this does not preclude their role in the selection and delimitation of marine IBA's.

28. Along the North Sea these species are mainly found close to the coastline[25] so that the seaward delimitation of IBAs can often be related to sea depth and is not too difficult. In the Baltic Sea such shallow areas are also found further from the coast because of the presence of banks separated from the coastline by deeper waters. Delimitation of such areas is more difficult than along the North Sea and the Marine Classification Criterion (MCC) might be an appropriate method to standardize site selection and delimitation. In any case the Baltic Sea report (Skov *et al.* 2000) provides data on 169 coastal and marine sites covering a relatively small proportion of the Baltic Sea and Kattegat. These sites could be considered IBA's as meant by BirdLife International. However, the problems noted in Appendix II apply also, although may be less prominent.

[25] A notable exception are the shallow waters of IBA Eastern German Bight (listed as DK123 only) which extend up to 40 nm from the coastline of Schleswig-Holstein

29. The term "European region" plays an important role in the application of criterion C6 (see para 18) because it determines the maximum number of sites that can be selected under this criterion. However, the division of EU NUTS regions used for this criterion is largely based on administrative boundaries on land and it does not cover the sea (except coastal zones). It is suggested that a division is made between Baltic Sea, North Sea, NE. Atlantic, SE. Atlantic and Mediterranean. The boundaries between these regions can be based on those used by the International Council for the Exploration of the Sea (ICES). The same division is used by the EU in the framework of the Common Fisheries Policy[26]. For most small countries this means one region (e.g. Portugal SE. Atlantic) and for large countries two regions (e.g. Germany: Baltic Sea and North Sea).

30. The application of the MCC for waterbirds at sea can be done under the existing set of criteria. It can fall within the scope of criteria B1i, C2, C3 and C6 as it is merely considered a tool to delimit sites with waterbird concentrations. If it is not possible to use the MCC methodology the delimitation of sites can also be made manually, in particular because most marine waterbird concentrations outside the Baltic Sea region are presumably more or less linearly distributed along coast lines.

Migration hotspots

31. The IBA2000 criteria include a separate criterion (B1iv) for migration bottlenecks for selected groups of terrestrial species: "The site is a 'bottleneck' site where over 5,000 storks, or over 3,000 raptors or cranes regularly pass on spring or autumn migration"[27]. The corresponding global criterion (A1iv) includes a threshold of 20,000 for all these species combined[28]. The most obvious European examples of bottleneck sites for seabird passage are the Strait of Gibraltar and the Bosporus (Turkey). These "hotspots" have been included in IBA2000 under criteria B1i/ B1ii and B1ii respectively[29]. Nevertheless the introduction of a separate criterion for "marine" bottleneck sites (or extension of the existing bottleneck criteria to cover marine birds) would be useful to distinguish these sites from breeding, wintering and staging areas. This may be also necessary because doubts can be raised whether the verb "to hold" applied in criteria B1i and B1ii covers also birds on passage at bottleneck sites.

32. The bottleneck criterion for seabirds could be similar to B1iv, for example:

> The site is a "migration hotspot" where at least x seabirds or 20,000 waterbirds regularly pass through a narrow strait or along a headland during spring or autumn migration.

Apart from narrow straits the criterion covers also headlands along which marine birds funnel during migration. The local topography of such sites needs further clarification[30]. The threshold for waterbirds equals the threshold in criterion A4iii. The threshold for seabirds has not yet been determined ("x"). Presumably the seabird threshold will be larger[31] than those for waterbirds and seabirds (10,000) in criterion A4iii. The thresholds need to be tested (and resident birds to be excluded) against site data to establish what is appropriate.

References

- Durinck J. *et al.* 1994. Important marine areas for wintering birds in the Baltic Sea. Ornis Consult, Copenhagen.

[26] see http://europa.eu.int/comm/fisheries/doc_et_publ/pub_en.htm#map

[27] The EU criterion C5 is the same except that the word "over" has been replaced by "at least" twice (as in A41iv!).

[28] The site is known or thought to be a 'bottleneck' site where at least 20,000 storks (Ciconiidae), raptors (Accipitriformes and Falconiformes) or cranes (Gruidae) regularly pass during spring or autumn migration.

[29] the same sites are also bottlenecks for migratory terrestrial species qualifying under criterion A1iv and/ or B1iv for storks and raptors

[30] The African IBA Book (Fishpool & Evans 2001) gives a helpful explanation of bottleneck sites used by terrestrial migrants (box 7, page 14).

[31] SEO has commented as follows: "The two most important migration hotspots in Spain hold incredibly big numbers: >150,000 Cory's Shearwaters through Straits of Gibraltar twice a year (plus many other species), >300,000 seabirds along Estaca de Bares (Galicia) each autumn. The figure of 20,000 is probably much too low: the Ebro delta population of Audouin's Gull, for example, numbers in excess of 28,000 birds and most of these migrate S along the coastline."

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Table 1. Areas considered of international importance for marine birds in the North Sea, Channel and Kattegat. Sum of proportions is the total percentage of populations occurring within the area in internationally important concentrations (from Skov *et al.*1995).

Area name (see figure 1)	Area size (ha)	Depth (m)	No. species	Sum of proportions
1 Northern Kattegat	1,100,000	0-60	10	96,7%
2 Orkney – Shetland	2,200,000	0-200+	7	93.0
3 Moray Firth – Aberdeen Bank - Tees	4,900,000	0-100+	9	71.7
4 Skagerrak – Southwest Norwegian Trench	4,850,000	20-400	6	47.3

5 Eastern German Bight	1,280,000	0-30+	6	47.3
6 Cap Gris Nez – Schiermonnikoog	1,600,000	0-20+	7	35.4
7 Flamborough Head and the Hills	1,600,000		7	27.8
Other 13 areas (total area estimated)	2,400,000		1 – 3	1.0 – 10.9
Total area of these 20 areas	c. 20,000,000			
Total area of North Sea, Channel & Kattegat	75,000,000			

Table 2. Selected large marine IBA's in the Baltic and Kattegat (data from Skov *et al.* 2000).

Code	Area name	Area (ha)	Depth (m)	Main species	Population	% Flyway
SE050	Inshore area East Gotland	152,500	0-40	Long-tailed Duck	164,000	3,6%
SE065	Hoburgs Bank	157,900	10-40	Long-tailed Duck	872,000	19,0%
SE066	Northern Midsjö Bank	85,760	10-40	Long-tailed Duck	65,000	1,4%
SE067	Southern Midsjö Bank	81,430	20-40	Black Guillemot	770	1,7%
SE072 DK129	Lille Middelgrund	126,000	10-50	Kittiwake Razorbill Guillemot	99,000 93,500 93,000	1,2% 6,9% 1,6%
FI045	Merenkurkku Archipelago	223,652	0-10	Velvet Scoter Long-tailed Duck	100,000 100,000	10% 2,2%
EE049	Irbe Strait	378,900	0-50	Long-tailed Duck Black Guillemot	700,000 3900	15,6% 8,7%
LV059	Seashore at Palanga	113,000		Steller's Eider	1400-2300	4,7-7,7%
LT001 RU220	Seashore at Nida	77,000		Velvet Scoter Long-tailed Duck	80-160,000 68,000	8-16% 1,5%
PL080	C. Polish Inshore waters	272,500		Long-tailed Duck	217,000	4,7%
DE040	Pomaranian Bay	623,500		Long-tailed Duck	837,000	18,2%
DK083	Hyllekrog - Rodsand and Fehmarn belt	100,000		Tufted Duck Red-br Merganser	22,000 4100	2,2% 3,3%
DK128	Northwestern Kattegat	580,000		Common Scoter Eider	360,000 264,000	22,5% 19,6%
DK130	Smålandsfarvandet	135,300		Tufted Duck	16,880	1,7%

Table 3. Marine boundaries around seabird breeding colonies for three categories of feeding ranges of species breeding in the British Isles (RSPB 2000).

GROUP I	GROUP II	GROUP III
Radius 5 km	Radius 15 km	Radius 40 km
Stercorarius parasiticus	*Puffinus puffinus* (rafts only)	*Catharactes skua*
Sterna albifrons	*Phalacrocorax carbo*	*Larus argentatus*
Cepphus grylle	*P. aristotelis*	*L. fuscus*
	Larus canus	*L. marinus*
	Sterna paradiseae	*Rissa tridactyla*
	Sterna hirundo	*Uria aalge*
	Sterna sandvicensis	*Alca torda*
	Sterna dougalli	*Fratercula arctica*

Table 4. Threatened bird species at the global level, in Europe (SPEC 1-3 and/ or in the European Union[32] which are wholly or partly dependent on the marine environment. This indicative list is confined to species that (may) regularly occur in EU waters in important numbers (thus excluding species largely confined to the Arctic). Species which may be most relevant for the identification of marine IBA's across European marine waters (thus excluding rare and localised species) tentavily set in bold type.

[32] Species that will be included in Birds Directive Annex I with the extension of the EU within parentheses

Species	Globally	SPEC	Annex I	Non-breeding [33]	Where mostly in Europe [38]
Gavia stellata		4	4	Coastal	NE. Atlantic, Baltic
Gavia arctica		4	4	Coastal	NE. Atlantic, Baltic
Gavia immer		P	4	Coastal	NE. Atlantic
Pterodroma feae	4	4	4	Pelagic	Macaronesian
Pterodroma madeira	4	4	4	Pelagic	Macaronesian
Bulweria bulwerii		4	4	Pelagic	Macaronesian
Calonectris diomedea		4	4	Pelagic	All, except Baltic
***Puffinus puffinus* s.s.**		4		Pelagic	NE. Atlantic
Puffinus mauretanicus [34]	4	P	4	Pelagic	Mediterranean, NE. Atlantic
Puffinus yelkouan		(4)	(4)[32]	Pelagic	Mediterranean, NE. Atlantic
Puffinus assimilis		4	4	Pelagic	Macaronesian
Pelagodroma marina		4	4	Pelagic	Macaronesian
Hydrobates pelagicus		4	4	Pelagic	NE. Atlantic, Mediterranean
Oceanodroma leucorhoa		4	4	Pelagic	NE. Atlantic
Oceanodroma castro		4	4	Pelagic	Macaronesian
Morus bassanus		4		Pelagic	NE. Atlantic, Mediterranean
Phalacrocorax a. desmarestii		[35]	4	Coastal	Mediterranean
Aythya marila		4		Coastal	Baltic, NE. Atlantic
Polysticta stellerii	4	4	(4)	Coastal	Baltic
Melanitta fusca		4		Coastal	Baltic, NE. Atlantic
Phalaropus lobatus		P	4	?[36]	NE. Atlantic
Larus minutus		4	(4)	Coastal	All
Larus melanocephalus		(4)	4	Coastal	Mediterranean, East Atlantic
Larus genei		P	4	Coastal	Mediterranean
Larus audouinii	4	4	4	Coastal	Mediterranean, East Atlantic
Larus fuscus fuscus		(4)		Coastal	Baltic, Mediterranean
Larus canus		4		Coastal	Baltic, NE. Atlantic
Sterna caspia		4	4	Coastal	Baltic, Mediterranean
Gelochelidon nilotica		4	4		Mediterranean
Sterna sandvicensis		4	4	Coastal	NE. Atlantic, Mediterranean
Sterna dougallii		4	4	Coastal	NE. Atlantic, Macaronesian
Sterna hirundo			4	Coastal	All
Sterna paradiseae		P	4	Pelagic	Baltic, NE. Atlantic
Sterna albifrons		4	4	Coastal	E. Atlantic, Mediterranean
Cepphus grylle		4		Coastal	NE. Atlantic, Baltic
Fratercula arctica		4		Pelagic	NE. Atlantic
Uria aalge ibericus		P	4	?	NE. Atlantic

Table 5. Non-threatened bird species in Europe which are wholly or partly dependent on the marine environment (main occurrence not filled in for Black Sea). This indicative list is confined to species which (may) regularly occur in EU waters in important numbers. The most important candidate species for the identification of marine IBA's have been tentatively set in bold type.

[33] "coastal" refers to marine waters less than 20 m deep and "pelagic" to marine waters deeper than 20 m.
[34] named Puffinus puffinus mauretanicus in Annex I of the Birds Directive (also considered conspecific with yelkouan in Birds of Europe (1994) and IBA2000). BirdLife International has reviewed the taxonomic status of Puffinus mauretanicus, which is now listed, as Near-Threatened, in its Threatened Birds of the World 2000)
[35] Subspecies not assessed by Birds of Europe (1994)
[36] Pelagic in its tropical winter quarters.

Species	SPEC[37]	Breeding	Non-breeding	Dispersion	Where mostly Europe [38]
Fulmarus glacialis	P	4	Pelagic		NE. Atlantic
Puffinus gravis	P		Pelagic		NE. Atlantic, Macaronesian
Puffinus griseus	P		Pelagic		NE. Atlantic
Oceanites oceanicus			Pelagic		NE. Atlantic
Phalacrocorax carbo carbo		4	Coastal		NE. Atlantic
Phalacrocorax carbo sinensis		4	Coastal		Baltic, Mediterranean [39]
Phalacrocorax aristotelis aristotelis	4	4	Coastal		NE. Atlantic
Aythya fuligula		4	Coastal	Congregatory	Baltic
Mergus serrator	P	4	Coastal	Congregatory	Baltic, NE. Atlantic
Clangula hyemalis	P	4	Coastal Pelagic	Congregatory	Baltic
Somateria mollissima	P	4	Coastal	Congregatory	Baltic, NE. Atlantic
Melanitta nigra	P	4	Coastal	Congregatory	Baltic, NE. Atlantic
Stercorarius parasiticus	P	4	Pelagic		NE. Atlantic
Stercorarius longicaudus	P		Pelagic		NE. Atlantic
Catharactes skua	P	4	Pelagic		NE. Atlantic
Larus argentatus	P	4	Coastal		NE. Atlantic
Larus cachinans		4	Coastal		All, except Baltic
Larus marinus	4	4	Coastal		Baltic, NE. Atlantic
Larus fuscus graelsii	4	4	Coastal		NE. Atlantic
Rissa tridactyla	P	4	Pelagic		NE. Atlantic
Uria aalge (excl. ssp. ibericus)	P	4	Pelagic		NE. Atlantic, Baltic
Alca torda	4	4	Pelagic		NE. Atlantic, Baltic
Alle alle	P		Pelagic		NE. Atlantic

Table 6. Categories of species which are used to identify Important Bird Areas

Category	Explanation	IBA criteria
Species of conservation concern	Species of global conservation concern Species with an unfavourable conservation status in Europe Species with a favourable conservation status in Europe, but concentrated in Europe (Sub-)species listed in Annex I of the Birds Directive	A1, C1 B2 B3 C2, C6
Congregatory species		A4, B1, C3, C4, C5
Assemblages of restricted range species	Species whose breeding distribution define an Endemic Bird Area or a Secondary Area [terrestrial in Europe]	A2
Assemlages of biome-restricted species	Species whose breeding distribution are largely or wholly confined to one biom [terrestrial in Europe]	A3

Appendix I. Identification of marine IBA's, species and data availability in 11 European countries
(data provided by participants of BirdLife's seminar on marine issues, Brussels, 30 May 2002)

Country	LV	DK	DE	NL	BE	UK	IE	FR	ES	PT	MT
Breeding seabirds											
Number of IBAs identified for	0	1[40]	1[40]	7	1	46+	c. 60	15	39[41]	c.	3

[37] Species of Conservation Concern, category 4 (not threatened or declining but concentrated in Europe);
a "P" indicates non-SPEC priority species of marine habitats in Europe according to Tucker & Evans (1997)
[38] Division of NE.Atlantic (North and West European seas) and Macaronesian seas taken from Tucker & Evans (1997)
[39] Only small proportion at coastal sites in the East Atlantic
[40] excluding tern and gull colonies
[41] North Spain 6, Mediterranean 21, Canary Islands 11

breeding seabirds										23[42]	
Number of qualifying seabird species in these IBAs	0	1	C7[43]	5	3	18	18	12	19	11-12	3
Any data on feeding ranges?	n.a.	yes	?	yes	?	yes	yes[44]	no	yes	no[45]	no
Waterbird concentrations											
Number of nearshore IBAs identified for waterbirds	7	6 [46]	21	2	1	?	0	?	1	0	0
Number of qualifying waterbird species in these IBAs	8	c. 20	4	4	1	?	4	?	1	0	0
Completeness of inventory in this respect	no	yes	yes	yes	yes	yes?	no[47]	90-95%	yes	90%	100%
Regular counts made?	no	yes?	yes	yes	?	yes?	no[48]	yes	yes	no	no
Dispersed pelagic birds											
Number of IBAs identified for non-breeding seabirds	0	2	none	none	none	none	none	none	none	none	none
Any data available of non-breeding occurrence?	yes	yes	yes	yes	yes	yes	no?	yes?	yes[49]	?	no
Any known seabird concentrations?	no	yes	no?	no?	?	yes?	yes?[50]	yes	yes[51]	?	no
Any attempts made to identify such IBA's?	yes	yes	yes	yes	yes	yes	no	no	yes[52]	no	no

Appendix II. Drawbacks related to the application of the Marine Classification Criterion for pelagically distributed seabirds.

- The validity of setting maximum area (parameter "A") must be tested. It is likely that the total area of selected sites and the bird numbers covered depend on "A" (3,000 km^2 in the quoted MCC inventories[53]). It would be interesting to see the effects of different maximum areas (e.g. 1000 and 2000 km^2) on population coverage and total IBA area selected[54].

[42] Azores 14, Madeira 9, mainland coast 1
[43] site included under IBA criterion C7
[44] some data for birds feeding in breeding and post-breeding season (i.e. Roseate and Little Tern); some SPA's include 500 metre zone around breeding colonies
[45] only data on tern species feeding close to breeding colonies
[46] includes IBA #083 (100,000 ha), #118 (162,500 ha), #119 (870,000 ha; also Alca torda), IBA #120 (100,000 ha), #122 (120,000 ha), #123 (1,150,000 ha)
[47] distribution inshore/ offshore not well known
[48] any regular counts are from the Wetland Bird Survey which would pick up birds nearshore
[49] some data on movements of Puffinus yelkouan through the Strait of Gibraltar to the Cantabrian Sea for post-breeding concentrations and moulting. Offshore sites located there.
[50] some evidence of post-breeding concentrations of Little Gull and tern species on offshore banks
[51] yes, for other species than P. yelkouan but more data and scientific evidence needed
[52] yes, for P. yelkouan, that will probably coincide with feeding areas of other species
[53] This figure is based on the feeding range of Razorbills from their breeding colony. This appears to be a rather arbitrary choice and its logic is far from satisfactory: what is the relation between the feeding range of a particular species during the breeding season and the non-breeding dispersion of seabirds in general?

[54] Meanwhile it appears that this has been done and it is concluded that "the selection of the globally important areas for seabird species with clustered distributions is less sensitive to this parameter (within the range of 1000-3000km^2" (Draft: *A quantitative method for evaluating the importance of marine areas for conservation birds;* see also Appendix IV*).* However, this refers to the number of sites selected; the effect on the total area of the sites selected is unclear. Furthermore, the data presented in Appendix IV show that this conclusion mostly refer to waterbirds; the numbers of sites selected for gannets and auks indicate a clear effect of reducing the maximum area size from 3000 to 1000 km^2.

- MCC uses very low densities of birds over wide areas to establish important areas (as low as 100 birds/km2). Questionable whether this constitutes a congregation or dispersed. Even without the C4 criterion, the areas selected are too large - not consistent with the IBA concept
- The methodology does not have regard to bird activity/ use of the site. An observed occurrence of birds may not be site specific. It requires repeat counts or behavioural observations to indicate site fidelity.
- Little is known to which extent the distribution patterns of seabirds vary from year-to-year. If the "concentrations" move in time this would be another factor that enlarge marine IBAs. Anyway the issue of seabird site fidelity is something BirdLife needs to look at more carefully because IBAs require areas to be regularly used.
- The approach to actually defining site boundaries is unclear. At least 5 'limitations' or variables are identified but the impact of changing these is not known.
- It is not clear on the basis of what criteria sites are combined (see discussion of IBA Northwestern Kattegat in Appendix III).
- Technique is too data hungry: it can only be properly applied with a vast amount of survey data that are only available from a very limited number of marine areas in the world.
- Technique is too complex, requiring specialists to employ it. Its application is complicated because of interpolation of census data and the necessity of a GIS software.
- The application of the criterion does not lead to consistent results as shown in the Ardea review of Skov *et al.* 2000 (see Appendix III and see Skov's reaction in Appendix IV).

SKOV H., VAITKUS G., FLENSTED K.N., GIRSHANOV G., KALAMEES A., KONDRATYEV A., LEIVO M., LUIGUJOE L., MAYR C., RASMUSSEN J.F., RAUDONIKIS L., SCHELLER W., SIDLO P.O., STIPNIECE A., STRUWE- JUHL B. & WELANDER B. 2000 - *Inventory of coastal and marine important bird areas in the Baltic Sea* - BirdLife International, Cambridge, 287pp. ISBN 9986-756-97-9, softback, mono-colour, 72 maps. Available from BirdLife Denmark, Copenhagen.

Birdlife International produced yet another report on Important Bird Areas (IBAs), this time again with emphasis on marine or coastal areas, and only in the Baltic Sea. BirdLife International has been rightly praised into heaven for its recent collations of data (e.g. Heath & Evans 2000; Stattersfield & Capper 2000). Their efforts should be acknowledged and their work is very important indeed. The present report is remarkable, however, because it is said to be complementary to Heath & Evans 2000, which was published as a two volume book at about the same time and which looked like the 'definitive' work for Europe, at least for the time being. Complementary means that the report identifies more IBAs in the Baltic than the book, while some "old ones" have had their boundaries altered. There must be a relationship with two earlier reports, not least because of the overlap in authors, one of which dealt with wintering areas for marine birds the Baltic (Durinck *et al.* 1994), and one of which referred to the North Sea (Skov *et al.* 1995). All publications have dealt with the Kattegat, so that a local manager will have to pick his choice. Does he get the same results in each? As a user, I checked one of the most important areas for consistency in each report.
Northern Kattegat is "an exceptionally important area for wintering seaduck and pelagic species (divers and auks). Seaduck are mainly within Danish watets, the pelagic species mainly in the Swedish parts." Moreover, "This is the most important wintering area in north-west Europe for *Somateria mollissima*, *Melanitta nigra*, and *Alca torda*." (Heath & Evans 2000a). A comparison between the reports (see Table):

	Durinck *et al.* 1994	Skov *et al.* 1995	Heath & Evans 2000	Skov *et al.* 2000
surface area	10 500 km^2	11 000 km^2	10 500 km^2	5800 km^2
period	1988-93	1980-93	[-] 1993	1987-93
divers	2900	1150	2900	2160
Red-necked Grebe	2350	1600	2350	1880
Common Eider	400 000	264 000	400 000	264 000
Common Scoter	495 000	396 000	495 000	360 000
Velvet Scoter	82 000	148 000	82 000	76 500
Razorbill	129 000	223 000	129 000	not listed

'Northern Kattegat' is the fourth most important area of the Baltic according to Durinck *et al.* 1994. Numbers of birds are average total winter- ing numbers based on' survey periods between 1988 and 1993', indicating that 13.3% of the north-western European wintering population of Common Eiders, 38.1% of Common Scoters and 10.8% of Razorbills occurred.
'Northern Kattegat' is the most important area of the North Sea and Kattegat according to Skov et at. 1995. Their area is slightly larger, however, while numbers of Common Eiders and scoters, divers and Red-necked Grebes are markedly smaller. The figures are averages again and are said to 'not represent the total number of birds within the area'. So be it, but Razorbills have, mysteriously, nearly doubled in numbers (22.5% of the biogeographic population).
'Northern Kattegat' is listed as Danish IBA 119 in Heath & Evans (2000a). The bird figures of Durinck et at. 1994 were copied rather than the update of Skov et at. 1995, although both reports were listed in the references. There is no clarification why the first and not the second report was adopted. Data were listed as from 1993, which is not true given Durinck et at. 1994 (average numbers over 1988-93), and the range for minimum-maximum population presented (using Durinck's averages for the lower and higher values) is an error. Skov et at. (1995)'s average of 223 000 Razorbills over 1980-93, "a concentration" that "has been observed every year since 1987", has gone.
In the present report, Northern Kattegat has been replaced by 'Northwestern Kattegat'. IBA 128 includes the 'old IBAs' 119 ('Northern Kattegat'), 002 (coast between Dokkedal and Lyngså), and 010, (south Læsø). The area is a lot smaller than previous publications (53% of the 'Northern Kattegat' of Skov et at. 1995), while it has identical numbers of Eiders but fewer seaduck, no Razorbills at all, and substantially more divers and Red-necked Grebes as in Skov et at. 1995, and higher densities of all species (except Razorbills) than in any earlier publication, except for Velvet Scoter, for which higher densities were reported in a two times larger area by Skov et at. 1995. Surveys used: 1987-93 for divers, 1980-93 for seaduck, so the same underlying data were used. In the text for Sweden (IBA 072) as well as in the

text for Denmark (IBA 129) we are now confronted with a 1260 km^2 area 'Lille Middelgrund', which is a new IRA "selected on the basis of information from offshore habitats", but that in fact used to belong to the 'Northern Kattegat' IBA. Here we find 93 500 Razorbills again (72% of the lowest figure produced earlier for 'Northern Kattegat'), but up come 93 000 Guillemots out of the blue, not mentioned in any of the earlier publications. Survey period for all these data: 1987-93...

So what has happened? Three out of four publications are from BirdLife International, Durinck et at. (1994) is a 'Report to the European Commission' by the National Environmental Research Institute and Ornis Consult in Denmark. All reports seem to have used the same data sets, constantly altering precise borders, occasionally altering total/ average or whatever bird numbers on the basis of which the areas have been given IBA status.

The report reviewed here states that a particular problem for marine IBAs is that there are no "obvious site boundary features" and it therefore promotes a system that could overcome that problem. Is that system different from previous site descriptions? So which report is the most authoritative? Is changing site definitions and numbers of birds within sites at an alarming rate based on the same underlying data an example of proper database analysis? Have we now left out major bird concentrations in comparison to the three earlier publications, or is the new method more conservative in the result? Northern Midsjö Bank (Sweden 066) is a new IBA "selected on the basis of information from offshore areas" (just an example). That data were collected 1992-93, so what's the explanation for the difference with the two-volume book!? The reports do not even try to give explanations for particularly high numbers of birds and why the borders of certain marine areas are where they were drawn. We simply have to rely on the authors, who seem to produce different results every time they're asked. If details are different but while the main conclusions are similar (IBAs are in urgent need for better legal protection), is it perhaps time to stop rewinding old data? Are we satisfied with a site description in which the underlying data are completely out of sight and with the text shortened as a list of facts with no reference to original work? Is it a signal that the present report has 16 authors and only 27 references (none of which is providing background infonnation for any of the data presented in this report)? Browsing through the lists of references in all reports and BirdLife books gives at least the impression that the authors have consulted only their own previous reports and copy (or sometimes mysteriously alter) the numbers of birds listed. Is the recruitment of local knowledge (and hence a long list of 'authors' or an immense, Acknowledgements' section) a guarantee for high quality data?

The present report is printed as an A4 size paperback in blue tones. The maps are ugly, typical computer generated GIS products with far too much detailed coastal contours and excessively detailed bathymetry. The shading of landmasses does not fit the coastal contours and crucial information is hidden in the same colours (blue tones) and shadings. Most maps are wider than they are high (giving latitudinal degrees the same distance as longitudinal degrees, which is wrong at 60° N), others, showing exactly the same part of the globe, are higher than wide but give a more traditional view of this part of the world. Figure 6 shows nine species-specific, but largely overlapping, IBA polygons as lines in different styles and tones of blue, so that, I guarantee, none could be reproduced in isolation without errors. The text template used is similar to that for descriptions of marine and coastal IBAs as in Heath & Evans 2000, but with no reference to sources of infonnation and therefore no help for anyone trying to work out how reliable the presented infonnation actually is.

My bookshelf is rapidly filling up with massive reports and even bigger books describing and, listing IBAs in Europe. 'Major challenges', milestones' and a 'tremendous effort' are terms that BirdLife managers and the authors themselves use to describe their work. I believe that, and I do see a need to identify areas important for birds, I do appreciate the importance of this work (which is the reason why I collect, keep and use these publications), ...but as a tool, not a goal. Understanding bird distribution and habitat requirements leading to effective bird conservation are important goals. Also, milestones should mark one-mile distances, not every one-hundred metres. What do we achieve by a repetition of the same (ca. 10-15 year old) data in different formats and with different figures in a series of glossy reports and book volumes? At least the impression has been given that we have stopped collecting data in marine areas in 1993, which is worrying given the far from fixed population levels and distribution patterns. I would recommend that future IBA overviews are more informative with respect to the original sources, more conservative with respect to boundaries chosen, and that only new, additional data were used to re-assess the status of a particular region. Four partly overlapping reviews, using different methods but the same underlying data, giving different results and abundance estimates, within a time span of only six years is a little over the top and arguably leads to confusion by the end-users.

[References not included]

Kees (C.J.) Camphuysen,
Netherlands Institute for Sea Research,
P.O. Box 59, 1790 AB Den Burg, Texel

Recent development of the Marine Classification Criterion (MCC)

Designation of marine EU Special Protection Areas

The identification of marine IBAs by the use of the MCC in the North Sea (Skov et al. 1995) and the Baltic Sea (Skov et al. 2000) has created a framework for the current designation of marine SPAs by the involved member states. The first truly marine SPA will be the Hoburgs Bank (IBA no. 65), which was designated by Sweden earlier this year. Hoburgs Bank, which is of global importance to Long-tailed Ducks *Clangula hyemalis*, is an offshore bank of about 1200 km^2 located 25-50 km from the Swedish coast. In general, however, the scale of the maps and the lack of a geo-statistical basis for the definition of IBA boundaries has made it difficult to use the IBA information in the 1995 North Sea report as more than general guidelines for the location of potential SPAs. The selection process by the individual member states is now refining the boundaries using the same techniques as in the Baltic 2000 report. As an example, Germany is just finalising the analyses of seabird data in their part of the Baltic and the North Sea, - the improved methods have resulted in a more fine-scale resolution of the core areas of high densities for the species in question.

Critical size of an area supporting 1%

The critical size of an area supporting 1% of a bio-geographic reference population was preliminarily set to 3000 km^2 based on the size of seabird concentrations in the North Sea and the Baltic and known feeding ranges of auks around colonies of international importance. Ideally it should be defined on the basis of estimations of marine habitat ranges for species with clustered distributions. With the present knowledge it is possible to model marine habitat ranges for most marine key species, - a priority activity for the team behind the MCC (Mark Tasker, Joint Nature Conservation Committee, Mardik Leopold, Alterra, Jan Durinck and myself from Ornis Consult).

The MCC team has just finalised tests of the effect of changing the critical size on the selection of IBAs as published in Skov et al. (1995) for the North Sea and in Skov et al. (2000) for the Baltic. The result (see table below) shows that of the pelagic species the total selection of IBAs for divers, grebes, seaducks and auks was affected moderately, while the selection of IBAs for gulls and gannets was strongly affected. Due to characteristic pattern of dispersal of the key marine bird species in the two seas, the selection of the more important IBAs is less sensitive towards the choice of the critical size. The major portion of the non-breeding populations of divers, grebes, seaducks and auks concentrate in relatively few, but large areas. Thus, the populations are in fact highly clustered when measured over the entire distribution range. Due to the high proportion of the biogeographic populations present within these concentrations, these areas will meet the MCC even if the critical size is reduced to 1000 km^2.

The table shows the number of areas selected for different groups of common seabirds occurring during winter in the Baltic Sea and the North Sea when different sizes for *A* is chosen.

Baltic Sea

Species group	***A* = 3000**	***A* = 2000**	***A* = 1000**
Divers	11	11	8
Grebes	14	14	12
Swans	17	17	17
Aythya ducks	29	29	29
Seaducks	43	42	37
Goldeneye and mergansers	43	41	41
Auks	20	17	14

North Sea

Species group	***A* = 3000**	***A* = 2000**	***A* = 1000**
Divers	14	13	13
Grebes	5	5	5
Cormorants and shags	6	6	5
Gannets	4	4	1
Seaducks	15	14	14
Larus Gulls	11	5	4

Auks	14	12	11

Accurate delineation of concentrations of birds at sea

Ornis Consult has developed the spatial IBA routines so that the definition of IBA boundaries at sea can now be described as a generic process involving a suite of linked GIS and geo-statistical routines. This means that defining IBA boundaries no longer introduces an element of subjectivity, - the characterisation of distribution patterns and the selection of contours marking the boundaries of an IBA are both computer-driven and can be reproduced by different teams. The application of spatial models has also involved the European Seabirds at Sea Database (ESASD) and we are now offering courses in the use of these techniques to colleagues (like in the case of SPA selection in Germany). As an important by-product of the geo-statistical basis for the mapping routines, the boundaries of IBAs can now be computed with confidence intervals, which will effectively pinpoint areas where boundary definitions are shaky, and where more data are needed.

Application outside the Baltic and the North Sea

It has still to be tested whether the results for the Baltic and parts of the North Sea are unique, - does the MCC apply equally well in the Mediterranean or the Biscay ?. However, the available data on seabird distribution at sea in these two regions is yet inadequate to carry out such tests. There is a great need to improve the ESAS (European Seabirds at Sea) database for these regions, and luckily new data are on the way for the Bay of Biscay. BirdLife International are recommend to push for the development of the knowledge of seabird distribution in these two regions.

Response to a review (published in Ardea) by C.J. Camphuysen of 'Inventory of coastal and marine important bird areas in the Baltic Sea 2000'

Although the review is covering the 2000 marine IBA report, the bulk of it is in fact a comparison between the three different published assessments of important marine bird areas in the Baltic. As such, this comparison is not too meaningful as methods used to select areas have changed significantly during the seven-year period between the first 'Important Marine Areas for Wintering Birds in the Baltic Sea' and the new report. I guess the reviewer can be excused due to the relatively short 'methods' sections available in the three reports, but his mistakes are great. The major differences between the reports can explain all the differences in estimated numbers of bird and area sizes listed. One major difference is the method used for delineation of important areas, which in the 1994 report for the Baltic and the 1995 report for the North Sea was b-spline approximation techniques, while the more rigorous geo-statistical method (kriging) was only used in the 2000 Baltic report. The benefit of applying geo-statistics in the 2000 report as compared to the other two reports is as mentioned above that extrapolation of high densities into poorly surveyed areas is minimised and a more accurate account of the boundary is produced. This explains the reduction in the size of many areas (and the split of the Northern Kattegat into two IBAs) and the increase in average densities within these areas in the 2000 report. Equally important, the databases used are not identical between the three reports, as different seasons are used (November-March in the 1994 report, variable and species-dependent in the two other reports) and more data were included in the 1995 account as compared to 1994 and more data again in 2000 as compared to 1995. In fact, the 2000 Baltic report is the first ever attempt to perform a basin-wide analysis of all coastal (and marine) bird data available and so, despite the meagre appearance (lay-out etc) it contains much more background data than the other two reports. Recent data (1995-2000) were also added to the data. On top of this, the MCC was not applied in the 1994 report, only in the two later studies, and correction factors for undetected birds in transect were only applied using line-transect theory and non-linear functions in the same two reports. Thus, in relation to the current discussion of the definition of IBAs the 1994 and the 1995 reports can only be used as rough indications of areas of importance and in case of the 1994 report estimated densities are generally too low. One can regret that we didn't wait publishing information about important bird areas until the MCC and the geo-statistical basis for delineation of boundaries of high-density areas was developed. However, the development of more fine-scale and statistically sound methods for mapping boundaries of IBAs is a process common to both terrestrial, coastal and marine IBAs. In fact, the boundary of many coastal IBAs in the Baltic Sea can now be regarded as less rigorous than the boundary of marine IBAs, as in many cases coastal counts cover large stretches of coastline with variable levels of densities of waterbirds, and often the boundary of the stretch counted can not be unambigously determined from the count database. During the production of the 2000 IBA report for the Baltic Sea it became clear that checking boundary errors and utilise GIS mapping routines should be an important part of the work for the coastal IBAs in the next European update. What is not clear to the reviewer is that the assessment of the importance of IBAs and the refinement of mapping techniques is an ongoing process. The rest of the review provides useful criticism of the obviously poor co-ordination between the European 2000 and the Baltic 2000 reports and the 'thin' presentation of methods and underlying data.

Henrik Skov 2002-07-25

2. GOOD PRACTICES EXAMPLES RELATED TO SITE SELECTION PROCESS OR MANAGEMENT OF DESIGNATED MARINE NATURA SITES

Relevant actions of the NGO, Spanish Cetacean Society, were the creation of a national database and standardized research protocols and the so-called Project: "Identification of Areas of Special Importance for the Conservation of Cetaceans in the West Mediterranean, in Spain" with the collaboration of the former Directorate General for Biodiversity, Ministry of Environment.

The results of three years of research carried out in the context of this Project, in addition of the previous monitoring programme on cetacean and sea turtle, it has highlighted the relevance of the special oceanography conditions of the Alboran Sea and its adjacent Mediterranean and Atlantic waters for the conservation of the three marine pelagic species present in Annex II of the Habitat Directive: *Tursiops truncatus*, *Phocoena phocoena* and *Caretta caretta*. Outcomes of this project were identified as proposals on Special Area for Conservation (SACs) - Habitat Directive - as well as on nominated areas as Specially Protected Area of Mediterranean Importance (SPAMIs) - Barcelona Convention -.

Furthermore Spanish Cetacean Society sets up the LIFE Nature Project: "Conservation of Cetaceans and Sea Turtles in Murcia and Andalusia" in order to provide a follow-up to the abovementioned Project, to contribute to the adequate inclusion of the region in the Natura 2000 network and to ensure the social acceptance of the proposed marine protected areas. Efforts are focused at three levels:

- Development of proposals on management and Conservation Plan for the three pelagic marine species included in Annex II of the Habitat Directive: *Tursiops truncatus, Phocoena phocoena* and *Caretta caretta*;
- Development of cost efficient tools for the monitoring of cetacean and sea turtle populations;
- Identifying of management schemes and developing public awareness programmes.

Other global objectives established were identified as follows: to reduce the impact caused by fisheries interactions, maritime traffic and marine debris pollution on target species; to ensure the long-term socio-economic viability of the management and monitoring of these species and their habitats in the region; to create a monitoring GIS tool based on the development of a series cost-efficient long-term research programmes and on the compilation of opportunistic observations of target groups *inter alia* fishermen and maritime police, and on the existing databases from the environmental and fisheries regional and national authorities; to analyse sea turtle migration routes and habitat use; to optimise the sea turtle recovery centres network; and finally, to promote new "environmentally friendly" tourism activities through conservation strategies (whale watching, artisanal fisheries, environmentally friendly scuba-diving activities and water sports).

POSITIVE EXPERIENCES IN RELATION TO FISHERIES TECHNIQUES TO REDUCE BIRD BY-CATCH

With regard to some positives experiences concerning to fisheries techniques to reduce bird by-catch, a competition of ideas was organised by SEO/BirdLife (BirdLife International partner organisation in Spain) as a contribution to the *Save the Albatross* campaign. The competition launches as well as the ideas received are part of a programme of considerable scope. It was officially launched in New Zealand (Southern Seabird Solutions) - Jul. '02; Hawaii (II International Fisher's Forum) - Nov. '02; Brazil (Projeto Albatroz) - Jan. '03; Spain (several events) - Mar. / Apr. '03.

Most albatrosses and several other seabird species are heading for extinction. They are being unintentionally drowned in large numbers by "longline" fishing boats. Longlining is the single greatest threat to the world's seabirds. BirdLife's Save the Albatross Campaign is trying to stop the needless slaughter of these magnificent birds by ensuring that relevant international agreements are implemented that will benefit both the birds and the legal fishing industry. Albatrosses and other seabirds often feed by scavenging for food behind fishing vessels and other boats, waiting for prey to be disturbed or scraps thrown overboard. When longlining, fishing boats set thousands of baited hooks on a fishing line to catch fish. Some birds swallow the hooks and are dragged underwater and drown. More than 300,000 seabirds are killed in this way each year. 26 species of seabird, including 17 species of albatrosses, are in danger of extinction because of the deaths caused by longlining. Once set, the hooks are too deep for the birds to reach. To stop birds being needlessly killed, it is essential to stop them having the opportunity to swallow the baited hooks before they have sunk. Many cheap and readily implemented solutions have been, and are being developed. Employing these will be of benefit to the fishermen themselves because the more bait eaten by birds, the smaller the catch of fish.

The initiative was widely publicized in many countries (particularly in New Zealand, US Pacific coast and South America) in magazines, listservers, newsletters, TV and radio. More than 3 months before the closing date (30 June 2003) for entries, over 20 requests from 8 countries were dealt with, and several innovative ideas were already put forward.

Some of the ideas submitted were identified as follows: Visual and sounding bird-scarer - new design of bird-scaring line with simple elements which reflects and sounds as it is towed on the water surface -; taste deterrent - mixing fish bait with simple materials that make it unpalatable for birds -; distraction (food) - system of offal (discards) disposal away from setting boat, to attract birds to a distant point -; visual bird-scarer - towing of simple element that reflects on water -.

Besides the ideas already submitted, it is known that various fishermen from New Zealand and Australia who are experimenting with new designs to increase the hooks' sinking rate. 87 ideas were submitted, 60 of them came from Spain, that means the great importance of the Spanish longline fisheries in the world. Several hundred fishermen have heard of it and, by so doing, have learnt more about the seabird bycatch problem. Fishermen and the specialised media alike, everyone was welcomed SEO/BirdLife's competition as it signals a new, collaborative approach to a serious problem that occurs

every day in the world's oceans. So the fishermen's competition was proving a tool for communication among the fishing community about the unwanted death of large numbers of seabirds in the world's oceans every year.

POSITIVE EXPERIENCES IN RELATION TO OIL SPILL DAMAGE PREVENTION

Mid- and long-term proposals on impact studies due to oil spill damage have accomplished certain conservation measures for "wide ranging" species. Some of these proposals are synthesized as follows: Accurate monitoring on post-oil spill damage, studies deal with the deep knowledge of trend dynamic populations, considering mainly an assessment due to the impact as well as a final damage evaluation on species and habitats. Other proposals concerning conservation measures are not only focused on threatened species but on the most affected areas. Finally, strategies drafting will be carry out applied to target groups and others, and even with the purpose of developing activities related to tourism (i.e. the presence of bird watching tourism in the affected area).

Taking into account that an existing estimate of species affected by oil slick may collect and register from previous environment disaster, it might be implemented recovery measures for the affected species and habitats. The monitoring plan includes a monitoring, control and surveillance programme. Emergency Plan reports a detailed definitions of the recommendations, which are the basis of solving another similar cases that require the develop of appropriate corrective and preventive actions/ measures that can be taken to correct the near-term condition.

The Prevention Plan has been designed in response to a control process that relates to mitigate any potential oil spill damage. The preliminary stage of the proposed Plan has been endorsed for coastal areas. It has been determined that it will be considered as main part of an specific Investment Portfolio by the National Park Unit, and it has been approved yearly. To ensure its efficiency within the determined timeframe, the scope is the identification of preventive measures that could reasonably be expected to reduce or preclude any potential oil spill damage in three different areas: Islas Atlánticas National Park - Atlantic region -, Cabrera National Park -Mediterranean region -, and Timanfaya National Park – Macaronesian region -.

3. Important Bird Areas (IBAs) for seabirds in Spain

Project reference: LIFE2004NAT/ES/000049
Project executor: SEO/BirdLife

CONTEXT
The project focuses on the sea waters of Spain (including the Balearic and Canary islands) and seeks to identify Important Bird Areas (using scientifically-sound criteria) for the seabird species listed in Annex I of the Birds Directive with populations in Spain. This project contributes to the implementation of the Birds Directive in the marine environment and to the future designation of Special Protected Areas (SPAs) in coastal and pelagic waters.

Due to its geographical location and productive marine waters, Spain enjoys one of the richest and most varied seabird faunas in Europe, including species which are endemic to our country and are seriously threatened with extinction. From a biogeographical perspective, three distinct marine regions can be found around Spain: the endemic-rich Mediterranean Sea, the subtropical waters around the Canary islands and the highly productive Atlantic region between Galicia and the Bay of Biscay. All of these regions sustain important fisheries and all are subject to a heavy human pressure.

PROBLEMS TO BE SOLVED
In Spain, as in most other European Union countries, a reasonable network of SPAs protects seabirds on their nesting colonies, which are invariably on land. However, the current number, location and extension of marine SPAs is clearly insufficient to guarantee the survival of the Annex I species in the habitat where they feed, rest, migrate and spend most of their time, the sea.

It is essential to identify the areas of the sea that are most important for the conservation of seabirds. For those areas, all relevant threats need to be known and addressed, so that appropriate action can be taken towards the preservation of healthy ecosystems that can sustain viable populations of seabirds.

OBJECTIVES
- To carry out a complete and detailed inventory, with objective methodological criteria, of the Important Bird Areas (IBA) at sea for the seabird species listed in Annex I of the Bird Directive with populations in Spain.

- To include in the marine IBA inventory a characterisation of each IBA, with GIS geo-referenced cartography, a description of the main threats affecting it and a number of conservation measures proposed.

- To develop a standard methodology for the identification and delimitation of IBAs at sea and to disseminate the methodology so that it can be applicable to other countries.

ACTIONS TO BE UNDERTAKEN
(a) map seabird distribution
Create maps showing distribution at sea and use of space in the marine environment for seabird species listed in Annex I of the Birds Directive with populations in Spain. 2 types of analysis are carried out: specific monitoring (i.e., remote tracking) in the case

of bigger species for which it is technically feasible, and generic sampling of the most favourable areas in the case of smaller species.

Specific actions consist of:
→ satellite tracking of 40-44 *Calonectris diomedea* (*diomedea* as well as *borealis*) and 20-24 *Larus audouinii*;
→ radio tracking of 26-30 *Bulweria bulwerii*, 16-20 *Puffinus assimilis*, 26-30 *Oceanodroma castro* from the Canaty islands, and 26-30 *Phalacrocorax aristotelis desmarestii* from the Mediterranean;
→ analysis and mapping of the 16.000 recoveries of ringed seabirds in Spain;
→ survey of coastal waters around *Larus* and *Sterna* breeding colonies in the Ebro delta and Albufera de Valencia (2000 hrs during breeding season), in order to establish the feeding radius for each species;
→ use of observers on board of fishing vessels (>300 days in various fisheries), to rpovide data on seabird use of fishing grounds as reliable feeding areas;
→ create and analyse a data base of oiled and other seabirds found dead on beaches

(b) predict seabird distribution using oceanographic variables
Identify and map the various factors (oceanographic: physical & biotic, and anthropic) that determine the distribution patterns of seabirds at sea. Using those data, (pre)identify areas of highest probability of holding significant concentrations of seabirds.

(c) develop standard methodology
Develop standard methodological criteria for the identification of marine IBAs:
→ organise a specialised workshop on identification of marine IBAs;
→ take part in 3 international meetings on marine IBAs;
→ formulate final document on standard methodology;
→ publish leaflet on identification of marine IBAs and distribute through BirdLife International network

(d) characterise marine IBAs, identify threats, recommend conservation measures
Select and define the limits of marine areas that fit the criteria to qualify as IBAs; characterise each IBA and identify threats, recommending set of conservation measures needed; publish detailed inventory "Important Bird Areas for Seabirds in Spain"

CONCLUSIONS
The present project seeks to identify those areas of the sea that are most important in terms of seabird conservation, and to propose ways of address their current threats and, therefore, to guarantee their preservation. This work is based on scientifically-sound criteria and methods, so that it can be applied objectively to other regions and species groups. The project is aimed at obtaining an inventory of areas of the ocean with high conservation value that warrant SPA designation. The ultimate goal is to have a network of marine SPAs in place that is representative and serves the purpose of conserving healthy seabird populations.

CONTACT:
Carles Carboneras, SEO/BirdLife, Melquiades Biencinto 34, 28053 - Madrid, Spain
Tel. (+34) 91 434 09 10; Fax (+34) 91 434 09 11
ccarboneras@seo.org

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Finland's communication to the Marine working Group of Habitats Committee

14.8.2004

4. Proposal of good practices for SCI/SPA site selection process in Finnish marine offshore areas and experiences in protection of wide ranging species

This document describes practices that are recommendable and conceivable in the offshore site selection process from Finland's point of view, informs WG2 about the legal circumstances and mapping situation of the Finnish offshore areas and measures taken to protect wide ranging species.

Occurrence of Annex I habitats (in practice sandbanks and reefs) and Annex II species of the Habitats Directive (in practice seals, porpoise and salmon) and Annex I species of the Birds Directive in Finnish offshore areas should be examined as soon as possible after enforcement of the Finland's Exclusive Economic Zone (EEZ). The Finnish government bill for the EEZ law is currently in debate in committee, and is expected to come into operation in late 2004.

Potential occurrence of Reefs (1170) can be first assessed based on bathymetric maps. Potential areas for occurrence of Sandbanks (1110) can be assessed from geological data in some in inshore parts of the Finnish marine areas, but no systematically collected data exists yet from offshore (future EEZ) areas. Areas where first hand assessments suggest presence of reef or sandbank habitat, more detailed inventories should be carried out using e.g. remote sensing by aerial photography, seismic and echolocation techniques, sediment sampling and underwater videography.

Offshore areas important for Annex II species of the Habitats Directive and Annex I of the Birds directive should be recognized based on long term records kept by national institutes. Whenever possible, these data should be supplemented by records collected by non-governmental organizations.

Finnish authorities and institutes have readiness to use all the mapping techniques brought up in the Marine Expert Group so far. Finland will take into account the procedural recommendations on the site selection process suggested by HELCOM in the Marine Expert Group.

It is desirable that the Finland's national submarine inventory programme launched in 2003 gained resources for and carried out marine habitat inventories in Finnish offshore areas in addition to its primary task, which is to generate comprehensive knowledge on occurrence of marine Annex I habitats in inshore areas and existing conservation areas. Completion of the programme will take up to ten years and it should enable evaluation of the conservation status of the marine Annex I habitats in Finland and ecological coherence of Finnish Marine SAC's. Site designation process in offshore areas should be based on scientific information regardless of the fact that decisions must likely be made prior to the inventory programme's full completion. Exchange of information and co-operation with neighboring Member States (Estonia, Sweden) and with Russia during the site selection process should be encouraged to ensure that selected sites contribute to ecologically coherent network of marine SAC's in the Baltic Sea.

Measures taken to protect wide ranging Habitats Directive Annex II species in Finland include establishment of sanctuaries in inshore seal resting areas and moving salmon fishery closure during migration to spawning rivers. However, yearly hunting/fishing quota system is in use for grey seal and salmon. Baltic salmon stock is supplemented by reared salmon, but fishing is not restricted to reared stock. Especially offshore fisheries exploit wild salmon relatively heavily. E.g. WWF Finland recommends total salmon fishery closure in Finnish offshore areas as means to ensure existence of the northern Baltic natural salmon stock. Such a measure was ideally taken in joint position with Sweden and Estonia.

5. Swedish practices on selecting marine protected areas, including Natura 2000 sites in the marine environment

The practice for selecting MPAs and marine Natura 2000 sites in Sweden is a modification of the system suggested by IUCN (Kelleher and Kenchington, 1992). The main categories of criteria are naturalness, bio-geographic importance, ecological importance, economic importance, social importance, scientific importance and international or national significance, and practicality/feasibility.

It should be noticed that so far there are only 8 designated marine nature reserves in Sweden, why our experiences are limited.

In the process of selecting MPAs/Natura 2000 sites criteria is used for two purposes:

1. Value criteria: used to evaluate sites
2. Priority criteria: used to set a list of priority among sites (to rank sites)

Marine biological systems are different in certain respects from systems on land, and therefore criteria for selecting MPAs/Natura 2000 sites may differ from those used to select areas for protection on land. Marine systems also tend to be more open than terrestrial systems, why marine protected areas tend to be directed more towards protecting habitats, biotopes or ecosystem functions, rather than individual species.

Marine sites selected for protection are mainly coastal sites, which to a large extent are influenced by natural processes and human activities occurring on land. For that reason the protection of a coastal site may need restrictive measures also for activities on land e.g. in a drainage area. On the Swedish west coast the Gullmarn nature reserve and Natura 2000 area is a fjord, where beside the ordinary restrictions in the drainage area certain additional restrictions have been introduced. In order to reduce the nutrient load to the fjord these restrictions cover sewage treatment plants and agricultural practices in different zones of the drainage area of the river Örekilsälven entering the fjord.

MPAs and marine Natura 2000 sites are usually not well known to the public, or have little aesthetic value. Therefore, the information to the public about these areas is of vital importance.

In the management of a MPA/Natura 2000 site zonation is a way to set management practices and regulations for different activities in different parts of a MPA. A zonation may encompass:

1. A core zone, where changes in present activities may be necessary, and where new uses should be avoided.

2. A buffer zone, where most present day activities are allowed, and where new activities can be allowed after careful evaluation of their effects on the environment.

3. A transition zone, where activities (new or old) can be allowed provided they do not negatively influence the biological values of the core and buffer zones.

The zonation is often easier to implement and control and it is suited for local participation. The alternative to zonation is to have the activities regulated in more detail and encompassing the whole MPA/Natura 2000 site.

Monitoring
Monitoring and investigations have to be carried out once a MPA/Natura 2000 site is declared. The management and the rules for a MPA should be possible to modify in accordance with changed needs and knowledge. The monitoring programme should be responsive to the users of the area as well as to the conservationists. However, a monitoring programme is costly. With scarce resources the monitoring programme should focus on the feature you want to protect. Therefore the monitoring programme should concentrate on the investigation of:

- that the values the MPA was set up to protect really are protected, and
- that the management practices implemented actually contribute to the protection.

The monitoring should start before the MPA is set up and repeated a number of times thereafter. Regulations and zonation of the MPA should then continuously be evaluated, based on the results from the monitoring programme.

Fishing techniques to reduce bird by-catches
Swedish experiences of measures to reduce bird by-catch in fisheries are so far very limited.
With regard to oil spill in the seas around Sweden it is already forbidden to disperse oil in the marine environment. The greatest problem we have with regard to oil spill is the illegal oil spills although the Baltic Sea is a Special Protected Area regarding oil. In order to better control the shipping in the area the Baltic Sea countries in an application to IMO have got the Baltic Sea classified as a PSSA area (april 2004). The Baltic riparian countries now have two years to provide IMO with the additional protective measures they want to introduce for the Baltic Sea PSSA.

Management of marine Natura 2000 sites in Sweden – existing experience and ongoing developments

Sweden has several designated Natura 2000 sites in our coastal areas, most in the archipelago areas. Several of these areas have been selected based on already existing nature reserves, where the main reason for the protection is the terrestrial values and to which a water area has been added. Very few of the coastal sites are plain marine sites. Some of them have been investigated appropriately but for most of these sites there is a lack of scientific knowledge of their marine nature values, habitats and species. Basic more systematic inventories on the coastal marine Natura 2000 sites have been planned to start during 2005. With the increasing need to create an ecological coherent network of Natura 2000 sites and other marine protected areas habitat mapping has come up high on the agenda at the national as well as international level. The designation of MPAs/marine Natura 2000 sites demand scientifically based background information of the sites. Therefore it should be a joint interest of member states to co-operate as far as possible in habitat mapping activities, including methodological development, monitoring, quality assurance and surveillance. This joint work, independent of the financial sources, should be connected to/coordinated with the regional marine conventions such as HELCOM and OSPAR.

So far Sweden has designated three marine offshore Natura 2000 sites. These are Hoburgs Bank (outside the territorial boundary) in the Baltic Proper, Lilla Middelgrund (partly outside the territorial boundary) and Fladen (inside the territorial boundary) both in the Kattegat.

The Swedish government has commissioned the Swedish Environmental Protection Agency to start a general inventory of about 20 marine offshore areas all around the Swedish coast. The selected areas are areas, which have been announced being of interest for marine windmill establishments as well as areas that may be of certain interest for marine nature conservation. The inventory started in 2003 and will continue during 2004 and 2005. The results of the inventory will be presented to the government in the beginning of 2006.

The areas that will be investigated are sand banks and reefs down to 30 m. The inventory consists of four parts:

- Marine geology (SGU) – bottom conditions
- Hydrology (SMHI)– circulation and stratification
- Biology (Marine Research Centre of Göteborg, Stockholm and Umeå) - species abundance, coverage and habitat distribution
- Data handling and management (GIS consultant) – GIS application with GIS generalizations, pattern analysis and area estimations.

Implementing Natura 2000 sites as well as MPAs means management of conflicts between interests for protection and other users of coastal and marine resources. Fisheries management is in this respect an especially sensitive issue. The management of different marine user interests demands a more planned management than currently is the case in most countries. In this respect integrated coastal zone management (ICZM) has turned up as a useful tool in the spatial planning process. The concept of integration includes: interaction, involvement, participation, cooperation and co-management. The ICZM-work should provide the basic features of the aim of the management process and the expected achievements in terms of sustainability and quality of available environmental assets and socio-economic conditions.

Integrated coastal zone management is a planning tool not specifically adjusted to planning and management of marine protected areas but a tool for a more comprehensive planning and management in coastal and marine areas. However, the ICZM-process involving interaction, involvement, participation, cooperation and co-management can be used. In Sweden the Environmental Code is the legal instrument for protection of marine nature conservation sites independent of the area is a Natura 2000 site or a MPA. This act is valid in Swedish territorial waters as well as in the Swedish Exclusive Economic Zone (EEZ). The process for planning and management is independent of where a site is situated. However, the involved agencies are different. While the municipalities and County Councils are the main responsible actors inside the territorial boundary the government and central agencies are the main responsible actors in the EEZ. So far we have not made a management plan for a Natura 2000 site or a marine nature reserve in the EEZ. Therefore there are some uncertainties with regard to responsibilities among the central agencies. The Swedish Environmental Protection Agency (SEPA) has proposed a pilot study at Hoburgs Bank, in order to go more closely into the matter of making a management plan for that area.

The Swedish experiences of planning and management of marine sites come from marine nature reserves inside the territorial boundary. Based on the Environmental Code the planning and management of a nature reserve can, in principle, address any human activity that may

have an impact on the nature value you want to protect. The development of a management plan for a protected area is a long and complicated process of participation, involvement, integration, coordination and cooperation. In the Koster-Väderö Natura 2000 site in the Skagerrak a management plan has been developed for the area, in which shrimp trawling is the main threat to the cold water corals to be protected. A group of representatives from public authorities, fishing organizations, individual fishermen and scientists have been working to reduce the damaging trawl effects on the corals. Based on the work of the group an agreement has been reached with the fishermen on how to fish in the area. Certain gear regulations have been introduced and a number of small areas within the Natura 2000 site have been identified as protected zones, where the trawling is forbidden. So far the agreement has been successfully introduced and followed.

A special issue with regard to marine reserves and Natura 2000 sites is the control of the effectiveness of the management of a site. In this respect the Swedish Coast Guard usually is given special responsibilities for control and enforcement on sites inside the territorial boundary and would most certainly be given the same task outside the territorial boundary.

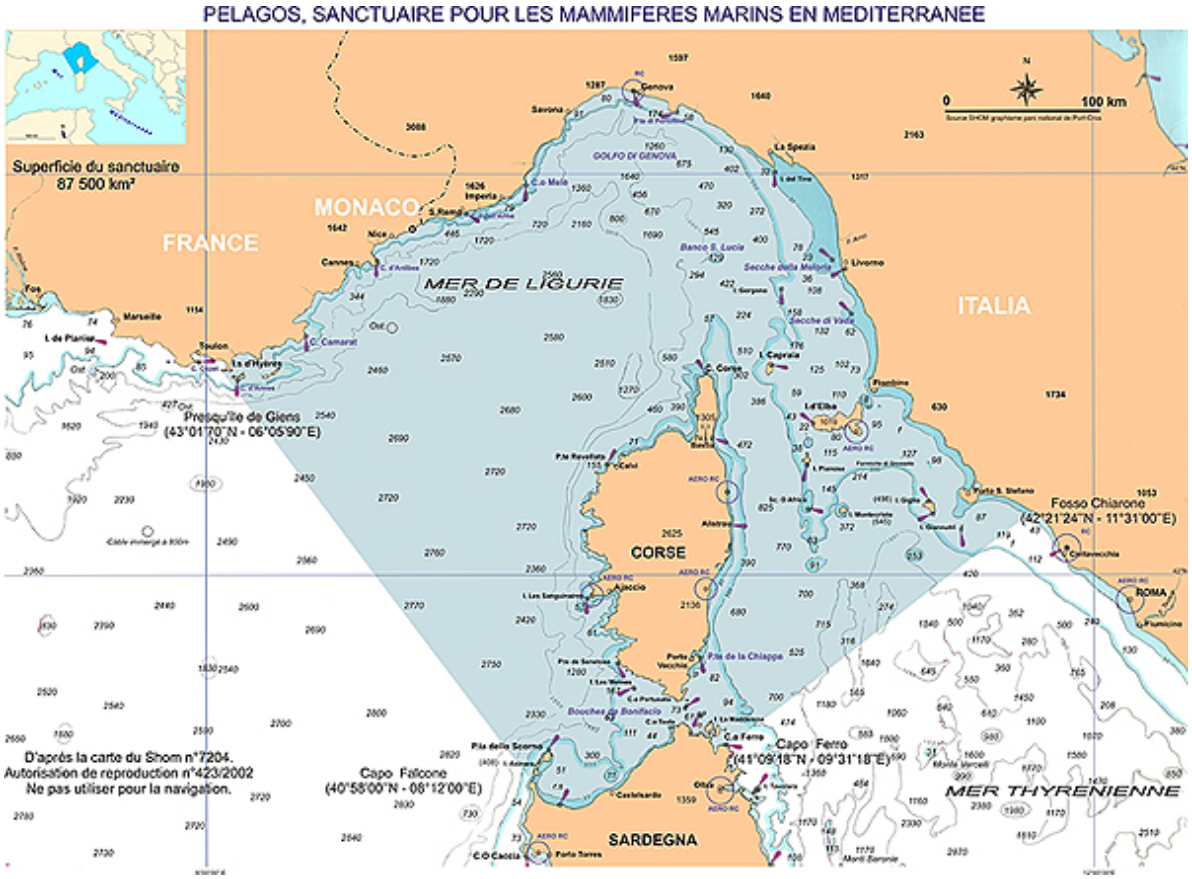
6. PELAGOS: An international Marine mammal sanctuary in the North-Western Mediterranean sea

The agreement concerning the creation of PELAGOS, a marine mammal sanctuary in the Mediterranean sea, was signed on the 25th of November 1999 in Rome by the governments of France, Italy and the Principauty of Monaco. Parties may invite other States or international organisations to participate.

Area of application

- PELAGOS is located in the territorial waters of France, Italy and the Principauty of Monaco, and extends to areas of the Mediterranean high seas under their national jurisdictions. These areas are rich in biodiversity and are crucial to the conservation of marine mammals. The sanctuary covers an area of 87500 km2 and includes 2022 km of coasts. It would host around a thousand whales and 25000 dolphins.

- PELAGOS boundaries are clearly stated in the article 3 of the agreement. It extends from the peninsula of Giens in France to the Toscan archipelago in Italy and includes Corsica.



Objectives

Pelagos aims are to:

- Guarantee a favourable conservation status of all marine mammal species by protecting them, protecting their habitat, and mitigating direct and indirect impacts of human activities.
- Organise the cooperation between States to evaluate periodically the status of mammal populations, mortality causes, threats on their habitats, and more specifically, threats on vital functions such as reproduction and feeding processes.
- Intensify pollution monitoring and control activities.
- Adopt national strategies to suppress progressively toxic wastes that are being dumped in the sanctuary area.

Jurisdictional effects

- Within the sanctuary, Parties :
    - forbid intentional catch or disturbance of marine mammals. They may authorise non lethal catches in emergency cases or for the sake of *in situ* scientific research.
    - Apply the international and European Union legislations, regarding in particular the use of fishing gears that could be detrimental to cetaceans.
    - Set up together regulations regarding the use of fishing gears that might be involved in the accidental catch of mammals or could threaten their food resources, and submit these regulations for adoption to international forums.
    - Regulate mammal sighting tourism
    - Regulate and if necessary forbid motorised contests within the sanctuary.
    - Harmonise all activities mentioned above
- Parties are allowed to adopt national measures that are stricter than those foreseen in the agreement.
- Parties hold frequent meetings to implement the agreement and follow it up. They encourage national sensitisation campaigns (e.g.: prevention of collisions between mammals and boats, how to inform local authorities in case of sighting of a mammal in danger…) and international research programmes to support the implementation of the agreement.
- To ensure the implementation of the agreement, parties organise control mechanisms within the boundaries of the sanctuary. They cooperate to organise the surveillance. They apply simplified procedures to facilitate one another use of their ports and airports.

- Parties invite other non member States that are active in the sanctuary (through fishing or tourism activities…) to respect the measures applied by the parties to protect mammals within the sanctuary.
- The sanctuary has been listed on the list of the Mediterranean specially protected areas (MSPA)of the Barcelona Convention in 2001. A management plan has been adopted by the three parties and institutional dispositions such as the creation of a secretariat, the provision of a budget and the creation of a scientific committee are under way.

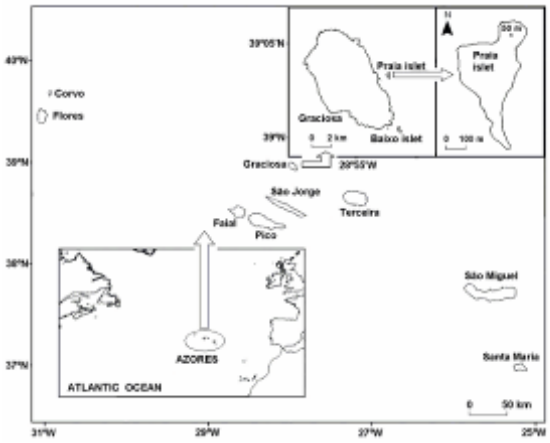
First concrete results:

- 230 000 euros have been invested in the French part of the sanctuary on research programmes to reconcile human activities and the presence of cetaceans.
- Speed Boat races within the sanctuary have been forbidden ever since 2001.
- A code of conduct targeting cetaceans watching tourism from boats has been set up.
- The suspension of the use of the 'thonaille', a local fishing gear, has been adopted from the 15th of August till the 15th of September to avoid the frequent by-catch of dolphins that would take place around this period.
- The obligation for fishermen to equip their boats with 'pingers', an acoustic device which frightens dolphins away has been adopted.

7. Habitat restoration on Praia islet, Graciosa (Azores)

Maria C. Magalhães [1], Joël Bried [1], Mark Bolton [1, 2], Verónica C. Neves [1, 3], José M. Pereira [4], Maria José Pitta Groz [4], Luís Aguiar [5], Luís R. Monteiro [1, †] and Ricardo S. Santos [1]

[1] Departamento de Oceanografia e Pescas, Centro do IMAR da Universidade dos Açores, 9901-862 Horta, Azores, Portugal
[2] Royal Society for the Protection of Birds, The Lodge, Sandy, Bedfordshire SG19 2DL, United Kingdom
[3] Ornithology Unit, IBLS, University of Glasgow, Graham Kerr Building, G12 8QQ Glasgow, Scotland, United Kingdom
[4] Direcção Regional do Ambiente, rua Cônsul Dabney, 9900-014 Horta, Azores, Portugal
[5] Praia, Graciosa, Azores, Portugal
[†] Deceased



Context

The Azores seabird assemblage represents a transition between tropical and temperate avifaunas. For this reason, it has an international scientific importance. Because seabirds essentially breed on oceanic islands free of native terrestrial predators, these species generally lack adaptations that would enable them to cope successfully with introduced predators or with perturbations of their nesting habitat.

Consequent on the introduction of alien mammals in the Azores archipelago by the Portuguese during the 15th century, most seabird species became extirpated from the main islands and are now restricted to a few islets and remote coastal strips. This is likely to have resulted in higher inter-specific and intra-specific competition for nest sites at this locality. Therefore, one of the priorities was to eradicate introduced mammals and to restore habitat whenever and wherever possible. Due to its accessibility to man and to the richness of its seabird community, Praia islet (0.12 km^2), off Graciosa island, was chosen for such an experiment. Praia islet holds more than 40% of the Azorean breeding population of Madeiran Storm Petrels *Oceanodroma castro*, both from hot and cold season populations. Roseate Terns *Sterna dougallii*, Common Terns *S. hirundo*, Cory's Shearwaters *Calonectris diomedea borealis* and Little Shearwaters *Puffinus assimilis* also breed on the islet. All these species are included in Annex I of the EU Wildbirds Directive 79/409and Annex 2 of Bern Convention.

Problems to be solved

Like at several other localities, the presence of Rabbits *Oryctolagus cuniculus* on Praia islet, has resulted in the disappearance of some native plant species and in increased soil erosion, as well as in the destruction of seabird breeding sites and hence a decrease in seabird breeding numbers.

Objectives

Eradicating the rabbits and restoring the habitat on Praia islet, both in terms of vegetation and suitability for seabirds.

Actions undertaken

Rehabilitation measures were implemented from 1995 onwards. They included rabbit eradication, habitat restoration, installation of artificial nests for terns and storm petrels and educational measures.

Rabbit eradication

Rabbit eradication was conducted from 12 September to 2 October 1997, using brodifacoum, an anticoagulant.

Control of erosion

Due to the presence of the rabbits and the nature (friable substrate) of the islet, erosion was very important in some areas. In order to minimize this phenomenon, branches cut down from trees and debris dams made of rock piles and wooden planks were installed in the erosion scars in 1995 and 1997.

Replanting the native vegetation

The species that should be (re-)introduced on Praia islet were determined from the results of a preliminary study conducted on the neighbouring Baixo islet (*ca* 2 km south of Praia) in 1996. Small plants of 9 native species collected on Baixo islet and on Graciosa island were planted on Praia islet from May 1998 onwards, according to their habitat preferences. Operations are still ongoing.

Measures to increase seabird populations

Construction of nest boxes for roseate terns:

To enhance Roseate Tern establishment on Praia islet, 50 wooden nest boxes (0.4 x 0.4 x 0.2 m) were built and installed on the islet at the onset of the 1996 breeding season in order to increase the number of suitable areas for this species. Since then, nests boxes have been installed every year in early April and removed in September, after all the chicks have fledged.

Construction of artificial nests for Madeiran Storm Petrels:

In 2000 and 2001, 150 artificial nests were installed on Praia islet to increase the breeding populations of the two seasonal morphs of Madeiran Storm Petrels. Since then, these nests have been annually monitored for each seasonal population, monitoring consisting in short visits to the colony (5-10 days) to determine occupancy rate, the number of breeding pairs, and chick productivity. Adults and chicks are ringed.

Educational measures

In 1995, informative panels explaining the impact of human disturbance on seabirds were put on the islet to limit the access by visitors to tern colonies, and awareness campaigns were conducted.

Results:

Rabbit eradication

Rabbit eradication proved to be successful. No evidence of the presence of Rabbits has been found since the end of the 1997 campaign.

Control of erosion

Putting tree branches into erosion scars and building debris dams proved their efficacy in terms of soil retention, and herbaceous plants had already started to colonise the soil in 1998. In 2004, all the erosion scars were partially filled up and contained vegetation.

Replanting the native vegetation

The program is still ongoing due to some difficulties experienced with some species like *Azorina vidalii* or *Solidago sempervirens* which have very low growth rates, whereas other species such as *Festuca petrea* already started to spread. However, the plants of *A. vidalii* introduced in 1998 already produced seeds that have germinated, giving birth to several young plants. Exotic plants that attempt to colonise the islet, (essentially *Carpobrotus edulis*) are removed. Plant introductions and removal of exotic species are currently conducted by the nature warden from Graciosa.

Measures to increase seabird populations

Construction of nest boxes for roseate terns:

Rabbit eradication and the installation of nest boxes resulted in the increase in the breeding populations of terns on the islet, although not immediately. Roseate Terns had been almost totally absent from Praia islet since 1991. Despite the installation of nest boxes, they did not breed between 1996 and 1998. Except for two pairs in 1998, the first noticeable breeding attempts by this species occurred in 2000; since then, breeding numbers have kept increasing, exceeding 300 pairs in 2003.

A few tens of Common Tern pairs have always been breeding on Praia since 1989, except in 1995 and 1996. This species bred again in 1997, before Rabbits were eradicated. Since then, breeding numbers have kept increasing, and Praia islet currently holds the largest Common Tern colony (about 1000 pairs) of the Azores.

Concerning wooden boxes, however, adult terns never used them, but chicks use them as shelters from both predators and weather.

Construction of artificial nests for Madeiran Storm Petrels:

The occupancy rate of artificial nests by Madeiran Storm Petrels has kept increasing since 2000, with 46 breeding pairs for each seasonal morph in 2004. This represents a two-fold increase for the cool season morph and a 3.5-fold increase for the hot season morph. A long-term demographic survey is being conducted to estimate the demographic parameters of each seasonal population.

Educational measures

Every summer, informative panels are still installed on Praia islet. Although visits on the islet are still allowed, they have been discouraged and overnight stays are only permitted to researchers. Although he is not obliged to do it, the nature warden from Graciosa island is present during diurnal visits to inform the public about the sensitivity of seabirds to human disturbance and the vulnerability of the ecosystem of Praia islet.

Conclusion: future work

Praia islet remains a vulnerable area since people come with boats for diurnal visits, most of which occur between May and August, i.e. when the weather is the most settled, but also coinciding with the breeding period of seabirds. However, the nature warden is present during these visits and he keeps the visitors informed about the bird species that are present to ensure that people will not disturb birds during the breeding period. Despite this, people may land on the islet at any time of the day or night (that is, outside the working hours of the nature warden) and cause disturbance inadvertently. Therefore, it is desirable to maintain sessions of environmental education. On the islet, control and/or removal of exotic plants remain necessary. So does the maintenance of the tern nesting habitat (installation of wooden boxes for terns each summer, removal at the end of the breeding season), and that of the storm petrel artificial nests (removing the vegetation at the entrance of the nest boxes).

Further information and contact addresses

Maria Pitta Groz, *Secretaria Regional do Ambiente*, 9900 Horta, Azores, Portugal

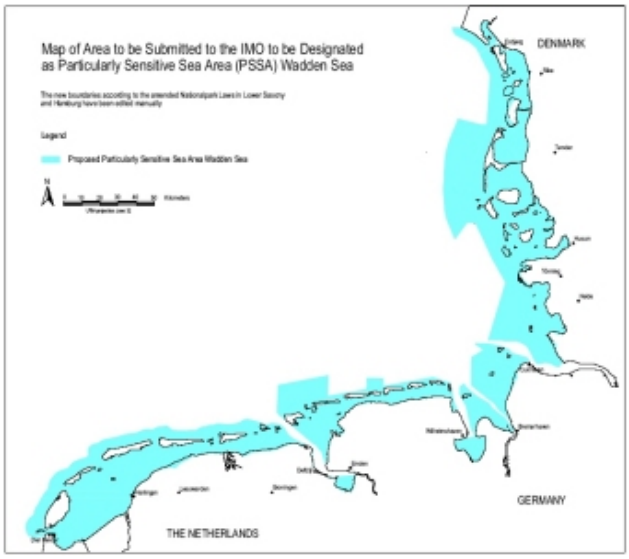
Maria Carvalho Magalhães, *Departamento de Oceanografia e Pescas, Centro do IMAR da Universidade dos Açores*, 9901-862 Horta, Azores, Portugal. Email <mcarvalho@notes.horta.uac.pt>

Joël Bried, *Departamento de Oceanografia e Pescas, Centro do IMAR da Universidade dos Açores*, 9901-862 Horta, Azores, Portugal. Email joelbried@yahoo.com

8. The Wadden Sea : an example for Best-Practices in Marine Conservation

The Wadden Sea - Location, Habitat Types and Species

The Wadden Sea is Europe's largest and most important marine wetland. It is a marine area of outstanding international importance, which is shared by Denmark, Germany and the Netherlands. Nowhere else in the world is there an area on a similar scale and multifaceted, containing such a complex of tidal flats, gullies, salt marshes, dunes and islands. The Wadden Sea is an exceptional, highly dynamic tidal ecosystem and its exceptionality relates to its extensiveness, complexity and interrelationship of habitats and species as well as its high biomass productivity, which provides the foundation for an abundance of species.



Sandbanks, estuaries, mudflats and sandflats not covered by seawater at low tide, large shallow inlets and bays, reefs, salt marsh habitat types and dune habitat types are the main natural European habitat types according to the EU Habitat Directive, which can be found in the Wadden Sea. About 10 to 12 million waterbirds pass through the area to build up the necessary energy reserve for their migration flight. The most numerous native marine mammal species in the Wadden Sea is the Harbour seal with some 10,800 individuals (2003). The Wadden Sea is the main nursery ground for fish species that are hatched in the North Sea. The commercial fishery of the North Sea is dependent on these nursery ground facilities. (see list of relevant Habitat Directive habitats and species in **Annex 1**)

Man settled in the Wadden Sea area more than 2000 years ago. The Wadden Sea of today is partly the result of man´s interference with the Wadden Sea environment through land reclamation and altering of the landscape. The Wadden Sea has been subject to a generation of protection and management, also in an international context, as shared by three countries. The trilateral Wadden Sea Cooperation celebrated its 25-year anniversary in 2003. There is hence a long experience in terms of protection and management of a large and complex marine area located in a part of Europe with many pressures and developments impacting the area both in a national and international context.

It has been recognized that the Wadden Sea could only be protected and managed in the context of an overall management of the coastal zone both landward and offshore because

many of the pressures on the area occur outside the area subject to the protection. The Wadden Sea case provides an extraordinary opportunity to examine the management of a large marine protected area on a national and international scale and in the context of a complex coastal zone.

2 Managing the Wadden Sea – The Trilateral Perspective

The collaboration between the three countries on the protection of the Wadden Sea is based on the Joint Declaration, which was concluded at the 1982 Wadden Sea Conference. The three governments declare their intention to consult each other in order to coordinate their activities and measures to implement relevant EU directives and other international legal instruments such as the Ramsar and Bonn Conventions. The Joint Declaration is a political declaration of intent made by the three governments expressing a joint responsibility for the protection of the Wadden Sea as a shared marine wetland area. In 1987 the Common Wadden Sea Secretariat was established to facilitate and support the cooperation.

Wadden Sea Plan: Geographical delimitation - External Impacts

In 1997, the Wadden Sea countries adopted the Wadden Sea Plan, which is the key joint policy and management plan for the overall protection, management and sustainable use of the Wadden Sea. The Wadden Sea Plan is applicable to the Wadden Sea Area as defined by the trilateral Danish-German-Dutch Wadden Sea cooperation as the area between basically three nautical mile offshore and the seawalls on the mainland including the estuaries up to the brackish water limit and the islands. The Wadden Sea Area covers an area of almost 15,000 km^2 of which almost 12,000km^2 constitutes the trilateral Conservation Area of the national Wadden Sea nature reserves and national parks (see **Figure**: Map of the Wadden Sea Area and Conservation Area). The Wadden Sea is also subject to international designations such as the designation as candidate Special Areas of Conservation (cSACs) according to the EU Habitat Directive and a Special Protection Area (SPA) according to the Bird Directive and Ramsar Convention. It is important to acknowledge that the Wadden Sea Area geographically covers basically all of the Wadden Sea ecosystem including its natural habitats but also to appreciate that the protection and management regime is in principle confined to this area though the significance of external impacts on the area is well recognized.

Regarding the impact of shipping off the Wadden Sea, the designation of the Wadden Sea as a Particularly Sensitive Sea Area (PSSA) in the year 2002 is a recognition of the vulnerability of the Wadden Sea. The protective measures, which have been taken off the Wadden Sea, are now recognized as associated measures, which serve to protect the Wadden Sea from impacts from shipping.

Trilateral Objective, Management Principles and Targets

The guiding principle of the trilateral Wadden Sea policy is to achieve, as far as possible, a natural and sustainable ecosystem in which natural processes proceed in an undisturbed way (Wadden Sea Plan, §I,8, 1997). This guiding principle is a compelling political statement on the objective of the efforts of the countries to protect and conserve a natural ecosystem for present and coming generations. Seven management principles, such as the precautionary principle have been agreed to, which are fundamental for decisions on activities and projects within the Wadden Sea Area. A list of those shared principles is in **Annex 2**.



The conservation and management is hence directed towards maintaining and achieving the full scale of habitats, which belong to a natural and dynamic Wadden Sea by working towards targets set for habitats, birds and mammals, quality of sediment and water, and landscape and cultural aspects. A list of the Targets is in **Annex 3**. The Targets were developed upon the extensive scientific documentation of the area and the Quality Status Reports of which two have been issued. The Targets are open-end formulated based on the assessment that in order to achieve a natural and sustainable ecosystem the area, which is natural and undisturbed, should be increased. The target approach is concerning one of the few areas, if any, in Europe where such a management approach is applied to and politically accepted. Recently, it was concluded that the Targets complies with the requirements of scientific credibility, management usefulness and suitability for communication with stakeholders.

For each of the Targets a comprehensive set of joint policies and management has been adopted by the countries as encompassed by the Wadden Sea Plan. These policies and management cover all relevant activities and uses in the Wadden Sea Area related to the Targets on landscape, water and sediments, habitats, birds and marine mammals. These includes policies on coastal protection, agriculture, industry and harbour, fisheries, tourism and recreation, extraction of oil and gas, sand and gravel extraction etc. as listed in the Wadden Sea Plan.

3 Implementation on the National Level

The trilateral protection and management scheme as laid down in the Wadden Sea Plan through a coherent system of management principles, targets, measures, monitoring and assessment, constitutes an integrated ecosystem management of the Wadden Sea as one shared ecosystem. A shortcoming in the approach is the legally non-committal nature of the agreements and the institutions.

The implementation of the agreements made in the framework of the trilateral Wadden Sea Cooperation is the task of the national responsible, primarily of the nature conservation authorities but also other authorities, which have a stake in Wadden Sea conservation and management. There are some notable differences between the national protection schemes.

The German national parks have established a unified management of the protected areas through an overall zoning system. The national parks authorities are also strong institutional elements, which potentially guarantee a strong implementation and enforcement of the

stipulations of the national park laws. Its weakness is the lack of integration with the developments and activities in the adjacent land and sea territory.

In opposition to this, the Dutch approach is one, which in principle has integration as a leading principle horizontally and vertically between the authorities and, which take account of developments in the adjacent area. A weakness is potentially the problems in pursuing conservation objectives in conjunction with the lack of a strong institutionalized lead agency for the Wadden Sea. During the developments of the last decades, however, there have been fewer principle differences between the two approaches, also because of the development of common trilateral framework.

The Danish Wadden Sea nature reserve was established by state order since the Danish state has sole responsibility on the sea territory is very similar to the German national parks with a few essential exceptions. The zoning system is activity related and not a fixed system. Furthermore no special authority has been established but the existing state authority of the Danish Forest and Nature Agency is the competent authority for management and issuing of permits and exemptions.



5 Wadden Sea protection - Assessment and Measures

The implementation of the trilateral Targets is monitored and assessed by the Trilateral Monitoring and Assessment Program (TMAP) on the basis of a common list of agreed parameters. The TMAP is set up to enable an appraisal of the measures, which have been introduced and, if necessary, to design and introduce new ones if required to achieve the Targets. The Targets, measures, monitoring of the Targets and recurring policy assessment is in principle a very consistent system, which is applicable to all other systems and protected area management schemes.

The 1999 Quality Status Report (QSR) is the most recent comprehensive quality assessment of the Wadden Sea based on the Targets, which has made use of the TMAP data to the extent available. Some essential results as summarized (summary available at www.waddensea-secretariat.org) are

- Water, sediment and biota: phosphate levels have decreased significantly in most parts of the Wadden Sea, whereas this is not the case for nitrate; concentrations of most heavy metals in sediment are approaching background levels but an exception is mercury, which is still three to ten times higher than background levels; also concentrations of PCBs in sediment and HCB and HCH in bird eggs show a steady decrease.

- The tidal area: the target of an increased area and more natural development of natural mussel beds, eelgrass meadows and sabellaria reefs has not been reached; the decline of mature beds of the blue mussel and seagrass meadows has continued in the 90s; as a result of human interference, most notable fixed coastal constructions but also fisheries, dredging, sand extraction and gas extraction – the ability of the system to compensate for sea level rise may have decreased.
- Salt marshes: much has been achieved to in the 90ies to improve the natural situation in salt marshes by the reduction, or phasing out of grazing and artificial drainage.
- Birds: the population of several bird species have increased in the last decades and few have declined; the main factor for the increase of breeding birds are, amongst others, an improved protection during the breeding season; Kentish plover and Little tern populations have decreased, which is due to lack of sufficient undisturbed breeding habitats caused by recreational activities.
- Marine mammals: the Harbour seal population has increased significantly and though the population was affected by an epidemic in 2002 as in 1988, the population may be regarded as viable.
- Estuaries: only few estuaries have remained in the Wadden Sea area and consequently natural transitions of fresh and salt water hardly exist; the anthropogenic impact on the three main estuaries is still increasing as a result of current deepening and the building of a storm surge barrage.

The protection of the Wadden Sea ecosystem has benefited much from the comprehensive and integrated protection scheme, which was launched almost a generation ago. The 1999 QSR points to a number of positive developments in particular with regard to birds and seals and some of the habitats such as the salt marshes. The QSR also identifies a number of areas of concern for which an improvement is needed. This concerns the developments in the tidal area and with regard to the external impacts from pollution and other developments in the coastal zone. The next QSR including the assessment until 2003 is being compiled at the moment and will be published in 2005.



6 The Seal Management Plan

The Wadden Sea seal population slumped in the mid-1970s to about 3,900 individuals – the lowest number ever logged. A ban on hunting was introduced in all three Wadden Sea countries and as a result seal numbers stabilized and began to rise in some places. This positive development was interrupted by a dramatic epizootic at the end of the 1980s caused by the highly infectious phocine distemper virus (pdv). By 1988, the seal population slumped by about 60 percent. It happened again 14 years later, once more reducing the seal population tremendously. Yet in the meantime a positive new factor had entered the equation.

In October 1991, an Agreement was struck between Denmark, Germany and the Netherlands on the Conservation of Seals in the Wadden Sea. It was the first regional Agreement under the Bonn Convention (CMS) and its aim was trilateral cooperation to improve the conservation prospects of seals in the Wadden Sea. After the first pdv epizootic, between 1988 and 2002, seal numbers rallied significantly. Aerial surveys of the entire Wadden Sea in 2002 counted some 20,975 seals. This comeback was attributed to a higher reproductive rate and lower initial juvenile mortality. But later that same year, pdv struck again and half the Wadden Sea's seals (about 10,500) were found dead. One year later, however, the maximum number of surviving seals counted during the moult period in August 2003 amounted to some 10,800 seals. In other words the population was 53 percent below pre-outbreak levels. Though in absolute numbers more seals died than during the earlier epizootic of 1988, the evidence showed that relative mortality was evidently lower this time around.

It was widely acknowledged that the Seal Agreement played a part in turning the tide. The Agreement required Parties to develop a 'conservation and management plan for the seal population' on the basis of scientific knowledge – the Seal Management Plan (SMP). This plan, which was compiled with the support of the results of the EC funding project 'Joint Management Plan for the Wadden Sea Seal Population', has become the key instrument for achieving and maintaining the objectives of the Seal Agreement. Among other provisions, it set up seal reserves throughout the Wadden Sea, which are closed to all activities in periods when the animals are giving birth and nursing young. The environmental conditions of seals, however, are still not satisfactory. The present and short-term conservation status of the seals in the area is primarily determined by pollution and disturbance as results of various human activities are the main problems.

A rise in seal populations may run the risk of conflict with fishermen. It may also challenge the current reserve system if additional reserves are needed to cope with growing numbers. Research projects on the feeding ecology of Harbour seals, and investigations of habitat requirements of seals in relation to recreational demands are the top two priorities for implementation under the revised SMP for 2002-2006 (available at http://www.waddensea-secretariat.org/). The SMP remains an essential tool for heading off potential future conflicts of interest in an area with lots of commercial users. It aims to strike a balance between managing the area for human uses, and conserving viable stocks of seals to maintain a natural breeding cycle.





7 Conclusions - Lessons Learnt

Looking back at a generation of Wadden Sea protection it seems justified to conclude that the entire approach in terms of conservation and management of a comprehensive marine wetland has been a very progressive one. The level of environmental protection and management can be characterized as unique in terms of harmonized international and national policies, management arrangements, and integrated environmental monitoring and assessment procedures. The measures have been successful in conserving species and habitats though there still remain issues of concern in particular the quality of water, sediment and biota caused by the input of hazardous substances and nutrients from sources outside the Wadden Sea. This issue can only be addressed in a larger context.

Furthermore, there is much concern related to the possibility for compensating the effects of the sea level rise and responding to accelerated sea level rise, which is also an issue that requires addressing developments outside the Wadden Sea Area. The decline of mature beds of blue mussel and sea grass meadows and the increasing impact in the estuaries are also a major cause of concern. The comprehensive protection and management of the Wadden Sea as a coastal marine area has been a very positive achievement, which needs to be continued. The management of the Wadden Sea has practiced coastal management for a long period along the principles for integrated coastal zone management as outlined in the European Union program.

8 Further Information

http://www.waddensea-secretariat.org/
http://www.waddensea-forum.org/

9 Contact Address

Jens A. Enemark and Bettina Reineking
Common Wadden Sea Secretariat
Virchowstrasse 1,
D - 26382 Wilhelmshaven
Federal Republic of Germany
Phone: +49 (0)4421 9108- 11
Fax: +49 (0)4421 910830
Email: Enemark@waddensea-secretariat.org
Reineking@waddensea-secretariat.org
info@waddensea-secretariat.org

ANNEXES

Figure: Map of the Wadden Sea Area and Conservation Area

Annex 1: List of the habitats and species according to the Habitat Directive Annex I and II occurring in the Wadden Sea

Annex 2: Shared Principles of the Trilateral Wadden Sea Cooperation - Wadden Sea Plan

Annex 3: Trilateral Targets

Annex 1:

List of the habitats and species according to the Habitat Directive Annex I and II occurring in the Wadden Sea

List of Habitats

1110 Sandbanks which are slightly covered by sea water all the time
1130 Estuaries
1140 Mudflats and sandflats not covered by seawater at low tide
1160 Large shallow inlets and bays
1170 Reefs
1210 Annual vegetation of drift lines
1310 *Salicornia* and other annuals colonising mud and sand
1320 *Spartina* swards *(Spartinion maritima*e)
1330 Atlantic salt meadows *(Glauco-Puccinellietalia maritima*e)
2110 Embryonic shifting dunes
2120 Shifting dunes along the shoreline with *Ammophila arenaria* (white dunes)
2130 Fixed coastal dunes with herbaceous vegetation ('grey dunes')
2140 Decalcified fixed dunes with *Empetrum nigrum*
2150 Atlantic decalcified fixed dunes *(Calluno-Ulicete*a)
2160 Dunes with *Hippophaë rhamnoides*
2170 Dunes with *Salix repens* ssp. *argentea (Salicion arenaria*e)
2180 Wooded dunes of the Atlantic, Continental and Boreal region
2190 Humid dune slacks
4010 Northern Atlantic wet heaths with *Erica tetralix*
4030 European dry heaths

List of the species

A4.1 Common Seal and Grey Seal
A4.2 Harbour Porpoise
A4.3 Fish species
A4.4 Root vole
A4.5 Fen orchid

Annex 2:

Shared Principles of the Trilateral Wadden Sea Cooperation - Wadden Sea Plan

The Guiding Principle of the trilateral Wadden Sea policy is ”to achieve, as far as possible, a natural and sustainable ecosystem in which natural processes proceed in an undisturbed way” (ED §1). The Principle is directed towards the protection of the tidal area, salt marshes, beaches and dunes (LD §8).

In addition, seven Management Principles have been adopted which are fundamental to decisions concerning the protection and management within the Wadden Sea Area (Esbjerg Declaration §3):

- the Principle of Careful Decision Making, i.e. to take decisions on the basis of the best available information;
- the Principle of Avoidance, i.e. activities which are potentially damaging to the Wadden Sea should be avoided;
- the Precautionary Principle, i.e. to take action to avoid activities which are assumed to have significant damaging impact on the environment, even where there is no sufficient scientific evidence to prove a causal link between activities and their impact;
- the Principle of Translocation, i.e. to translocate activities which are harmful to the Wadden Sea environment to areas where they will cause less environmental impact;
- the Principle of Compensation, i.e. that the harmful effect of activities which cannot be avoided, must be balanced by compensatory measures; in those parts of the Wadden Sea, where the Principle has not yet been implemented, compensatory measures will be aimed for;
- the Principle of Restoration, i.e. that, where possible, parts of the Wadden Sea should be restored if it can be demonstrated by reference studies that the actual situation is not optimal, and that the original state is likely to be re-established;
- the Principles of Best Available Techniques and Best Environmental Practice, as defined by the Paris Commission.

Unreasonable impairments of the interests of the local population and its traditional uses in the Wadden Sea Area have to be avoided. Any user interests have to be weighed on a fair and equitable basis in the light of the purpose of protection in general, and the particular case concerned .

Annex 3:

TRILATERAL TARGETS

Landscape and Culture

- Identity - to preserve, restore and develop the elements that contribute to the character, or identity, of the landscape.
- Variety - to maintain the full variety of cultural landscapes, typical for the Wadden Sea landscape.
- History - to conserve the cultural-historic heritage.
- Scenery - to pay special attention to the environmental perception of the landscape and the cultural-historic contributions in the context of management and planning.

Water and Sediment

- Background concentrations of natural micropollutants.
- Concentrations of man-made substances as resulting from zero discharges.
- A Wadden Sea which can be regarded as a eutrophication non-problem area.

Salt Marshes

- An increased area of natural salt marshes.
- An increased natural morphology and dynamics, including natural drainage patterns of artificial salt marshes, under the condition that the present surface area is not reduced.
- An improved natural vegetation structure, including the pioneer zone, of artificial salt marshes.
- Favorable conditions for migrating and breeding birds.

Tidal Area

- A natural dynamic situation in the tidal area.
- An increased area of geomorphologically and biologically undisturbed tidal flats and subtidal areas.
- An increased area and a more natural distribution and development of natural mussel beds, *Sabellaria* reefs and *Zostera* fields.
- Viable stocks and a natural reproduction capacity, including juvenile survival, of the Common Seal and the Grey Seal.
- Favorable conditions for migrating and breeding birds.

Beaches and Dunes

- Increased natural dynamics of beaches, primary dunes, beach planes and primary dune valleys in connection with the offshore zone.
- An increased presence of a complete natural vegetation succession.
- Favorable conditions for migrating and breeding birds.

Estuaries

- Protection of valuable parts of the estuaries.
- Maintaining and, as far as possible, restoring the river banks in their natural state.

Offshore Area

- An increased natural morphology, including the outer deltas between the islands.
- A favorable food availability for birds.
- Viable stocks and a natural reproduction capacity of the common seal, grey seal and harbour porpoise.

Rural Area

- Favorable conditions for flora and fauna, especially migrating and breeding birds.

Birds

- Favorable conditions for migrating and breeding birds:
  a favorable food availability;
  a natural breeding success;
  sufficiently large undisturbed roosting and moulting areas;
  natural flight distances.

Marine Mammals

- Viable stocks and a natural reproduction capacity of the Common Seal including juvenile survival.
- Viable stocks and a natural reproduction capacity of the Grey Seal including juvenile survival.
- Viable stocks and a natural reproduction capacity of the Harbour Porpoise

9. Overview of the measures included in the existing management plans of the French marine Natura 2000 sites

Normandy , Brittany, Corsica, Poitou Charentes and Provence Alpes Côte d'Azur as at 20th of June 2005

Below is a synthesis of the measures that are proposed in some French marine Natura 2000 sites that already apply a management plan. The evaluation of their impact will take place in the near future. On the basis of these measures and their effect, a national working group will be proposing additional measures that should be taken into account locally when drafting future management plans.

1. ***Public awareness and information :***

Awareness campaigns are being caried out on the need to protect and better manage wild habitats and species and on the existing legislation : development of education tools (guides for sustainable leisure fishing, information on nesting sites, leaflets on Natura 2000 and its legislation, delimitation of sites with informative signs…)

2. **E*co-label*ling** of products is being encouraged

3. ***Protection activities***

It consists in:

- Promoting nature reserve projects
- Harmonising local legislations
- Protecting and restoring sites that host or could host bird and fish species : spawning and nesting sites, resting sites, feeding grounds
- Controlling invasive species: rats, ravens, … to limit the predation on marine birds nesting sites, *Caulerpa taxifolia* in Mediterranean sites to protect *posidonia* beds.

4. ***Sustainable development***

The following activities are being set up:

- Collaboration with local producers to adapt their activities to a sustainable use of the resource : design of ways suitable for motor vehicles for the exploitation of oysters and mussels that are not detrimental to birds, development of mooring sites outside of *zoostera* and *posidonia* beds, no trawling over fragile habitats, protection of waterways between lagoons and the open sea in the Mediterranean sea…
- Limitation of the use and development of the shores and nearby seawaters located in ecologically rich areas. Projects that could have an impact on the substrata (dredging, etc), on sea habitats (harbour developments, embankments, etc), on water quality and the biological balance of natural habitats (sewage treatment plants, aquaculture farms, etc) are being thoroughly screend.
- Follow up of the impact of fisheries (trawls and dragnets), evaluation of local interrelations between seafood farming and marine habitats, support to sustainable fishing practices (e.g. by avoiding the overexploitation of sea urchins predator fish species or limiting the size of herbivorous species feeding on sea grass beds).
- Maintenance of natural harbours and their biodiversity (by avoiding the accumulation of silts, limiting dredging activities…)
- Promotion of the cleaning of beaches and sea wracks by a selective manual sorting of waste; limitation of the amount of waste from sea food farming activities.

5. Implication in other programmes related to water quality

Support to local water management plans, water quality evaluation schemes. Integration of marine water preservation needs into the set criteria used for the management of the continental watershed.

6. Follow up and evaluation of habitats and species

It consists in:

- Setting up local marine biodiversity observatories
- Further developing inventories of marine habitats and species (though the design of more precise marine habitat maps, the closer follow up of endangered habitats and those that have a rich biodiversity and/or that are under strong pressure…
- Increasing the knowledge of marine mammal populations (diet, use of water space, …) and their long term viability (genetic bank…), protecting their resting sites, sensitising the public (tourists, tour operators, fishermen…).
- Protecting migratory fish species through a better knowledge and the suppression of migration obstacles.
- Protecting the feeding grounds of marine species and birds
- Protecting the habitats of the European otter and supporting its installation on the coast line

10. Limitation to the negative interactions between dolphins and human activities (LINDA) Corsica, France

Project Background

The bottlenose dolphin (Tursiops truncatus) has a very large distribution range and is found everywhere around European coasts, from the Mediterranean to the North Sea. However, few data exists on the species and its populations, being classified as «data deficiency » by the UICN. The 3 sites of the project (the 2 marine nature reserves of Bonifacio and Scandola and the Agriates, all of them being proposed Natura 2000 sites) are included in the international marine sanctuary (PELAGOS) and hold half of the total Corsican population, estimated to be between 198 to 242 individuals.

The bottlenose dolphins are essentially gregarious and exploit a large variety of coastal habitats up to 200 meters of depth. They have learnt how to take advantage of man fishing techniques to satisfy their needs, by pilfering directly in fishing nets. However, due to the damages produced this behaviour has led to the hostility of the fishermen. Voluntary aggressions and accidental captures are the consequences of this behaviour. Moreover, the overfishing and the reduction of fish stocks could lead to the accentuation of competition between dolphins and fishermen.

Other threats are maritime traffic and motorboat racing (inducing sound pollution, disturbance, injuries and death by collisions), uncontrolled whale watching activities and pollution.

Project Objectives

The LINDA started in 2004 and will last until 2007. The project aims at maintaining the populations of bottlenose dolphins in Corsica in an accurate status of conservation through securing an harmonious cohabitation between the presence of the species and the economic activities. The main stakeholders, local authorities and tourists collaborate to develop sustainable fishing, yachting and whale-watching practices.

For the achievement of these goals, the LINDA project:

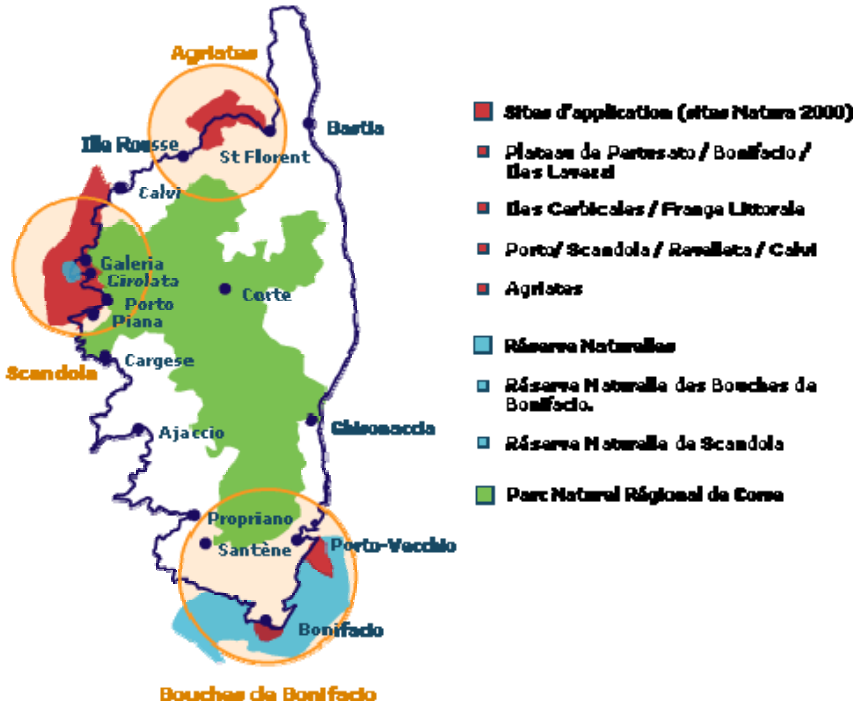
-Monitors the population of bottlenose dolphins and human activities affecting the species (sound pollution, interactions with fishing activities, yachting…) so as to assess the project impact and to produce a regional action plan for the species at the end of the project.

-Implements measures to minimise conflicts between bottlenose dolphins and fishermen (acoustic repellents on fishing nets, alternative fishing practices…)

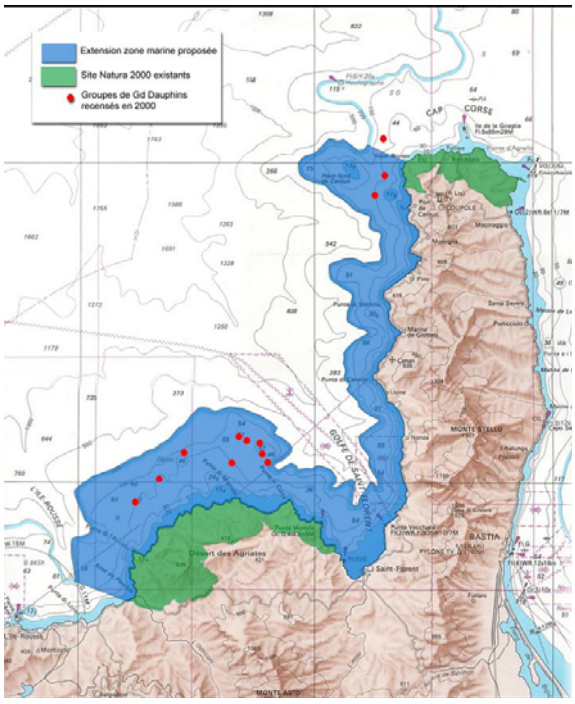
-Promotes dolphin-friendly management of activities related to water sports (motorboat racing, whale watching and yachting) and launch communication initiatives for public awareness.

More information is available on

http://www.lifelinda.org

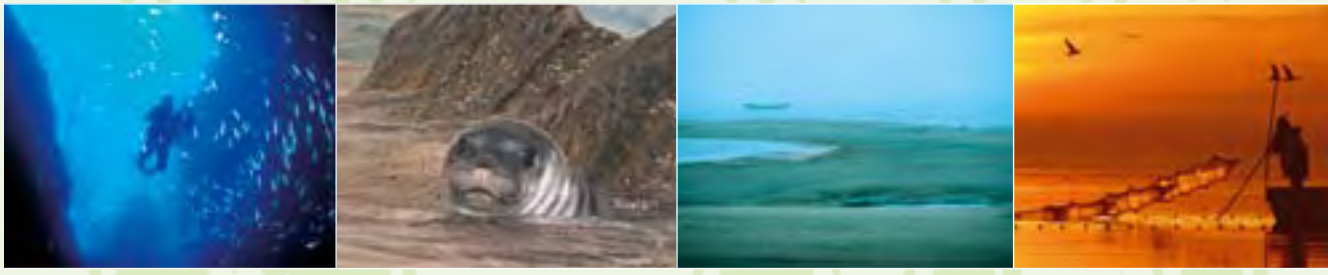


Location of the LINDA LIFE project sites



LIFE III

focus



LIFE and the marine environment

Promoting sustainable management of Europe's seas

European Commission

European Commission
Environment Directorate-General

LIFE ("The Financial Instrument for the Environment") is a programme launched by the European Commission and coordinated by the Environment Directorate-General (LIFE Unit - BU-9 02/1).

The content of the publication "LIFE and the marine environment" does not necessarily reflect the opinions of the institutions of the European Union.

Authors: João Pedro Silva (Technical expert), Wendy Jones, Jon Eldridge, Eric Sarvan (Astrale GEIE-AEIDL, Communications Team Coordinator). **Managing Editor:** Philip Owen, European Commission, Environment DG, LIFE Unit - BU-9, 02/1, 200 rue de la Loi, B-1049 Brussels. **LIFE Focus series coordination:** Simon Goss (LIFE Communications Coordinator), Evelyne Jussiant (DG Environment Communications Coordinator). **The following people also worked on this issue:** Michael Oliver, José Rizo-Martin, Placido Hernandez Aguilar, Stephen Gardner, Aixa Sopeña, Iñigo Ortiz de Urbina, João Salgado, Georgia Valaoras, Marco Fritz, Olivier Coppieters, Maxime Schreiber. **Graphic design:** Daniel Renders. **Production:** Christine Charlier. **Photos:** From the respective LIFE projects unless otherwise specified. **Acknowledgements:** Thanks to all LIFE project beneficiaries who have contributed comments, photos and other useful material for this report.

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Foreword



Peter Gammeltoft

The world's oceans and seas cover 71% of the Earth's surface and contain more biological diversity than terrestrial and freshwater ecosystems. The marine environment is a precious asset and a great contributor to economic prosperity, social well-being and quality of life. However, the marine environment is under pressure. Waste dumping, dredging and extraction of sand and gravel, water borne and atmospheric deposition of dangerous substances and nutrients, oil and gas exploration and shipping are just some of the activities examples causing the degradation of our seas. Other activities such as bottom trawling and over-fishing are also contributing to the destruction of marine habitats and species.

The European Union, aware of the increasing concern about the state of Europe's oceans and seas, included in the Sixth Environment Action Programme a commitment to develop a strategy for the protection and conservation of the marine environment with the overall aim being "to promote sustainable use of the seas and conserve marine ecosystems".

The Marine Strategy focuses on the protection of the regional seas surrounding the EU, taking into account international commitments and the importance of reducing the EU's impact on the marine environment in a global context. The Marine Strategy must also be seen within the broader context of the development of the new EU Maritime Policy.

The European Commission's LIFE (Financial Instrument for the Environment) programme has contributed to the conservation of highly endangered marine species and habitats. It has also gathered information and experience for the establishment and implementation of the Natura 2000 Network in the marine environment, and has promoted the implementation of the Habitat and Birds Directives on the European seas and oceans.
This LIFE Focus brochure details the accomplishments of various projects that with their actions contributed to the knowledge, protection, prudent use, and understanding of the marine environment.

Peter Gammeltoft
Head of Unit - Protection of Water and Marine Environment
European Commission, DG Environment.



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The marine environment status



Europe borders four major seas and two oceans: the Mediterranean, Black Sea, Baltic Sea, North Sea, and the North Atlantic and Arctic Oceans. Almost every EU-25 country[1] has coastal areas, and the maritime surface area under their jurisdiction is larger than the total land area of the European Union. Europe's identity, quality of life and economic development are directly related to the health and diversity of its seas and oceans. However, the marine environment is under significant pressure.

1 Excluding Austria, Luxembourg, Slovakia, Czech Republic and Hungary

Main threats to the marine environment

Current pressures on Europe's marine environment that are putting the sustainability of our oceans and seas at risk include:

> Overfishing
This is a common problem in all European seas, although management systems for the exploitation of these resources have been introduced within the Common Fisheries Policy. A number of important commercial fish stocks have reached historically low levels. In addition, intensive fishing activities may have also significantly damaged non-target fish species and other marine life (cetaceans, seals, seabirds and turtles) and may damage important marine habitats such as maerl beds, *Posidonia* seagrass beds and deep-sea reefs.

> Alien species
The introduction (unintentional or deliberate) of non-indigenous species, genetically modified or disease-bearing organisms to the marine environment can have a catastrophic effect on natural ecosystems, thus threatening marine biodiversity.

> Habitat modifications and disturbance
Human activity along coasts and offshore (such as the development of ports and harbours, coastal protection, land reclamation, tourism, sand and gravel extraction, offshore oil, gas and wind power installations) has a significant impact on the marine habitats. This is the result of direct destruction, excessive demands for marine services and goods, increasing traffic, acoustic disturbance (underwater and on the surface), exploration and installation of offshore platforms.

> Pollution (hazardous substances)
Industrial and urban discharges and emissions that reach the marine environment may contain various hazardous substances. Some substances[1] have been shown to be able to disrupt the biological processes of marine species and to interfere with the ecological food chain.

> Eutrophication
This is a condition caused by the excessive influx of nutrients (nitrogen and phosphorous). Although this is predominantly from agricultural and urban sources, the atmospheric deposition of airborne nitrogen compounds (for instance from seagoing ships) may also be a relevant factor. The abundance of nutrients can promote spectacular growths of macroscopic algae – *algal bloom*.

> Oil pollution
The majority of oil pollution at sea is not the result of spectacular oil slicks but comes from routine operations, such as leaks from coastal installations, harbour tanker terminals and coastal transport pipelines to refineries, and widespread operational discharges from tankers and other vessels on the ocean. The damage caused to coastlines from oil pollution is costly and takes a long time to recover. As a result, the marine ecosystems and centres of human activity (for example, aquaculture sites and tourist centres) may be affected.

> Climate change
The possible consequences of climate change on the marine environment are far from being fully understood, but some of the results are already noticeable. The consequences may include changes to the strength and transport capacity of ocean currents, the speed of formation of water masses, sea-level height variation, the intensity and frequency of climatic phenomena, rainfall and the flow of waterways, with downstream effects on ecosystems and fisheries. One of the most visible effects of rising sea levels is coastal erosion. One fifth of the EU's coastline is already affected, and some places are losing between 0.5 to 2 metres a year and even up to 15 metres in a few alarming cases. A particular worrying effect is the increase in the acidity of marine waters, resulting from increased rates of dissolved CO_2.

1 These include, inter alia, tributyltin (TBT), PCBs (Polychlorinated Biphenyls), organochlorine pesticides, PAHs (Polycyclic Aromatic Hydrocarbons) and heavy metals

This publication shows, through LIFE case studies, how the conservation of marine ecosystems and marine biodiversity can be incorporated into policies and management plans to preserve the EU´s seas. The LIFE examples featured in this brochure enhance the knowledge of our marine environments (thus promoting the implementation of the Natura 2000 Network), promote the protection of endangered species and habitats, ensure the prudent use of marine goods and services, build partnerships between stakeholders, and improve the environmental quality of our seas.

EU marine policy in an international context

One of the particular features of the marine environment is the number of organisations, regional conventions and international bodies that are concerned with its protection. In addition, the EU itself has an extensive body of legislation, policies and programmes that directly or indirectly impact upon the quality of our oceans and seas.

A review of current EU policies and legislation[1] shows the existence of a wide variety of EU measures that contribute to the protection of the marine environment. However, as most of this is sectoral and as the geographic scope varies, there is no integrated EU policy focused on the marine protection. The institutional and legal complexity of marine protection is indeed one of the main challenges to be confronted.

EU marine environment policy has evolved in a broader context of treaty obligations at global and regional levels. There are a large number of different organisations contributing to the protection of the marine environment. There is an important overlap in the geographical area covered by these organisations and in terms of membership.

At a global level, the United Nations Convention on the Law of the Sea (UNCLOS) and the Convention on Biological Diversity (CBD) are among the most relevant bodies under which the EU has committed itself to protect the marine environment. Further agreements and commitments at a regional level, under the OSPAR Convention for the North-East Atlantic, the Helsinki Convention (HELCOM) for the Baltic Sea and the Barcelona Convention for the Mediterranean Sea, should also be highlighted.

Two recent environmental initiatives of the European Commission should be underlined:

1. The European Marine Strategy, which is intended to provide an integrated framework for action to deal with the impact of human activities on the marine environment;
2. The full implementation of the Birds and Habitats Directives in all waters under the jurisdiction of EU Member States. Once completed, the Natura 2000 Network in offshore waters will constitute a very important tool to ensure the proper protection of marine wildlife.

1 See, for instance, annexes to COM(2002)539: "Towards a Strategy to protect and conserve the marine environment."



Photo: Jean Roche / Still Pictures

The Law of the Sea

The UNCLOS – United Nations Convention on the Law of the Sea was signed by participating countries under the auspices of the United Nations (UN) at Montego Bay (Jamaica) on 10 December 1982, and has gained virtual universal acceptance. One hundred and forty-nine nations have ratified the convention since its entry into force on 16 November 1994. The convention establishes general obligations for safeguarding the marine environment and protecting freedom of scientific research on the high seas. It also creates an innovative legal regime for controlling mineral resource exploitation in deep seabed areas beyond national jurisdiction, through an International Seabed Authority*.

** More information on: http://www.un.org/Depts/los/index.htm*

International Council for the Exploration of the Sea

The International Council for the Exploration of the Sea (ICES) is an intergovernmental organisation that coordinates and promotes marine research in the North East Atlantic, the Baltic Sea and North Sea. More than 1,600 marine scientists from 19 countries around the North Atlantic gather information about the marine ecosystem. As well as filling gaps in existing knowledge, this information forms the basis for unbiased, non-political advice on fish and shellfish stocks, the marine environment including contaminants, and the status and outlook for marine ecosystems including the effects of human exploitation. The ICES plans and coordinates marine research, and prepares technical advice on catches of fishing stocks, as well as strategies and measures to mitigate the impact of human activities on the marine ecosystem, to its including the European Commission and other international regulatory bodies such as OSPAR and HELCOM*.

** More information can be found on http://www.ices.dk/*

The European Marine Strategy

The "Thematic Strategy on the Protection and Conservation of the Marine Environment" aims to ensure that all European seawaters are in good environmental status by 2021. This ambitious Marine Strategy, launched by the Commission on 24 October 2005, targets the protection of the marine environment and is also the key component of the future Maritime Policy, which has been proposed by the Commission.

Coastal and marine ecosystems are among the world's most productive ecosystems and provide a wide range of services to society. However, the marine environment is under significant pressure. The UN Millennium Ecosystems Assessment[1] points out that human activity is the main cause of degradation and loss of marine species and habitats, and forecasts "a great risk of collapse of all major fish stocks and climate change-induced sea-level rise (with mean value of 0.5 – 0.7 m)".

Although some significant improvements in the quality status of seas surrounding Europe have been achieved and some of the worsening pollution trends have been halted or reversed, a large number of problems have yet to be fully addressed and major threats still persist. The reasons for this include:

- A complex and inadequate legal framework for the management of the seas within and outside the EU, and the number of actors concerned;
- Gaps in basic knowledge, due to a lack of alignment between research priorities and needs;
- A lack of an integrated marine protection policy.

1 UNEP (2006) Marine and costal ecosystems and human well-being. A synthesis report based on the findings of the Millennium Ecosystems Assessment.

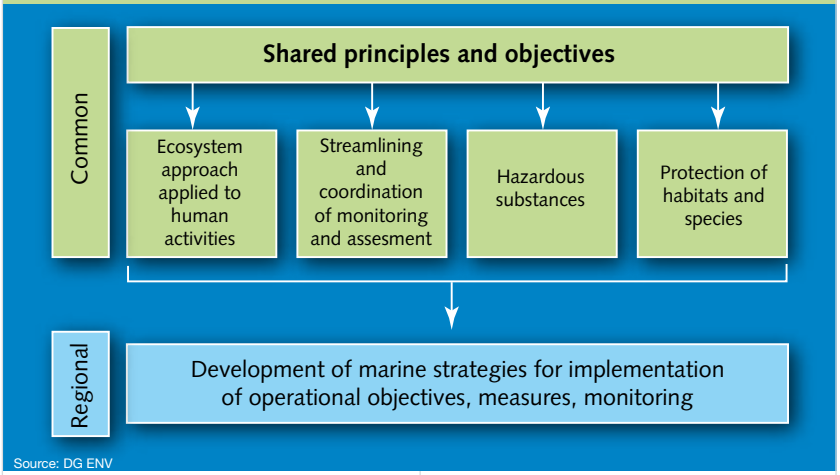


European Marine Strategy logo

Taking into account the underlying problems that affect the marine environment, the Sixth Environment Action Programme (6th EAP) considered the conservation and the protection of the marine environment as a key environmental priority. In 2002 the European Commission adopted the Communication "Towards a strategy to protect and conserve the marine environment". After three years, this communication was followed by a "Thematic Strategy on the Protection and Conservation of the Marine Environment." The Commission proposed a "Marine Strategy Directive", requiring Member States to take measures to achieve good environmental status for all the EU's marine waters by 2021. To this end, they have to prepare and implement programmes of measures in close cooperation with other Member States and third countries that share the same waters, through the development of marine strategies for its marine waters. Cooperation between EU Member States and with countries outside the EU would be encouraged within the framework of existing Marine Regional Conventions (OSPAR, HELCOM, Barcelona Convention and the Bucharest Convention).

Regional marine strategies will contain a detailed assessment of the state of the environment, a definition of "good environmental status" at regional level and the establishment of clear environmental targets and monitoring programmes. To take account of regional differences, the Commission's proposal puts forward a "two level" approach that sets out common objectives and

Figure I: **Two-level approach of the Marine Strategy**



Source: DG ENV

principles to be implemented at regional level. As a result, Member States sharing a marine area will be responsible for working in close cooperation to ensure the good environmental status of their common waters (see Figure I).

The Ecosystem[2] approach

The Convention on Biological Diversity (CBD)[3] defines the ecosystem approach as "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way". The CBD also recognises that "humans, with their cultural diversity, are an integral component of ecosystems". The proposal for the Marine Strategy is based on the ecosystem approach and focuses on the integrated management of human activities.

Extensive work on application of the ecosystem approach to the marine environment was carried out during a stakeholder consultation process before the adoption of the Strategy[4]. This approach is instrumental to the sustainable development of Europe's oceans and seas and to the effective protection of the marine environment. It builds upon concepts such as "favourable status of conservation" and "good ecological status". It should apply to all areas, including coastal seas, territorial waters, exclusive economic zones or equivalent ones as well as all activities taking place in these areas that affect the marine environment

The endorsement of this approach results in a well-defined way of working that starts with the consideration of the objectives stemming from the Vision or desired state adopted for the marine environment in general and the existing principles and obligations that apply. These objectives have to be put into action. The effectiveness of the actions has to be monitored by using indicators and targets that will allow further adjustments of the actions to ensure that the objectives are eventually achieved. A summary of the process is shown in Figure II.

The Marine Strategy and the new EU Maritime Policy

In addition, the European Commission is launching a wide debate on an EU Maritime Policy that coordinates the current sectoral policy approach. On 7 June 2006 the European Commission published a Green Paper titled "Towards a future Maritime Policy for the Union: A European vision for the oceans and seas". It aims to accomplish the objectives of the Lisbon Strategy and integrate many related maritime policy areas such as transport, renewable energies, trade, tourism, fisheries, aquaculture, marine research, coastal and harbour industries. The Marine Strategy will constitute the "main environmental pillar of the EU Maritime Policy"[5] and be seen as the environmental component of the overall policy. A period of consultation with citizens and stakeholders has followed, starting 7 June 2006 and ending 30 June 2007. All documents, including the Green Paper and information of events, can be found on the Commission's maritime website[6].

Natura 2000 and the Marine Strategy

Rather than creating new legal provisions or requirements for designating Marine Protected Areas (MPAs), the proposed Directive supports the full implementation of the Natura 2000 ecological network in the marine environment under the Habitats and Birds Directives, as an important contribution to achieving good environmental status of marine waters.

The proposed marine strategy requires the Member States to identify measures that need to be implemented in order to achieve good environmental status, taking into consideration the measures relevant for MPAs in general. Measures aimed at achieving the conservation objectives set for Natura 2000 sites included in a marine region should then be inserted in the plan of measures for the region as a whole.

2 Ecosystem definition – "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit" (Article 2 of the CBD)

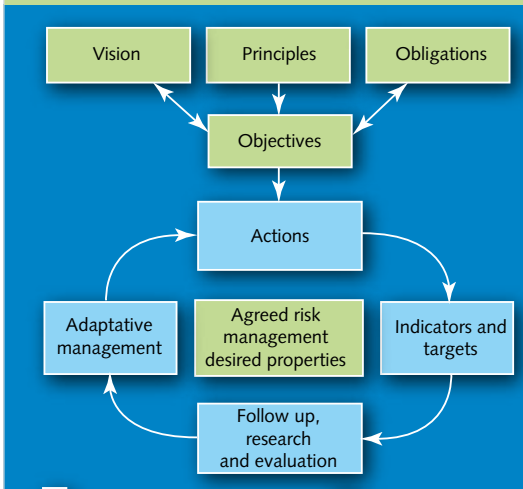
3 http://www.biodiv.org/programmes/cross-cutting/ecosystem/default.shtml

4 A working group led by the International Council for the Exploration of the Sea, ICES produced the ICES cooperative research report No 273 (http://www.ices.dk/pubs/crr/crr273/crr273.pdf)

5 Speech by Dr. Joe Borg Member of the European Commission responsible for Fisheries and Maritime Affairs at the European Maritime Policy and the Regions conference, Azores, 26 June 2006

6 http://ec.europa.eu/maritimeaffairs/policy_en.html

Figure II: **Implementing the 'Ecosystem Approach'**



Source: Dan Laffoley, English Nature

The marine component of the Natura 2000 Network

The Natura 2000 Network is an ecological network of natural areas designated to conserve Europe's rich but vulnerable habitats and species. The network includes more than 20,000 sites from all 25 Member States of the EU. Collectively, they cover almost a fifth of Europe's land and continental waters.

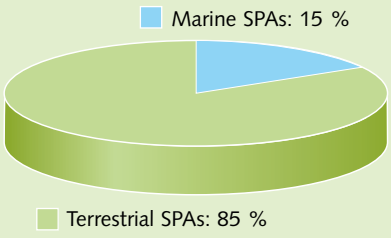


Photo: ImagDOP@Svizinho

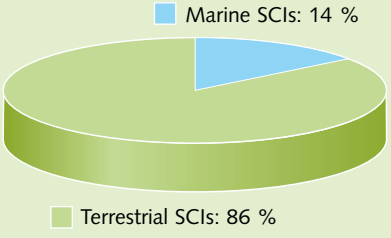
Ponta do Castelo marine site in the Azores

The Natura 2000 ecological network, set up by the EU Habitats and Birds Directives, is the cornerstone of the EU's nature conservation policy. The marine component of the Natura 2000 Network will be an integral component of the overall Natura 2000 Network.

Marine Special Protection Areas (SPAs) in Europe



Marine Sites of Community Interest (SCIs) in Europe



Together with the Special Protection Areas (SPAs) designated under the Birds Directive, the areas designated under the Habitats Directive as Special Areas of Conservation (SACs) shelter species and habitats that are rare or endangered at European level. This network is one of the principal means of implementing the commitment made by the Union's Heads of State and Government at the Gothenburg summit in June 2001 to "halt the loss of biodiversity by the year 2010". It will also contribute to fulfilling obligations stemming from

international conventions such as the CBD Convention. For the first time, all Member States are working together towards the same conservation goal and within the same legislative framework (the two directives) to protect and manage vulnerable species and habitats across their natural range, irrespective of political boundaries. Designation of SPAs and proposals for SACs (the so-called Sites of Community Importance, SCIs) is now almost complete in the old EU15, and the process is well under way in the new Member States. The total EU25 marine and terrestrial SCIs' area covers 559,082 km² and the SPAs' area covers 444,368 km².



Photo: ImagDOP@Svizinho

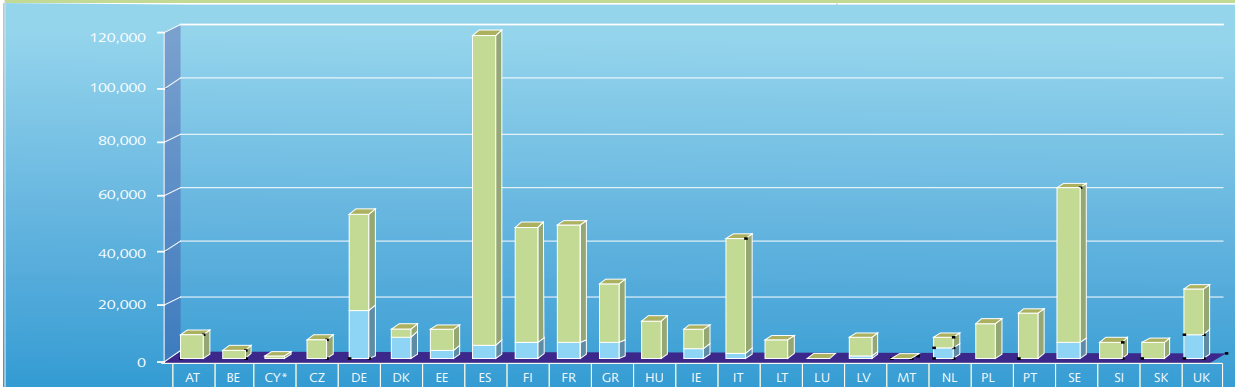
Release of Madeiran Storm-Petrel, an endangered seabird that spends most of its life at sea

The Natura 2000 Network introduced a series of key elements in nature conservation related to the marine environment:

- The inclusion of open sea as a breeding, feeding or resting zone for the targeted species in a network of protected areas, the protection of valuable habitat types, as well as the specific protection of habitats such as cold water reefs and *Posidonia* beds (underwater sea-grass prairies).
- The protection of each area as part of a coherent network, rather than as isolated sites.
- The freedom of choice for Member States to guarantee the conservation of sites either with specific management plans or through conservation measures included in broader development plans, rather than the establishment of one set of strict rules and regulations for general application.

Many conservation actions funded by LIFE focus on building a sound knowledge base on marine species and habitats in order to be able to develop appropriate conservation measures to protect them.

Figure III: **Marine and terrestrial areas of the SCIs by Member State**



	AT	BE	CY*	CZ	DE	DK	EE	ES	FI	FR	GR	HU	IE	IT	LT	LU	LV	MT	NL	PL	PT	SE	SI	SK	UK
Terrestrial Areas (km²)	8,884	3,040	459	7,241	35,208	3,177	7,172	113,913	43,092	43,204	21,643	13,929	7,175	41,750	6.493	343	7.095	39	3,485	13,125	16,013	56,708	6.359	7,539	15,972
Marine Areas (km²)	–	181	50	–	18.086	7,959	3,419	5,191	5,460	5,605	5,998	–	3,386	2,227	171	–	556	0	4.025	0	490	5,848	–	–	9,131

** denotes the area where the community acquis currently applies according to protocol 10 of the Accession Treaty.*

Source: Natura 2000 Barometer - June 2006. (http://ec.europa.eu/environment/nature/nature_conservation/useful_info/barometer/barometer.htm)

LIFE on the sea

Although a relatively small fund in EU terms, LIFE's contribution has helped establish and manage the Natura 2000 Network on open water, promoting innovative techniques for the protection of the marine environment and capacity-building around the Mediterranean and Baltic Seas.

Establishing and managing Natura 2000 sites costs money. The Habitats Directive acknowledges this, and in its Article 8 foresees a contribution from the Community towards these costs. Launched in 1992 – at the same time as the Habitats Directive came into force – the nature strand of LIFE III is the only EU programme primarily dedicated to nature conservation and to the creation of the Natura 2000 ecological network. LIFE-Nature is assigned 47% of the total LIFE III programme budget for actions that contribute to the protection of species and maintaining or restoring of natural habitats under the Birds and Habitats Directives. It has so far contributed more than € 700 million to more than 800 nature projects with a total budget of € 1.3 billion across the EU and Romania. It was not intended to financially cover the implementation of the Natura 2000 Network wholesale (that would require much more money) but to help establish the network and demonstrate how it can work in practice. Some 2,000 sites, representing over 10% of the total network, have been targeted by LIFE-Nature projects so far.

Another LIFE III programme strand, LIFE-Environment, aims to implement Community policy and legislation on the environment in the EU and Romania. This approach enables the demonstration and development of new methods and innovative techniques for the protection and the enhancement of the environment. Nearly half – 47% – of the LIFE III programme budget goes to LIFE-Environment. Five areas, all with a potential impact on the marine environment, are tackled by LIFE-Environment projects:

- Land-use development and planning.
- Water management.
- Environmental impact of economic activities.
- Waste management.
- Environmental impact of products through an integrated product policy.



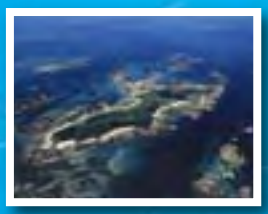
Photo: ©IFAW

Striped dolphin (Stenella coeruleoalba) *an Annex IV Habitats Directive species*

LIFE-Third Countries, which specifically aims to provide capacity building in countries outside the EU around the Mediterranean and Baltic Seas, is the third LIFE III programme strand, taking around six percent of the LIFE budget. LIFE-Third Countries projects in the marine environment cover issues like the development of national and international systems for responding to accidental marine pollution, establishing effluent limits based on best available technology, reducing heavy metal pollution and establishing marine environmental action plans.

The LIFE programme, as a whole, has demonstrated its effectiveness as a key financial and technical tool helping Member States to fulfil their obligations as regards the protection of the marine environment. Some of the most common actions funded are:

- Information gathering about the status and requirements of marine species and habitats, including monitoring sea mammal, bird and fish populations.
- Identification and designation of Natura 2000 sites in open waters.
- Elaboration and implementation of management actions (including management plans) for marine sites, with the aim of avoiding the depletion of endangered species and of maintaining and restoring valuable habitats.
- Demonstration and testing of innovative methods and technologies for preventing pollution and mitigating the effects of environmental accidents.
- Consultation with the public on plans and projects for the elaboration and adoption of integrated management plans for marine areas.
- Promoting capacity building in the private and public sectors in countries bordering the Mediterranean and Baltic seas.





Enhancing our knowledge of the marine environment



Implementing the Habitats and Birds Directives in the marine environment presents some substantial challenges, especially as regards the offshore environment, due to the difficulties in obtaining scientific knowledge on the distribution and abundance of species and habitats. So while the designation of Natura 2000 sites in coastal and inshore waters is considered to be fairly advanced, there are still important gaps in the offshore marine environment network.

The LIFE programme has helped to enhance the knowledge of the marine environment needed to designate Natura 2000 sites in the open sea.



Implementation of the marine component of the Natura 2000 Network

Knowledge and designation of Natura 2000

Implementing the Habitats Directive, which includes some marine species and habitats, presents substantial challenges, especially for the offshore marine environment due to existing knowledge gaps about the distribution and abundance of species and habitats and the cost of carrying out oceanographic research. In addition, the need for a more precise definition of marine habitat types in Annex I of the Habitats Directive is widely acknowledged. Many of these species and habitats are also listed in regional conventions such as the OSPAR, Helsinki or Barcelona Conventions. On the other hand, all marine bird species are covered by the Birds Directive, which makes its implementation more straightforward.

The full establishment of the marine component of the Natura 2000 Network will be a significant step towards the protection of the marine environment in EU waters.



Part of the problem in implementing Natura 2000 in the sea is that there is insufficient data when compared with terrestrial environments. Offshore marine surveys are difficult to do and also tend to be very costly. As a result, the amount of data on the distribution of species and habitats tends to decrease the further one goes from the shore. Nevertheless, a basic level of knowledge is essential if suitable marine sites are to be selected for the Natura 2000 Network.

Member State Nature Directors agreed that further work was needed to develop a common understanding of the provisions of the Birds and the Habitats Directives to designate and manage marine Natura 2000 sites. The European Commission was asked to establish an ad hoc working group under the Habitats Committee, with a view to providing guidance on this subject.

Since March 2003, a Marine Expert Group has been working on the development of a common understanding of the provisions of Natura 2000 relating to the marine environment in order to facilitate the designation and future management of these areas. This should help Member States achieve this important task and will provide useful reference material for other stakeholders.

Legal aspects of applying the Birds and Habitats Directives to the marine environment

The opinion of the Commission is that the claim by a Member State of rights on the maritime zone should include obligations as well as those rights: “The provisions of the Habitats Directive automatically apply to the marine habitats and marine species located in territorial waters (maximum 12 miles). However, if a Member State exerts its sovereign rights in an exclusive economic zone of 200 nautical miles (for example, the granting of an operating licence for a drilling platform), it thereby considers itself competent to enforce national laws in that area, and consequently the Commission considers in this case that the Habitats Directive also applies, in that Community legislation is an integral part of national legislation*”.
This opinion was confirmed by the Position of the European Court Justice delivered in the case C-6/04 on 20 October 2005.

Thus the exclusive right of exploiting natural resources implies also the conservation of the marine ecosystems and applies to all the maritime areas claimed by the Members states, including:

- The internal waters and the Territorial Sea;
- The Exclusive Economic Zone (EEZ) and/or to other areas where MS are exercising equivalent sovereign rights (fishing protection zones, environmental protection zones…);
- The Continental Shelf.

** COM (1999) 363*

Marine site selection

After the clarification of where the Habitats and Birds Directives apply, the question is: how to select marine sites for Natura 2000?

There are nine marine habitat types, 18 species listed in the Habitats Directive and numerous seabirds (under the Birds Directive), for which Member States are required to propose sites for the Natura 2000 Network. The procedures for the delineation of sites are the same as on land. The assessments must take into account the size, the distribution and conservation status of the target habitats and species and their overall contribution to the Natura 2000 Network.

The first step is to distinguish between coastal and inshore water species and habitats, and the true pelagic species (species that live in the open sea). Fish species such as those belonging to the genera Valencia or Aphanius, terns (genus Sterna), and habitats such as coastal lagoons (Habitats Directive Annex I code - 1150* - priority) or estuaries (1130) are related to coastal areas. For these cases the site designation procedure is similar to land sites and the surveying and delineation of areas is relatively easy to accomplish. These sites also provide for the conservation of land areas where marine species spend a part of their lifecycle, such as islands for seabirds, sandbanks for seals, and nesting beaches for loggerhead sea turtles.

Thus, the requirement for the identification and proposal of offshore sites is linked to a shorter list of habitats and species. For these cases the answer is to carry out surveys focusing on habitats and species. The surveys have to be appropriate (for example not all would depend on sea floor information) and sometimes would be linked with oceanographic information (geology, bathymetry-sea depth, currents sea temperature, salinity levels, nutrients and plankton patterns). For a wide range of species (sea mammals and seabirds) the surveys must include onboard surveys and satellite/radio tracking to build up a picture of the species' distribution patterns and behaviour.

LIFE-Nature has been contributing to projects that aim to carry out preliminary studies and surveys of the marine environment. This could be considered as something of an exception to its normal rule of not funding scientific studies and surveys. This approach allowed the funding of more than 50 projects that had an important information gathering and survey component, and thus provided important data that is used for the identification of sites and their inclusion in the Natura 2000 Network. Some of the projects contributed for the first time to the production of real large-scale results that covered wide areas of the European seas.



Photo: Imag*OOP@JFontes*

Dusky grouper (Epinephelus marginatus) *in the Azores*

LIFE in action

SCANS: Abundance of small cetaceans in the North Sea and adjacent waters

The SCANS LIFE project increased knowledge of the abundance and distribution of North Sea cetaceans. Its survey produced reliable information which formed the basis for establishing threshold levels for the sustainability of cetacean populations and for implementing conservation measures.

Across the world, sea mammals are under threat. Accidental entanglement (the by-catch) in fishing nets, pollution, overfishing of their food supplies and hunting are contributing to the problem. The threats faced by cetaceans in EU waters are recognised in the Habitats Directive, which lists those that require strict protection (Annex IV). Furthermore, Annex II of the directive lists the harbour porpoise *(Phocoena phocoena)* and the bottlenose dolphin *(Tursiops truncatus)* as species that Member States should protect under Special Areas of Conservation (SACs).

The International Whaling Commission (IWC) has stated that the level of by-catch for cetacean populations should be less than 1%. Also, the Agreement on the Conservation of Small Cetaceans in the Baltic and North Seas (ASCOBANS) advised that the maximum annual by-catch for harbour porpoises should not exceed 1.7% of the population. Nonetheless, the by-catch of harbour porpoise in fish nets has reached high levels and has given rise to calls for the introduction of management measures. In this respect, the adoption of a Common

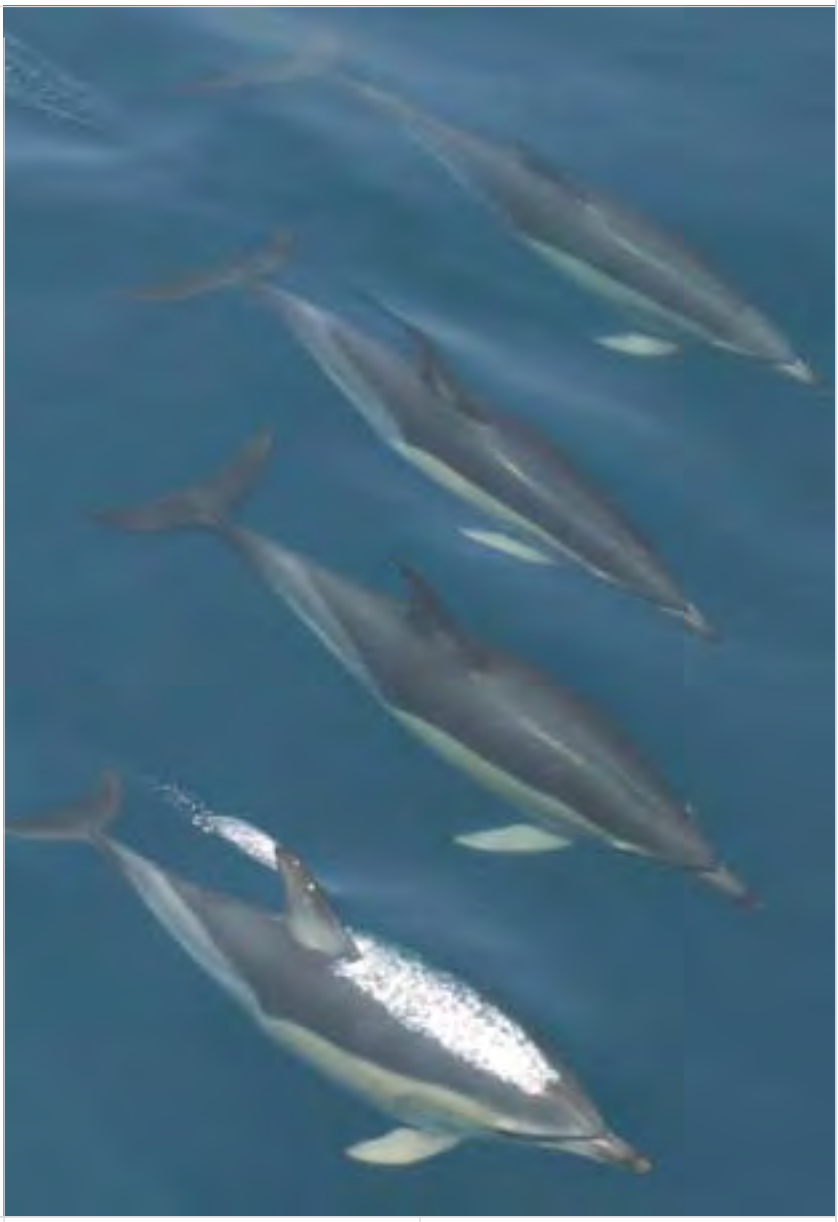


Photo: Ana Cañadas

Common dolphin (Delphinus delphis) *spotted during the SCANS project surveys*



Onboard survey of the sea for cetaceans

Fisheries Policy Regulation[1] setting measures aimed at reducing cetacean by-catch should be seen as a breakthrough. In any event, assessing the impact of by-catch and implementing concrete conservation measures requires good estimates of the population of cetaceans in European waters. Quantitative information on the distribution and abundance of cetaceans is essential for the conservation and management of these species and serves as a baseline for their future monitoring.

The LIFE-Nature SCANS project, coordinated by the Sea Mammal Research Unit (SMRU) and involving extensive international partnerships, proposed to collect information on the distribution and abundance of cetaceans in the North Sea.

1 Council Regulation (EC) No 812/2004 of 26.4.2004

Habitats Directive Annex II cetaceans' species

The harbour porpoise *(Phocoena phocoena)* is a small cetacean on average 1.8 m long, weighing between 50-70 kg. It has a circumpolar distribution in the Northern Hemisphere, and occurs, as its name indicates, mainly in coastal waters or river estuaries. Though it is the most abundant cetacean species in the North Sea, it is considered endangered by the IUCN*. The bottlenose dolphin *(Tursiops truncatus)* is the most common and well-known dolphin species. It ranges form 2 to 4 m in length and weighs between 150 and 650 kg. In north European waters it is found in coastal waters and further offshore. Its diet consists of fish, squid and shrimp.

** Red List of Threatened Species IUCN (International Union for Conservation of Nature), 2006*

What did LIFE do?

The SCANS project estimated the absolute abundance and distribution of the harbour porpoise and other small cetaceans in the North Sea and adjacent areas. The survey was carried out by international teams of observers onboard research ships and small aircraft during July 1994. The estimated population of harbour porpoise was 341,000. Most of the countries with a North Sea coast were included in the survey to map the distribution and to estimate the abundance of the harbour porpoise and other species. The project also included the revision of the methodology for collecting and analysing survey data. The intention of the project was to use these distribution and abundance estimates to set the limits of by-catch and assess the impacts on the target species.

Figure IV: **SCANS-1 project survey areas**



What was the outcome?

The LIFE SCANS project produced the first large-scale estimates of the abundance of harbour porpoise, white-beaked dolphin and minke whale in the North Sea. The extensive survey coverage and the

Figure V: **SCANS-II project survey areas covering 1,011,000 Km² of sea**





Cetacean observation box installed at the bow of the survey boat

methodological developments resulted in precise, scientific estimates.

The SCANS results are now widely used by a range of international organisations (IWC, International Council for the Exploration of the Sea, ASCOBANS and the European Commission) to assess the impact of by-catch and to implement conservation measures on small cetaceans. The by-catch of harbour porpoises in these areas has decreased due to a combination of reduced fishing and the use of acoustic "pingers" (acoustic devices which emit ultrasonic signals to warn cetaceans of the proximity of nets). Furthermore, the project contributed to the development of new survey and analysis methods that are now widely accepted by the world's scientific community.

The project results provided important data essential for the conservation and management of cetaceans in the North Sea.

Life after LIFE

The SCANS project provided the first reliable information on the abundance and distribution of small cetaceans in the North Sea. Nevertheless such estimates are only useful if repeated at ten-year intervals to monitor changes in populations and distribution. The SMRU, now based at the University of St Andrews in Scotland, proposed a follow-up LIFE-Nature SCANS II survey that started during the second half of 2004 and aimed to update the estimates. In addition to the area surveyed during SCANS, this project will also cover continental shelf waters to the west of Britain, Ireland, France, Spain and Portugal.

The first survey was carried out in 2005 and covered more than 30,000 km of sea survey transects and 200 hours of flying time. Another part of the project aimed to refine methods to determine cetacean abundance via shipboard and aerial surveys. The information on abundance and monitoring from this project can be used to assess by-catch and provide scientific information to managers so that they can ensure conservation objectives are met. This project will aid Member States and the Commission in the definition and assessment of favourable conservation status for cetaceans as required under the Habitats Directive.

Conclusions

This project and the follow-up SCANS II project were very successful. The data acquired and the current update has been adopted as a standard for the implementation of the Natura 2000 Network in European waters.

SCANS-I project survey ship Dana.



Project number: LIFE92 ENV/UK/000065
Title: Distribution and abundance of the harbour porpoise and other small cetaceous in the North Sea
Key species: *Phocoena phocoena, Tursiops truncatus*
Beneficiary: Sea Mammals Research Unit, NERC c/o British Antartic Survey
Contact: Kelly MacLeod
Email: scans2@st-andrews.ac.uk
Website: http://biology.st-andrews.ac.uk/scans2/
Period: 01-Jan-1993 to 31-Mar-1995
Total budget: € 1,408,900
LIFE contribution: € 704,500

LIFE in action

Portugal and Spain: Marine IBAs

LIFE-Nature co-funded projects in Portugal and Spain are providing guidelines for the implementation of the Birds Directive in the marine environment. These projects involve extensive survey work covering vast offshore and costal areas of the Atlantic and Mediterranean seas. Among the expected results from these pioneering projects is the publication of an inventory of marine IBAs that will subsequently be considered as a proposal for the identification of future Marine SPAs under the European Birds Directive.

Marine birds spend most of their life at sea. They use the marine environment to roost, feed or migrate. Indeed, some species only visit the coast during the breeding season. Seabirds, in their offshore marine habitat, are under threat as a result of increasing pollution, fishing activities, marine transport and depletion of food sources.

Thus, the implementation of the Birds Directive in the marine environment is crucial for the conservation of all seabirds and has to include more than just the simple delimitation of Special Protection Areas (SPAs) on some coastal breeding sites These sites must be sufficient in number and size for the conservation of birds listed in Annex I of the Birds Directive as well as migratory species, taking into account their protection requirements. The difficulties for implementing Natura 2000 offshore are related to a lack of scientific knowledge and the high costs of offshore research and surveying.



Pedro Geraldes

Cory's Shearwater (Calonectris diomedea) *seabird surveyed by the project*

Two LIFE-Nature projects run by SEO and SPEA (BirdLife partners in Spain and Portugal) aim to identify Important Bird Areas (IBAs) in Spanish and the Portuguese Economic Exclusive Zone (EEZ), including those of the Canaries, Madeira and the Azores archipelagos.

What is LIFE doing?

These two projects are contributing to the implementation of the Birds Directive in the marine environment and will identify the most suitable areas for Annex I marine birds, that can later be proposed as SPAs in coastal and pelagic areas within Portugal and Spain.

Madeiran Storm-Petrel (Oceanodroma castro)



Projects' Target Species (Annex I Birds Directive)

Fea's Petrel: *Pterodroma fea**
Bulwer's Petrel: *Bulweria bulwerii*
Little Shearwater: *Puffinus assimilis*
Madeiran Storm-petrel: *Oceanodroma castro*
Roseate Tern: *Sterna dougallii**
Cory's Shearwater: *Calonectris diomedea*
White-faced storm petrel: *Pelagodroma marina*
Freira Petrel: *Pterodroma madeira**
Shag (Mediterranean subspecies): *Phalacrocorax aristotelis* subsp. *desmerestii**
Audouin's Gull: *Larus audionii**
Balearic shearwater: *Puffinus mauretanicus*

** Considered as "priority for funding under LIFE"*



Survey boat Noruega *used for the detection of seabirds*

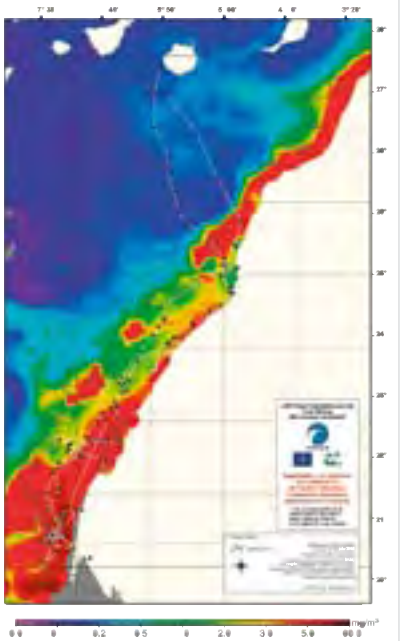
In 2005, the projects organised two international seminars in Lisbon and Vilanova (Barcelona) that addressed the definition of practical and methodological parameters for marine IBAs' determination and the subsequent implementation of Natura 2000 in the marine environment. The debate focused on the application of terrestrial bird IBA criteria to the marine environment. Normally this simple approach results in enormous sites. Among the conclusions of these two workshops was a new definition of the four types of marine IBAs:

- Important feeding areas at sea;
- Areas with important regular concentrations of seabirds;
- Seaward extension of breeding colonies;
- Migration hotspots where due to the geographical position, seabirds fly in large concentrations during the migrating season.

These two projects target all the seabirds included in Annex I of the Birds Directive and are currently implementing the following actions:

- Aerial and marine census of seabirds (some of the marine censuses were done together with the LIFE-Nature project SCANS II);
- Satellite and data-logger tracking of individual birds;
- Radio-tracking of the smaller seabird species;
- Oceanographic characterisation of the marine environment (salinity, chlorophyll, temperatures, currents etc);
- Analysis of fishing activity and the presence of marine mammals.

All the data will be analyzed and correlated in order to sketch out the potential distribution for both coastal and offshore distribution patterns of seabirds. Maps are being produced showing areas of interaction with human activities and correlations with ecological and oceanographical data. From this it should be possible to identify the most appropriate areas that could qualify as IBAs. Such pre-selected areas will then be described in detail, threats to them identified and recommendations made for their conservation.



Satellite tracking movements of the Cory's Shearwater *in the Canary Islands*

Project number: LIFE04 NAT/ES/000049
Title: Important Bird Areas for seabirds (marine IBAs) in Spain
Key species: *Calonectris diomedea, Larus audouinii, Bulweria bulwerii, Puffinus assimilis, Oceanodroma castro* and *Phalacrocorax aristotelis* subsp. *desmarestii*
Beneficiary: Sociedad Española de Ornitología, SEO/BirdLife
Contact: Alejandro Sánchez Pérez
Email: lifemarinas@seo.org
Website: http://www.seo.org/programa_intro.cfm?idPrograma=32
Period: 01-Oct-2004 to 01-Oct-2008
Total budget: € 1,092,000
LIFE contribution: € 780,000

Project number: LIFE04 NAT/P/000213
Title: Important bird areas for seabirds in Portugal
Key species: *Pterodroma feae, Pterodroma madeira, Bulweria bulwerii, Calonectris diomedea, Puffinus mauretanicus, Puffinus assimilis, Oceanodroma castro, Sterna hirundo, Sterna dougallii, Sterna sandvicensis, Larus melanocephalus, Larus audouinii* and *Uria aalge (ibericus)*
Beneficiary: Sociedade Portuguesa para o Estudo das Aves - SPEA
Contact: Ivan Rámirez, IBA and Marine Programmes Coordinator
Email: ivan.ramirez@spea.pt
Website: http://www.spea.pt/MIBA/
Period: 01-Oct-2004 to 01-Oct -2008
Total budget: € 1,515,000
LIFE contribution: € 1,136,000

LIFE in action

UK: Establishing management schemes on Marine Special Areas of Conservation (SACs)

The UK's marine habitats are highly diverse and support a range of human activities, with intensive fishing, recreational and industrial uses. A LIFE-Nature project aimed to improve knowledge of the marine habitats around the UK by studying their ecology and developing management schemes for 12 marine sites within a framework that would be transferable to other marine SACs in the EU in order to fulfil the requirements of the Habitats and Birds Directives.

Successful conservation of the marine environment and effective implementation of management measures in protected areas must be based on comprehensive understanding of marine species and their habitats. An important aspect of this is understanding the sensitivity of different areas to human activity.

The UK's marine habitats range from coastal lagoons and estuaries, to sea caves and reefs. The UK's coastal waters are heavily used for fishing, recreation, and industry. All of these uses pose potential threats to marine species and habitats. The UK government has adopted legislation (UK Habitats Regulations) providing for management schemes to be established for marine SACs. These are designed to ensure that use of the sites is compatible with the conservation needs of the habitats and species of European interest.

The project defined and established management schemes for 12 sites around the UK, based on nine marine habitat reviews reports, guidelines, and seven studies on the impact of human activities on marine sites. The nature conservation interest of each site was defined, along with guidelines designed to ensure that the key features – such as bottlenose dolphins in Cardigan Bay or *Zostera* eel-grass habitats along the north Norfolk coast – are maintained. The guidelines also address how to monitor sites for change, and how to respond if detrimental changes are detected.

What did LIFE do?

The project was carried out by a consortium of UK nature conservation agencies. Its key innovation was a partnership approach involving the main marine user, interest, and specialist groups, including port authorities, fisheries authorities, local and regional councils, scientific research institutes and recreational interest groups.

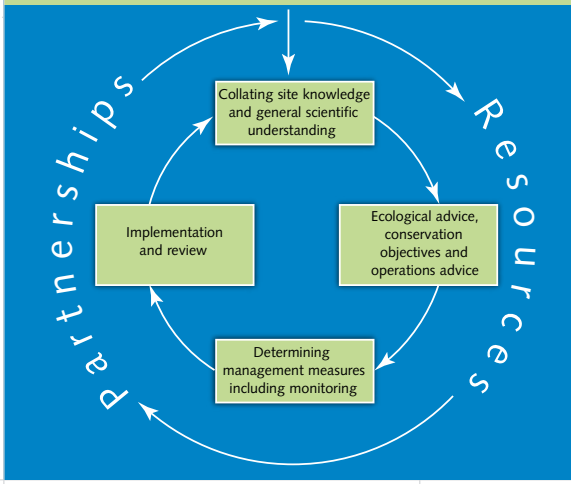
The four year project sought to develop approaches to and techniques for the management and monitoring of twelve marine Natura 2000 special conservation areas, thus fulfilling the EC Habitats Directive objective of setting up protected marine areas. The success of the project was based on gathering existing knowledge on the dynamics and sensitivity of marine features and on the impact of human activities, and from this developing practical techniques for monitoring and assessing the state of marine species and habitats. The project also anticipated the sharing of good practice on developing appropriate management schemes and raising awareness in the UK and continental Europe.

What was the outcome?

The project encouraged the development of management schemes at other UK marine sites by providing a national centre of expertise, by developing the skills base amongst consultants and others, and by disseminating information to a wide audience.

For each management plan a management group was established, which coordinated the gathering of survey data, the filling of knowledge

Process approach to management of marine SACs





The 12 marine project sites covered by management schemes

gaps, data mapping, the defining of conservation objectives, evaluation of current and potential operations, identification of monitoring programmes, and the drafting and finalising of management schemes.

The project involved the relevant authorities that have a special role in the management of a Natura 2000 marine site (local authorities, sea fisheries committees, port, harbour and navigation authorities, etc.). The project also focused on a democratic participatory approach and gave stakeholders the opportunity to voice their opinions.

The project produced surveys and marine habitat maps cartography, and compiled essential information with the help of various UK experts. This information was used to produce nine detailed review reports for habitats and communities common to many of the 12 sites covering: Zostera beds, intertidal reef biotopes, intertidal sand and mudflats and subtidal mobile sandbanks, infralittoral reef biotopes with kelp species, sea pens and burrowing megafauna, circalittoral faunal turfs, subtidal brittlestar beds, biogenic reefs, and maerl beds. The review reports underpinned the development of the marine site management plans and provided definitive reference sources that could be used in all EU marine sites.

The project published 12 guidelines for developing conservation objectives for marine SACs that give the framework for a management and monitoring plan. The guidelines cover the legal background, practical development, supporting information, and presentation of conservation objectives.

In addition, within the scope of the project, seven series of studies were produced focusing on the impacts of human activities on marine species and habitats. These covered recreational activity, ports and harbours, water quality, collecting bait, fisheries practice, water quality in saline lagoons, and aggregate extraction. The studies have helped to establish common ground across conflicting interest groups, and their use may reduce the time needed for consultation when developing future management schemes.

In addition the project implemented a wide range of activities to raise awareness about the project sites, targeted at the general public but also local stakeholders and the European scientific community.

Life after LIFE

Conservation objectives and operations advice was provided for each of the 12 sites. In addition the guidelines for developing conservation objectives for marine SACs are not a statement of nature conservation agency policy but an opportunity to transfer the learning from the project to conservation agency staff and practitioners in the UK and other Member States. The monitoring handbook, meanwhile, fulfils the monitoring requirements under the Habitats Directive and the Water Framework Directive and gives a thorough background to the legislation and links to existing monitoring programmes.

Conclusions

The project made a major contribution on compiling and filing gaps in information regarding the implementation of management plans in marine Natura 2000 sites. Overall, it was a major breakthrough in the monitoring and management of marine sites, species and habitats.

Project number: LIFE96 NAT/UK/003055
Title: To develop and promote the necessary conservation measures for UK marine SACS
Key species: *Phocoena phocoena*
Key habitats: Submerged or partially submerged sea caves, Estuaries, Mudflats and sandflats not covered by water
Beneficiary: English Nature
Contact: Jon Terless
Website: www.ukmarinesac.org.uk
Period: 01-May-1996 to 31-Oct-2001
Total budget: € 4,914,000
LIFE contribution: € 2,457,000







Preserving and protecting marine species and habitats of Community interest

Over the last 10 years, LIFE-Nature has contributed some € 40 million to around 50 marine projects across the EU´s Natura 2000 marine sites. Many have focused on the conservation of highly endangered marine species such as the loggerhead sea turtle *(Caretta caretta)*, sea mammals like the harbour porpoise *(Phoconea phocoena)*, and rare seabirds such as Audouin's gull *(Larus audouini)*. Projects have also focused on the conservation and improvement of marine habitats such as *Posidonia* beds, reefs and sea caves.





The European Seas

GENERAL VIEW



North Sea

The shallow areas of the sea are among the most productive marine areas in the world. This high productivity supports a wide range of species and habitats and one of the world's most important fishing grounds. The seabed is also rich in oil and gas.

Species
Harbour Porpoise *(Phocoena phocoena)*

Habitats
Mud flats (1140)

Threats
Anthropogenic impacts have been significant for many years. Pollution is still the main issue for the North Sea. Over the last decade, awareness of and concern about the precarious status of North Sea fish stocks and the impact of fisheries on other parts of the ecosystem has increased.

North-East Atlantic Ocean

The North-east Atlantic Ocean along the Western coastline of Europe is dominated by deep ocean basins. The overall biodiversity is high and the ocean hosts unique habitats, such as high diverse cold-water coral reefs, hydrothermal vents, and rare species including seabirds, several seals and whales.

Species
Zino's Petrel *(Pterodroma madeira)*

Habitats
Reefs (1170)

Threats
Around the North-east Atlantic Ocean the human population is concentrated in the coastal area. Increased human activity around the coasts has led to an increase in sewage discharge, in maritime transport, use of the sea for tourism and recreation, and exploration of the sea's natural resources. Over-fishing, eutrophication, dumping, direct discharges and spills of contaminants are all threats to biodiversity in this ocean.

Mediterranean Sea

The Mediterranean Sea is almost completely enclosed by land. This results in high water temperatures, low nutrients, high salinity (it is the most saline of Europe's seas), and reduced tidal range variation. The Mediterranean Sea is one of the world's highest biodiversity areas, particularly in the coastal zone where this is high occurrence of endemic species.

Species
Monk seal *(Monachus monachus)*

Habitats
Posidonia oceanica beds (1120)

Threats
The Mediterranean coast hosts many human activities that degrade the marine ecosystem. The main threats are: urban, industrial and oil effluents, coastal eutrophication, coastal urbanisation and biological invasions (manly via the Suez Canal).



Baltic Sea

The Baltic Sea region is one of the largest brackish water areas in the world and in many aspects is similar to an estuary or inland lake. Only the shallow waters between Denmark and Sweden connect the Baltic to the open sea. These unique features contribute to highly diverse communities ranging from fresh to salty water habitats. The surrounding land is heavily industrialised and populated.

Species
Ringed seal *(Phoca hispida* subsp. *bottnica)*

Habitats
Large shallow bays (1160)

Threats
The Baltic sea is a semi-enclosed area that is very sensitive to anthropogenic pressures. Eutrophication remains the most pressing problem in the region. Nitrogen and phosphorus inputs are still too high, despite considerable efforts to reduce discharges. Overexploitation of fish is also considered a severe problem, mainly due to fishing quotas being exceeded and excessive fleet capacity.

Black Sea

The Black Sea is a deep water depression. Due to the relatively high salinity and density of the water, the ocean bed to surface currents are highly reduced and result in a naturally anoxic (without oxygen) environment, which also has high levels of hydrogen sulphide. Its almost landlocked position, the major influx of fresh waters from its tributary rivers, such as the Danube and Dnjeper, and hydrological factors make this sea a very unique environment and highly sensitive to anthropogenic impacts.

Species
Dolphin *(Tursiops truncatus)*

Habitats
Estuaries (1130)

Threats
The Black Sea is probably one of the most environmentally degraded seas on our planet. Pollution and eutrophication by land-based sources (agriculture, industrial activity and inputs of insufficiently treated sewage), overexploitation and no overall management of fish stocks are the main threats that the Black sea faces.

The annexes to the Habitats and Birds Directives list nine habitat types, 29 seabirds and 16 other marine animals in need of protection in view of their precarious conservation state. These include such well known species as the Mediterranean monk seal, the loggerhead sea turtle, and the bottlenose dolphin, as well as rare habitats such as cold water reefs and *Posidonia* beds (underwater prairies).

Marine environnent natural habitat types in Annex I of the Habitats Directive (92/43/EEC)

- Sandbanks which are slightly covered by sea water all the time - 1110
- *Posidonia* beds *(Posidonion oceanicae)* - 1120*
- Estuaries - 1130
- Mudflats and sandflats not covered by seawater at low tide - 1140
- Coastal lagoons - 1150*
- Large shallow inlets and bays - 1160
- Reefs - 1170
- Submarine structures made by leaking gases - 1180
- Submerged or partially submerged sea caves - 8330

Marine environment species in Annex II of the Habitats Directive (92/43/EEC)

> Sea Mammals
- *Tursiops truncatus*
- *Phocoena phocoena*
- *Halichoerus grypus*
- *Phoca vitulina*
- *Monachus monachus**
- *Phoca hispida* subsp. *bottnica*
- *Phoca hispida* subsp. *saimensis**

> Sea turtles
- *Caretta caretta**
- *Chelonia mydas**

> Fish
- *Lampetra fluviatilis*[a]
- *Petromyzon marinus*[a]
- *Acipenser naccarii**[a]
- *Acipenser sturio**[a]
- *Alosa alosa*[a]
- *Alosa fallax*[a]
- *Salmo macrostigma*[a]

Sea Birds included in Annex I of the Birds Directive (79/406/EEC)

- *Gavia stellata*
- *Gavia immer*
- *Pterodroma madeira*
- *Pterodroma feae*
- *Bulweria bulwerii*
- *Calonectris diomedea*
- *Puffinus puffinus* subsp. *mauretanicus*
- *Puffinus yelkouan*
- *Puffinus assimilis*
- *Pelagodroma marina*
- *Hydrobates pelagicus*
- *Oceanodroma leucorhoa*
- *Oceanodroma castro*
- *Phalacrocorax aristotelis* susbsp. *desmarestii*
- *Phalacrocorax pygmeus*
- *Charadrius alexandrinus*
- *Calidris alpina schinzii*
- *Larus melanocephalus*
- *Larus genei*
- *Larus audouinii*
- *Larus minutus*
- *Sterna caspia*
- *Sterna sandvicensis*
- *Sterna dougallii*
- *Sterna hirundo*
- *Sterna paradisaea*
- *Sterna albifrons*
- *Uria aalge ibericus* (U. aalge in Baltic Sea and North Sea)

** priority for conservation*
[a] anadromous: Fish that live most of their adult life in marine environment but spawn in freshwater

LIFE in action

France: Rescuing Mediterranean *Posidonia* beds from invasive algae *Caulerpa taxifolia*

A growing menace to some of Europe's unique marine habitats lies under the blue waters of the Mediterranean. *Caulerpa taxifolia*, an invasive green algae, is quickly destroying high bio-diversity *Posidonia* beds. In 20 years, the ecological integrity of more than 15,000 hectares of sea-bed has been compromised. The LIFE programme funded two projects to monitor the spread of the invasive species in the Mediterranean, and to establish guidelines and approaches to help manage it.



Despite its beauty Caulerpa taxifolia *is an invasive species*

Posidonia seagrass beds[1] are an important part of the Mediterranean sea's marine ecosystem. The beds are mainly comprised of the seagrass *Posidonia oceanica*. Human pressure on this habitat has increased significantly in the last few years, resulting in a reduction of the surface area of the seagrass beds. The principal cause of this decline is a Caribbean green algae that competes with the seagrass. This non-native species, *Caulerpa taxifolia*, was introduced in 1984. As well as its impact on biodiversity, it also threatens food resources, and can pose a risk to human health because of transmission of the algae´s toxins along the food-chain. As a consequence of this coastal fishing for fish, molluscs and crustaceans, has become impossible in some areas.

1 A priority conservation habitat classified under Annex I of the Habitats Directive.

What did LIFE do?

Between 1992 and 1999, the LIFE programme funded two projects (LIFE92 ENV/F/000066 and LIFE95 ENV/F/000782), led by Marseilles University and with the involvement of Spanish and Italian partners (universities, local authorities and scientific centres). These projects aimed to build knowledge about the ecology of *C.taxifolia* in

order to predict its possible spread in the Mediterranean, and to establish a scientific and technological basis for its management and thus the conservation of the *Posidonia* beds.

The projects deoped a strategy and tools for surveying *C.taxifolia* and monitoring its expansion into new locations. In order to conduct the survey, the beneficiary distributed 60,000 pamphlets in six languages to fishermen, divers and yachtsmen, asking them to report the presence of the plant and, when found in nets and on anchors, not to throw it back into the sea. With this information it was possible to build a predictive model of the algae's expansion, and thus identify 'at-risk' areas and habitats. The projects also worked to improve eradication techniques using copper, as an alternative to manual eradication.

The beneficiary produced identification and eradication guidelines in English, French, Catalan and Spanish, and conducted a public awareness campaign that was also extended to southern Mediterranean countries (Malta, Tunisia and Algeria), which are also affected by the spread of *C. taxifolia*.

What was the outcome?

As a result of the LIFE projects, *Caulerpa taxifolia* is a very well known, introduced species. Unfortunately, the project has also confirmed that once the algae is introduced, it cannot be completely eradicated. Nevertheless, a Mediterranean detection and survey network has been developed, and strategic guidelines for the control of the invasive algae have been implemented. The projects have also carried out stakeholder and public awareness campaigns.

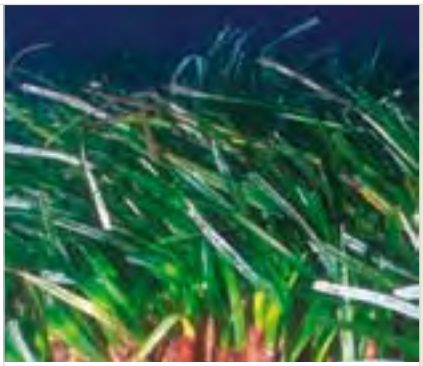


Photo: LIFE00 NAT/E/007303

Posidonia oceanica *beds an endangered Mediterranean habitat*

Life after LIFE

Following the formal closure of the projects, the regional governments of the Balearics, Catalonia and Valencia drew up anti-Caulerpa regulations. In France, the Parliament is examining an anti-*Caulerpa taxifolia* law. Also, on the Côte d'Azur, diving enthusiasts, both amateur and professional, perform annual systematic underwater searches, and manually clear *Caulerpa taxifolia*.

Posidonia oceanica

Posidonia oceanica, named after Poseidon, the god of the sea, and commonly called Neptune grass, is a seagrass that plays an important role in the ecosystem of the Mediterranean sea by providing a vital habitat for a wide variety of marine species. It lives in a narrow coastal strip, normally on beds of soft sediment, at depths of between five and 50 metres, depending on water clarity. It is a true plant, in that it can bear flowers and disperse seeds.
The *Posidonia* habitats are increasingly being destroyed by human activities (trawler-fishing, the development of new marinas and offshore constructions, and boat anchoring). However, one of the greatest threats comes from competition with the invasive *Caulerpa taxifolia*.
The European Environment Agency's 2006 report "Priority Issues in the Mediterranean Environment", considered the *Posidonia oceanica* "a key species for the Mediterranean region".

** http://reports.eea.europa.eu/eea_report_2006_4/en/medsea_4_2006.pdf*

Spread of *Caulerpa taxifolia* in the Mediterranean



Project number: LIFE95 ENV/F/000782
Title: Control of the *Caulerpa taxifolia* extension in the Mediterranean Sea
Beneficiary: GIS Posidonie
Contact: Claude Boudouresque
Tel: +33 4 91269130
Website: http://www.com.univ-mrs.fr/gisposi/article.php3?id_article=8
Period: 01-Jan-1996 to 08-Mar-1999
Total budget: € 290,300

LIFE in action

Greece: Recovery of the loggerhead sea turtle population on Crete

The loggerhead turtle *(Caretta caretta)* is an endangered species in Europe. It is threatened on land, where it comes to nest, and at sea, as a result of the activities of fishermen. One of several LIFE-funded projects to protect the loggerhead turtle focused on increasing, in the long term, the numbers that nest on the island of Crete. Volunteer monitoring patrols were established, and public-awareness campaigns were introduced to encourage local involvement in the protection of the sites used as nesting areas. In addition, a management plan was drawn up to ensure the long term viability of these sites. Crete can play a crucial role in the survival of the loggerhead turtle. One in four of the total population of Greece nests on the island, and the turtle returns to the same nesting sites year after year.

The use of the same nesting sites means that the survival of sea turtles is dependent on the viability of the beaches for nesting. If a nesting site is destroyed, the female may not find an alternative and eventually the local population could be wiped out through lack of recruitment. However, the sandy beaches of Greece have attracted tourists, which have caused severe degradation of the sites. Beaches have natural protection against erosion in the form of sand replenishing dunes, but constructions on the dunes can affect this process and leave beaches vulnerable. Umbrellas and sunbeds, pathways and light pollution pose an increasing threat to the nesting sites of the turtles. They impede access to the back of the beach where nests are constructed, while artificial light disorientates newly hatched turtles that use reflected moon or starlight to navigate their way to the sea.

As a result, a strategy for sustainable development of tourism and other forms of land use is vital for the protection of the beaches.

The LIFE programme in Crete aimed to tackle these problems through the protection of nesting sites, public-awareness campaigns and the implementation of a management plan for sustainability. The beneficiary was the Sea Turtle Protection Society (STPS), which was set up in 1983 to lobby for the protection of sea turtles initially on the island of Zakynthos, as well as raising awareness among the public about the threats they face. Six years after its formation, as a result of a nationwide beach survey of Greece, the STPS identified important nesting sites for loggerhead sea turtles on the island of Crete and began small-scale initiatives in these areas.



Caretta caretta *a priority species listed in Annex II of the Habitats Directive*

Unlike Zakynthos, the density of turtle nests on Crete is relatively low and the population could only be sustainable provided certain conditions are respected. Islanders, however, were largely ignorant of the sea turtles existence, so raising awareness was a key first step. Public funding for the

necessary protection of the three principal beaches was insufficient. Therefore in 1995, STPS applied to LIFE-Nature for funds.

What did LIFE do?

LIFE funding supported the daily patrol of the beaches to assess the number of nests dug and, later in the season, the number of hatchings. The patrol also included protection measures such as placing metal cages in situ to avoid human disturbances, and shading to prevent hatchling disorientation through light pollution. The beaches of Crete are prone to high seas due to strong northerly winds. As there is a danger of nests being destroyed by flooding, vulnerable nests were relocated higher up the beach, or at one of the natural hatcheries away from the danger. A major campaign was launched to persuade hotel and sunbed operators to stack their chairs each night at the back of the beach. Similar campaigns were run to reduce light pollution, and curb the use of vehicles on the beaches.

An awareness campaign was launched that targeted local authorities, businesses, hotels, tourists, and schools. It consisted of the distribution of printed material, presentations at hotels, meetings with local businesses, talks and projects with schoolchildren and the setting up of information kiosks. The public was also informed of the beach work. Finally, a management plan for the long-term conservation of the sea turtle in Crete was agreed and circulated widely for consultation. The final version was presented to the local authorities for adoption at the end of the project.

What was the outcome?

Over the three years of the project, STPS attracted a large number of volunteers to monitor the three beaches and protect nests. At the end of the third year, hatchling rate had already increased.

Attempts to persuade hoteliers to voluntarily stack sunbeds were only partly successful, and focus has now

Municipality of Platanias information board



Marking and protection of turtles' nests





Painting the street lights facing the sea

shifted towards achieving stacking of sunbeds through regulations determined by the relevant authorities. Similar regulations would also be helpful in reducing the effects of artificial light. However, 25 operators were persuaded to make changes to their lightings for the benefit of the nesting sites, and project members painted the sides of lights facing the sea to reduce artificial light on the beach.

The project was also successful in persuading those responsible for municipal beach-cleaning activities to take into account the needs of the turtles, that is, not compacting the sand with heavy machinery. Its awareness initiatives included around 300 hotel presentations per year, reaching an estimated quarter of a million visitors over the three years. Press releases also generated wide media coverage.

Life after LIFE

The end of the project has by no means signalled an end to the volunteer work. In fact, volunteer numbers have almost doubled. With a sufficient workforce, STPS has been able to continue its monitoring and protection work on the three beaches.

Under the LIFE project vulnerable nests were commonly transferred to hatcheries, but following international consultation, nests are now transferred as close as possible to the original location of the nest. However, STPS realised that too little was known about the potentially damaging effects of these transfers, and noted that 35-40% of the nests laid on the monitored sites need to be transferred or they would otherwise be destroyed through inundation.

The STPS has also been the beneficiary of two subsequent LIFE programmes: the implementation of a management plan for the sea turtles in Southern Kyparissia Bay (LIFE98NAT/GR/5262) and a project to reduce turtle mortality at sea (LIFE02NAT/GR/8500).



Coast guards take an injured turtle to ARCHELON's centre

Conclusions

The LIFE project has played a vital role in the survival of the loggerhead turtle on Crete. It has helped establish the beneficiary as a powerful advocate for the species on the island and has enabled it to protect nest sites. The profile of the species has also risen locally and internationally, and a strong emphasis on cooperation has shown that sea turtles and tourism can exist side by side.

A strategic long-term approach to conservation is still required, however, and it is important that national and local authorities are engaged. Legal obligations to protect beaches point the way forward, and STPS can be an effective lobbying agency in bringing these about.

Project number: LIFE 95 NAT/GR/001115
Title: Recovery of the Loggerhead Sea Turtle *(Caretta caretta)* Population Nesting on Crete
Key species: *Caretta caretta*
Beneficiary: Sea Turtle Protection Society of Greece (STPS) - ARCHELON
Contact: Aliki Panagopoulou
Email: stps@archelon.gr
Website: http://www.archelon.gr
Period: 01-Apr-1995 to 31-Mar-1998
Total budget: € 536,000
LIFE contribution: € 402,000

LIFE in action

Conserving marine life in Spanish waters

Spanish waters off the coast of Andalusia and Murcia are home to many protected habitats that contain endangered marine life including turtles and cetaceans. A 2002 LIFE project aimed to draw up management plans for habitats in the area in collaboration with local stakeholders.

A recent LIFE project in the marine areas around the southern coast of Spain concentrated on developing marine management plans in collaboration with local stakeholders. The range of stakeholders with an interest in marine environments tends to be both diverse and uncoordinated. Moreover, few interest groups have previous experience of marine conservation issues. As a result, any attempt to change existing practices or attitudes is best accompanied by a targeted campaign to inform stakeholders of the issues and the potential impacts for them.

Such an approach was very successful for the southern coast of Spain. Previously the beneficiary, the Spanish Cetacean Society, had identified several potential marine Natura 2000 sites along the narrow sea that links the Mediterranean to the Atlantic. The project organisers recognised that attempts to protect these sites would be met with great resistance from local interest groups that would feel their livelihoods unjustly threatened. The project therefore launched a major awareness-raising campaign targeted at potential stakeholder groups along the coast. The aim was to explain why the rich seas around Andalusia and Murcia needed protection and to engage the different interest groups in discussions about the best ways to conserve this natural resource, while respecting the needs of local communities.



Atlantic spotted dolphins (Stenella frontalis) *surface breathing*

In 2002, three boats travelled to 19 ports on the coast to deliver talks and hold events, excursions and other awareness-raising activities aimed at local stakeholders. A follow-up trip, a year later, took the process one step further and engaged local stakeholders in discussing the protection of these valuable resources, especially in areas where there are potential conflicts with existing human activities.

The final trip aimed to reach a consensus on draft management plans for the areas that were prepared on the basis of the extensive consultation process. In addition to the general information campaign activities, formal meetings were held with stakeholder groups at strategic locations along the coast to take the process forward.

So far signs are encouraging. The discussions are being held in a spirit of cooperation and constructive dialogue. Stakeholders are now aware of the important issues, meaning they can concentrate on finding practical solutions in specific areas of conflict

Figurehead of the project boat Toftewaag





Project boat, Toftewaag*, in Almería harbour*

without questioning the whole concept of marine protection.

Although objections to the designations cannot be ruled out, the inclusive nature of the preparatory work should facilitate local acceptance of potential restrictions to activities. Threats addressed include poor fishing practices (especially harmful to turtles), illegal fishing, noise and marine pollution. Where restrictions are likely, the project will encourage new economic ventures such as whale watching.

Reducing by-catch and pollution

To help the management planning process further, the project is also undertaking a number of practical actions relating to fisheries by-catch and marine pollution. Through its partners, the Ministry of Fisheries and the Spanish Oceanographic Institute, satellite tracking is being used to determine the movements of turtles through this narrow sea passage and to correlate this with information on water temperature and long-line fishing operations. The results are expected to highlight the areas of greatest conflict in order that they may be specifically addressed. Already it is clear that swordfish and red tuna long lines are the most problematic.

The project is also tackling the problem of marine rubbish. Not only is this unsightly, but it also causes problems for many marine animals. For example, turtles sometimes ingest plastic bags and bottles thinking it is food and birds can get caught up in plastic material and drown. Working with local fishermen and port authorities, the project installed dustbins on all main fishing harbours and on 25 fishing vessels. This was accompanied by an awareness-raising campaign. Numerous spent lightbulbs, used during night fishing and then simply discarded overboard, have already been safely disposed of.

Building on experience

Several LIFE-Nature projects have already been coordinated by the Spanish Cetacean Society, and the regional government of the Canaries. The first conservation project for the protection of turtles and dolphins in the Canary Islands began in 1997. In cooperation with the regional government and the Society for the Study of Cetaceans in the Canary Archipelago, it identified the key marine sites and regulated activities adversely affecting them.

Surveys showed that waters surrounding the Canaries contain some of the most densely populated areas for bottlenose dolphins in the EU. Several new sites were identified to be of key importance to the species. As a result, boundaries of existing Natura 2000 marine sites were adjusted and the standard datasheets updated to reflect the presence of dolphins in the existing marine sites.

The project also addressed the issue of whale watching which is becoming a major industry in the Canaries bringing in over € 30 million a year. After studying the biological and socioeconomic aspects of the industry, the project developed a series of measures to regulate whale watching activities in order to ensure they do not unduly disturb the mammals. By the end of the project a new law had been passed which tightened up the regulations for operating a whale watching business.



Project number: LIFE02 NAT/E/008610
Title: Conservation of cetaceans and turtles in Andalusia and Murcia
Key species: *Tursiops truncatus, Phocoena phocoena, Caretta caretta*
Beneficiary: Spanish Cetacean Society
Contact: Ricardo Sagarminaga van Buiten
Email: sec@cetaceos.com
Website: http://www.cetaceos.com/life/index.htm
Period: 01-Jul-2002 to 30-Jun -2006
Total budget: € 3,474,000
LIFE contribution: € 1,737,000

LIFE in action

Spain: Recovery plan for the Balearic shearwater *Puffinus mauretanicus*

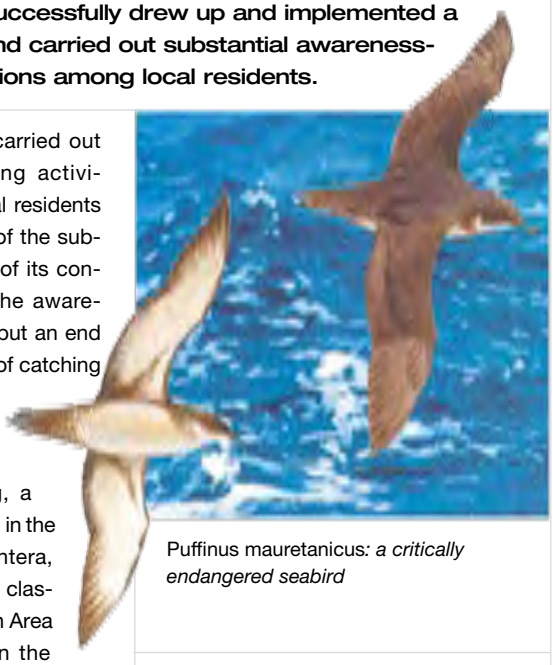
The LIFE-Nature "Puffinus" project carried out detailed monitoring of Balearic shearwater *(Puffinus mauretanicus)* colonies – providing valuable information on numbers, biology and behaviour of this critically endangered seabird species. The project also successfully drew up and implemented a plan to control predation and combat theft from nests, and carried out substantial awareness-raising activities to increase support for conservation actions among local residents.

The Balearic shearwater *(Puffinus mauretanicus)* is a critically endangered species endemic to the Balearic Islands. After spending autumn along the French Atlantic, the shearwater returns to the Mediterranean in November to mate and nest. The seabird nests in burrows or caves in the cliffs along the northern coasts of the archipelago. The main threats affecting the species on the islands are predation by rats and introduced mammals, and competition for burrows with rabbits. Even in recent times, locals have made use of the bird as a food source. As a consequence, a decline of its population has been observed since the mid-20th century and some nesting colonies have even disappeared altogether from the Balearic Islands. At present, 70% of the total breeding population is found on the island of Formentera.

What did LIFE do?

The project was implemented by the regional governing body for the Balearic Islands (Conselleria de Medio Ambiente). Its aim was to implement the Balearic shearwater *(Puffinus p. mauretanicus)* Action Plan within the Special Protection Areas designated in the Balearic Islands. Its overall objective was to ensure the viability of existing colonies, as well as to increase the numbers of their colonies and the subspecies' distribution range. The project also carried out various awareness-raising activities aimed at making local residents aware of the importance of the subspecies and of the value of its conservation. In particular, the awareness campaign aimed to put an end to the traditional practice of catching the birds for food.

In order to meet these objectives, Can Marroig, a 130-hectare estate located in the northern coast of Formentera, was purchased. This area, classified as a Strict Protection Area has been incorporated in the Natural Park of Ses Salines of Ibiza and Formentera.



Puffinus mauretanicus*: a critically endangered seabird*

Life after LIFE

The main legacy of the project is the monitoring of shearwater numbers. This work has included population counts, which will be continued on a regular basis. It is difficult to determine whether the population in the islands has increased or decreased since the beginning of the project. However, it is clear that the situation remains critical, and the biggest colonies have already been lost in Formentera. The monitoring work will be supported by surveys of other species in the area. Measures to control cats and rats are also planned. The LIFE project has played a vital role in increasing the knowledge of the ecology and distribution of the species.

Project number: LIFE97 NAT/E/004147
Title: Recovery Plan of *Puffinus p. mauretanicus* in SPA (Balearic Islands)
Key species: *Puffinus puffinus* subsp. *mauretanicus*
Beneficiary: Conselleria de Medi Ambient, Govern Balear
Period: 01-Mar-1997 to 31-Dec-2000
Total budget: € 2,973,000
LIFE contribution: € 1,486,000

LIFE in action

Restoring terns and petrels colonies on the islands of Brittany

Populations of terns in Brittany are declining and endangered. As a result of changes to their habitats, successful breeding has become more difficult and the threat of predators greater. A LIFE project aimed to improve breeding conditions for the threatened bird species.

The huge number of islets off the coast of Brittany are rich in rare wildlife. Many of the coast's marine habitats are listed for special protection under the Habitats Directive and are home to the nesting sites of several species of tern, including the rare Roseate tern *(Sterna dougalii)*, and petrels *(Hydrobates pelagicus)*. Despite enjoying legal protection, however, the island habitats are threatened by environmental changes, mounting human pressures and introduced species such as rats and rabbits. The biodiversity of the region is further affected by the increasing presence of herring gulls *(Larus argentatus)* and people.



Photo: Arnaud Le Nevé, Bretagne Vivante - SEPNB



Young Roseate tern (above)
Project awareness campaign leaflet (left)

The LIFE project aimed to promote the preservation of Brittany's marine areas through pilot conservation measures on five groups of islets. The first and largest group, Trégor-Goèlo, contains 80 islets ranging in size from 0.1 to 18.8 hectares. The Natura 2000 management plan had already been adopted in this group, and the project aimed to assess its success, in addition to a series of activities including securing management contracts, cleaning up and regulating access to the inter-tidal zone, and the restoration of a lagoon.

The second group was made up of privately owned islets. For this group, the project aimed to draw up conservation contracts with landowners. On Béniguet Island, the third area, the focus was on habitat restoration, while the fourth and fifth groups targeted specific measures for terns and petrels. On three of the groups, the most visited islets, people's movements were analysed as a basis for possible future management. Increasing public awareness and safeguarding nesting sites would lead to an improved chance of successful breeding.

Schoolchildren learn about the Brittany marine environment



Photo: Arnaud Le Nevé, Bretagne Vivante - SEPNB

Common tern (Sterna hirundo) *in flight*



Photo: Fanch Ladure, Bretagne Vivante - SEPNB

Preserving and protecting marine species and habitats



Photo: Olivier Ganne, Bretagne Vivante - SEPNB

Clearing vegetation at Île-aux-Dames



Photo: Pierre Yésou, ONCFS

SEPNB and construction of nest shelters for terns

Surveying and preserving

On Trégor-Goèlo, the project raised awareness of the importance of preserving the biodiversity of the tidal zone, particularly through good fishing practices. To support this goal, an educational kit containing different tools, including an aquarium, a CD-ROM, a video and models was created. The awareness-raising campaign was continued after the end of the LIFE project. However, only one agreement with an island owner for the management of land was signed. (The other owners were unwilling to accept the terms of the proposed conservation contracts.) Nevertheless, natural heritage inventories of 10 private islands were drawn up. These reports, called *bilan patrimonial*, were often the first surveys to have been made of the small islands and contain vital information for their ecological management.

New equipment including a boat helped improve the quality of the surveillance of the four species of tern that breed on the Brittany islands. In order to make their breeding sites more secure, it was necessary to control the populations of gulls and invasive species such as American mink *(Mustela vison)* and rats. Vegetation was also cut back before the breeding season to maintain favourable conditions for the terns. For three species – the sandwich tern, the common tern and the little tern – results were positive: the project achieved an overall increase in their populations. The threatened population of the fourth species, the Roseate tern, remains stable. The colony in Brittany is the only one in France and is still endangered due its small size (about 70-80 pairs on a small island).

Restoring habitats

Artificial nest burrows for the storm petrel were tested in the Sept-Iles and Molène archipelagos. The results were encouraging in the Molène natural reserve at the start of the bird colonisation. Agricultural activity on Béniguet Island has been largely abandoned leading to an expansion of wasteland to the detriment of natural habitats. Thanks to the tractor bought by the project, it was possible to restore dune grassland by mowing bracken *(Pteridium aquilinum)*. Poor diet has resulted in the low breeding success of terns on the island in the past.

Finally, the project organised a three-day workshop on Island Management in Ouessant and Molène in February 2001. More than a hundred participants attended this symposium, which brought together scientists, stakeholders, managers, NGOs, and Balearic and Scottish experts.

Project number: LIFE98 NAT/F/005250
Title: Maritime archipelagos and islets of Brittany
Key species: *Hydrobates pelagicus, Sterna sandvicensis, Sterna hirundo, Sterna dougallii, Sterna albifrons*
Beneficiary: Société pour l'Etude et la Protection de la Nature en Bretagne - Bretagne vivante, France
Contact: Luc Raoul
Email: bretagne-vivante@bretagne-vivante.asso.fr
Period: 01-Oct-1998 to 28-Feb-2003
Total budget: € 1,113,000
LIFE contribution: € 557,000

LIFE in action

Recovering the Audouin's Gull population in Spain

While numbers of Audouin's Gull have increased slightly in recent years, this native Mediterranean bird is threatened by rival species and the scarcity of nesting sites. A LIFE project was set up on a Spanish island to monitor populations of the gull and draw up a recovery plan.

The project took place on Isla Grosa, a Natura 2000 site off the southeast coast of Spain that hosts a colony of 900 pairs of Audouin's Gull *(Larus audouinii)*. Ninety percent of the world's population of the species can be found in the EU, though they migrate south in the winter, particular to the Atlantic coast of Africa.

The fish-eating birds feed on waste from fishing boats and compete with the yellow-legged gull *(Larus cachinnans)* for that. The species is also threatened as a result of the lack of suitable nesting sites and its concentration in just a few locations.

To combat these threats, a LIFE project was set up with the Ministry of Environment, Water and Agriculture of the region of Murcia, in particular, the Directorate General for Nature Conservation, which is responsible for species and habitats conservation at the regional level. The project's activities were coordinated with the regional administrations of Catalonia and Valencia, which are also conducting LIFE projects on the species.

The Murcia project restored an abandoned military installation to use as a surveillance and research centre. It also sought to control competitor species, in particular the yellow-legged gull *(Larus cachinnans)*. Restoration of the Audouin's Gull population was also attempted by encouraging the species to breed. This was done by creating artificial nests and using artificial calls. The same methods were used to enhance the breeding of the European storm petrel *(Hidrobates pelagicus)*.



Audouin's Gull (Larus audouinii)*: 90% of the world's population can be found in the EU*

This ongoing project features a widespread public information campaign, and the recovery plan for the species on the island, based on the results of the monitoring programme, will be approved during the project.

Project number: LIFE03 NAT/E/000061
Title: Conservation of *Larus audouinii* in Spain. Grosa Island SPA (Murcia)
Beneficiary: Consejería de Medio Ambiente y Ordenación del Territorio
Contact: Matías García
Email: matias.garcia@carm.es
Website: http://www.carm.es/cma/dgmn/europa/life0361/indice.htm
Period: 01-Jan-2004 to 31-Dec-2007
Total budget: € 943,000
LIFE contribution: € 707,000

Ensuring prudent utilisation of marine goods and services







Many Natura 2000 marine sites are also economically important. Activities such as transport, tourism and temporarily fishing, or constantly impact on the marine environment. Many LIFE-Nature projects have established management plans and national action plans for marine species and sites. The development of these plans is complex and delicate, involving a wide range of interests. Moreover, many stakeholders had limited previous management experience and incomplete base-line information on the marine environment. The projects helped to change practices and attitudes through awareness-raising campaigns and demonstration activities that fulfil both Natura 2000 conservation requirements and socio-economic objectives. These goals included the regulatory control of financial activities, incentive schemes for implementing appropriate management practices, limiting of activities to defined zones, and establishing sustainability objectives.



LIFE in action

Threatened Cetaceans: Aiding the recovery of Black Sea dolphins

The overwhelming majority of stranded dolphins on the Romanian Black Sea coast were found to have been caught up in gillnets, and either drowned or died from their injuries after escaping. A LIFE-Nature project reduced the number of dolphin fatalities and addressed the problems of habitat loss and degradation, and the depletion of food resources. The success of this project was mostly due to intensive awareness-raising campaigns that targeted local fishermen, tourists and schoolchildren. Some of the project's actions have served as a model for other dolphin programmes in the Black Sea.

Three dolphin species live in the Romanian Black Sea waters: the harbour porpoise (*Phocoena phocoena*, between 400-600 individuals), the bottle-nosed dolphin *(Tursiops truncatus*, 500-1,000 individuals) and the common dolphin (*Delphinus delphis*, 600-800 individuals). Today's population in the Black Sea is estimated to be a mere 4% of what it once was. After a period of killing for soap production between the1930s and the early 1980s, a hunting ban was declared (in 1966 in the former USSR, Bulgaria and Romania; and in 1983 in Turkey). In spite of the ban, stocks continued to decline, primarily due to dolphins getting caught in large fishing nets.

Urban development and industrialisation along the coast have also taken a toll. Pollution and over-fishing have resulted in the destruction of fish nurseries and the accumulation of toxic compounds in the cetaceans. Habitat degradation and maritime traffic is also affecting the dolphins. These threats have raised the level of stress and incidence of disease among Black Sea dolphins.

Romania has signed up to several international agreements to undertake measures for improving the conservation status of cetaceans in the Romanian Black Sea. The LIFE-Nature project, however, proposed a national action plan for dolphin conservation. The project was implemented by the National Institute for Marine Research and Development in collaboration with the NGO, Mare Nostrum, and Dolphinarium Constanta.



A group of Black Sea bottlenose dolphins (Tursiops truncatus)

LIFE funding made possible the implementation of an ambitious conservation project that also led to the creation of the first protected marine site on the Romanian coast. (The site now extends across the border to Bulgaria.)

What did LIFE do?

The main goal of the project was to develop the technical and legal bases for conservation of the three endangered dolphin species in the Romanian Black Sea. It aimed to find out more about the accidental catching of dolphins and to impose restrictions on fishing methods known to have adverse impacts on them. The project also prepared and adopted a national action plan, proposing measures for the conservation of the habitat, including the designation of new marine reserves.

What was the outcome?

Knowledge about the Black Sea dolphin populations has greatly increased as a result of the project. Years after the project, dolphin sightings, strandings and unintended captures continue to be systematically recorded. Furthermore, the project cooperated with a leading oil company to obtain data on population distributions and conducted a survey on the adverse impact of marine and land-based economic activities. A marine database was created that allows dolphin scientists to monitor the effects of management plans. Initial results show that the decline of the dolphin populations has stopped.

Cooperation was found to be important. The support of ACCOBAMS (Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and contiguous Atlantic Area) and international experts[1] as well as the cooperation of the main stakeholders and authorities involved in dolphin conservation, made possible the adoption of a national action plan for dolphin conservation. The action plan has served as a valuable model for Bulgarian waters and the Mediterranean. Moreover, a suitable monitoring system has been designed and implemented to assess the change in cetacean populations and their habitats in this marine area.

Little was known about the Black Sea's fish stocks, and it was important to make an assessment of the main fish species that make up the dolphins' diet. Data collected can also be used to mitigate the effects of possible over-fishing in the Black Sea. Romanian fishermen do not see dolphins as serious competitors in their fishing areas. Dolphin by-catch happens mostly incidentally and creates financial losses, and fishermen are legally obliged to notify the authorities of each caught dolphin. The same authorities are responsible for issuing fishing licences and fishing associations receive a small grant for valuable information about stranded dolphins.

Surveys conducted as part of the project have identified the best areas for dolphin protection in the Romanian littoral zone. These have helped flesh out a management plan for one of the priority areas, the Danube Delta Biosphere Reserve. Together with the Ministry of Environment, the beneficiary is implementing measures for considerably reducing fishing pressure in this reserve. Two key measures were the suspension of fishing licences for the 1,200 km^2 Danube Delta marine area; and the reduction of the diameter of existing gillnets to reduce the risk of dolphins being caught in the nets.

The second priority area is the marine reserve of Vama Veche - 2 Mai, which the LIFE beneficiary was authorised to manage. Actions included the removal of fishing gear in the reserve area and the cross-border matching extension of the reserve into Bulgarian waters.

Key to the success of the project is the support of the public, and numerous awareness-raising activities were held with the participation of local institutions (the dolphinarium, schools, children's clubs, etc.). During the project, a dolphin week was organised every year featuring exhibitions, theatre performances, and drawing contests, among other activities. Moreover, the project widely publicised its activities through the mass media, including TV broadcasts on several channels, and the production of eye-catching communications.



Dead dolphins as a result of illegal fishing

The project also presented its results at scientific meetings in the Black Sea region and in scientific publications. In addition, scientists from the neighbouring countries Bulgaria, Turkey and Ukraine, in cooperation with the ACCOBAMS secretariat, were trained in dolphin protection.

Around 50 people cooperated with the project on a voluntary basis: students, border police and even the Romanian navy were trained by the NGO, Mare Nostrum, in monitoring stranded dolphins on beaches. Fishermen, meanwhile, are registering the dolphin by-catches. Young people have been especially positive towards dolphin protection, and local stakeholders (fishermen, sailors, frontier policemen) have changed their attitudes towards environmental protection.

Dolphin awareness-raising campaign logo



1 ACCOBAMS website: http://www.accobams.mc/



Stranded dolphins on a Black Sea beach

Analysing the impact of fishing gear on dolphins and stock assessments of the main migrating fish species are now common exercises, which the project plans to intensify in the future. In cooperation with Turkey, several marine resource management and conservation measures have been implemented on the south coast of the Black Sea. International cooperation on projects has the added benefit of prompting local authorities in Romania to intensify their nature protection efforts.

A model project

One of the main achievements of the project has been to include relevant national and international stakeholders in drawing up and implementing a national action plan for dolphins. The project has promoted a consensus about the protection and suitable management of these species in the Romanian Black Sea among scientists, nature conservationists, authorities, fishermen and international organisations. Such a consensus is quite an achievement for Romania, which had little experience of the management of marine species and areas before the LIFE project.

Life after LIFE

LIFE has given an enormous boost to dolphin protection in Romanian waters, but they are still far from being entirely dolphin-friendly. The beneficiary was aware that the work of the three-year EU-funded project needed to continue. Along with the project partners, it has managed to maintain the high profile of dolphin protection along the Black Sea coast.

Monitoring the incidental catches of dolphins and strandings continues, along with the surveys and behaviour observations at sea. The school projects in Constanta are also ongoing, as is the yearly dolphin week. Scientific studies are still urgently needed in several areas, including fishing gear management and acoustic deterrents (which are believed to disturb dolphins' orientation).

Furthermore, both marine areas, as well as almost 50% of the Romanian Black Sea coastline, have been included in the Natura 2000 site nomination process. It is also proposed that the marine reserve, Vama-Veche - 2 Mai, should be included in this list along with the other priority area for dolphin protection, the Danube Delta biosphere reserve (marine zone). Such measures ensure that Romania meets the EU's target for designating Special Conservation Areas that assure the protection and conservation of the three dolphin species included in the Habitats Directive.

The future

Future measures include the creation of a tissue bank for aiding research into the causes of diseases affecting the dolphin population and closer monitoring of Black Sea pollution. In addition, the introduction of a dolphin-safe label should popularise dolphin-friendly fishing products. Surveys on pollutant sources from the Romanian coast that have harmful effects on dolphins and studies on the incidence of diseases will also be carried out.

Project number: LIFE00 NAT/RO/007194
Title: Conservation of the Dolphins from the Romanian Black Sea waters
Key species: *Delphinus delphis, Phoecena phoecena, Tursiops truncatus*
Beneficiary: National Institute for Marine Research and Development
Contact: Gheorghe Radu
Email: gpr@alpha.rmri.ro
Website: http://www.delfini.ro/
Tel: 40 41 540870
Period: 01-Jul-2001 to 30-Jun-2004
Total budget: € 417,000
LIFE contribution: € 208,000

LIFE in action

Greece: Protecting the endangered monk seal in fishing areas

The Mediterranean monk seal *(Monachus monachus)* is one of the most endangered marine mammals in the world. The main threats come from accidental or deliberate killing by fishermen, reduction in food sources (mainly because of over-fishing), human disturbance, and the deterioration and destruction of their habitats. Greece has a special responsibility for this species, as its waters host the largest European populations (200-250 individuals). One of three LIFE projects to protect the monk seal focused on the study and protection of the species at two Natura 2000 sites. Surveillance with regular boat patrols was central to the success of the project. It highlighted the effect of tourist boats and amateur fishing boats in one area. Surveillance findings helped secure funding for a follow-up LIFE project that aims to mitigate the conflicts between protecting the seals and the fisheries sector.

What did LIFE do?

Over the past nine years, the project beneficiary, the Hellenic Society for the study and protection of the monk seal (MOm) in Greece, has run three consecutive LIFE-Nature projects concerned with the monk seal. The first project in 1996 (LIFE96 NAT/GR/003225) set out to discover more about the species' distribution.



Awareness-raising campaign



The monk seal - one of the most endangered marine animals in the world

Photos: P.Dendrinos/MOm

Having helped to establish a network of protected sites for the seals in Greece under Natura 2000, the second project sought to implement some of the main actions proposed in the management plans on the islands of the Polyaigos-Kimolos and the Karpathos-Saria complex, which host around 40 and 20 seals respectively.

To achieve this objective, the beneficiary first established regular surveillance activities of the monk seal sites and caves; and secondly implemented a major awareness-raising programme aimed at fishermen, local inhabitants and tourists.

The project targeted in particular the problem of deliberate killings of seals by fishermen and illegal fishing. For decades, monk seals have been persecuted by local fishermen for stealing fish and damaging nets.

A dedicated team of local wardens was recruited at both of the Natura 2000 sites and provided training in surveillance techniques at the National Marine Park of Alonissos-Northern Sporades. The teams were responsible for implementing a protection scheme in cooperation with the port authorities. This involved collecting information on various aspects of the species' behaviour and monitoring illegal activities.



The teams talked to local people about the plight of the monk seal and built up support and acceptance for conservation. The awareness-raising campaign was supported by dissemination tools, such as a website and information leaflets, posters, stickers and newsletters. These were aimed at tourists, local authorities and, in particular, fishermen. Schoolchildren were



The impact of human activities was studied by the project



Preparing to monitor the monk seal populations



Dimitris an orphaned monk seal found in December 2003

targeted via a programme of environmental education, and the general public via information centres. The project team also worked closely with local, regional and national authorities in order to promote the two management plans.

What was the outcome?

The project made significant progress in implementing conservation measures at the two sites. By the end of the project, 32 seal pups had been born in the Kimolos-Polyaigos area – a breeding rate of eight pups per year had been achieved in the Natura 2000 site. According to the beneficiary, "It is the second highest number of pups ever recorded – in such a period – in a single area within the Mediterranean." Based on available data, the beneficiary estimated that the area contained at least 43 seals (not including the pups). The project also highlighted the potential threat to the marine environment posed by tourist boats and amateur fishing boats in the area of Kimolos.

For the Karpathos area, over the same four-year period, 19 newborn pups were recorded – an average birth rate of just under five pups per year. The beneficiary estimated that a minimum of 23 adult and juvenile seals inhabit the area.

The local element of the project was fundamental to its success. As well as aiding conservation, teams located on the ground helped to change local attitudes. Rather than viewing the monk seal as a threat, local people are now realising the potential of eco-tourism for the islands.

Conclusions

A third LIFE project (LIFE05 NAT/GR/000083) is building on the experience of the project by aiming to mitigate the conflicts between monk seals and fishermen in Greece. Seven hotspots will be selected in which the scale of the problem will be assessed and measures to combat it will be proposed. A monk seal fisheries action plan is expected to be adopted by 2009 that will cover the monk seal's range in Greece[1].

Awareness-raising campaign for schoolchildren







Project number: LIFE00 NAT/GR/007248
Title: The Monk Seal: conservation actions in two Greek Natura 2000 sites
Key species: *Monachus monachus*
Key habitats: *Posidonia* beds *(Posidonion oceanicae)*
Beneficiary: MOm/Hellenic Society for the Study and Protection of the Monk Seal
Contact: Spyros Kotomatas
Website: www.mom.gr/life
Period: 01-Jan-2001 to 31-Jan-2005
Total budget: € 1,498,000
LIFE contribution: € 899,000

1 Source DG Environment website: "Marine: Good management practices of Natura 2000" http://ec.europa.eu/environment/nature/nature_conservation/natura_2000_network/managing_natura_2000/exchange_of_good_practice/marine/04case_seals.html









Building partnerships for the seas

Another key issue addressed by many LIFE-Nature projects concerns the interactions between fisheries and threatened marine habitats and species. Numerous surveys have shown the extent of the problem and the types of fishing practices that are most damaging in specific marine areas. This knowledge has been used to open a dialogue with the fishermen and authorities concerned.

LIFE in action

Portugal: Sustaining coastal and marine zones in the Azores

The coastal and maritime environments of the Azores archipelago boast a natural heritage of national and Community-wide importance. The Portuguese islands contain a range of important marine species and habitats. With the active support and participation of regional environment and fisheries' authorities, tourism operators and the local population – the MARÉ project was able to complete management plans for 12 Natura 2000 sites and to introduce key measures for the conservation of four marine species – including the priority loggerhead sea turtle *(Caretta caretta)*, the bottlenose dolphin *(Tursiops truncates)*, the Madeiran storm-petrel (*Oceanodroma castro)* and the Roseate tern *(Sterna dougallii)* seabirds.



Photo: IFAW

Sperm whales (Physeter macrocephalus) *in the Atlantic*

Over the past 20 years, an increase in human activities (fishing, tourism, scuba-diving etc.) has started to damage the marine species and habitats of the region's coastal and marine environments. Several measures to reduce this environmental damage were introduced during this period, including the legal protection of loggerhead seas turtles and bottle-nosed dolphins. But these measures did not address broader issues such as the management of activities already going on in nature reserves or the surveillance of these areas. The application of the Birds and Habitats Directives to the Azores had resulted in the designation of 31 proposed Natura 2000 sites.

What did LIFE do?

The four-year project sought to draw up a range of integrated measures for 12 of the 31 proposed sites, targeting the sustainability of fishing and tourism activities, including whale watching. The project was implemented by the project beneficiary, the University of the Azores, through its Department



Photos: ImagDOP©JFontes

Common dolphin (Delphinus delphis).

of Oceanography and Fisheries *(Universidade dos Açores - Dep. de Oceanografia e Pescas).*

When the project began there was little data on the impact of socio-economic activities on the targeted marine species notably on loggerhead sea turtles and bottlenose dolphins in the region. The first phase of the project was therefore dedicated to the collection of such data and included a marine species census. On the basis of this information management plans were drawn up and implemented in conjunction with local environment and fisheries authorities. They were adopted following public consultation.

Management actions were also developed for whale watching. These resulted in the adoption of a new regional regulation. Measures to be adopted by fishermen to reduce the amount of by-catch of sea turtles were also defined.

What was the outcome?

Management plans for 12 Natura 2000 sites were completed. An important achievement was the establishment of good cooperation between the scientific community and the tourism and fisheries' sectors. Awareness-raising activities were also successful both in the Azores and on mainland Portugal, as shown by the continuing high demand for the project's awareness-raising educational kit. This project involved the whole Azores community (fishermen, students, scientific community and local population) together with the economic agents (tourism operators) and the regional authorities responsible for the Natura 2000 coastal and marine sites management.

Life after LIFE

A post-project follow-up study of the project was carried out in March 2006 by the LIFE external monitoring team. It showed that a permanent warden post had been created. Moreover, four other people hired under the LIFE project are continuing to work on some of the actions initiated by LIFE but now funded by Interreg, the European Regional Development Fund, and the Portuguese Science and Technology Foundation.

Management plans are being drawn up for a further 18 Azores Natura 2000 sites. This task is now overseen by the regional authorities and financed through structural funds for the Azores region and also with an Interreg project with Spanish partners. Two other projects have been launched to continue research into biological and ecological aspects of cetaceans of the



Photos: ImagDOP©JFontes

Diver with pilot whales (Globicephala melaena)

Azores. These should prove useful in monitoring the effectiveness of the proposed actions and possibly in improving existing management measures. A test on turtle by-catch in long line fishing activities is still ongoing. So are the majority of the awareness-raising measures through schoolteachers and NGOs that were involved with the project, and also through a visitors' centre established during the LIFE phase and now managed by an NGO.

Conclusions

The project made a major contribution to the establishment of the Natura 2000 Network; its management plan preparation and implementation strategies can be used as a model for other important marine sites both in mainland Portugal and elsewhere in the EU.

Project number: LIFE98 NAT/P/005275
Title: MARÉ - Integrated management of coastal and marine zones in the Azores
Key species: **Caretta caretta, Oceanodroma castro, Sterna dougallii, *Tursiops truncatus*
Beneficiary: *Universidade dos Açores- Dep. de Oceanografia e Pescas*, Portugal
Contact: Ricardo Serrão Santos
Email: ricardo@dop.horta.uac.pt
Website: www.horta.uac.pt/projectos/macmar/ogamp/index.html
Period: 01-Oct-1998 to 31-Mar-2003
Total budget: € 1,366,000
LIFE contribution: € 819,000

** Denotes priority species*

LIFE in action

Bothnian Bay: Conserving through partnership

Human activities pose a threat to the marine environment of Bothnian Bay in the Baltic Sea. To meet this challenge, a LIFE project brought together various governmental bodies to develop a joint database for the exchange of information about the bay's water quality and to introduce a plan for the sustainable management of the area.

Located between Finland and Sweden, Bothnian Bay is the most northern basin of the Baltic Sea. The bay, which freezes over for several months of the year, is particularly vulnerable due to the scarcity of the species living in it, its arctic conditions and the shallowness of its waters (average depth 40 metres). Moreover, the bay is exposed to pollution from the local steel, pulp and paper industries as well as from sewage treatment plants. Perhaps even more importantly, the bay is affected by agricultural and forestry practices, peat mining, and to some extent construction work related to sea transport.

Tools for managing the sea area

Many different national and regional bodies monitor environmental conditions in the bay, and the beneficiary identified the need to pool various information sources. To achieve this, the project built up an extensive online database under the guidance of the beneficiary, the North Ostrobothnia Regional Environment Centre (NOREC) in Finland. The database features various indicators of water quality in the bay:

- Physical and chemical data from 62 observation points.
- Results of automatic water quality monitoring and samples collected by the system.
- Data on the material transport and water discharges of 31 rivers, and use of the land in their catchment area.
- Information about the 52 industrial plants and wastewater treatment plants, including annual loading data.
- Top ten lists for rivers, industries and wastewater treatment plants.

In addition to the database, the project also developed a web-based BAT (Best Available Technology) information exchange system for the metal industry and produced a versatile exhibition for dissemination purposes.

The project, which began at the end of 2001, also developed a model for estimating the impact of human actions in the coastal areas. The Bothnian Bay Water Quality and Ecosystem Model allows experts working in the area to assess the impact of loading on water quality. Assessments are made by calculating likely changes to the concentration of soluble nutrients and algae. Human activity has caused eutrophication (the addition of nutrients that promote the growth of algae) that disrupts the coastal ecosystems.



Photo: Anne Laine

Bothnian Bay: the most northern basin of the Baltic Sea

The project canvassed the views of a wide range of experts and stakeholders to produce an action plan for Bothnian Bay. The plan outlines targets and priorities for sustainable development and sets guidelines for monitoring and for status assessments. It also aims to meet EU and national environmental requirements and to improve information exchange and cooperation in the Bothnian Bay area. NOREC continues to cooperate with the project partners to implement the action plan and maintain databases.

Project number: LIFE00 ENV/FIN/000646
Title: Integrated Management System for the Bothnian Bay
Beneficiary: North Ostrobothnia Regional Environment Centre, Finland
Contact: Anne Laine
Email: anne.laine@ymparisto.fi
Website: www.ymparisto.fi/perameri
Period: 01-Aug-2001 to 31-Jan-2005
Total budget: € 1,049,000
LIFE contribution: € 520,000





Improving environmental quality of our seas



Despite the many conventions and measures taken at national and international levels, the environmental status of our seas is still not satisfactory and in some areas can be considered critical. However, there are also positive signs. The reinforcement of effluent limits, waste recycling, and alternative solutions for treating dangerous substances are on their way. Some legislation sets best practice standards, and LIFE can contribute substantially to the improvement of best available techniques and methods.

LIFE in action

Treating TBT-rich sediment from the Port of Antwerp

As one of the largest ports in the world, the Port of Antwerp is particularly affected by TBT-contamination from ship paints. A LIFE project attempted to remove affected sediments from Antwerp's harbours and to treat the material for eventual reuse.

The use of tributyltin (TBT) in ship paints has been banned in the EU since the beginning of 2003. TBT is a toxic biocide that was used since the 1970s to prevent the growth of algae, barnacles and other organisms on ships' hulls. The toxic substance, however, leaches from the paint into marine waters and eventually accumulates in sediments on the beds of harbours and ports. The removal of these sediments is vital to prevent TBT being reabsorbed into the water.

The project, which was carried out by the Antwerp Port Authority (Gemeentelijk Havenbedrijf Antwerpen), aimed to demonstrate an integrated approach to the elimination of TBT from the marine environment: prevention, removal, treatment and finally reuse. Specific objectives included the following:

- Assess the environmental impact of available alternatives for TBT.
- Evaluate the release of TBT from sediments into the aquatic environment during dredging operations.
- Test on a pilot-scale several treatment technologies for TBT contaminated sediments.
- Identify possibilities for the reuse of treated sediments.

The port teamed up with the Environmental Research Centre (ERC) in Hofstade, (Aalst) to carry out the chemical analyses and perform lab-scale feasibility experiments for the different sediment and water remediation techniques.



Dredging craft in the port of Antwerp

Five-point plan

The project was expected to produce a list of environmentally friendly alternatives to TBT in anti-fouling (that is, the prevention of growth of organisms) systems. It was also expected to determine limits and best practice for dredging operations in order to minimise the release of TBT from sediments. To achieve its aims, the project focused on five main action areas:

1) The drawing up of a questionnaire on alternatives for TBT to be sent to interested parties in the EU including coating producers, ship-repair yards, ship-owners etc. From the answers received, the project would be able to assess the impact of the alternatives based on their characteristics, active compounds, methods of application, energy use, waste generation and ease of maintenance.

2) Simulation of dredging operations on a pilot-scale and analysis of TBT concentrations in the aqueous phase. TBT concentrations would be correlated with turbidity measurements taken simultaneously.

Removal of TBT contaminated sediments



3) The dredging of about 2000 m^3 of TBT contaminated sediments form the Port of Antwerp and elsewhere in Flanders and its treatment in pilot-scale installations, on-site or off-site, using thermal treatment, bioremediation, washing and separation, phyto-remediation and electrochemical treatment. An evaluation of TBT removal rates for each technique was to be performed.
4) The construction of a pilot-scale treatment plant for the purification of TBT contaminated waters created during dredging or treatment operations. An evaluation of the removal efficiency of this plant for TBT was planned.
5) The reuse of cleaned sediments in landscaping, dike reinforcement and construction.

Results

While a standard practice for the reuse or application of sediment on land has yet to be reached, geotechnical and chemical requirements were developed. Chemical criteria were developed by the Flemish Institute for Technological Research (VITO) in accordance with Flemish legislation on reuse of soil and treated mineral waste for construction purposes.

The project provided a general framework for quantifying the effects of toxic materials that can be used in discussions with the Flemish authorities and for the development of European quality controls on the reuse of sediments.

Deposition of extracted sediments following TBT removal





Disseminating the project results and experiences

Some results of the project could also be used to formulate recommendations and restrictions on dredging activities. The project demonstrated that the amount of TBT released during dredging activities is mainly determined by conditions in the harbour (for example acidity, salinity and temperature).These environmental conditions are more important than the dredging technique.

The project also determined that dredging of highly contaminated sediments in the Port of Antwerp is best performed during the winter when the pH of the water is below 8.0. A new time schedule for dredging operations now dramatically reduces the release of TBT in the port. Such a recommendation could also apply to other ports.

Another important aspect of the project was the construction of a mechanical water extraction installation. The installation should be operational by the end of 2008 and will cost an estimated € 65 million.

The project worked in consultation with the Flemish government to carry out the mechanical extraction of water from dredged material and to develop acceptable TBT-concentrations in dewatered sludge and discharge limits for effluent water. Dumping sites in Antwerp are expensive and limited in number and size. However, prospects for the port are very encouraging. Once recycled, for example, sediments can now be reused for creating dikes and other constructions.

Project number: LIFE02 ENV/B/000341
Title: Development of an integrated approach for the removal of tributyltin (TBT) from waterways and harbours: prevention, treatment and reuse of TBT contaminated sediments
Beneficiary: Gemeentelijk Havenbedrijf Antwerpen, Belgium
Contact: Eddy Bruyninckx
Website: www.portofantwerp.be/tbtclean
Email: eddy.bruyninckx@haven.antwerpen.be
Period: 01-Oct-2002 to 01-Jan-2005
Total budget: € 3,222,000
LIFE contribution: € 1,335,000

LIFE in action

OSIS: Improving oil-spill detection in the North Sea

Ships and offshore installations are the most common sources of more than 500,000 tonnes of oil that is spilt in the marine environment every year. The OSIS (Oil Spill Identification System), developed and tested with LIFE-Environment co-funding, is aiding identification of oil discharges from offshore installations in the North Sea. This permanently-mounted 'real-time' sensor – together with a new mobile sensor being adapted for ships in a follow-up LIFE project – will allow decision-makers to take corrective action rapidly.



New OSIS sensor on board Cunnar Seidenfaden

Every day large amounts of oil are deliberately pumped into the sea by ships along the coastline of Europe. Together with large oil spills, such pollution constitutes a major threat to the environment and places enormous demands on national authorities responsible for rapid response and clean-up operations. The 1992 OSPAR Convention[1] for the protection of the marine environment of the northeast Atlantic tackles this environmental threat.

Effectively controlling oil pollution has, however, proved difficult. Airborne surveillance systems currently used to control oil outlets are too expensive to be utilised efficiently against the large number of offshore

1 The OSPAR Convention http://www.ospar.org/eng/html/welcome.html, which entered into force in March 1998 and includes the participation of the EU, develops new programmes and measures required to identify, prioritise and monitor the emissions, discharges and losses of substances to the marine environment.



'Real-time' OSIS sensor at the front of an oil rig

installations. Along with ships, such installations are the most common sources for the more than 500,000 tons of oil spilt annually into the marine environment[2]. The lack of monitoring systems means that offshore installations have not yet been included in the strict OSPAR rules governing oil pollution in 'special areas' designated by the International Maritime Organisation (IMO).

OSPAR call for technologies

Peter Moeller-Jensen, project manager at OSIS International, a privately owned Danish SME says: "In the late 1990s, OSPAR called for technologies, such as OSIS to be developed so that they could enforce a new type of regulation in those special areas." The OSIS team thus sought to demonstrate a potential solution to this widespread problem of international concern by developing online remote monitoring of offshore installations in any location based on new sensor technology. The system would use a new generation of communication satellites and the internet.

The project has fully achieved its objective, posting impressive results from tests for the detection of spills surrounding oils rigs in the North Sea. Data gathered by OSIS is also transferred via satellite to onshore decision-makers and can be used in conjunction with a Geographical Information System (GIS). This provides further information about leaks and helps the planning of corrective actions. "This will enhance the information for decision-making concerning corrective action and also provide opportunities for efficient clean-up operations," says Mr Moeller-Jensen.

Conclusions

The OSIS technology, designed for fixed offshore structures such as oil platforms, is also proving attractive for maritime transport. A second LIFE project (LIFE04 ENV/DK/00076) launched in 2004 by the same beneficiary is currently adapting the fixed OSIS sensor and transmission system for ships.

2 Source: Global Marine Oil Pollution Information Gateway http://oils.gpa.unep.org/facts/sources.htm

Close-up of the permanently-mounted OSIS sensor



Project number: LIFE02 ENV/DK/000151
Title: Sensor for identification of oil spills from offshore installations
Beneficiary: OSIS International, Denmark
Contact: Peter Moeller-Jensen
Website: www.osis.biz
Email: pmj@osis.biz
Period: 01-Jan-2002 to 30-Apr-2005
Total budget: € 3,359,000
LIFE contribution: € 867,000

Further successful and promising projects

The table below presents some of the numerous past and current LIFE projects focusing on the marine environment. For further information on individual projects, visit the online LIFE database at: http://ec.europa.eu/environment/life/home.htm.

Start	Country	Number	Title
Enhancing our knowledge of the marine environment			
1992	United Kingdom	LIFE92 ENV/UK/000065	Small Cetacean Abundance in the North Sea and adjacent waters (SCANS) with follow-up project
2004	Portugal	LIFE04 NAT/P/000213	Important bird areas for seabirds in Portugal
2004	Spain	LIFE04 NAT/ES/000049	Important Bird Areas For Seabirds (Marine IBAs) in Spain
2004	United Kingdom	LIFE04 NAT/UK/000245	Small Cetaceans in the European Atlantic and North Sea (SCANS II)
Preserving and protecting marine species and habitats of Community interest			
1995	Greece	LIFE95 NAT/GR/001115	Recovery of the Loggerhead Sea Turtle *(Caretta caretta)* population nesting on Crete
1996	Greece	LIFE96 NAT/GR/003221	Conservation actions for *Larus audouinii* in Greece
1996	Portugal	LIFE96 NAT/P/003019	Conservation support project for North Atlantic *Caretta caretta* sea turtles
1996	Spain	LIFE96 NAT/E/003144	Actions for the recovery of the Atlantic Monk Seal *(Monachus monachus)* population
1996	United Kingdom	LIFE96 NAT/UK/003055	To develop and promote the necessary conservation measures for UK marine SACS
1997	Italy	LIFE97 NAT/IT/004153	Capraia and other small islands of the Tuscan Archipelago : biological diversity conservation
1997	Spain	LIFE97 NAT/E/004146	Recovery plan of *Puffinus p.mauretanicus* in SPA's
1997	Spain	LIFE97 NAT/E/004151	Project to support the conservation of *Caretta caretta* and *Tursiops truncatus* in the Canary Islands
1998	France	LIFE98 NAT/F/005250	Maritime archipelagos and islets of Brittany
1998	Spain	LIFE98 NAT/E/005300	Conservation of island SPAs in the Valencian region
2000	Spain	LIFE00 NAT/E/007303	Protection of *Posidonia* grasses in SCIs of Baleares
2002	Spain	LIFE02 NAT/E/008610	Conservation of cetaceans and turtles in Andalusia and Murcia
2002	Third Countries	LIFE02 TCY/TR/061	Preserving the Marine Environment of Oludeniz Lagoon
2003	France	LIFE03 NAT/F/000105	Conservation of Cory's shearwater on the Hyères islands
2003	Italy	LIFE03 NAT/IT/000163	Reduction of the impact of human activity on Caretta and Tursiops and their conservation in Sicily
2003	Spain	LIFE03 NAT/E/000061	Conservation of *Larus audouinii* in Spain. Grosa Island SPA (Murcia)
2003	Spain	LIFE03 NAT/E/000062	Conservation of *Tursiops* and *Caretta* on the Gomera Island

Start	Country	Number	Title
2004	Italy	LIFE04 NAT/IT/000172	Tuscan Islands: new actions towards sea birds and habitat
2004	Italy	LIFE04 NAT/IT/000187	Tartanet, a network for the conservation of sea turtles in Italy
2005	France	LIFE05 NAT/F/000137	Conservation of the Roseate Tern in Brittany
2005	United Kingdom	LIFE05 NAT/UK/000141	Canna seabird recovery project
2006	Denmark	LIFE06 NAT/DK/000159	Rebuilding of Marine Cavernous Boulder Reefs in Kattegat
Ensuring prudent utilisation of marine goods and services			
1997	Finland	LIFE97 NAT/FIN/004102	Conservation and Management of the Porvoonjoki Estuary - Stenböle Natura 2000 Area
1998	Greece	LIFE98 NAT/GR/005262	Application of Management Plan for *Caretta caretta* in southern Kyparissia Bay
1999	Italy	LIFE99 NAT/IT/006271	Urgent conservation measures of *Caretta caretta* in the Pelagian Islands
1999	Italy	LIFE99 NAT/IT/006275	Protection of sea and coastline habitats in SCIs along the Southern Tyrrhenian Sea in Italy
1999	Portugal	LIFE99 NAT/P/006432	Project for the conservation of cetaceans in Madeira Archipelago
2000	Greece	LIFE00 NAT/GR/007248	The Monk Seal : conservation actions in two Greek NATURA 2000 sites
2000	Romania	LIFE00 NAT/RO/007194	Conservation of the dolphins from the Romanian Black Sea waters
2002	Greece	LIFE02 NAT/GR/008500	Reduction of mortality of *Caretta caretta* in the Greek seas
2003	France	LIFE03 NAT/F/000104	Limitation to the negative interactions between dolphins and human activities
2005	Greece	LIFE05 NAT/GR/000083	Monk seal & fisheries: Mitigating the conflict in Greek seas
2005	Spain	LIFE05 ENV/E/000267	Benign and environmentally friendly fish processing practices to provide added value and innovative solutions for a responsible and sustainable management of fisheries.
2006	Italy	LIFE06 NAT/IT/000050	Urgent conservation measures for biodiversity of Central Mediterranean Sea
2006	Portugal	LIFE06 NAT/P/000192	Restoration and Management of Biodiversity in the Marine Park Site Arrábida-Espichel
Building partnerships for the seas			
1996	Denmark	LIFE96 ENV/DK/000012	Integrated Cooperation on Sustainable Tourism Development and Recreational Use in the Wadden Sea Area
1998	Portugal	LIFE98 NAT/P/005275	Integrated management of coastal and marine zones in the Azores
2000	Finland	LIFE00 ENV/FIN/000646	Integrated Management System for the Bothnian Bay
2005	Latvia	LIFE05 NAT/LV/000100	Marine protected areas in the Eastern Baltic Sea

Start	Country	Number	Title
Improving environmental quality for our seas			
1995	France	LIFE95 ENV/F/000782	Control of the *Caulerpa taxifolia* extension in the Mediterranean Sea
1996	Third Countries	LIFE96 TCY/INT/08	Development of oil spill response capabilities of Cyprus, Egypt and Israel
1998	Greece	LIFE99 ENV/GR/000567	Demonstration and large scale application of the new magnetic method 'cleanmag' for the clean-up of waterborne oil spills
1998	Italy	LIFE98 ENV/IT/000079	BO.FO.PO.LI Port of Leghorn's seabed reclamation
1998	Netherlands	LIFE98 ENV/NL/000199	Action to demonstrate the harmful impact of TBT. Effective communication strategies between scientists and policy makers to assist in policy development
1999	Third Countries	LIFE99 TCY/INT/017	Development of the national system for preparedness and response to accidental marine pollution in Syria
2000	Spain	LIFE00 ENV/E/000560	Integral management of fishing waste in a coastal area : Pilot scheme
2002	Belgium	LIFE02 ENV/B/000341	Development of an integrated approach for the removal of tributyltin (TBT) from waterways and harbours
2002	Denmark	LIFE02 ENV/DK/000151	Sensor for identification of oil spills from offshore installations
2003	Netherlands	LIFE03 ENV/NL/000474	LNG Tanker, Demonstrating the effective and safe use of liquid natural gas as fuel for ship engines for short-sea shipping and inland waterway transport.
2004	Denmark	LIFE04 ENV/DK/000076	Oil Spill Identification System for Marine Transport
2006	Belgium	LIFE06 ENV/B/000362	Demonstration of a 100% non-toxic hull protection and anti-fouling system contribution to zero emissions to the aquatic environment and saving 3-8 % heavy fuels
2006	Finland	LIFE06 ENV/FIN/000195	Controlled Treatment of TBT-Contaminated Dredged Sediments for the Beneficial Use in Infrastructure Applications Case: Aurajoki - Turku
2006	Germany	LIFE06 ENV/D/000479	Demonstration of an innovative wind propulsion technology for cargo vessels

http://ec.europa.eu/life

The LIFE programme's online database features all LIFE projects since 1992, including LIFE-Nature projects specifically addressing marine environment issues. Many of the LIFE-Environment and LIFE-Third Country projects registered are also relevant to the marine environment.

Search the database by year, country or keyword, to find information and contact details of successful projects and good practices relevant to your work.

Available LIFE publications

LIFE-Focus brochures

A number of LIFE publications are available on the LIFE website:

LIFE and European forests (2006 - 68pp. ISBN 92-79-02255-5 - ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/forests/forest_lr.pdf*

LIFE in the City – Innovative solutions for Europe's urban environment (2006, 64pp. - ISBN 92-79-02254-7 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/urban/urban_lr.pdf*

Integrated management of Natura 2000 sites (2005 - 48 pp. – ISBN 92-79-00388-7) *http://ec.europa.eu/environment/life/infoproducts/managingnatura_highres.pdf*

LIFE, Natura 2000 and the military (2005 - 86 pp. – ISBN 92-894-9213-9 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/lifeandmilitary_en.pdf*

LIFE for birds - 25 years of the Birds Directive: the contribution of LIFE-Nature projects (2004 - 48 pp. – ISBN 92-894-7452-1 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/lifeforbirds_en.pdf*

The air we breathe - LIFE and the European Union clean air policy (2004 - 32 pp. – ISBN 92-894-7899-3 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/focusair/lifeair_hr_en.pdf*

LIFE-Nature: communicating with stakeholders and the general public - Best practice examples for Natura 2000 (2004 - 72 pp. – ISBN 92-894-7898-5 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/naturecommunicating_lowres_en.pdf*

A cleaner, greener Europe - LIFE and the European Union waste policy (2004 - 28 pp. – ISBN 92-894-6018-0 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/lifewaste_en.pdf*

Alien species and nature conservation in the EU - The role of the LIFE programme (2004 - 56 pp. – ISBN 92-894-6022-9 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/alienspecies_en.pdf*

Industrial pollution, European solutions: clean technologies - LIFE and the Directive on integrated pollution prevention and control (IPPC Directive) (2003 - 32 pp. – ISBN 92-894-6020-2 – ISSN 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/cleantechnologies_en.pdf*

LIFE and agri-environment supporting Natura 2000 - Experience from the LIFE programme (2003 - 72 pp. – ISBN 92-894-6023-7 – ISSN N° 1725-5619) *http://ec.europa.eu/environment/life/infoproducts/agrienvironmentreport_en.pdf*

LIFE for Natura 2000 - 10 years implementing the regulation (2003 - 108 pp. – ISBN 92-894-4337-5) *http://ec.europa.eu/environment/life/infoproducts/lifepournatura2000_en.pdf*

A sustainable approach for the environment - LIFE and the Community Eco-Management and Audit Scheme (EMAS) (2003 - 32 pp. – ISBN 92-894-0543-0) *http://ec.europa.eu/environment/life/infoproducts/emas_en.pdf*

Water, an essential resource - LIFE and the new European water policy (2002 - 28 pp. – ISBN 92-894-0538-4) *http://ec.europa.eu/environment/life/infoproducts/water_en.pdf*

A number of printed copies of certain LIFE publications are available and can be ordered free-of-charge at: *http://ec.europa.eu/environment/env-informa/*

Other publications

Best LIFE-Environment Projects 2005-2006 (2006, 40 pp. – ISBN 92-79-02123-0) *http://ec.europa.eu/environment/life/infoproducts/bestlifeenv/bestenv_0506_lr.pdf*

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LIFE-Environment in Action. 56 new success stories for Europe's environment (2001 -131 pp. – ISBN 92-894-0272-5) *http://ec.europa.eu/environment/life/infoproducts/successstories2001_en.pdf*

LIFE-Environment Projects 2006 compilation (2006, 56 pp.-ISBN 92-79-02786-7) *http://ec.europa.eu/environment/life/infoproducts/lifeenvcompilation_06.pdf*

LIFE-Nature Projects 2006 compilation (2006, 67 pp. – ISBN 92-79-02788-3) *http://ec.europa.eu/environment/life/infoproducts/lifenatcompilation_06.pdf*

LIFE-Third Countries Projects 2006 compilation (2006, 20 pp. – ISBN 92-79-02787-5) *http://ec.europa.eu/environment/life/infoproducts/lifetcycompilation_06.pdf*

LIFE-Environment Projects 2005 compilation (2005, 97 pp.-ISBN 92-79-00104-3) *http://ec.europa.eu/environment/life/infoproducts/lifeenvcompilation_05_lowres.pdf*

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The programme

Name LIFE ("L'Instrument Financier pour l'Environnement" / The financial instrument for the environment)

Type of intervention co-financing of actions in favour of the environment in the twenty-five Member States of the European Union, in the candidate countries who are associated to LIFE and in certain third countries bordering the Mediterranean and the Baltic Sea.

LIFE is made up of three thematic components: "LIFE-Nature", "LIFE-Environment" and "LIFE-Third countries".

Objectives

> with a view to sustainable development in the European Union, contribute to the drawing up, implementation and updating of Community policy and legislation in the area of the environment;
> explore new solutions to environmental problems on a Community scale.

Beneficiaries any natural or legal person, provided that the projects financed meet the following general criteria:

> they are of Community interest and make a significant contribution to the general objectives;
> they are carried out by technically and financially sound participants;
> they are feasible in terms of technical proposals, timetable, budget and value for money.

Types of project

> Eligible for LIFE-Environment are innovative pilot and demonstration projects which bring environment-related and sustainable development considerations together in land management, which promote sustainable water and waste management or which minimise the environmental impact of economic activities, products and services. LIFE-Environment also finances preparatory projects aiming at the development or updating of Community environmental actions, instruments, legislation or policies.
> Eligible for LIFE-Nature are nature conservation projects which contribute to maintaining or restoring natural habitats and/or populations of species in a favourable state of conservation within the meaning of the "Birds" (79/409/EEC) and "Habitats" (92/43/EEC) Community Directives and which contribute to the establishment of the European network of protected areas – NATURA 2000. LIFE-Nature also finances "co-op" projects aiming to develop the exchange of experiences between projects.
> Eligible for LIFE-Third countries are projects which contribute to the establishment of capacities and administrative structures needed in the environmental sector and in the development of environmental policy and action programmes in some countries bordering the Mediterranean and the Baltic Sea.

Implementation National authorities in the Member States or third countries send the Commission the proposals of projects to be co-financed (for LIFE-Environment preparatory projects, the applicants send their proposals directly to the Commission). The Commission sets the date for sending the proposals annually. It monitors the projects financed and supports the dissemination of their results. Accompanying measures enable the projects to be monitored on the ground.

Period covered (LIFE III) 2000-2006.

Funds from the Community approximately EUR 638 million for 2000-2004 and EUR 317 million for 2005-2006.

Contact

European Commission – Environment Directorate-General
LIFE Unit – BU-9 02/1 – 200 rue de la Loi – B-1049 Brussels – Fax: +32 2 292 17 87
Internet: http://ec.europa.eu/life

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JUDGMENT OF THE COURT (Third Chamber)

11 April 2013 (*)

(Environment – Directive 92/43/EEC – Article 6 – Conservation of natural habitats – Special areas of conservation – Assessment of the implications for a protected site of a plan or project – Criteria to be applied when assessing the likelihood that such a plan or project will adversely affect the integrity of the site concerned – Lough Corrib site – N6 Galway City Outer Bypass road scheme)

In Case C-258/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Supreme Court (Ireland), made by decision of 13 May 2011, received at the Court on 26 May 2011, in the proceedings

Peter Sweetman,

Ireland,

Attorney General,

Minister for the Environment, Heritage and Local Government

v

An Bord Pleanála,

notice parties:

Galway County Council,

Galway City Council,

THE COURT (Third Chamber),

composed of R. Silva de Lapuerta, acting as the President of the Third Chamber, K. Lenaerts, G. Arestis (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 12 September 2012,

after considering the observations submitted on behalf of:

– Mr Sweetman, by B. Harrington, Solicitor, and R. Lyons SC,

– Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government, by D. O'Hagan and G. Simons, acting as Agents, and M. Gray BL,

– An Bord Pleanála, by A. Doyle and O. Doyle, Solicitors, and N. Butler SC,

– Galway County Council and Galway City Council, by V. Raine and A. Casey, acting as Agents, E. Keane SC and B. Kennedy BL,

– the Greek Government, by G. Karipsiades, acting as Agent,

– the United Kingdom Government, by H. Walker, acting as Agent, and K. Smith, Barrister,

– the European Commission, by S. Petrova and K. Mifsud-Bonnici, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 November 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive').

2 The request has been made in proceedings between (i) Mr Sweetman, Ireland, the Attorney General and the Minister for the Environment, Heritage and Local Government and (ii) An Bord Pleanála (the Irish Planning Board), supported by Galway County Council and Galway City Council, concerning An Bord Pleanála's decision to grant development consent for the N6 Galway City Outer Bypass road scheme.

Legal context

European Union law

3 The third recital in the preamble to the Habitats Directive states:

'… the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; … the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities'.

4 Article 1(d), (e), (k) and (l) of the Habitats Directive provide:

'For the purpose of this Directive:

…

(d) *priority natural habitat types* means natural habitat types in danger of disappearance, which are present on the territory referred to in Article 2 and for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority natural habitat types are indicated by an asterisk (*) in Annex I;

(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservative status of a natural habitat will be taken as "favourable" when:

– its natural range and areas it covers within that range are stable or increasing, and

– the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

– the conservation status of its typical species is favourable as defined in (i);

...

(k) *site of Community importance* ["SCI"] means a site which, in the biogeographical region or regions to which is belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I or of a species in Annex II and may also contribute significantly to the coherence of Natura 2000 referred to in Article 3, and/or contributes significantly to the maintenance of biological diversity within the biogeographic region or regions concerned.

...

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated'.

5 Article 2 of the Habitats Directive is worded as follows:

'1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

6 Article 3(1) of the Habitats Directive states:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network … shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to [Council] Directive 79/409/EEC [of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1)].'

7 Article 6(2) to (4) of the Habitats Directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

8 Annex I to the Habitats Directive, entitled 'Natural habitat types of Community interest whose conservation requires the designation of special areas of conservation', designates '[l]imestone pavements' as a priority habitat type, under code 8240.

Irish law

9 The European Communities (Natural Habitats) Regulations, 1997, in the version applicable at the material time ('the 1997 Regulations'), implement the obligations of the Habitats Directive in Irish law.

10 Regulation 30 of the 1997 Regulations, which transposed the requirements of Article 6 of the Habitats Directive, provides:

'(1) Where a proposed road development in respect of which an application for the approval of the [competent authority] has been made in accordance with section 51 of the Roads Act, 1993, is neither directly connected with nor necessary to the management of a European site but likely to have a significant effect thereon either individually or in combination with other developments, the [competent authority] shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

(2) An environmental impact assessment as required under subsection (2) of section 51 of the Roads Act, 1993, in respect of a proposed road development referred to in paragraph (1) shall be an appropriate assessment for the purposes of this Regulation.

(3) [The competent authority] shall, having regard to the conclusions of the assessment undertaken under paragraph (1), agree to the proposed road development only after having ascertained that it will not adversely affect the integrity of the European site concerned.

(4) In considering whether the proposed road development will adversely affect the integrity of the European site concerned, the [competent authority] shall have regard to the manner in which the proposed development is being carried out or to any conditions or restrictions subject to which the approval is given.

(5) [The competent authority] may, notwithstanding a negative assessment and where [it] is satisfied that there are no alternative solutions, decide to agree to the proposed road development where the proposed road development has to be carried out for imperative reasons of overriding public interest.

(6) (a) Subject to paragraph (b) imperative reasons of overriding public interest shall include reasons of a social or economic nature;

(b) If the site concerned hosts a priority natural habitat type or a priority species, the only considerations of overriding public interest shall be –

(i) those relating to human health or public safety,

(ii) beneficial consequences of primary importance for the environment, or

(iii) further to an opinion from the Commission to other imperative reasons of overriding public interest.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 By decision of 20 November 2008, An Bord Pleanála decided to grant development consent for the N6 Galway City Outer Bypass road scheme. Part of the proposed road was planned to cross the Lough Corrib SCI. Following an enlargement of the extent of the SCI, it hosts a total of 14 habitats referred to in Annex I to the Habitats Directive, of which six are priority habitat types, including karstic limestone pavement, the specific protected habitat forming the subject-matter of the main proceedings.

12 The road scheme involves the permanent loss within the Lough Corrib SCI of approximately 1.47 hectares of that limestone pavement. Those 1.47 hectares will be lost from an area which was described by An Bord Pleanála's inspector as constituting a 'distinct sub-area and an area having the particular characteristic of possessing substantial areas of a priority habitat', and which contains a total of 85 hectares of limestone pavement. That surface of 85 hectares itself forms part of a total of 270 hectares of such limestone pavement – which constitutes a priority habitat type referred to in Annex I to the Habitats Directive – in the entire SCI.

13 At the time when An Bord Pleanála's decision was taken, that area had already been included as a potential SCI on a list of sites transmitted by Ireland to the Commission. The extended Lough Corrib site was formally classified as an SCI by a Commission decision of 12 December 2008. According to the referring court, although the extended Lough Corrib site was not formally classified by the Commission as an SCI before that date, An Bord Pleanála was required under national law to apply legal protections equivalent to those under Article 6(2) to (4) of the Habitats Directive to that site from December 2006.

14 In its decision of 20 November 2008, An Bord Pleanála stated, inter alia, that 'it is considered that the part of the road development being approved would be an appropriate solution to the identified traffic needs of the city and surrounding area … and, while having a localised severe impact on the Lough Corrib candidate Special Area of Conservation, would not adversely affect the integrity of this candidate special Area of Conservation. The development, hereby approved, would not, therefore, have unacceptable effects on the environment and would be in accordance with the proper planning and sustainable development of the area.'

15 Mr Sweetman applied to the High Court for leave to issue judicial review proceedings against, in particular, An Bord Pleanála's decision of 20 November 2008. He submitted that An Bord Pleanála had erred in its interpretation of Article 6 of the Habitats Directive in concluding, in particular, that the effect of the road scheme on the Lough Corrib protected site would not constitute an 'adverse effect on the integrity of the site'.

16 By decision of 9 October 2009, the High Court dismissed the application for leave to issue judicial review proceedings and upheld An Bord Pleanála's decision. On 6 November 2009 Mr Sweetman was granted leave to appeal to the Supreme Court against the decision of 9 October 2009.

17 The Supreme Court observes that it has doubts as to when and in what circumstances, where an appropriate assessment of a plan or project is carried out pursuant to Article

6(3) of the Habitats Directive, such a plan or project is likely to have 'an adverse effect on the integrity of the site'. In that regard, the Supreme Court states that the judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405 has not fully dispelled its doubts.

18 It is in those circumstances that the Supreme Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. What are the criteria in law to be applied by a competent authority to an assessment of the likelihood of a plan or project the subject of Article 6(3) of the Habitats Directive, having "an adverse effect on the integrity of the site"?

2. Does the application of the precautionary principle have as its consequence that such a plan or project cannot be authorised if it would result in the permanent non-renewable loss of the whole or any part of the habitat in question?

3. What is the relationship, if any, between Article 6(4) and the making of the decision under Article 6(3) that the plan or project will not adversely affect the integrity of the site?'

Consideration of the questions referred

Jurisdiction of the Court

19 Galway County Council and Galway City Council plead, in essence, that the Court lacks jurisdiction to answer the questions referred for a preliminary ruling given that Article 6(3) of the Habitats Directive is not applicable to the main proceedings because An Bord Pleanála's decision approving the N6 Galway City Outer Bypass road scheme was adopted before the Commission decision to classify as an SCI the Lough Corrib site extension which is affected by the scheme.

20 It is indeed apparent from the order for reference that, on the date of An Bord Pleanála's decision, 20 November 2008, the extension of the Lough Corrib site had been notified within Ireland, under Regulation 4 of the 1997 Regulations, but had not yet been designated as an SCI in the list of sites adopted by the Commission. Such a decision was adopted by the Commission on 12 December 2008, that is to say, three weeks after An Bord Pleanála's decision.

21 In the main proceedings, as the referring court itself states, Regulation 30 of the 1997 Regulations largely replicates the wording of Article 6 of the Habitats Directive. It follows, furthermore, from the title of the 1997 Regulations that the Irish legislature intended by their adoption to transpose that directive into domestic law. Finally, as the referring court observes, by according a notified site protection equivalent to that under Article 6(2) to (4) of the Habitats Directive before its designation as an SCI in the list adopted by the Commission, Ireland considered itself to have complied with its obligation to take appropriate protective measures pending designation of a site as an SCI.

22 On that last point, it should be recalled that the Court has already held that, whilst the protective measures prescribed in Article 6(2) to (4) of the Habitats Directive are

required only as regards sites which are placed on the list of sites selected as SCIs drawn up by the Commission, this does not mean that the Member States do not have to protect sites as soon as they propose them, under Article 4(1) of the directive, as sites eligible for identification as SCIs on the national list transmitted to the Commission (see Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraphs 25 and 26, and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, paragraphs 36 and 37).

23 Therefore, as soon as a site is proposed by a Member State, pursuant to Article 4(1) of the Habitats Directive, on the national list transmitted to the Commission as a site eligible for identification as an SCI, and at least until the Commission adopts a decision in that regard, that Member State is, by virtue of the Habitats Directive, required to take protective measures of such a kind as to safeguard the ecological interest referred to (see, to this effect, *Dragaggi and Others*, paragraph 29, and *Bund Naturschutz in Bayern and Others*, paragraph 38). The situation of such a site thus cannot be categorised as a situation not falling within the scope of European Union law.

24 It accordingly follows from the foregoing considerations that the Court has jurisdiction to answer the questions referred for a preliminary ruling by the Supreme Court.

Substance

25 By its questions, which it is appropriate to deal with together, the referring court asks, in essence, whether Article 6(3) of the Habitats Directive must be interpreted as meaning that in a situation such as that in the main proceedings a plan or project not directly connected with or necessary to the management of a site adversely affects the integrity of that site. For the purposes of such an interpretation, the referring court raises the question of the possible effect of the precautionary principle and the question of the relationship between Article 6(3) and Article 6(4) of the Habitats Directive.

26 It is apparent from the order for reference that the implementation of the N6 Galway City Outer Bypass road scheme would result in the permanent and irreparable loss of part of the Lough Corrib SCI's limestone pavement, which is a priority natural habitat type specially protected by the Habitats Directive. Following assessment of the impact of the road scheme on the Lough Corrib SCI, An Bord Pleanála established that it would have a locally significant negative impact on the SCI, but decided that such an impact did not adversely affect the integrity of that site.

27 According to Mr Sweetman, Ireland, the Attorney General, the Minister for the Environment, Heritage and Local Government and the Commission, a negative impact of that kind on the site caused by that road scheme necessarily entails an adverse effect on the site's integrity. By contrast, An Bord Pleanála, Galway County Council and Galway City Council and the United Kingdom Government submit that the finding of damage to that site is not necessarily incompatible with there being no adverse effects on its integrity.

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

integrity of that site (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 34, and Case C-182/10 *Solvay and Others* [2012] ECR I-0000, paragraph 66).

29 That provision thus prescribes two stages. The first, envisaged in the provision's first sentence, requires the Member States to carry out an appropriate assessment of the implications for a protected site of a plan or project when there is a likelihood that the plan or project will have a significant effect on that site (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 41 and 43).

30 Where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light of, in particular, the characteristics and specific environmental conditions of the site concerned by such a plan or project (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 49).

31 The second stage, which is envisaged in the second sentence of Article 6(3) of the Habitats Directive and occurs following the aforesaid appropriate assessment, allows such a plan or project to be authorised on condition that it will not adversely affect the integrity of the site concerned, subject to the provisions of Article 6(4).

32 In appraising the scope of the expression 'adversely affect the integrity of the site' in its overall context, it should be made clear that, as the Advocate General has noted in point 43 of her Opinion, the provisions of Article 6 of the Habitats Directive must be construed as a coherent whole in the light of the conservation objectives pursued by the directive. Indeed, Article 6(2) and Article 6(3) are designed to ensure the same level of protection of natural habitats and habitats of species (see, to this effect, Case C-404/09 *Commission* v *Spain* [2011] ECR I-0000, paragraph 142), whilst Article 6(4) merely derogates from the second sentence of Article 6(3).

33 The Court has already held that Article 6(2) of the Habitats Directive makes it possible to comply with the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration as well as disturbance which could have significant effects in the light of the directive's objectives (Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraph 49 and the case-law cited).

34 Article 6(4) of the Habitats Directive provides that if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, paragraph 81, and *Solvay and Others*, paragraph 72).

35 As an exception to the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive, Article 6(4) can apply only after the implications of a plan or project have been analysed in accordance with Article 6(3) (see *Solvay and Others*, paragraphs 73 and 74).

36 It follows that Article 6(2) to (4) of the Habitats Directive impose upon the Member States a series of specific obligations and procedures designed, as is clear from Article 2(2) of the directive, to maintain, or as the case may be restore, at a favourable conservation status natural habitats and, in particular, special areas of conservation.

37 In this regard, according to Article 1(e) of the Habitats Directive, the conservation status of a natural habitat is taken as 'favourable' when, in particular, its natural range and areas it covers within that range are stable or increasing and the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future.

38 In this context, the Court has already held that the Habitats Directive has the aim that the Member States take appropriate protective measures to preserve the ecological characteristics of sites which host natural habitat types (see Case C-308/08 *Commission* v *Spain* [2010] ECR I-4281, paragraph 21, and Case C-404/09 *Commission* v *Spain*, paragraph 163).

39 Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive the site needs to be preserved at a favourable conservation status; this entails, as the Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs, in accordance with the directive.

40 Authorisation for a plan or project, as referred to in Article 6(3) of the Habitats Directive, may therefore be given only on condition that the competent authorities – once all aspects of the plan or project have been identified which can, by themselves or in combination with other plans or projects, affect the conservation objectives of the site concerned, and in the light of the best scientific knowledge in the field – are certain that the plan or project will not have lasting adverse effects on the integrity of that site. That is so where no reasonable scientific doubt remains as to the absence of such effects (see, to this effect, Case C-404/09 *Commission* v *Spain*, paragraph 99, and *Solvay and Others*, paragraph 67).

41 It is to be noted that, since the authority must refuse to authorise the plan or project being considered where uncertainty remains as to the absence of adverse effects on the integrity of the site, the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle and makes it possible to prevent in an effective manner adverse effects on the integrity of protected sites as a result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not ensure as effectively the fulfilment of the objective of site protection intended under that provision (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 58).

42 Such an appraisal applies all the more in the main proceedings, since the natural habitat affected by the proposed road scheme is among the priority natural habitat types, which Article 1(d) of the Habitats Directive defines as 'natural habitat types in danger of

disappearance' for whose conservation the European Union has 'particular responsibility'.

43 The competent national authorities cannot therefore authorise interventions where there is a risk of lasting harm to the ecological characteristics of sites which host priority natural habitat types. That would particularly be so where there is a risk that an intervention of a particular kind will bring about the disappearance or the partial and irreparable destruction of a priority natural habitat type present on the site concerned (see, as regards the disappearance of priority species, Case C-308/08 *Commission* v *Spain*, paragraph 21, and Case C-404/09 *Commission* v *Spain*, paragraph 163).

44 So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 *Commission* v *Spain*, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements.

45 In the main proceedings, the Lough Corrib SCI was designated as a site hosting a priority habitat type because, in particular, of the presence in that site of limestone pavement, a natural resource which, once destroyed, cannot be replaced. Having regard to the criteria referred to above, the conservation objective thus corresponds to maintenance at a favourable conservation status of that site's constitutive characteristics, namely the presence of limestone pavement.

46 Consequently, if, after an appropriate assessment of a plan or project's implications for a site, carried out on the basis of the first sentence of Article 6(3) of the Habitats Directive, the competent national authority concludes that that plan or project will lead to the lasting and irreparable loss of the whole or part of a priority natural habitat type whose conservation was the objective that justified the designation of the site concerned as an SCI, the view should be taken that such a plan or project will adversely affect the integrity of that site.

47 In those circumstances, that plan or project cannot be authorised on the basis of Article 6(3) of the Habitats Directive. Nevertheless, in such a situation, the competent national authority could, where appropriate, grant authorisation under Article 6(4) of the directive, provided that the conditions set out therein are satisfied (see, to this effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 60).

48 It follows from the foregoing considerations that the answer to the questions referred is that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of SCIs, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site will adversely affect the integrity of that site if it is liable to prevent the lasting preservation of the constitutive characteristics of the site that are connected to the presence of a priority natural habitat whose conservation was the objective justifying the designation of the site in the list of sites of Community importance, in accordance with the directive. The precautionary principle should be applied for the purposes of that appraisal.

[Signatures]

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* Language of the case: English.

JUDGMENT OF THE COURT (Grand Chamber)

11 September 2012 (*)

(Reference for a preliminary ruling – Directives 85/337/EEC, 92/43/EEC, 2000/60/EC and 2001/42/EC – Community action in the field of water policy – Diversion of the course of a river – Meaning of the time-limit for production of river basin management plans)

In Case C-43/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Simvoulio tis Epikratias (Greece), made by decision of 9 October 2009, received at the Court on 25 January 2010, in the proceedings

Nomarchiaki Aftodioikisi Aitoloakarnanias,

Dimos Agriniou,

Dimos Iniadon,

Emporiko kai Viomikhaniko Epimelitirio Aitoloakarnanias,

Enosi Agrotikon Sinetairismon Agriniou,

Aitoliki Etairia Prostasias Topiou kai Perivallontos,

Elliniki Ornithologiki Etairia,

Elliniki Etairia gia tin Prostasia tou Perivallontos kai tis Politistikis Klironomias,

Dimos Mesolongiou,

Dimos Aitolikou,

Dimos Inakhou,

Topiki Enosi Dimon kai Kinotiton Nomou Aitoloakarnanias,

Pagkosmio Tamio gia ti Fisi WWF Ellas

v

Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon,

Ipourgos Esoterikon, Dimosias Diikisis kai Apokentrosis,

Ipourgos Ikonomias kai Ikonomikon,

Ipourgos Anaptixis,

Ipourgos Agrotikis Anaptixis kai Trofimon,

Ipourgos Politismou,

intervening parties:

Nomarchiaki Aftodioikisi Trikalon,

Nomarchiaki Aftodioikisi Magnisias,

Dimosia Epikhirisi Ilektrismou AE (DEI),

Nomarchiaki Aftodioikisi Karditsas,

Nomarchiaki Aftodioikisi Larisas,

Topiki Enosi Dimon kai Kinotiton tou Nomou Trikalon,

Topiki Enosi Dimon kai Kinotiton tou Nomou Larisis,

Topiki Enosi Dimon kai Kinotiton tou Nomou Karditsas,

Tekhniko Epimelitirio Elladas – Periferiako Tmima Kentrikis kai Ditikis Thessalias,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot and U. Lõhmus, Presidents of Chambers, A. Rosas, E. Levits, A. Ó Caoimh, L. Bay Larsen (Rapporteur), T. von Danwitz, A. Arabadjiev and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 May 2011,

after considering the observations submitted on behalf of:

– Nomarchiaki Aftodioikisi Aitoloakarnanias, Dimos Agriniou, Dimos Iniadon, Emporiko kai Viomikhaniko Epimelitirio Aitoloakarnanias, Enosi Agrotikon Sinetairismon Agriniou, Aitoliki Etairia Prostasias Topiou kai Perivallontos, Elliniki Ornithologiki Etairia, Elliniki Etairia gia tin Prostasia tou Perivallontos kai tis Politistikis Klironomias, Dimos Mesolongiou, Dimos Aitolikou, Dimos Inakhou, Topiki Enosi Dimon kai Kinotiton Nomou Aitoloakarnanias and Pagkosmio Tamio gia ti Fisi WWF Ellas, by C. Rokofillos, G. Khristoforidis, V. Dorovinis, N. Alevizatos, M. Asimakopoulou, E. Kiousopoulou and N. Khatzis, dikigoroi,

– Nomarchiaki Aftodioikisi Trikalon, by A. Tigkas, dikigoros,

– Nomarchiaki Aftodioikisi Magnisias, by X. Kontiadis, dikigoros,

– Dimosia Epikhirisi Ilektrismou AE (DEI), by C. Sinodinos and F.-A. Mouratian, dikigori,

– Nomarchiaki Aftodioikisi Karditsas, by A. Kormalis, dikigoros,

– Nomarchiaki Aftodioikisi Larisas, Topiki Enosi Dimon kai Kinotiton tou Nomou Trikalon, Topiki Enosi Dimon kai Kinotiton tou Nomou Larisis, Topiki Enosi Dimon kai Kinotiton tou Nomou Karditsas, Tekhniko Epimelitirio Elladas – Periferiako Tmima Kentrikis kai Ditikis Thessalias, by S. Flogaïtis, A. Sinis and G. Siouti, dikigori,

– the Greek Government, by G. Karipsiadis, C. Mitkidis and K. Kardakastanis, acting as Agents,

– the Norwegian Government, by K. Moe Winther and I. Thue, acting as Agents,

– the European Commission, by D. Recchia, S. Petrova, I. Chatzigiannis and P. Oliver, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337'), of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30) and of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

2 The reference has been made in legal proceedings brought by the Nomarchiaki Aftodioikisi Aitoloakarnanias (Prefectural Authority of Aitoloakarnania) and other legal persons against the Ipourgos Perivallontos, Khorotaxias kai Dimosion Ergon (Minister for the Environment, Regional Planning and Public Works) and other ministers, seeking the annulment of measures relating to the project for the partial diversion of the upper waters of the river Acheloos (Western Greece) to the river Pinios, in Thessaly.

Legal context

European Union law

Directive 2000/60

3 Recitals 19, 20, 25 and 32 in the preamble to Directive 2000/60 are worded as follows:

‘(19) This Directive aims at maintaining and improving the aquatic environment in the Community. This purpose is primarily concerned with the quality of the waters concerned. Control of quantity is an ancillary element in securing good water quality and therefore measures on quantity, serving the objective of ensuring good quality, should also be established.

(20) The quantitative status of a body of groundwater may have an impact on the ecological quality of surface waters and terrestrial ecosystems associated with that groundwater body.

...

(25) Common definitions of the status of water in terms of quality and, where relevant for the purpose of the environmental protection, quantity should be established. Environmental objectives should be set to ensure that good status of surface water and groundwater is achieved throughout the Community and that deterioration in the status of waters is prevented at Community level.

...

(32) There may be grounds for exemptions from the requirement to prevent further deterioration or to achieve good status under specific conditions, if the failure is the result of unforeseen or exceptional circumstances, in particular floods and droughts, or, for reasons of overriding public interest, of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, provided that all practicable steps are taken to mitigate the adverse impact on the status of the body of water.’

4 Article 2 of that directive provides the following definitions:

‘…

(10) “Body of surface water” means a discrete and significant element of surface water such as a lake, a reservoir, a stream, river or canal, part of a stream, river or canal, a transitional water or a stretch of coastal water.

…

(13) “River basin” means the area of land from which all surface run-off flows through a sequence of streams, rivers and, possibly, lakes into the sea at a single river mouth, estuary or delta.

(14) “Sub-basin” means the area of land from which all surface run-off flows through a series of streams, rivers and, possibly, lakes to a particular point in a water course (normally a lake or a river confluence).

(15) “River basin district” means the area of land and sea, made up of one or more neighbouring river basins together with their associated groundwaters and coastal waters, which is identified under Article 3(1) as the main unit for management of river basins.

…

(17) “Surface water status” is the general expression of the status of a body of surface water, determined by the poorer of its ecological status and its chemical status.

(18) “Good surface water status” means the status achieved by a surface water body when both its ecological status and its chemical status are at least “good”.

(19) “Groundwater status” is the general expression of the status of a body of groundwater, determined by the poorer of its quantitative status and its chemical status.

(20) “Good groundwater status” means the status achieved by a groundwater body when both its quantitative status and its chemical status are at least “good”.

(21) “Ecological status” is an expression of the quality of the structure and functioning of aquatic ecosystems associated with surface waters, classified in accordance with Annex V.

(22) “Good ecological status” is the status of a body of surface water, so classified in accordance with Annex V.

…

(24) “Good surface water chemical status” means the chemical status required to meet the environmental objectives for surface waters established in Article 4(1)(a), that is the chemical status achieved by a body of surface water in which concentrations of pollutants do not exceed the environmental quality standards established in Annex IX and under Article 16(7), and under other relevant Community legislation setting environmental quality standards at Community level.

(25) “Good groundwater chemical status” is the chemical status of a body of groundwater, which meets all the conditions set out in table 2.3.2 of Annex V.

(26) “Quantitative status” is an expression of the degree to which a body of groundwater is affected by direct and indirect abstractions.

…

(28) “Good quantitative status” is the status defined in table 2.1.2 of Annex V.

…’

5 Article 3(1) and (4) of that directive provide:

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

…

4. Member States shall ensure that the requirements of this Directive for the achievement of the environmental objectives established under Article 4, and in particular all programmes of measures are coordinated for the whole of the river basin district. …’

6 Article 4 of Directive 2000/60 is worded as follows:

‘1. In making operational the programmes of measures specified in the river basin management plans:

(a) for surface waters

(i) Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;

(ii) Member States shall protect, enhance and restore all bodies of surface water, subject to the application of subparagraph (iii) for artificial and heavily modified bodies of water, with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8;

…

(b) for groundwater

(i) Member States shall implement the measures necessary to prevent or limit the input of pollutants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

(ii) Member States shall protect, enhance and restore all bodies of groundwater, ensure a balance between abstraction and recharge of groundwater, with the aim of achieving good groundwater status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application

of paragraphs 5, 6 and 7 without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);

…

…

4. The deadlines established under paragraph 1 may be extended for the purposes of phased achievement of the objectives for bodies of water, provided that no further deterioration occurs in the status of the affected body of water when all of the following conditions are met:

(a) Member States determine that all necessary improvements in the status of bodies of water cannot reasonably be achieved within the timescales set out in that paragraph for at least one of the following reasons:

(i) the scale of improvements required can only be achieved in phases exceeding the timescale, for reasons of technical feasibility;

(ii) completing the improvements within the timescale would be disproportionately expensive;

(iii) natural conditions do not allow timely improvement in the status of the body of water.

(b) Extension of the deadline, and the reasons for it, are specifically set out and explained in the river basin management plan required under Article 13.

(c) Extensions shall be limited to a maximum of two further updates of the river basin management plan except in cases where the natural conditions are such that the objectives cannot be achieved within this period.

(d) A summary of the measures required under Article 11 which are envisaged as necessary to bring the bodies of water progressively to the required status by the extended deadline, the reasons for any significant delay in making these measures operational, and the expected timetable for their implementation are set out in the river basin management plan. A review of the implementation of these measures and a summary of any additional measures shall be included in updates of the river basin management plan.

5. Member States may aim to achieve less stringent environmental objectives than those required under paragraph 1 for specific bodies of water when they are so affected by human activity, as determined in accordance with Article 5(1), or their natural condition is such that the achievement of these objectives would be infeasible or disproportionately expensive, and all the following conditions are met:

(a) the environmental and socioeconomic needs served by such human activity cannot be achieved by other means, which are a significantly better environmental option not entailing disproportionate costs;

(b) Member States ensure:

– for surface water, the highest ecological and chemical status possible is achieved, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution,

– for groundwater, the least possible changes to good groundwater status, given impacts that could not reasonably have been avoided due to the nature of the human activity or pollution;

(c) no further deterioration occurs in the status of the affected body of water;

(d) the establishment of less stringent environmental objectives, and the reasons for it, are specifically mentioned in the river basin management plan required under Article 13 and those objectives are reviewed every six years.

6. Temporary deterioration in the status of bodies of water shall not be in breach of the requirements of this Directive if this is the result of circumstances of natural cause or *force majeure* which are exceptional or could not reasonably have been foreseen, in particular extreme floods and prolonged droughts, or the result of circumstances due to accidents which could not reasonably have been foreseen, when all of the following conditions have been met:

(a) all practicable steps are taken to prevent further deterioration in status and in order not to compromise the achievement of the objectives of this Directive in other bodies of water not affected by those circumstances;

(b) the conditions under which circumstances that are exceptional or that could not reasonably have been foreseen may be declared, including the adoption of the appropriate indicators, are stated in the river basin management plan;

(c) the measures to be taken under such exceptional circumstances are included in the programme of measures and will not compromise the recovery of the quality of the body of water once the circumstances are over;

(d) the effects of the circumstances that are exceptional or that could not reasonably have been foreseen are reviewed annually and, subject to the reasons set out in paragraph 4(a), all practicable measures are taken with the aim of restoring the body of water to its status prior to the effects of those circumstances as soon as reasonably practicable, and

(e) a summary of the effects of the circumstances and of such measures taken or to be taken in accordance with paragraphs (a) and (d) are included in the next update of the river basin management plan.

7. Member States will not be in breach of this Directive when:

– failure to achieve good groundwater status, good ecological status or, where relevant, good ecological potential or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

– failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means which are a significantly better environmental option.

8. When applying paragraphs 3, 4, 5, 6 and 7, a Member State shall ensure that the application does not permanently exclude or compromise the achievement of the objectives of this Directive in other bodies of water within the same river basin district and is consistent with the implementation of other Community environmental legislation.

9. Steps must be taken to ensure that the application of the new provisions, including the application of paragraphs 3, 4, 5, 6 and 7, guarantees at least the same level of protection as the existing Community legislation.'

7 Article 5(1) of Directive 2000/60 provides:

'Each Member State shall ensure that for each river basin district or for the portion of an international river basin district falling within its territory:

– an analysis of its characteristics,

– a review of the impact of human activity on the status of surface waters and on groundwater, and

– an economic analysis of water use

is undertaken according to the technical specifications set out in Annexes II and III and that it is completed at the latest four years after the date of entry into force of this Directive.'

8 Article 6(1) of that directive states:

‘Member States shall ensure the establishment of a register or registers of all areas lying within each river basin district which have been designated as requiring special protection under specific Community legislation for the protection of their surface water and groundwater or for the conservation of habitats and species directly depending on water. They shall ensure that the register is completed at the latest four years after the date of entry into force of this Directive.’

9 Under the first subparagraph of Article 9(1) of that directive:

‘Member States shall take account of the principle of recovery of the costs of water services, including environmental and resource costs, having regard to the economic analysis conducted according to Annex III, and in accordance in particular with the polluter pays principle.’

10 Article 11(7) of Directive 2000/60 is worded as follows:

‘The programmes of measures shall be established at the latest nine years after the date of entry into force of this Directive and all the measures shall be made operational at the latest 12 years after that date.’

11 Article 13 of that directive provides:

‘1. Member States shall ensure that a river basin management plan is produced for each river basin district lying entirely within their territory.

…

4. The river basin management plan shall include the information detailed in Annex VII.

5. River basin management plans may be supplemented by the production of more detailed programmes and management plans for sub-basin, sector, issue, or water type, to deal with particular aspects of water management. Implementation of these measures shall not exempt Member States from any of their obligations under the rest of this Directive.

6. River basin management plans shall be published at the latest nine years after the date of entry into force of this Directive.

7. River basin management plans shall be reviewed and updated at the latest 15 years after the date of entry into force of this Directive and every six years thereafter.’

12 Article 14 of that directive is worded as follows:

‘1. Member States shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans. Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users:

(a) a timetable and work programme for the production of the plan, including a statement of the consultation measures to be taken, at least three years before the beginning of the period to which the plan refers;

(b) an interim overview of the significant water management issues identified in the river basin, at least two years before the beginning of the period to which the plan refers;

(c) draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers.

On request, access shall be given to background documents and information used for the development of the draft river basin management plan.

2. Member States shall allow at least six months to comment in writing on those documents in order to allow active involvement and consultation.

3. Paragraphs 1 and 2 shall apply equally to updated river basin management plans.'

13 Article 15 of the directive states:

'1. Member States shall send copies of the river basin management plans and all subsequent updates to the Commission and to any other Member State concerned within three months of their publication:

(a) for river basin districts falling entirely within the territory of a Member State, all river management plans covering that national territory and published pursuant to Article 13;

(b) for international river basin districts, at least the part of the river basin management plans covering the territory of the Member State.

2. Member States shall submit summary reports of:

– the analyses required under Article 5, and

– the monitoring programmes designed under Article 8,

undertaken for the purposes of the first river basin management plan within three months of their completion.

3. Member States shall, within three years of the publication of each river basin management plan or update under Article 13, submit an interim report describing progress in the implementation of the planned programme of measures.'

14 Under the first subparagraph of Article 24(1) of Directive 2000/60, Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive at the latest by 22 December 2003 and forthwith to inform the Commission thereof.

15 Article 1 of Directive 85/337 is worded as follows:

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

2. For the purposes of this Directive:

“project” means:

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

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

“developer” means:

the applicant for authorisation for a private project or the public authority which initiates a project;

“development consent” means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

“public” means:

one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

“public concerned” means:

the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

…

5. This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.’

16 Article 2(1) of that directive provides:

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

17 Article 5(3) of that directive provides:

‘The information to be provided by the developer in accordance with paragraph 1 shall include at least:

– a description of the project comprising information on the site, design and size of the project,

– a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

– the data required to identify and assess the main effects which the project is likely to have on the environment,

– an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,

– a non-technical summary of the information mentioned in the previous indents.’

18 Under Article 6 of Directive 85/337:

‘1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To this end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [(OJ 2003 L 41, p. 26)], information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

…'

19 Article 8 of that directive states:

'The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.'

20 Article 9(1) of that directive is worded as follows:

'When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

– the content of the decision and any conditions attached thereto,

– having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

– a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.'

Directive 2001/42

21 Article 2 of Directive 2001/42 provides:

'For the purposes of this Directive:

(a) "plans and programmes" shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

– which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

– which are required by legislative, regulatory or administrative provisions;

…'

22 Article 3(2) of that directive provides:

'Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes:

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.'

Directive 92/43

23 According to the third recital in the preamble to Directive 92/43, 'the main aim of this Directive being to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, this Directive makes a contribution to the general objective of sustainable development; … the maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities'.

24 Article 2(3) of that directive provides:

'Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

25 Article 3(1) of that directive is worded as follows:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas ["SPAs"] classified by the Member States pursuant to [Council] Directive 79/409/EEC [of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1)].'

26 Article 4 of Directive 92/43 states:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural

habitat types in Annex I and which species in Annex II that are native to its territory the sites host. …

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. That information shall include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21.

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance ["SCIs"] drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

…

The list of sites selected as [SCIs], identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a [SCI] has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

27 Under Article 6(2) to (4) of that directive:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

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

site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

28 Article 7 of that directive is worded as follows:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

Directive 79/409

29 Under Article 4(1) and (2) of Directive 79/409:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

…

Member States shall classify in particular the most suitable territories in number and size as [SPAs] for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

30 The dispute in the main proceedings concerns a project for the partial diversion of the upper waters of the river Acheloos to Thessaly ('the project at issue in the main

proceedings'). That major project, intended to serve not only the irrigation needs of the region of Thessaly and electricity production but also the supply of water to towns and cities in that region, has long been the subject of litigation. A number of actions, seeking the annulment of the ministerial decrees approving successive versions of that project, have been brought by environmental organisations, international non-governmental organisations and local authorities concerned.

31 The environmental parameters in respect of certain individual technical works forming part of that project were initially approved by two decisions of 9 October 1991 and 21 April 1992 of the competent ministers. They concerned a tunnel of 18.5 kilometres channelling the waters of the river Acheloos to Thessaly and dams and reservoirs, together with works associated with that project.

32 Both those ministerial decisions were annulled, by judgments No 2759/1994 and No 760/1994 respectively of the Simvoulio tis Epikratias (Council of State), on the ground that they were not based on a comprehensive study of the environmental impact of the project at issue in the main proceedings. That court held that the diversion of a proportion of the waters of the river Acheloos to the plain of Thessaly constituted a technically complex and large-scale project whose overall effect on the environment of the areas concerned was not confined to the sum of the strictly local consequences of each of the works considered in isolation. Consequently, it was not sufficient, in order to measure and assess the consequences of that project, to identify the environmental effects of each of the works taken separately, but it was on the contrary necessary to prepare an overall study in which the various distinct consequences and the subsequent environmental impact of that project would be considered and assessed together, in accordance with an appropriate scientific method.

33 Following those judgments, a single assessment was drawn up which related to all the works to be carried out as part of the project at issue in the main proceedings. Consequently, by joint decision of 15 December 1995, the competent ministers approved the environmental parameters relating to the partial diversion to Thessaly of the upper waters of the river Acheloos and the construction and operation of the works associated with that diversion, which included, inter alia, hydroelectric power stations. Further, by another ministerial decision, the maximum volume of water which could be diverted was reduced from 1 100 million to 600 million cubic metres per annum.

34 A further action for the annulment of those decisions was upheld by judgment No 3478/2000 of the Simvoulio tis Epikratias. The court held that, taking into account the findings and evaluations contained in the environmental impact assessment ('the EIA'), it was apparent that the assessment contained a thorough and informed evaluation which balanced the impact of those works against the needs which they were to meet and, in particular, the maintenance and strengthening of productivity in the plain of Thessaly. However, the court also held that that assessment did not consider any alternative solution capable of avoiding the destruction of most of the important monuments in the region concerned. Consequently, those decisions were annulled in their entirety.

35 After the Simvoulio tis Epikratias delivered that judgment, the Minister of the Environment and Public Works decided to commission a 'supplementary environmental impact assessment on the partial diversion to Thessaly of the waters of the river

Acheloos'. It is apparent from that assessment, produced in 2002, that its aim was, in particular, to explore projects which were full alternatives to that diversion, to present new environmental data which had in the interim become available on the areas affected by the works and to clarify the environmental impact and the remedial measures, taking into account the specific technical studies carried out in those affected areas since completion of the environmental impact assessment produced in 1995. That supplementary assessment was approved by a decision of the Minister of Culture of 13 March 2003.

36 Thereafter, the competent ministers issued their joint decision of 19 March 2003 which approved the environmental parameters applicable to the construction and operation of the works partially to divert the upper waters of the Acheloos to Thessaly.

37 That decision was annulled by judgment No 1688/2005 of the Simvoulio tis Epikratias. In that judgment, the court held that, taking into account the provisions then in force of Law 1739/1987 (FEK A' 201/20.11.1987) and in the light both of Directive 2000/60 and of the principle of sustainable water management, the execution of works exploiting water resources was permitted only if such works were part of a programme of sustainable development of those resources. The work relating to the project at issue in the main proceedings had never been incorporated into such a programme, which, moreover, had never been implemented. As a consequence of that decision to annul, the Simvoulio tis Epikratias also annulled, by judgment No 1186/2006, a decision of 18 March 2005, whereby the Minister of the Environment approved the award of the contract for the 'completion of the Sikia dam'.

38 On 2 August 2006, Law 3481/2006 (FEK A' 162/2.8.2006) was adopted; Articles 9 and 13 thereof, approving the project at issue in the main proceedings, were submitted to the Greek Parliament, in the form of an amendment, on 6 July 2006. Article 9 of that law provided that, until the ratification of the national programme for management and protection of the water resources of the country and the regional management plans, it was possible to approve management plans for the waters of specific river basins and to transfer water to other basins, and that projects relating to such plans had to be approved by legislation where they were large-scale projects or projects of national importance. Under Article 13 of that law, the works associated with the project at issue in the main proceedings were defined as large-scale works and works in the public interest and the management plan for the Acheloos and Pinios river basins was approved, as were the environmental specifications applicable to the construction and operation of the works associated with that project.

39 Article 13(4) of Law 3481/2006 provided that it was possible, in accordance with the management plan and the environmental parameters ratified in Article 13(3), to bring into service or complete construction of the public works and the works of Dimosia Epikhirisi Ilektrismou (DEI (the Public Power Corporation of Greece)) relating to the diversion of the upper waters of the river Acheloos to Thessaly or the production of electrical energy which had been subject to a public procurement procedure and which were constructed or under construction. On the basis of that provision the company awarded the contract was instructed to continue the work which it had suspended following the judgment which annulled the award of the contract.

40 The applicants in the main proceedings seek the annulment of the project at issue in the main proceedings in its entirety. The actions are directed against both Article 13 of Law 3481/2006 and the related administrative measures. The Simvoulio tis Epikratias states that both the measures approving the environmental parameters and the measures pursuant to which the works associated with that project were to be carried out had previously been annulled by judgments of that court delivered prior to the entry into force of Law 3481/2006. In the opinion of the referring court, there is therefore an attempt to adopt those measures anew by means of the abovementioned management plan, which was approved on the basis of Article 9 of that law. The main question at issue in the main proceedings is the compatibility of the provisions of Articles 9 and 13 of that law with European Union law.

41 In those circumstances, the Simvoulio tis Epikratias decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does Article 13(6) of Directive 2000/60/EC … merely set an ultimate temporal limit (22 December 2009) for the drawing up of management plans for water resources or does it lay down, up until that date, a special time-limit for transposition of the relevant provisions of Articles 3, 4, 5, 6, 9, 13 and 15 of that directive?

2. Should the Court of Justice hold that the foregoing provision of that directive merely sets an ultimate temporal limit (22 December 2009) for the drawing up of management plans for water resources:

Is national legislation that permits the transfer of water from a particular river basin to another river basin, without the plans having yet been drawn up for the river basin districts within which the river basins from and towards which water will be transferred are located, consistent with Articles 2, 3, 4, 5, 6, 9, 13 and 15 of Directive 2000/60, given that, under Article 2(15) of that directive, the main unit for management of a river basin is the river basin district to which it belongs?

3. Should the preceding question be answered in the affirmative:

For the purpose of Articles 2, 3, 5, 6, 9, 13 and 15 of Directive 2000/60, is the transfer of water from a river basin district to a neighbouring river basin district permitted? Should the answer be in the affirmative, can the purpose of that transfer be only to meet water-supply needs or can irrigation and power generation also be served? Is it in any event a requirement, for the purpose of those provisions of that directive, that the administrative authorities have decided, stating reasons and on the basis of the necessary scientific study, that the receiving river basin district cannot meet with its own water resources the needs which it has in respect of water supply, irrigation and so forth?

4. Should the Court of Justice hold, as regards Question 1, that Article 13(6) of Directive 2000/60 does not merely set an ultimate temporal limit (22 December 2009) for the drawing up of management plans for water resources, but lays down a special time-limit for transposition of the relevant provisions of Articles 3, 4, 5, 6, 9, 13 and 15 of that directive:

Does national legislation, enacted within that special time-limit for transposition, that permits the transfer of water from a particular river basin to another river basin, without the plans having yet been drawn up for the river basin districts within which the river basins from and towards which water will be transferred are located, place, without more, the practical effect of that directive at risk, or is it necessary, in order to assess whether the practical effect of the directive is placed at risk, to take account of criteria such as the scale of the interventions provided for and the objectives of the transfer of the water?

5. Is a legislative provision which is enacted by a national parliament and which approves river basin management plans without the relevant national rules providing for a public consultation stage in the procedure before the national parliament, and without it being apparent from the case-file that the consultation procedure before the administrative authorities that is provided for in Directive 2000/60 was observed, compatible with Articles 13, 14 and 15 of that directive which concern the procedures for informing and consulting the public and for public participation?

6. For the purpose of … Directive 85/337/EEC …, does an [EIA] which relates to the construction of dams and the transfer of water and which was placed for approval before the national parliament after the annulment by a judicial decision of the measure by which it had previously been approved and in respect of which the publicity procedure had previously been observed, without that procedure being observed anew, meet the requirements of Articles 1, 2, 5, 6, 8 and 9 of that directive regarding informing the public and public participation?

7. Does a project to divert a river fall within the field of application of Directive 2001/42/EC … where that plan:

   (a) concerns the construction of dams and the transfer of water from one river basin district to another (from those of western mainland Greece and Epirus to those of Thessaly),

   (b) falls within the field of application of Directive 2000/60 …,

   (c) concerns works under … Directive 85/337 …,

   (d) may have environmental effects on areas covered by … Directive 92/43/EEC ...?

8. Should the preceding question be answered in the affirmative:

   For the purpose of Article 13(1) of Directive 2001/42, can acts which concerned the project at issue and which have been annulled with retroactive effect by judicial decisions be considered to be formal preparatory acts which were issued before 21 July 2004 so that there is no obligation to prepare a strategic environmental report?

9. Should the preceding question be answered in the negative:

   For the purpose of Article 11(2) of Directive 2001/42, if a plan simultaneously falls within the field of application of that directive and within that of Directives

2000/60 and 85/337 which also require the environmental effects of that scheme to be assessed, are the assessments which have been drawn up on the basis of the provisions of Directives 2000/60 and 85/337 sufficient for observance of the requirements of Directive 2001/42, or will an autonomous strategic environmental report have to be prepared?

10. For the purpose of Articles 3, 4 and 6 of … Directive 92/43 …, were the areas which were included in the national lists of [SCIs] and, ultimately, were included in the Community list of SCIs covered by the protection afforded by Directive 92/43 before the publication of Commission Decision 2006/613/EC of 19 July 2006 adopting [, pursuant to Council Directive 92/43,] the list of sites of Community importance for the Mediterranean biogeographical region [(OJ 2006 L 259, p. 1)]?

11. Is it possible, for the purpose of Articles 3, 4 and 6 of Directive 92/43, for the competent national authorities to grant consent authorising the carrying out of a project for the diversion of waters which is not directly connected with or necessary to the conservation of a district included within a special protection area when all the studies that are contained in the file for that project record a complete lack of information or an absence of reliable and updated data regarding the birds in that district?

12. For the purpose of Articles 3, 4 and 6 of Directive 92/43, can reasons for which a project to divert waters is undertaken that relate principally to irrigation and secondarily to water supply constitute the imperative public interest which that directive requires in order for that scheme to be permitted to be carried out notwithstanding its adverse effects on areas protected by that directive?

13. Should the preceding question be answered in the affirmative:

In determining the sufficiency of the compensatory measures which are necessary to ensure that the overall coherence of the Natura 2000 network, where that is harmed by a project to divert waters, is protected, for the purpose of Articles 3, 4 and 6 of Directive 92/43 should criteria such as the scale of that diversion and the extent of the works which the diversion entails be taken into account?

14. For the purpose of Articles 3, 4 and 6 of Directive 92/43, interpreted in the light of the principle of sustainable development as enshrined in Article 6 of the EC Treaty, may the competent national authorities grant consent for the carrying out of a project to divert waters within a Natura 2000 area that is not directly connected with or necessary to the preservation of the coherence of that area, when it is apparent from the [EIA] for that project that the project will result in the conversion of a natural fluvial ecosystem into a man-made fluvial and lacustrine ecosystem?'

Consideration of the questions referred for a preliminary ruling

The first question

42 By its first question, the referring court seeks, in essence, to ascertain whether Article 13(6) of Directive 2000/60 fixes solely a time-limit for the production of river basin management plans or whether it also establishes a special transposition time-limit in respect of certain provisions of Articles 3 to 6, 9, 13 and 15 of that directive.

43 Under the first subparagraph of Article 24(1) of Directive 2000/60, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with that directive at the latest by 22 December 2003.

44 The fact that Article 13(6) of Directive 2000/60 states that river basin management plans must be published at the latest nine years after the date of entry into force of that directive, in other words by 22 December 2009, cannot call into question the time-limit laid down for the transposition of that directive in Article 24(1) thereof.

45 Article 13(6) of Directive 2000/60 does not concern the time-limit for the transposition of the directive, but merely fixes a final date for the implementation of one of the measures which the Member States must take pursuant to that directive after its transposition.

46 The Court has indeed already ruled that, by excluding from national legislation in force in September 2004 the definitions of the terms in Article 2 of Directive 2000/60 and the timescales within which the standards of water quality are to be met, as set out in Articles 4 to 6 and 8 of that directive, the obligations under Article 2, read in conjunction with those latter provisions, were not implemented with the binding force required (see, to that effect, Case C-32/05 *Commission* v *Luxembourg* [2006] ECR I-11323, paragraphs 16, 17 and 65).

47 In the light of the foregoing, the answer to the first question is that Articles 13(6) and 24(1) of Directive 2000/60 must be interpreted as respectively fixing 22 December 2009 as the date of expiry of the period allowed to Member States for the publication of river basin management plans and 22 December 2003 as the date of expiry of the maximum period available to the Member States for the transposition of that directive, in particular Articles 3 to 6, 9, 13 and 15 thereof.

The second, third and fourth questions

48 By its second, third and fourth questions, which should be examined together, the referring court seeks first to ascertain whether Directive 2000/60 must be interpreted as precluding a provision of national law whereby consent is given, prior to 22 December 2009, to a transfer of water from one river basin to another or from one river basin district to another where the river basin management plans concerned were not yet adopted by the competent national authorities. If the answer is in the negative, the referring court then asks whether such a transfer can take place solely to meet the objective of supplying drinking water or also for purposes of irrigation and energy production. Lastly, the referring court asks whether the compatibility of such a transfer with that directive is dependent on whether it is impossible for the receiving river basin or river basin district to meet from its own water resources its needs in respect of the supply of drinking water, electricity production or irrigation.

49 It must first be recalled that the project at issue in the main proceedings, in so far as it concerns the transfer of water from one river basin to another or from one river basin district to another, is liable, as observed by the Advocate General in points 66 and 67 of her Opinion, to be incompatible with the environmental objectives stated in Article 4(1) of Directive 2000/60.

50 It must next be recalled that the project at issue in the main proceedings was adopted by the Greek legislature on 2 August 2006.

51 As regards whether the Member State concerned was already bound to comply with the environmental objectives stated in Article 4(1) of Directive 2000/60 at the time when that project was adopted, it must be observed that Article 4(1) provides that, in respect of surface waters and groundwater, Member States are to adopt appropriate measures of conservation in making operational the programmes of measures specified in river basin management plans.

52 Article 4(1) of Directive 2000/60 thereby establishes a link between the appropriate measures of conservation which the Member States are bound to adopt under that provision and the prior existence of a management plan for the river basin district concerned.

53 Consequently, Directive 2000/60 does not prohibit a priori the transfer of water from one river basin to another or from one river basin district to another before the publication of management plans for the river basin districts concerned, that publication being however required, in accordance with Article 13(6) of that directive, by no later than 22 December 2009.

54 It is common ground that, at the time when the project at issue in the main proceedings was adopted, the river basin management plans for the river basins affected by that project did not exist (see judgment of 19 April 2012 in Case C-297/11 *Commission* v *Greece*, paragraph 17).

55 Thus, on the date when the project at issue in the main proceedings was adopted, the Hellenic Republic was not obliged to have produced the management plans for the river basin districts affected by that project. Even though the time-limit for the transposition of Directive 2000/60, as fixed in the first subparagraph of Article 24(1) thereof, had expired, the time-limit laid down in Article 13(6) of the directive for the publication of river basin management plans had not yet been reached.

56 Consequently, the project at issue in the main proceedings, as adopted by the Greek legislature on 2 August 2006, without prior production of river basin management plans for the river basins affected by that project, was not subject to Article 4 of Directive 2000/60.

57 However, it must be recalled that, in accordance with the Court's settled case-law, during the period prescribed for transposition of a directive, the Member States to which it is addressed must refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by that directive. Such an obligation to refrain owed by all the national authorities must be understood as referring to the adoption of any measure, general or specific, liable to produce such a compromising effect (see Case

C-129/96 *Inter-Environment Wallonie* [1997] ECR I-7411, paragraph 45, and Joined Cases C-165/09 to C-167/09 *Stichting Natuur en Milieu and Others* [2011] ECR I-0000, paragraph 78 and the case-law cited).

58 That obligation to refrain from taking measures is also owed by the Member States, by virtue of the application of the second paragraph of Article 10 EC in conjunction with the third paragraph of Article 249 EC, during a transitional period in which they are authorised to continue to apply their national systems, even though those systems do not comply with the directive in question (see, to that effect, *Stichting Natuur en Milieu and Others*, paragraph 79 and the case-law cited).

59 The same holds true where a directive such as Directive 2000/60 establishes a transitional period within which the Member States are not required to adopt all the measures prescribed by the directive.

60 Accordingly, even before 22 December 2009, the date on which the period imposed on the Member States, under Article 13(6) of Directive 2000/60, for the publication of river basin management plans expired, the Member States had to refrain from taking any measures liable seriously to compromise the attainment of the result prescribed by Article 4 of that directive.

61 In particular, as regards the environmental objectives set by Article 4 of Directive 2000/60, it should be noted that, under Article 4(1)(a)(ii), Member States are to 'protect, enhance and restore all bodies of surface water, … with the aim of achieving good surface water status at the latest 15 years after the date of entry into force of this Directive, in accordance with the provisions laid down in Annex V, subject to the application of extensions determined in accordance with paragraph 4 and to the application of paragraphs 5, 6 and 7 without prejudice to paragraph 8'.

62 The realisation of such an objective cannot, subject to certain qualifications, be jeopardised by a national measure, even where that measure was adopted before 22 December 2009.

63 In the absence, in the documents submitted to the Court, of any factor indicative of the situations provided for in Article 4(4) to (6) of Directive 2000/60, it must be observed that, under Article 4(7):

'Member States will not be in breach of this Directive when:

– failure to achieve good groundwater status, good ecological status … or to prevent deterioration in the status of a body of surface water or groundwater is the result of new modifications to the physical characteristics of a surface water body or alterations to the level of bodies of groundwater, or

– failure to prevent deterioration from high status to good status of a body of surface water is the result of new sustainable human development activities

and all the following conditions are met:

(a) all practicable steps are taken to mitigate the adverse impact on the status of the body of water;

(b) the reasons for those modifications or alterations are specifically set out and explained in the river basin management plan required under Article 13 and the objectives are reviewed every six years;

(c) the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society of achieving the objectives set out in paragraph 1 are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development, and

(d) the beneficial objectives served by those modifications or alterations of the water body cannot for reasons of technical feasibility or disproportionate cost be achieved by other means which are a significantly better environmental option.'

64 While it is true that, as stated in paragraph 56 of this judgment, Article 4(7) is not applicable, as such, to a works project adopted on 2 August 2006, without prior production of river basin management plans for the river basins affected by that project, the conditions governing the project cannot be more rigorous than those pertaining if it had been adopted subsequent to Article 4 of Directive 2000/60 having become applicable to it.

65 In the case of such a project, the criteria and conditions laid down in Article 4(7) of Directive 2000/60 may, in essence, be applied by analogy and, where necessary, *mutatis mutandis*, as setting the upper limit for restrictions on the project.

66 As stated in recital 15 of the preamble to that directive, the supply of water is a service of general interest. As regards the production of electricity and irrigation, it is clear from Article 4(3)(a)(iii) of the directive that they also in principle serve a general interest.

67 Consequently, consent was capable of being given to a project such as that at issue in the main proceedings, which is not subject to Article 4 of Directive 2000/60 and which would have been liable to have adverse effects on water of the kind stated in Article 4(7), at the very least if:

– all practicable steps were taken to mitigate the adverse impact of the project on the status of the body of water;

– the reasons why that project had to be carried out were specifically set out and explained;

– that project served a general interest which might consist in, inter alia, the supply of water, electricity production or irrigation, and/or the benefits to the environment and society linked to the achievement of the objectives set out in Article 4(1) were outweighed by the benefits to human health, to the maintenance of human safety or to sustainable development resulting from that project, and

– lastly, the beneficial objectives pursued by that project could not for reasons of technical feasibility or disproportionate cost be achieved by other means which would have been a significantly better environmental option.

68 While the fact that it is impossible for a river basin or river basin district to meet from its own water resources its needs in terms of drinking water, electricity production or irrigation may indeed be capable of justifying, in the light of Directive 2000/60, a transfer of water such as that in the project at issue in the main proceedings, it is not the case that such a transfer can be justified only by reason of such an impossibility. It cannot be ruled out that, even where there is no such impossibility, the transfer of water may be regarded as satisfying the conditions mentioned in the preceding paragraph and, in particular, (i) the condition that it serves a general interest and/or the benefits to the environment and society linked to the achievement of the objectives set out in Article 4(1) of that directive are outweighed by the benefits to human health, to the maintenance of human safety or to sustainable development resulting from the transfer of water and (ii) the condition that the beneficial objectives pursued by that transfer cannot, for reasons of technical feasibility or disproportionate cost, be achieved by other means which would be a significantly better environmental option.

69 In the light of the foregoing, the answer to the second, third and fourth questions is that Directive 2000/60 must be interpreted as meaning that:

– it does not preclude, in principle, a provision of national law whereby consent is given, prior to 22 December 2009, to a transfer of water from one river basin to another or from one river basin district to another where the management plans for the river basin districts concerned were not yet adopted by the competent national authorities;

– such a transfer must not be such as seriously to jeopardise the realisation of the objectives laid down by that directive;

– however, to the extent that that transfer is liable to have adverse effects on water of the kind stated in Article 4(7) of that directive, consent may be given to it, at the very least if the conditions set out in Article 4(7)(a) to (d) are satisfied, and

– the fact that it is impossible for the receiving river basin or river basin district to meet from its own water resources its needs in terms of drinking water, electricity production or irrigation is not a *sine qua non* for such a transfer of water to be compatible with that directive provided that the conditions listed above are satisfied.

The fifth question

70 By its fifth question, the referring court asks whether Articles 13 to 15 of Directive 2000/60 must be interpreted as precluding the approval by a national parliament of management plans for river basins, such as the plans at issue in the main proceedings, where no procedure for public information, consultation or participation has been implemented.

71 Since Articles 13 and 15 of Directive 2000/60 do not lay down any obligation relating to public information, consultation or participation when river basin management plans are produced, this question must be examined solely in the light of Article 14 of that directive, which does lay down such obligations.

72 In that regard, it must be recalled that Article 14(1) of Directive 2000/60 provides that 'Member States shall encourage the active involvement of all interested parties in the implementation of this Directive, in particular in the production, review and updating of the river basin management plans. Member States shall ensure that, for each river basin district, they publish and make available for comments to the public, including users … draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers'.

73 Further, the Court declared in Case C-297/11 *Commission* v *Greece*, paragraph 17, that the Hellenic Republic, by not having produced, by 22 December 2009, river basin management plans, both for those river basin districts falling wholly within its territory and for international river basin districts, had failed to fulfil its obligations under Article 13(1) to (3) and (6) and Article 15(1) of Directive 2000/60. In the course of those infringement proceedings, the Hellenic Republic did not maintain that it had, by that date, produced a river basin management plan within the meaning of Directive 2000/60. In particular, it made no mention of the law at issue in the main proceedings.

74 Accordingly, the management plans for river basins, such as the plans at issue in the main proceedings, adopted on 2 August 2006, cannot be regarded as management plans falling within Articles 13 to 15 of Directive 2000/60. The obligation stemming from Article 14(1) of that directive therefore does not apply to such plans.

75 Consequently, the answer to the fifth question is that the fact that a national parliament approves management plans for river basins, such as the plans at issue in the main proceedings, where no procedure for public information, consultation or participation has been implemented does not fall within the scope of Article 14 of Directive 2000/60, and in particular the scope of Article 14(1) thereof.

The sixth question

76 By its sixth question, the referring court asks, in essence, whether Directive 85/337 must be interpreted as precluding legislation such as Law 3481/2006, adopted by the Greek Parliament on 2 August 2006, which approves a project for the partial diversion of the waters of a river such as that at issue in the main proceedings on the basis of an EIA for that project which had served as the basis of an administrative decision adopted at the conclusion of a procedure which complied with the obligations in terms of public information and participation laid down by that directive, even though that decision was annulled by a court order.

77 Article 1(5) of Directive 85/337 provides that that directive 'shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process'.

78 It follows from that provision that, where the objectives of Directive 85/337, including that of supplying information, are achieved through a legislative process, that directive does not apply to the project in question (see Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 51; Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others* [2011] ECR I-0000, paragraph 36; and Case C-182/10 *Solvay and Others* [2012] ECR I-0000, paragraph 30).

79 That provision lays down two conditions for the exclusion of a project from the scope of Directive 85/337. The first requires the details of the project to be adopted by a specific legislative act. Under the second, the objectives of the directive, including that of supplying information, must be achieved through the legislative process (see Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 57; *Boxus and Others*, paragraph 37; and *Solvay and Others*, paragraph 31).

80 The first condition entails, first of all, adoption of the project by a specific legislative act. It should be pointed out in this regard that the terms 'project' and 'development consent' are defined in Article 1(2) of Directive 85/337. Thus, a legislative act adopting a project must, if it is to come within the scope of Article 1(5) of the directive, be specific and display the same characteristics as a development consent of that kind. It must in particular grant the developer the right to carry out the project (see *WWF and Others*, paragraph 58; *Boxus and Others*, paragraph 38; and *Solvay and Others*, paragraph 32).

81 The project must also be adopted in detail, that is to say, in a sufficiently precise and definitive manner, so that the legislative act adopting the project must include, like a development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment (see *WWF and Others*, paragraph 59; *Boxus and Others*, paragraph 39; and *Solvay and Others*, paragraph 33). The legislative act must therefore demonstrate that the objectives of Directive 85/337 have been achieved as regards the project in question (see *Linster*, paragraph 56; *Boxus and Others*, paragraph 39; and *Solvay and Others*, paragraph 33).

82 It follows that the details of a project cannot be considered to be adopted by a legislative act, for the purposes of Article 1(5) of Directive 85/337, if that act does not include the elements necessary to assess the environmental impact of the project or if the adoption of other measures is needed in order for the developer to be entitled to proceed with the project (see *WWF and Others*, paragraph 62; *Linster*, paragraph 57; *Boxus and Others*, paragraph 40; and *Solvay and Others*, paragraph 34).

83 As regards the second condition, it is clear from Article 2(1) of Directive 85/337 that the fundamental objective of the directive is to ensure that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their environmental effects before consent is given (see *Linster*, paragraph 52; *Boxus and Others*, paragraph 41; and *Solvay and Others*, paragraph 35).

84 In addition, the sixth recital in the preamble to Directive 85/337 states that the assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question (see *WWF and Others*, paragraph 61; *Linster*, paragraph 53; *Boxus and Others*, paragraph 42; and *Solvay and Others*, paragraph 36).

85 Consequently, the national legislature must have sufficient information at its disposal at the time when the project is adopted. In accordance with Article 5(3) of Directive 85/337 and Annex IV thereto, the minimum information to be supplied by the developer is to include a description of the project comprising information on the site, design and

size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, and the data required to identify and assess the main effects which the project is likely to have on the environment (see *Boxus and Others*, paragraph 43, and *Solvay and Others*, paragraph 37).

86 There is however nothing to prevent the national legislature, when adopting a project, from using information gathered as part of an earlier administrative procedure and the EIA produced in that connection, provided that the EIA is based on information and knowledge that are not out of date. The EIA, which must be carried out before the decision-making process, involves an examination of the substance of the information gathered as well as a consideration of the expediency of supplementing it, if appropriate, with additional data (see Case C-50/09 *Commission* v *Ireland* [2011] ECR I-0000, paragraph 40).

87 In that regard, the fact that the EIA was produced as part of an administrative procedure which led to the adoption of a decision which was ultimately annulled by court order is, as such, of no relevance.

88 However, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest, without the prior initiation of a substantive legislative process enabling the conditions stated in paragraph 79 of this judgment to be fulfilled, cannot be regarded as a specific legislative act within the meaning of Article 1(5) of Directive 85/337 and is not therefore sufficient to exclude a project from the scope of that directive (see *Boxus and Others*, paragraph 45, and *Solvay and Others*, paragraph 39).

89 In particular, a legislative act adopted without the members of the legislative body having had available to them the information mentioned in paragraph 85 of this judgment cannot fall within the scope of Article 1(5) of Directive 85/337 (see *Boxus and Others*, paragraph 46, and *Solvay and Others*, paragraph 40).

90 It is for the national court to determine whether those conditions have been satisfied. For that purpose, it must take account of both the content of the legislative act adopted and the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates (see *Boxus and Others*, paragraph 47, and *Solvay and Others*, paragraph 41).

91 The answer to the sixth question therefore is that Directive 85/337, and in particular Article 1(5) thereof, must be interpreted as not precluding legislation such as Law 3481/2006, adopted by the Greek Parliament on 2 August 2006, which approves a project for the partial diversion of the waters of a river such as that at issue in the main proceedings on the basis of an EIA for that project which had served as the basis for an administrative decision adopted on the conclusion of a procedure which complied with the obligations in terms of public information and participation laid down by that directive, even where that decision was annulled by court order, provided that that legislation constitutes a specific legislative act, so that the objectives of that directive can be achieved through the legislative process. It is for the national court to determine whether those two conditions have been complied with.

The seventh question

92 By its seventh question, the referring court seeks, in essence, to ascertain whether a project for the partial diversion of the waters of a river, such as that at issue in the main proceedings, must be regarded as a plan or programme falling within the scope of Directive 2001/42.

93 In that regard, it must be observed that, in order to establish whether a project falls within the scope of Directive 2001/42, it is necessary to consider whether that project is a plan or a programme within the meaning of Article 2(a) of that directive.

94 Under the second indent of Article 2(a) of Directive 2001/42, only plans and programmes required by legislative, regulatory or administrative provisions are to be regarded as 'plans and programmes' within the meaning of that directive.

95 It is not evident that the project concerned constitutes a measure which defines criteria and detailed rules for the development of land and which subjects implementation of one or more projects to rules and procedures for scrutiny (see, to that effect, Case C-567/10 *Inter-Environment Bruxelles and Others* [2012] ECR I-0000, paragraph 30).

96 Consequently, the answer to the seventh question is that a project for the partial diversion of the waters of a river, such as that at issue in the main proceedings, is not to be regarded as a plan or programme falling within the scope of Directive 2001/42.

The eighth and ninth questions

97 Having regard to the answer given to the seventh question, there is no need to answer the eighth and ninth questions of the referring court.

The tenth question

98 By its tenth question, the referring court asks whether the areas which were listed in the national list of SCIs transmitted to the Commission pursuant to the second subparagraph of Article 4(1) of Directive 92/43 and were then included in the list of SCIs adopted by Decision 2006/613 were entitled to the protection of that directive before that decision was published.

99 Decision 2006/613, whereby the Commission adopted the list of SCIs for the Mediterranean biogeographical region, took effect, pursuant to Article 254(3) EC, upon its notification to the Member States.

100 As the Commission has stated, without being contradicted, that decision was in fact notified to the Hellenic Republic on 19 July 2006, in other words prior to the adoption, on 2 August 2006, of Law 3481/2006 approving the project for the partial diversion of the waters of the river Acheloos.

101 Under Article 4(5) of Directive 92/43, the protective measures prescribed in Article 6(2) to (4) of that directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) thereof, are on the list of sites selected as SCIs which has been adopted by the Commission in accordance with the procedure laid down in Article 21 of that directive (see Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 25).

102 It follows that, after notification of Decision 2006/613 to the Member State concerned, it was obliged to take the protective measures laid down in Article 6(2) to (4) of Directive 92/43.

103 That conclusion cannot be called into question by the fact that, following the annulment, in 2005, of the administrative decisions giving consent to the project at issue in the main proceedings, the legislative provisions contained in Law 3481/2006 giving consent to that project were submitted to the Greek Parliament in the form of an amendment on 6 July 2006, while Decision 2006/613 was notified to the Hellenic Republic on 19 July of that year. In such circumstances, the application of Article 6(2) to (4) of Directive 92/43 relates, in any event, to a situation which cannot be regarded as already established.

104 That said, it must, in any event, be recalled that, even before the entry into force of Decision 2006/613, the Member States are to protect sites as soon as they propose them, under Article 4(1) of Directive 94/43, as sites eligible for identification as SCIs on the national list transmitted to the Commission (see, to that effect, *Dragaggi and Others*, paragraph 26). The Member States are required, under that directive, to take protective measures that are appropriate, having regard to the directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level (see *Dragaggi and Others*, paragraph 30) and cannot therefore consent to interventions which may create the risk of seriously compromising the ecological characteristics of those sites, for example interventions which create the risk of significantly reducing the surface area of a site, of leading to the disappearance of priority species present on that site, or, finally, of having as an outcome the destruction of the site or the eradication of its representative characteristics (see Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, paragraph 46, and Case C-340/10 *Commission* v *Cyprus* [2012] ECR I-0000, paragraph 44).

105 In the light of the foregoing, the answer to the tenth question is that the areas which were listed in the national list of SCIs transmitted to the Commission pursuant to the second subparagraph of Article 4(1) of Directive 92/43 and were then included in the list of SCIs adopted by Decision 2006/613 were entitled, after notification of Decision 2006/613 to the Member State concerned, to the protection of that directive before that decision was published. In particular, after that notification, the Member State concerned also had to take the protective measures laid down in Article 6(2) to (4) of the directive.

The eleventh question

106 By its eleventh question, the referring court seeks, in essence, to ascertain whether Directive 92/43 must be interpreted as precluding consent being given to a project for the diversion of water not directly connected with or necessary to the conservation of a SPA, but likely to have a significant effect on that SPA, in the absence of information or of reliable and updated data concerning the birds in that area.

107 According to the Court's settled case-law, under Article 4(1) and (2) of Directive 79/409 the Member States are required to classify as SPAs the territories meeting the ornithological criteria specified by those provisions (see, inter alia, Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 36).

108 It follows from Article 7 of Directive 92/43 that Article 6(2) to (4) of that directive replaces the first sentence of Article 4(4) of Directive 79/409 as from the date of implementation of Directive 92/43 or the date of classification by a Member State under Directive 79/409, where the latter date is later (see, in particular, Case C-418/04 *Commission* v *Ireland*, paragraph 173, and Case C-404/09 *Commission* v *Spain* [2011] ECR I-0000, paragraph 97).

109 It is clear from the order for reference and from the oral submissions of the Commission that the SPAs affected by the project at issue in the main proceedings had already been classified prior to the adoption of Law 3481/2006. Consequently, the obligations stemming from Article 6(2) to (4) of Directive 92/43 were applicable to those SPAs at the date when that project was approved.

110 In that regard, it must be recalled that Article 6(3) of Directive 92/43 provides for an assessment procedure intended to ensure, by means of a prior examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (see Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 34, and Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, paragraph 56).

111 With regard to the concept of 'appropriate assessment' within the meaning of Article 6(3) of Directive 92/43, it should be noted that the directive does not define any particular method for the carrying out of such an assessment (*Commission* v *Italy*, paragraph 57).

112 The Court has, however, held that that assessment must be organised in such a manner that the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse development consent (see *Commission* v *Italy*, paragraph 58).

113 With regard to the factors on the basis of which the competent authorities may gain the necessary level of certainty, the Court has stated that it must be ensured that no reasonable scientific doubt remains, and those authorities must rely on the best scientific knowledge in the field (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 59 and 61, and *Commission* v *Italy*, paragraph 59).

114 Furthermore, knowledge of the effects of a plan or a project in the light of the conservation objectives relating to a given site is an essential prerequisite for the application of Article 6(4) of Directive 92/43, since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (see, to that effect, *Commission* v *Italy*, paragraph 83, and *Solvay and Others*, paragraph 74).

115 In the light of the foregoing, it cannot be held that an assessment is appropriate where information and reliable and updated data concerning the birds in that SPA are lacking.

116 That said, where the development consent given to a project is annulled or revoked because that assessment was not appropriate, it cannot be ruled out that the competent national authorities may gather *a posteriori* reliable and updated data on the birds in the SPA concerned and that they may appraise, on the basis of that data and an assessment thereby supplemented, whether the project for the diversion of water adversely affects the integrity of that SPA and, where necessary, what compensatory measures must be taken to ensure that the execution of the project will not jeopardise protection of the overall coherence of Natura 2000.

117 Consequently, the answer to the eleventh question is that Directive 92/43, and in particular Article 6(3) and (4) thereof, must be interpreted as precluding development consent being given to a project for the diversion of water which is not directly connected with or necessary to the conservation of a SPA, but likely to have a significant effect on that SPA, in the absence of information or of reliable and updated data concerning the birds in that area.

The twelfth question

118 By its twelfth question, the referring court seeks, in essence, to ascertain whether Directive 92/43 must be interpreted as meaning that grounds linked, on the one hand, to irrigation and, on the other, to the supply of drinking water, relied on in support of a project for the diversion of water, may constitute imperative reasons of overriding public interest capable of justifying the implementation of a project which adversely affects the integrity of the sites concerned.

119 Article 6(4) of Directive 92/43 provides that if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) thereof, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see *Commission* v *Italy*, paragraph 81, and *Solvay and Others*, paragraph 72).

120 As is clear from paragraphs 100, 101, 107 and 108 of this judgment, such a provision applies both to SPAs and to SCIs in the list adopted by the Commission in accordance with the third subparagraph of Article 4(2) of Directive 92/43.

121 An interest capable of justifying, for the purposes of Article 6(4) of Directive 92/43, the implementation of a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed against that directive's objective of the conservation of natural habitats and wild fauna, including birds, and flora (see, to that effect, *Solvay and Others*, paragraph 75).

122 Irrigation and the supply of drinking water meet, in principle, those conditions and are therefore capable of justifying the implementation of a project for the diversion of water in the absence of alternative solutions.

123 However, where the SCI concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised, under the second subparagraph of Article 6(4) of Directive 92/43, are those relating to human health or

public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

124 Since the Commission has not, in the present case, been asked to give an opinion, the Court must examine whether irrigation and the supply of drinking water may fall within the considerations stated in the preceding paragraph.

125 As regards irrigation, it is evident that it cannot in principle qualify as a consideration relating to human health or public safety. On the other hand, it appears more plausible that irrigation may, in some circumstances, have beneficial consequences of primary importance for the environment.

126 In contrast, the supply of drinking water is, in principle, to be included within considerations relating to human health.

127 In any event, it is for the referring court to assess whether the project at issue in the main proceedings does in fact adversely affect the integrity of one or more SCIs hosting a priority natural habitat type and/or a priority species.

128 In the light of the foregoing, the answer to the twelfth question is that Directive 92/43, and in particular Article 6(4) thereof, must be interpreted as meaning that grounds linked, on the one hand, to irrigation and, on the other, to the supply of drinking water, relied on in support of a project for the diversion of water, may constitute imperative reasons of overriding public interest capable of justifying the implementation of a project which adversely affects the integrity of the sites concerned. Where such a project adversely affects the integrity of a SCI hosting a priority natural habitat type and/or a priority species, its implementation may, in principle, be justified by grounds linked with the supply of drinking water. In some circumstances, it might be justified by reference to beneficial consequences of primary importance which irrigation has for the environment. On the other hand, irrigation cannot, in principle, qualify as a consideration relating to human health or public safety, justifying the implementation of a project such as that at issue in the main proceedings.

The thirteenth question

129 By its thirteenth question, the referring court seeks, in essence to ascertain whether, under Directive 92/43, for the purposes of determining the adequacy of compensatory measures account should be taken of the extent of the diversion of water and the scale of the works involved in that diversion.

130 The first sentence of the first subparagraph of Article 6(4) of Directive 92/43 provides that if, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

131 As stated in paragraph 114 of this judgment, in order to determine the nature of any compensatory measures, the adverse impact of the project on the site concerned must be precisely identified.

132 The extent of the diversion of water and the scale of the works involved in that diversion are factors which must necessarily be taken into account in order to identify with precision the adverse impact of the project on the site concerned and, therefore, to determine the nature of the necessary compensatory measures in order to ensure the protection of the overall coherence of Natura 2000.

133 Consequently, the answer to the thirteenth question is that, under Directive 92/43, and in particular the first sentence of the first subparagraph of Article 6(4) thereof, for the purposes of determining the adequacy of compensatory measures account should be taken of the extent of the diversion of water and the scale of the work involved in that diversion.

The fourteenth question

134 By its fourteenth question, the referring court seeks, in essence to ascertain whether Directive 92/43, interpreted in the light of the objective of sustainable development, as enshrined in Article 6 EC, permits, in relation to sites which are part of the Natura 2000 network, the conversion of a natural fluvial ecosystem into a largely man-made fluvial and lacustrine ecosystem.

135 Even if the conversion of a natural fluvial ecosystem into a largely man-made fluvial and lacustrine ecosystem were to have a negative impact on the integrity of sites which are part of the Natura 2000 network, it does not necessarily follow that consent may not be given to the project which causes that conversion.

136 As stated in paragraph 119 of this judgment, under Article 6(4) of Directive 92/43, which concerns sites which are part of the Natura 2000 network, consent might be given to that project provided that the conditions referred to in that provision are satisfied.

137 According to the third recital in the preamble to Directive 92/43, as the main aim of that directive is to promote the maintenance of biodiversity, taking account of economic, social, cultural and regional requirements, the directive makes a contribution to the general objective of sustainable development. The maintenance of such biodiversity may in certain cases require the maintenance, or indeed the encouragement, of human activities.

138 Accordingly, the first subparagraph of Article 6(4) of Directive 92/43, and in particular the condition that the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected, must be applied in the light of the objective of sustainable development as referred to in the third recital in the preamble to that directive and enshrined in Article 6 EC.

139 Consequently, the answer to the fourteenth question is that Directive 92/43, and in particular the first subparagraph of Article 6(4) thereof, interpreted in the light of the objective of sustainable development, as enshrined in Article 6 EC, permits, in relation to sites which are part of the Natura 2000 network, the conversion of a natural fluvial

ecosystem into a largely man-made fluvial and lacustrine ecosystem provided that the conditions referred to in that provision of the directive are satisfied.

Costs

140 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Articles 13(6) and 24(1) of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy must be interpreted as respectively fixing 22 December 2009 as the date of expiry of the period allowed to Member States for the publication of river basin management plans and 22 December 2003 as the date of expiry of the maximum period available to the Member States for the transposition of that directive, in particular Articles 3 to 6, 9, 13 and 15 thereof.

2. Directive 2000/60 must be interpreted as meaning that:

– it does not preclude, in principle, a provision of national law whereby consent is given, prior to 22 December 2009, to a transfer of water from one river basin to another or from one river basin district to another where the managements plans for the river basin districts concerned were not yet adopted by the competent national authorities;

– such a transfer must not be such as seriously to jeopardise the realisation of the objectives laid down by that directive;

– however, to the extent that that transfer is liable to have adverse effects on water of the kind stated in Article 4(7) of that directive, consent may be given to it, at the very least if the conditions set out in Article 4(7)(a) to (d) are satisfied, and

– the fact that it is impossible for the receiving river basin or river basin district to meet from its own water resources its needs in terms of drinking water, electricity production or irrigation is not a *sine qua non* for such a transfer of water to be compatible with that directive provided that the conditions listed above are satisfied.

3. The fact that a national parliament approves management plans for river basins, such as the plans at issue in the main proceedings, where no procedure for public information, consultation or participation has been implemented does not fall within the scope of Article 14 of Directive 2000/60, and in particular the scope of Article 14(1) thereof.

4. **Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, and in particular Article 1(5) thereof, must be interpreted as not precluding legislation such as Law 3481/2006, adopted by the Greek Parliament on 2 August 2006, which approves a project for the partial diversion of the waters of a river such as that at issue in the main proceedings on the basis of an environmental impact assessment for that project which had served as the basis for an administrative decision adopted on the conclusion of a procedure which complied with the obligations in terms of public information and participation laid down by that directive, even where that decision was annulled by court order, provided that that legislation constitutes a specific legislative act, so that the objectives of that directive can be achieved through the legislative process. It is for the national court to determine whether those two conditions have been complied with.**

5. **A project for the partial diversion of the waters of a river, such as that at issue in the main proceedings, is not to be regarded as a plan or programme falling within the scope of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment.**

6. **The areas which were listed in the national list of sites of Community importance transmitted to the European Commission pursuant to the second subparagraph of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora and were then included in the list of SCIs adopted by Commission Decision 2006/613/EC of 19 July 2006 adopting, pursuant to Council Directive 92/43/EEC, the list of sites of Community importance for the Mediterranean biogeographical region were entitled, after notification of Decision 2006/613 to the Member State concerned, to the protection of that directive before that decision was published. In particular, after that notification, the Member State concerned also had to take the protective measures laid down in Article 6(2) to (4) of the directive.**

7. **Directive 92/43, and in particular Article 6(3) and (4) thereof, must be interpreted as precluding development consent being given to a project for the diversion of water which is not directly connected with or necessary to the conservation of a special protection area, but likely to have a significant effect on that special protection area, in the absence of information or of reliable and updated data concerning the birds in that area.**

8. **Directive 92/43, and in particular Article 6(4) thereof, must be interpreted as meaning that grounds linked, on the one hand, to irrigation and, on the other, to the supply of drinking water, relied on in support of a project for the diversion of water, may constitute imperative reasons of overriding public interest capable of justifying the implementation of a project which adversely affects the integrity of the sites concerned. Where such a project adversely affects the integrity of a site of Community importance hosting a priority natural habitat type and/or a priority species, its implementation**

may, in principle, be justified by grounds linked with the supply of drinking water. In some circumstances, it might be justified by reference to beneficial consequences of primary importance which irrigation has for the environment. On the other hand, irrigation cannot, in principle, qualify as a consideration relating to human health and public safety, justifying the implementation of a project such as that at issue in the main proceedings.

9. **Under Directive 92/43, and in particular the first sentence of the first subparagraph of Article 6(4) thereof, for the purposes of determining the adequacy of compensatory measures account should be taken of the extent of the diversion of water and the scale of the works involved in that diversion.**

10. **Directive 92/43, and in particular the first subparagraph of Article 6(4) thereof, interpreted in the light of the objective of sustainable development, as enshrined in Article 6 EC, permits, in relation to sites which are part of the Natura 2000 network, the conversion of a natural fluvial ecosystem into a largely man-made fluvial and lacustrine ecosystem provided that the conditions referred to in that provision of the directive are satisfied.**

[Signatures]

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* Language of the case: Greek.

JUDGMENT OF THE COURT (Fourth Chamber)

15 March 2012 (*)

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Articles 4(1) and 12(1) – Failure to include Paralimni Lake as a site of Community importance within the time-limit laid down – System of protection for the species Natrix natrix cypriaca (Cypriot grass snake))

In Case C-340/10,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 7 July 2010,

European Commission, represented by G. Zavvos and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Cyprus, represented by K. Lykourgos and M. Chatzigeorgiou, acting as Agents,

defendant,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal, K. Schiemann, L. Bay Larsen (Rapporteur) and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare that,

– by not having included the site of Paralimni Lake in the national list of proposed sites of Community importance ('SCIs'),

– by tolerating activities which seriously compromise the ecological characteristics of Paralimni Lake and by not having taken the protective measures necessary to maintain the

population of Natrix natrix cypriaca (Cypriot grass snake), the species which constitutes the ecological interest of the lake and Xyliatos Dam, and

– by not having taken the requisite measures to establish and apply a system of strict protection for that species,

the Republic of Cyprus has failed to fulfil its obligations under Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368, 'the Habitats Directive'), under the Habitats Directive as interpreted by the judgments in Case C-117/03 *Dragaggi and Others* [2005] ECR I-167 and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, and under Article 12(1) of that directive respectively.

Legal context

2 Under the first subparagraph of Article 3(1) of the Habitats Directive, '[a] coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.

3 Article 4(1) and (2) of the Habitats Directive provides:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. …

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. …

2. On the basis of the criteria set out in Annex III (Stage 2) … , the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

…

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.'

4 Article 5 of that directive provides:

'1. In exceptional cases where the Commission finds that a national list as referred to in Article 4(1) fails to mention a site hosting a priority natural habitat type or priority species

which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

2. If, on expiry of a consultation period not exceeding six months, the dispute remains unresolved, the Commission shall forward to the Council a proposal relating to the selection of the site as a site of Community importance.

3. The Council, acting unanimously, shall take a decision within three months of the date of referral.

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6(2).'

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

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

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

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

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

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

6 The Cypriot grass snake is a priority species referred to in Annex II and Annex IV(a) of the Habitats Directive.

The facts of the dispute and the pre-litigation procedure

7 On 16 May 2006 the Commission received a complaint from the Federation of environmental and ecological organisations of Cyprus regarding the inadequate protection of the Cypriot grass snake. According to that complaint, the Republic of Cyprus had wrongly failed, inter alia, to include the area of Paralimni Lake in the national list of SCIs.

8 In the light of the information it had available to it, the Commission, on 23 March 2007, sent to the Republic of Cyprus a letter of formal notice by which it drew the latter's attention to the inadequate protection of that species because of the failure to include the site of Paralimni Lake in the national list of SCIs and the failure to protect that site as well as Xyliatos Dam.

9 By letter of 18 May 2007, the Republic of Cyprus replied to the letter of formal notice indicating that the competent authority was in discussion with the relevant parties in order to arrive at a commonly accepted proposition to include the site of Paralimni Lake in the national list of SCIs before the end of 2007. That Member State also set out the different measures which had been taken to reinforce the protection of that site and the Xyliatos Dam.

Finally, it claimed that sending the letter of formal notice had been premature and unlawful because the Commission should have followed the procedure laid down in Article 5 of the Habitats Directive and not the procedure in Article 258 TFEU.

10 By letter of 6 June 2008, the Commission issued a reasoned opinion in which it stated that, by not adopting the laws, regulations and administrative provisions necessary to comply with the Habitats Directive, the Republic of Cyprus had failed to fulfil its obligations under that directive. As a consequence, the Commission requested the Republic of Cyprus to take the measures necessary to comply with that reasoned opinion within two months of its receipt.

11 By letter of 21 November 2008, the Republic of Cyprus responded to the reasoned opinion and set out the measures which had been taken to protect the Cypriot grass snake and the progress made in relation to the inclusion of the site of Paralimni Lake in the national list of SCIs.

12 By letter of 18 December 2009, the Commission referred in particular to the complaints relating to the property development in the northern part of the site of Paralimni Lake.

13 By letter of 23 December 2009, the Republic of Cyprus informed the Commission that the site had been officially included in the national list of SCIs on 24 November 2009. However, that Member State had not included the northern end of the lake in that list.

14 Subsequently, the Republic of Cyprus rejected the complaints referred to by the Commission in relation to the property development of the northern part of that lake.

The action

Failure to include the site of Paralimni Lake in the national list of SCIs

Arguments of the parties

15 The Commission takes the view that, by not having included the site of Paralimni Lake in the national list of SCIs before expiry of the period set in the reasoned opinion, the Republic of Cyprus has failed to fulfil its obligations under Article 4(1) of the Habitats Directive.

16 As regards Article 5(1) of the Habitats Directive, which the Republic of Cyprus claimed, during the pre-litigation stage, should have been applied where the Commission found that there was a failure to include a site which appears to be essential to the survival of the Cypriot grass snake in the national list of SCIs, the Commission claims that that provision presupposes the existence of a scientific disagreement between it and the Member State concerned, which, in this case, is lacking. In the present case, the information used by each party was the same and was not disputed. In its letters of 12 August and 21 November 2008, the Republic of Cyprus undertook to include the site of Paralimni Lake in the national list of SCIs. Consequently, the question of a scientific disagreement and a comparison of data does not arise.

17 In the alternative, the Commission claims that there are strong indications that the site boundaries which were finally disclosed to it concerning the designation of the SCIs, in so far as they do not include the important area situated at the northern end of Paralimni Lake,

which was transformed into a residential area during 2009, are not sufficient for the protection and conservation of the Cypriot grass snake and, therefore, that the infringement is ongoing.

18 The Republic of Cyprus reiterates that it has never disputed that the site of Paralimni Lake should constitute an SCI. It contends, however, that the boundary of the current area as an SCI is sufficient for the protection and conservation of the species at issue. That species is to be found only in the southern and eastern parts of the SCI. Moreover, the study carried out by the Austrian expert, to which the Commission refers, does not contain clear guidance regarding the demarcation of the SCI which she considers necessary for sufficient protection of the Cypriot grass snake.

19 Since the Republic of Cyprus is claiming, citing scientific data in support, that the demarcation of the SCI is sufficient for the preservation of the Cypriot grass snake and its habitats, which is called in question by the Commission, there is a scientific disagreement relating to the evaluation of the scientific data. That disagreement justifies the application of the bilateral consultation procedure provided for in Article 5 of the Habitats Directive.

Findings of the Court

20 As regards the subject-matter of the action, it must be remembered that under Article 92(2) of the Rules of Procedure of the Court the Court may at any time of its own motion consider whether there exists any absolute bar to proceeding with a case.

21 It is settled case-law that the purpose of the pre-litigation procedure is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under European Union law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. The subject-matter of the action brought under Article 258 TFEU is, therefore, delimited by the pre-litigation procedure provided for by that article. Accordingly, the action cannot be founded on any objections other than those stated in the pre-litigation procedure (see, inter alia, Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 23).

22 In the present case, it should be noted that it is not apparent from the documents before the Court that, during the pre-litigation stage, whether at the stage of the formal notice or that of the reasoned opinion, the question of demarcation of the site of Paralimni Lake was addressed by the parties, nor that the Commission raised any argument specifically relating to the northern part of the site. As regards the failure to include the site of Paralimni Lake in the national list of SCIs, the Commission merely called for the inclusion of that site, identified in general terms and without any indication as regards its demarcation, in the national list of SCIs, and the Republic of Cyprus undertook to include it in that list, which it did, more than 17 months after the reasoned opinion was issued.

23 Since the pre-litigation procedure in no way related to the demarcation of the site of Paralimni Lake nor, in particular, to the question of inclusion of the northern part of the site in it, the action is inadmissible in so far as it refers to that subject.

24 As regards the complaint alleging failure to include the site of Paralimni Lake in the national list of SCIs, the Court notes that it has never been disputed that, in general, that site should have been included in that list.

25 Therefore, it must be held, first, that the conditions for the application of Article 5 of the Habitats Directive were not, in any event, met for either of the two complaints.

26 Second, as regards the complaint alleging failure to include the site of Paralimni Lake in the national list of SCIs, it is not disputed that it was not included in the list before expiry of the period set in the reasoned opinion.

27 Since the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, inter alia, Case C-183/05 *Commission* v *Ireland* [2007] ECR I-137, paragraph 17, and judgment of 11 November 2010 in Case C-164/09 *Commission* v *Italy*, paragraph 19), it must be held that the Commission's action is well founded as regards that complaint.

Tolerance of activities which degrade or damage the habitat of the species concerned

Admissibility

– Arguments of the parties

28 The Republic of Cyprus claims that neither the letter of formal notice nor the reasoned opinion refer to the operation of a firing range and excavation works. Therefore, the Commission extended the subject-matter of the dispute by referring, in its action, to the firing range and excavation works as activities which degrade or damage the habitat of the species concerned.

29 The Republic of Cyprus claims that, since it was unable to make comments in response to those arguments they cannot be taken into account by the Court during the consideration of the Commission's complaints. The subject-matter of the dispute may be extended to events which took place after the reasoned opinion was delivered only if they are of the same kind as the events to which the opinion referred and constitute the same conduct, which is not the situation in the present case.

30 As regards the residential development of the 'northern part of the lake', the reasoned opinion did not clearly identify the arguments relied upon more generally in the letter of formal notice. Specifically, the residential development at the location in question was mentioned for the first time in the Commission's letter of 18 December 2009. The 'northern part of the lake' was mentioned neither in the letter of formal notice nor in the reasoned opinion.

31 Consequently, the Republic of Cyprus considers that the Commission's arguments regarding the operation of a firing range, excavation works and residential development in the northern part of Paralimni Lake must be rejected as inadmissible.

32 The Commission points out that, both in its letter of formal notice and its reasoned opinion, it criticises the conduct of the Republic of Cyprus, which tolerates activities seriously compromising the ecological characteristics of the lake as well as the fact that it has not taken the protective measures necessary to maintain the population of the Cypriot grass snake, in breach of European Union law. In that context, and in support of that complaint, the

Commission refers more specifically to the excessive extraction of water, residential development and moto-cross racing.

33 Even if the operation of the firing range and the excavation works took place after the reasoned opinion, the Commission submits that the subject-matter of the dispute may be extended to events which took place after that opinion if they are of the same kind as the events to which the opinion referred and constitute the same conduct. The events at issue are of the same kind as the events to which the opinion referred and constitute the same conduct.

34 As regards the alleged failure to set out arguments clearly in relation to the property development, the Commission points out that it defined the general concept as property development 'beside the lake but also within its boundaries'. That definition manifestly also encompasses the northern part of the lake, given that it is situated 'within the boundaries' of the lake. In any event, the Commission did not have any real possibility of including the issue of the recent property development affecting the northern part of the lake in its letter of formal notice or its reasoned opinion given that the Republic of Cyprus did not include that area in the urban development plan until March 2009, that is to say well after expiry of the period for replying to the reasoned opinion.

– Findings of the Court

35 As regards the excavation works, it must be noted that they are among the matters which the Commission raised, in its letter of formal notice and in its reasoned opinion, against the Republic of Cyprus.

36 Accordingly, the argument regarding tolerance of the excavation works is admissible.

37 As regards the operation of the firing range, it should be noted that, as the Commission itself accepts, that matter was not mentioned during the pre-litigation procedure. While it is true that even events which took place after the reasoned opinion, but of the same kind as the events to which the opinion referred and constitute the same conduct, may be taken into account in the context of infringement proceedings (see, to that effect, Case 42/82 *Commission* v *France* [1983] ECR 1013, paragraph 20, and Case 113/86 *Commission* v *Italy* [1986] ECR 607, paragraph 11), that is not the case with the operation of a firing range when compared with excessive extraction of water, residential development, excavation works or the organisation of moto-cross racing.

38 Therefore, the argument regarding the operation of the firing range is not admissible.

39 As regards the argument concerning the residential development in the northern part of Paralimni Lake and its effects in that area, it should be noted that, in view of what is stated at paragraph 23 of this judgment and the fact that the argument was not, in any event, invoked by the Commission in its letter of formal notice or its reasoned opinion, it is also inadmissible.

Substance

– Arguments of the parties

40 The Commission takes the view that the case-law of the Court, which accepts the necessity of protecting SCIs and safeguarding the objectives of the Habitats Directive, in

particular regarding the formation of a coherent European ecological network, also applies to sites which satisfy the necessary ecological criteria to be included in the list of SCIs.

41 The Commission states that the Republic of Cyprus tolerates the unlawful excessive extraction of water, which is the cause, in particular, of destruction of the habitat of the species concerned or the elimination of its representative characteristics. In addition, the residential development on the site at issue reduces the surface of that habitat and has, therefore, very substantial adverse effects on the conservation of the site and the species concerned. Furthermore, the organisation of moto-cross racing is particularly harmful to the Cypriot grass snake because of the continuous disturbance caused and is a hazard because it leads to injury and even death of the animals.

42 The Republic of Cyprus states that it has stopped the removal of water from where the Cypriot grass snake has its habitat, and that, therefore, the concerns regarding a drop in water level in the habitat of that species and the destruction of that habitat through the extraction of water are no longer justified. As regards the construction of residential buildings 'beside the lake', the defendant Member State states that there is no residential development within the SCI at issue and that the residential development on the outskirts of that site does not restrict the habitat of the Cypriot grass snake and will not have harmful consequences, contrary to what the Commission claims. As for the operation of a moto-cross track, the Republic of Cyprus notes that it has been terminated and the track has been demolished.

– Findings of the Court

43 It should be noted that, in the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Habitats Directive, required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level (see *Draggagi and Others*, paragraph 30).

44 The appropriate protection scheme applicable to the sites which appear on a national list transmitted to the Commission under Article 4(1) of the Habitats Directive requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics (see *Bund Naturschutz in Bayern and Others*, paragraphs 46 and 47).

45 If that were not the case, the European Union decision-making process, which is not only based on the integrity of the sites as notified by the Member States, but is also characterised by the ecological comparisons between the different sites proposed by the Member States, would run the risk of being distorted and the Commission would no longer be in a position to fulfil its duties in the area concerned, namely, in particular, to draw up the list of selected sites as sites of Community importance in order to form a coherent European ecological network (see *Bund Naturschutz in Bayern and Others*, paragraphs 41 and 42).

46 The above considerations also apply, in any event, mutatis mutandis, to the sites which the Member State at issue does not dispute satisfy the ecological criteria in Article 4(1) of the Habitats Directive and which, therefore, should have been included in the national list of SCIs sent to the Commission.

47 It cannot be permitted, under the Habitats Directive and the objectives which it pursues, that a site such as that at issue in the present case, which the Member State concerned does not dispute must be included in that list, does not enjoy any protection.

48 As regards the conduct of the Republic of Cyprus of which the Commission complains and which it claims is the cause of destruction of the habitat of the Cypriot grass snake in the site of Paralimni Lake and of the endangerment, on the same site, of the maintenance of the population of that species, it is not disputed that the organisation of moto-cross racing on the site at issue, which the defendant Member State claims to have terminated after expiry of the period set in the reasoned opinion, constitutes conduct likely to seriously compromise the ecological characteristics of the site.

49 In that respect, the complaint is therefore well founded.

50 As regards the excessive extraction of water on the site at issue, it is apparent from the documents before the Court that it had not terminated upon the expiry of the two month period set in the reasoned opinion. It is clear that, in the present case, that type of operation is capable of having a considerable negative impact on the habitat of the Cypriot grass snake and on the conservation of that species, particularly during years of drought.

51 Accordingly, the complaint must also be upheld in that respect.

52 As regards the property development other than in the northern part of the SCI at issue, which allegedly causes a reduction of the area of habitat of the species concerned and which the Commission raised against the Republic of Cyprus, the latter accepts that such a development took place around the SCI but not within it and disputes the harmful effects alleged by the Commission.

53 In that regard, it is established case-law that, in proceedings for failure to fulfil obligations, it is for the Commission to prove the existence of the alleged infringement and to provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see, inter alia, *Commission* v *Ireland*, paragraph 39, and judgment of 22 September 2011 in Case C-90/10 *Commission* v *Spain*, paragraph 25).

54 In the absence of any evidence of the impact of that property development on the area of habitat of the Cypriot grass snake in the part of the SCI concerned, such an argument, like the related argument on the tolerance of excavation works, cannot, in any event, be considered well founded.

55 Therefore, the complaint alleging infringement of the Habitats Directive, due to the tolerance of activities which degrade and damage the habitat of the species concerned in respect of the site of Paralimni Lake, must be upheld, subject to what is stated at paragraph 54 of the present judgment.

Failure to establish and apply a system of strict protection for the Cypriot grass snake

Arguments of the parties

56 The Commission takes the view that, by tolerating the abovementioned activities such as, in particular, the excessive extraction of water and the organisation of moto-cross racing, and by not applying protective measures, the Republic of Cyprus has failed to fulfil its obligations under Article 12(1) of the Habitats Directive. As a consequence of those activities the area of habitat of the Cypriot grass snake and the population of that species have declined at the site of Paralimni Lake.

57 The Commission is of the opinion that the building projects on that site have serious consequences as a result of the earthworks and the debris which damage the habitat of that species. The division of the northern part of Paralimni Lake also infringes Article 12(1)(a) and (b) of the Habitats Directive.

58 Except for the illegal operation of a racing circuit, the Republic of Cyprus claims to have taken the necessary measures to implement a system of strict protection of the Cypriot grass snake and to have not therefore breached its obligations under Article 12(1) of the Habitats Directive.

Findings of the Court

59 It should be remembered that Article 12(1) of the Habitats Directive requires Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) of the same directive, in their natural range, prohibiting all forms of deliberate capture or killing of specimens of these species in the wild, deliberate disturbance of those species, particularly during the period of breeding, rearing, hibernation and migration, deliberate destruction or taking of eggs from the wild as well as deterioration or destruction of breeding sites or resting places.

60 The transposition of that provision requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (*Commission* v *Ireland*, paragraph 29).

61 Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (judgment of 16 March 2006 in Case C-518/04 *Commission* v *Greece*, paragraph 16, and *Commission* v *Ireland*, paragraph 30).

62 Such a system of strict protection must therefore enable the effective avoidance of all forms of deliberate capture or killing of specimens of animal species listed in Annex IV(a) of the Habitats Directive in the wild, deliberate disturbance of the species, particularly during the period of breeding, rearing, hibernation and migration, deliberate destruction or taking of eggs from the wild as well as deterioration or destruction of breeding sites or resting places of those species (see, to that effect, Case C-383/09 *Commission* v *France* [2011] ECR I-0000).

63 In this case the defendant Member State accepts that, by tolerating the organisation of moto-cross racing, it infringed Article 12(1) of the Habitats Directive.

64 Regarding the excessive extraction of water, having regard to paragraph 50 of this judgment and the fact that the presence of the Cypriot grass snake on the site of Paralimni Lake was well known, the inevitable conclusion is that it constitutes, in any event, a deliberate disturbance in accordance with Article 12(1) of the Habitats Directive.

65 As regards the argument alleging harmful consequences for the Cypriot grass snake linked to the property development on the site of Paralimni Lake, it is apparent from the evidence in the documents before the Court that the property development and the construction in or near the site of Paralimni Lake, in particular in or near its northern part, which are associated with excavation works, is likely to lead to disturbances affecting that protected species in the whole ecosystem of that site.

66 In those circumstances, it is therefore apparent that the Republic of Cyprus did not put a system of strict protection in place to enable the effective avoidance of all matters set out at paragraph 62 of this judgment.

67 Consequently, the complaint alleging infringement of Article 12(1) of the Habitats Directive is well founded.

68 Having regard to the foregoing, the Commission's action must be upheld, subject to the reservation made at paragraph 55 of this judgment.

69 Accordingly, it must be held that the Republic of Cyprus,

– by not having included the site of Paralimni Lake in the national list of SCIs,

– by tolerating activities which seriously compromise the ecological characteristics of Paralimni Lake and by not having taken the protective measures necessary to maintain the population of Natrix natrix cypriaca (Cypriot grass snake), the species which constitutes the ecological interest of the lake and Xyliatos Dam, and

– by not having taken the requisite measures to establish and apply a system of strict protection for that species,

has failed to fulfil its obligations under Article 4(1) of the Habitats Directive, under the Habitats Directive and under Article 12(1) of that directive respectively.

Costs

70 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Cyprus has been essentially unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that the Republic of Cyprus,**

– **by not having included the site of Paralimni Lake in the national list of proposed sites of Community importance,**

– **by tolerating activities which seriously compromise the ecological characteristics of Paralimni Lake and by not having taken the protective measures necessary to maintain the population of Natrix natrix cypriaca (Cypriot grass snake), the species which constitutes the ecological interest of the lake and Xyliatos Dam, and**

– **by not having taken the requisite measures to establish and apply a system of strict protection for that species,**

has failed to fulfil its obligations under Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006, under Directive 92/43, as amended, and under Article 12(1) of Directive 92/43, as amended, respectively;

2. **Orders the Republic of Cyprus to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

16 February 2012 (*)

(Assessment of the effects of projects on the environment – Concept of legislative act – Force and effect of the guidance in the Aarhus Convention Implementation Guide – Consent for a project given without an appropriate assessment of its effects on the environment – Access to justice in environmental matters – Extent of the right to a review procedure – Habitats Directive – Plan or project affecting the integrity of the site – Imperative reason of overriding public interest)

In Case C-182/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour constitutionnelle (Belgium), made by decision of 30 March 2010, received at the Court on 9 April 2010, in the proceedings

Marie-Noëlle Solvay and Others

v

Région wallonne,

intervening parties:

Infrabel SA,

Codic Belgique SA,

Federal Express European Services Inc. (FEDEX),

Société wallonne des aéroports (Sowaer),

Société régionale wallonne du transport (SRWT),

Société Intercommunale du Brabant wallon (IBW),

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader and E. Jarašiūnas, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 24 November 2011,

after considering the observations submitted on behalf of:

– Ms Solvay and Others, by T. Vandenput and M.-L. Giovannelli, avocats,

– Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), by A. Lebrun, avocat,

– Association Inter-Environnement Wallonie and Others, by J. Sambon, avocat,

– Association Charleroi South Air Pur and Others, by D. Brusselmans, avocat,

– Mr Boxus and Others, by L. Misson and A. Kettels, avocats,

– Ms Laloux and Others, by L. Dehin, avocat,

– Région wallonne, by F. Haumont, avocat,

– the European Commission, by O. Beynet, J.-B. Laignelot and D. Recchia, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2, 3, 6 and 9 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention'), Articles 1, 9 and 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337'), and Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive').

2 The reference has been made in proceedings brought by persons residing near Liège-Bierset and Brussels South Charleroi airports and the Brussels-Charleroi railway against the Région wallonne (Region of Wallonia) concerning development consents for works relating to those airports and railway.

Legal context

International law

3 Under Article 2(2) of the Aarhus Convention, the definition of 'public authority' 'does not include bodies or institutions acting in a … legislative capacity'.

4 Article 3(9) of the Aarhus Convention provides:

‘Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.’

5 Article 6(9) of the Aarhus Convention provides:

‘Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.’

6 Under Article 9(2) to (4) of the Aarhus Convention:

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

(a) having a sufficient interest or, alternatively,

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

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5), shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.

Decisions under this Article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.'

European Union law

Directive 85/337

7 In Article 1(2) of Directive 85/337 the term 'project' is defined as 'the execution of construction works or of other installations or schemes' or 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. The term 'development consent' is defined as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. The terms 'public' and 'public concerned' are defined as follows:

'"public" means:

one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

"public concerned" means:

the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

8 Article 1(5) of Directive 85/337 states:

'This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.'

9 Article 2(1) of Directive 85/337 provides:

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

10 Article 5(4) of Directive 85/337 provides:

'Member States shall, if necessary, ensure that any authorities holding relevant information … shall make this information available to the developer.'

11 Article 9(1) of Directive 85/337 states:

'When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

– the content of the decision and any conditions attached thereto,

– having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

– a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.'

12 Article 10a of Directive 85/337 provides:

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

(a) having a sufficient interest, or alternatively,

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

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

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

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

The Habitats Directive

13 In accordance with Article 6(3) and (4) of the Habitats Directive:

'3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with

other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

National law

14 Articles 1 to 4 of the Decree of the Walloon Parliament of 17 July 2008 on certain consents for which there are overriding reasons in the public interest (Décret du Parlement wallon du 17 juillet 2008 relatif à quelques permis pour lesquels il existe des motifs impérieux d'intérêt général) (*Moniteur belge*, 25 July 2008, p. 38900), in their original version, provide:

'Article 1. Overriding reasons in the public interest have been established for the grant of town-planning consents, environmental consents and combined consents relating to the following acts and works:

1. Acts and works for the improvement of the infrastructure and public buildings of the regional airports of Liège-Bierset and Brussels South Charleroi, as follows:

(a) as regards Liège-Bierset airport:

– the extension of the north freight zone for aircraft parking positions and future freight buildings;

– the orbital road and the south taxiway;

– the installation of a fourth tank for the fuel storage area;

– the TGV freight station;

– the extension of the car park south of the motorway;

– the future office building;

(b) as regards Brussels South Charleroi airport:

– the extension of the runway, including the construction of access ways and the extension of the north taxiway between the access ways;

– the control tower and radar;

– the extension of aircraft parking positions;

– the installation of de-icing areas;

– the R3-airport road link;

– the perimeter road and the south taxiway;

– the extension of the terminal;

– the extension of the car parks;

– the railway station and infrastructure;

2. Pursuant to the cooperation agreement of 11 October 2001 between the Federal State and the Flemish, Walloon and Brussels Capital Regions relating to the Belgian Railways investment plan for the years 2001-2012, the acts and works in the Region of Wallonia relating to the RER rail network;

3. In connection with the implementation of the regional development scheme (Part 3, point 1.4) adopted by the Walloon Government on 27 May 1999, the acts and works relating to structural modes of public transport for Charleroi, Liège, Namur and Mons;

4. The missing road and waterway links in the Region of Wallonia of the trans-European transport network referred to in Decision No 884/2004/EC of the European Parliament and of the Council of 29 April 2004 amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network.

Article 2. Where the acts and works listed in Article 1 are referred to in Article 84 of the Walloon Code of rural planning, urban planning, heritage and energy (Code wallon de l'Aménagement du Territoire, de l'Urbanisme, du Patrimoine et de l'Énergie), the consent shall be granted by the Government or the person designated by it in accordance with the detailed conditions laid down in Article 127 of that code, including those in Article 127(3).

Where the acts and works listed in Article 1 concern an establishment within the meaning of the Decree of 11 March 1999 on environment consents (Décret du 11 mars 1999 relatif au permis d'environnement), Article 13(2) of that decree shall be applied.

By way of exception to the first and second paragraphs, an application for consent whose receipt was acknowledged or which was lodged before the entry into force of this decree shall continue to be examined in accordance with the provisions in force at that date.

Article 3. Within 45 days of their being granted the Government shall submit planning consents, environmental consents and combined consents relating to the acts and works referred to in Article 1 to the Walloon Parliament. The consents referred to in the third

paragraph of Article 2 shall be submitted to the Parliament within 45 days of their receipt by the Government.

The Walloon Parliament shall ratify the consents submitted to it within 60 days of the lodging of the file relating to the consents at its Bureau. Where no ratifying decree is approved within that time-limit, the consent shall be deemed not to have been granted.

The time-limits referred to in the first and second paragraphs are suspended between 16 July and 15 August.

A consent ratified by the Walloon Parliament shall be enforceable from the publication of the decree in the *Moniteur belge* and the consent shall be sent by the Government in accordance with the provisions of the code or the decree of 11 March 1999.

Article 4. Where an application for a consent relates to a minor alteration to a consent ratified by the Walloon Parliament, the application shall follow the general rules of the code or the decree.'

15 Articles 5 to 9 of the Decree of the Walloon Parliament of 17 July 2008 provide:

'Article 5. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 25 August 2005 on the environmental consent granted to SAB SA for Liège-Bierset airport.

Article 6. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 13 September 2006 granting planning consent to Société régionale wallonne des Transports for the extension of the runway of Liège-Bierset airport.

Article 7. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the planning consent of 16 September 2003 issued by the designated official of the Charleroi Directorate General for Town and Country Planning, Housing and Heritage to SOWAER SA for the implementation of works to culvert the Tintia stream and alteration of the ground relief in the north-eastern part of the airport area.

Article 8. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 25 July 2005 on the combined consent issued to SOWAER SA for Brussels South Charleroi Airport (terminal: 3 000 000 passengers per year),

car parks (1 600 spaces at ground level and 1 000 in multi-storey car parks), car park access roads, aircraft traffic surfaces, aircraft parking positions linked to the terminal, water treatment plant, technical buildings, fuel storage area (storage of 2 420m^3 of kerosene and 30m^3 of motor vehicle fuel) and opening of new local roads.

Article 9. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards acts and works for development of the infrastructure and public buildings of regional airports, the Ministerial Order of 27 July 2005 relating to the environmental consent issued to SOWAER SA for the operation of Brussels South Charleroi Airport.'

16 Article 14 to 17 of the decree provide:

'Article 14. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– as regards the RER network and the associated structures, access ways and connecting ways, the Ministerial Order of 9 February 2006 relating to the combined consent issued to SNCB (Belgian National Railways) for the construction and operation of the third and fourth tracks on Infrabel line 124 Brussels-Charleroi in the municipalities of Waterloo, Braine-l'Alleud and Nivelles.

Article 15. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– the Ministerial Order of 19 June 2008 relating to the combined consent issued to IBW for the construction and operation of the Hain treatment plant of 92 000 population equivalent in the municipality of Braine-le-Château.

Article 16. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– the Ministerial Order of 7 July 2008 relating to the environmental consent issued to Codic Belgique SA for the operation of a management and training centre consisting of various technical installations on land situated at Chaussée de Bruxelles 135, La Hulpe.

Article 17. The following consent, for which overriding reasons in the public interest have been established, is ratified:

– the Ministerial Order of 4 June 2008 relating to the planning consent issued to Codic Belgique SA for the construction of a management and training centre consisting of various technical installations on land situated at Chaussée de Bruxelles 135, La Hulpe.'

17 According to the documents submitted to the Court, the Conseil d'État (Council of State) essentially has jurisdiction to rule on actions for annulment brought against administrative acts and regulations of the administrative authorities and against administrative acts of the legislative assemblies or their organs.

18 It does not, on the other hand, have jurisdiction to hear actions brought against acts of a legislative character.

19 The ratification by decree of the Walloon Parliament of building consents and consents for works gives those acts legislative status. The Conseil d'État consequently ceases to have jurisdiction to hear actions for annulment brought against the acts thus ratified, which can now be challenged only before the Cour constitutionnelle (Constitutional Court), before which, however, only certain grounds may be pleaded.

The actions in the main proceedings and the questions referred for a preliminary ruling

20 The Cour constitutionelle has before it a number of actions seeking annulment of the decree of the Walloon Parliament of 17 July 2008 which 'ratified' the building consents for various works relating to Liège-Bierset airport, Brussels South Charleroi airport and the Brussels-Charleroi railway, that is to say, authorised them in view of 'overriding reasons in the public interest'.

21 The Cour constitutionelle further has before it questions referred by the Conseil d'État for a ruling on the lawfulness of that decree. The Conseil d'État had previously itself raised the question of the compatibility of the decree with European Union law and the Aarhus Convention and referred questions on that point to the Court for a preliminary ruling, on which the Court gave judgment on 18 October 2011 in Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others* [2011] ECR I-0000.

22 The effect of that legislative act is that those building consents may no longer be contested before the Conseil d'État, but only before the Cour constitutionelle, and only on grounds of their failure to comply with the rules whose observance it is for the Cour constitutionelle to review.

23 Thus in each of the cases in the main proceedings, the referring court is asked inter alia to rule on whether it was possible for the contested decree to withdraw the consents in question from review by the Conseil d'État and subject them to review by the Cour constitutionelle, even though the possibilities of review before that court are less extensive than before the Conseil d'État. By so doing, the legislature is said to have infringed the Belgian Constitution, read in conjunction with Article 9(2) to (4) of the Aarhus Convention and Article 10a of Directive 85/337.

24 In those circumstances, the Constitutional Court decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Must Articles 2(2) and 9(4) of the Aarhus Convention … be interpreted in accordance with the guidance provided in the Aarhus Convention Implementation Guide?

2. (a) Must Article 2(2) of the Aarhus Convention be interpreted as excluding from the scope of the convention legislative acts such as the planning or environmental consents granted in accordance with the procedure established by Articles 1 to 4 of the Decree of the Walloon [Parliament] of 17 July 2008 …?

(b) Must Article 2(2) of the Aarhus Convention be interpreted as excluding from the scope of the convention legislative acts such as the ratifications of planning or environmental consents contained in Articles 5 to 9 and 14 to 17 of that decree?

(c) Must Article 1(5) of Directive 85/337 … be interpreted as excluding from the scope of the directive legislative acts such as the planning or environmental consents granted in accordance with the procedure established by Articles 1 to 4 of that decree?

(d) Must Article 1(5) of Directive 85/337 … be interpreted as excluding from the scope of the directive legislative acts such as the ratifications of planning or environmental consents contained in Articles 5 to 9 and 14 to 17 of that decree?

3. (a) Must Articles 3(9) and 9(2), (3) and (4) of the Aarhus Convention and Article 10a of Directive 85/337 … be interpreted as precluding a procedure such as that established by Articles 1 to 4 of that decree, under which the legislature adopting the decree grants planning and environmental consents which have been prepared by an administrative authority and which can be contested only by the actions mentioned in [the order for reference] before the Constitutional Court and the ordinary courts?

(b) Must Articles 3(9) and 9(2), (3) and (4) of the Aarhus Convention and Article 10a of Directive 85/337 … be interpreted as precluding the adoption of legislative acts such as the retroactive ratifications contained in Articles 5 to 9 and 14 to 17 of that decree, which can be contested only by the actions mentioned in [the order for reference] before the Constitutional Court and the ordinary courts?

4. (a) Must Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 … be interpreted as precluding a procedure such as that established by Articles 1 to 4 of that decree, under which a decree granting planning or environmental consents need not itself contain all the information necessary to establish whether those consents are based on an adequate prior evaluation carried out in accordance with the requirements of the Aarhus Convention and Directive 85/337 …?

(b) Must Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 … be interpreted as precluding the adoption of legislative acts such as the ratifications contained in Articles 5 to 9 and 14 to 17 of that decree, which do not themselves contain all the information necessary to establish whether those consents are based on an adequate prior evaluation carried out in accordance with the requirements of the Aarhus Convention and Directive 85/337 …?

5. Must Article 6(3) of [the Habitats] Directive … be interpreted as permitting a legislative authority to authorise projects such as those referred to in Articles 16 and 17 of that decree, even though the impact assessment carried out in that connection has been held by the Conseil d'État, in a judgment given under the emergency procedure, to be incomplete and has been contradicted in an opinion of the authority of the Walloon Region responsible for the ecological management of the natural environment?

6. In the event of a negative reply to Question 5, must Article 6(4) of [the Habitats] Directive … be interpreted as permitting the creation of infrastructure designed to accommodate the management centre of a private company and a large number of employees to be regarded as an imperative reason of overriding public interest?'

Consideration of the questions referred

Question 1

25 By its first question the referring court asks whether Articles 2(2) and 9(4) of the Aarhus Convention must be interpreted in accordance with the guidance in the Aarhus Convention Implementation Guide.

26 It is apparent from the wording of that Guide, in particular the observations in the section headed 'How to use this Guide', that the aim of the document, drawn up by international experts, is solely to provide an analysis of the Aarhus Convention which 'introduces the reader to the Convention and to what it can mean in practice'.

27 While the Aarhus Convention Implementation Guide may thus be regarded as an explanatory document, capable of being taken into consideration if appropriate among other relevant material for the purpose of interpreting the Convention, the observations in the Guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention.

28 The answer to Question 1 is therefore that, for the interpretation of Articles 2(2) and 9(4) of the Aarhus Convention, it is permissible to take the Aarhus Convention Implementation Guide into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of the Aarhus Convention.

Question 2

29 By its second question, the various subdivisions of which should be examined together, the referring court asks essentially whether Article 2(2) of the Aarhus Convention and Article 1(5) of Directive 85/337 must be interpreted as meaning that an act such as the Decree of the Walloon Parliament of 17 July 2008 which 'ratifies', by giving them legislative status, planning, environmental or works consents previously granted by the administrative authorities, in respect of which it is declared that 'overriding reasons in the public interest have been established', is excluded from the scope of that convention and that directive.

30 It follows from Article 1(5) of Directive 85/337 that, where the objectives of that directive, including that of supplying information, are achieved through a legislative process, the directive does not apply to the project in question (see Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 51, and *Boxus and Others*, paragraph 36).

31 That provision lays down two conditions for the exclusion of a project from the scope of Directive 85/337. The first requires the details of the project to be adopted by a specific act of legislation. Under the second, the objectives of the directive, including that of supplying information, must be achieved through the legislative process (see Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 57, and *Boxus and Others*, paragraph 37).

32 As regards the first condition, it entails, first, the adoption of the project by a specific act of legislation. It should be observed here that the terms 'project' and 'consent' are defined in Article 1(2) of Directive 85/337. A legislative act adopting a project must therefore, if it is to come within the scope of Article 1(5) of the directive, be specific and display the same characteristics as a consent of that kind. In particular, it must grant the developer the right to

carry out the project (see *WWF and Others*, paragraph 58, and *Boxus and Others*, paragraph 38).

33 The project must also be adopted in detail, that is to say, in a sufficiently precise and definitive manner, so that the legislative act adopting the project must include, like a development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment (see *WWF and Others*, paragraph 59, and *Boxus and Others*, paragraph 39). The legislative act must therefore demonstrate that the objectives of Directive 85/337 have been achieved as regards the project in question (see *Linster*, paragraph 56, and *Boxus and Others*, paragraph 39).

34 It follows that the details of a project cannot be considered to be adopted by a legislative act within the meaning of Article 1(5) of Directive 85/337 if that act does not include the elements necessary to assess the environmental impact of the project or if the adoption of other measures is needed in order for the developer to be entitled to carry out the project (see *WWF and Others*, paragraph 62; *Linster*, paragraph 57; and *Boxus and Others*, paragraph 41).

35 As regards the second condition, Article 2(1) of Directive 85/337 shows that the essential objective of the directive is to ensure that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment of their effects on the environment before consent is given (see *Linster*, paragraph 52, and *Boxus and Others*, paragraph 41).

36 In addition, the sixth recital in the preamble to Directive 85/337 states that the assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question (see *WWF and Others*, paragraph 61; *Linster*, paragraph 53; and *Boxus and Others*, paragraph 42).

37 Consequently, the legislature must have sufficient information at its disposal at the time when the project is adopted. It is apparent from Article 5(3) of and Annex IV to Directive 85/337 that the minimum information to be supplied by the developer is to include a description of the project comprising information on the site, design and size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, and the data required to identify and assess the main effects which the project is likely to have on the environment (see *Linster*, paragraph 55, and *Boxus and Others*, paragraph 43).

38 Having regard to the characteristics of procedures for the approval of a plan in more than one phase, Directive 85/337 does not preclude a single project from being approved by two acts of national law which are considered, as a whole, to be a development consent within the meaning of Article 1(2) of the directive (see, to that effect, Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 102). Consequently, the legislature can, when adopting the final act authorising a project, take advantage of the information gathered during a prior administrative procedure (see *Boxus and Others*, paragraph 44).

39 The existence of such an administrative procedure cannot, however, have the effect of enabling a project to be regarded as a project the details of which are adopted by a specific legislative act in accordance with Article 1(5) of Directive 85/337 if that legislative act does

not fulfil the two conditions set out in paragraph 31 above. As the Court held in *Boxus and Others*, paragraph 45, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act within the meaning of that provision and is not therefore sufficient to exclude a project from the scope of Directive 85/337.

40 In particular, a legislative act adopted without the members of the legislative body having had available to them the information mentioned in paragraph 37 above cannot fall within the scope of Article 1(5) of Directive 85/337 (see *Boxus and Others*, paragraph 46).

41 It is for the national court to determine whether those conditions have been satisfied. For that purpose, it must take account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates (see *Boxus and Others*, paragraph 47).

42 That interpretation arrived at in *Boxus and Others* in relation to Article 1(5) of Directive 85/337 may be applied in the case of Article 2(2) of the Aarhus Convention. First, Article 2(2) of the Convention has substantially the same content as Article 1(5) of the directive. Secondly, there is nothing that could be deduced from the object or scope of the Aarhus Convention that would preclude the Court from applying, for the interpretation of the provisions of that convention, its interpretation of the similar provisions of Directive 85/337.

43 The answer to Question 2 is therefore that Article 2(2) of the Aarhus Convention and Article 1(5) of Directive 85/337 must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of the Convention and the directive.

Question 3

44 By its third question, the various subdivisions of which should be examined together, the referring court asks essentially whether Article 9(2) and (4) of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as precluding the right to implement a project which falls within their scope from being granted by a legislative act against which, under national law, no review procedure is available before a court of law or another independent and impartial body established by law that enables that act to be challenged as to the substance and the procedure.

45 It follows from Article 2(2) of the Aarhus Convention, read together with Articles 6 and 9 of the Convention, and from Article 1(5) of Directive 85/337 that neither the Convention

nor the directive applies to projects adopted by a legislative act satisfying the conditions set out in paragraph 31 above (see *Boxus and Others*, paragraph 50).

46 For other projects, that is to say, those adopted either by an act which is not legislative in nature or by a legislative act which does not fulfil those conditions, it follows from the very terms of Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337 that the Member States must provide for a review procedure before a court of law or another independent and impartial body established by law for challenging the substantive or procedural lawfulness of decisions, acts or omissions subject respectively to Article 6 of the Aarhus Convention or to Directive 85/337 (see *Boxus and Others*, paragraph 51).

47 The Member States, by virtue of their procedural autonomy and subject to compliance with the principles of equivalence and effectiveness, have a discretion in implementing Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedures referred to in those provisions and what procedural rules are applicable (see *Boxus and Others*, paragraph 52).

48 Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 would lose all effectiveness, however, if the mere fact that a project is adopted by a legislative act which does not satisfy the conditions set out in paragraph 31 above were to make it immune to any review procedure for challenging its substantive or procedural lawfulness within the meaning of those provisions (see *Boxus and Others*, paragraph 53).

49 The requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 presuppose in this regard that, when a project falling within the scope of Article 6 of the Aarhus Convention or of Directive 85/337 is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive and set out in paragraph 31 above must be amenable to review, under the national procedural rules, by a court of law or an independent and impartial body established by law (see *Boxus and Others*, paragraph 54).

50 If no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous paragraph and, as the case may be, drawing the necessary conclusions by disapplying that legislative act (see *Boxus and Others*, paragraph 55).

51 In the present case, if the referring court finds that the Decree of the Walloon Parliament of 17 July 2008 does not satisfy the conditions laid down in Article 1(5) of Directive 85/337 and set out in paragraph 31 above, and if it turns out that, under the applicable national rules, no court of law or independent and impartial body established by law has jurisdiction to review the substantive or procedural validity of that decree, the decree must then be regarded as incompatible with the requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337. The referring court must then disapply it (see *Boxus and Others*, paragraph 56).

52 The answer to Question 3 is therefore that Article 9(2) to (4) of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as meaning that:

– when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and

– if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.

Question 4

53 By its fourth question, the various subdivisions of which should be examined together, the referring court asks essentially whether Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 must be interpreted as precluding the adoption of legislative acts which do not themselves contain all the reasons for their adoption, reasons which make it possible to review whether the acts were adopted after an adequate prior evaluation carried out in accordance with the requirements of the Convention and the directive.

54 It has been held that Article 4 of Directive 85/337 must be interpreted as not requiring that a decision not to subject a project falling within Annex II to that directive to an assessment should itself contain the reasons for the competent authority's decision that an assessment was unnecessary; if, however, an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the decision or the relevant information and documents in response to the request made (see Case C-75/08 *Mellor* [2009] ECR I-3799, paragraph 61).

55 That interpretation can be applied to Article 9(1) of Directive 85/337.

56 Thus, although Article 9(1) of Directive 85/337 requires that the public must be informed, in accordance with the appropriate procedures, of the decision taken by the competent authority and the reasons on which the decision is based, it does not follow that the decision must itself contain the competent authority's reasons for deciding that it was necessary (see, by analogy, *Mellor*, paragraph 56).

57 It follows from that provision, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority was aware, in accordance with the rules laid down by national law, that an adequate prior evaluation had been carried out in accordance with the requirements of Directive 85/337 (see *Mellor*, paragraph 57).

58 Moreover, interested parties, as well as the other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with that obligation of the competent authority as to an evaluation (see *Mellor*, paragraph 58).

59 In that regard, effective judicial review, which must be able to extend to the lawfulness of the reasons for the decision being challenged, presupposes in general that the court before which the matter is brought may require the competent authority to communicate those reasons. However, where it is more particularly a question of securing the effective protection of a right conferred by European Union law, interested parties must also be able to defend that

right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its decision is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15, and *Mellor*, paragraph 59).

60 That subsequent communication may take the form not only of an express statement of the reasons but also of the making available of relevant information and documents in response to the request made (see *Mellor*, paragraph 60).

61 While the reasons need not necessarily be contained in the decision itself, the competent authority may none the less, pursuant to the applicable national legislation or of its own motion, indicate in the decision the reasons on which it is based (see *Mellor*, paragraph 63).

62 In that case, the decision must enable interested parties to decide whether to make use of a review procedure to contest it, taking into account any factors which might subsequently be brought to their attention (see *Mellor*, paragraph 64).

63 That interpretation may be applied in the case of Article 6(9) of the Aarhus Convention. First, that provision has substantially the same content as Article 9(1) of Directive 85/337. Secondly, there is nothing that could be deduced from the object or scope of the Aarhus Convention that would preclude the Court from applying, for the interpretation of the provisions of that convention, its interpretation of the similar provisions of Directive 85/337.

64 The answer to Question 4 is therefore that Article 6(9) of the Aarhus Convention and Article 9(1) of Directive 85/337 must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made.

Question 5

65 By its fifth question, the referring court asks essentially whether Article 6(3) of the Habitats Directive must be interpreted as allowing a legislative authority to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.

66 Article 6(3) of the Habitats Directive establishes an evaluation procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary for the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (see Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 34).

67 A plan or project may be authorised only on condition that the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such

effects (see Case C-239/04 *Commission* v *Portugal* [2006] ECR I-10183, paragraph 20). Moreover, it is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see *Commission* v *Portugal*, paragraph 24).

68 Furthermore, in the case of sites eligible for identification as sites of Community importance, in particular sites hosting priority natural habitat types, the Member States are, by virtue of the Habitats Directive, required to take protective measures that are appropriate, from the point of view of that directive's objective of conservation, for safeguarding the ecological interest which those sites have at national level (see Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 30, and Case C-491/08 *Commission* v *Italy*, paragraph 30).

69 Those obligations are incumbent on the Member States by virtue of the Habitats Directive regardless of the nature of the national authority with competence to authorise the plan or project concerned. Article 6(3) of the Habitats Directive, which refers to the 'competent national authorities', does not lay down any special rule for plans or projects approved by a legislative authority. That status consequently has no effect on the extent or scope of the obligations imposed on the Member States by Article 6(3) of the Habitats Directive.

70 The answer to Question 5 is therefore that Article 6(3) of the Habitats Directive must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.

Question 6

71 By its sixth question, the referring court essentially asks whether Article 6(4) of the Habitats Directive must be interpreted as meaning that the creation of infrastructure intended to accommodate the management centre of a private company may be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.

72 Article 6(4) of the Habitats Directive provides that if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected (see Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, paragraph 81).

73 Article 6(4) of that directive must, as an exception to the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly (see Case C-304/05 *Commission* v *Italy*, paragraph 82).

74 Moreover, it can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of the Habitats Directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for the application of Article 6(4), since, in the absence of those elements, no condition for the application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (see Case C-304/05 *Commission* v *Italy*, paragraph 83).

75 An interest capable of justifying, within the meaning of Article 6(4) of the Habitats Directive, the implementation of a plan or project must be both 'public' and 'overriding', which means that it must be of such an importance that it can be weighed up against that directive's objective of the conservation of natural habitats and wild fauna and flora.

76 Works intended for the location or expansion of an undertaking satisfy those conditions only in exceptional circumstances.

77 It cannot be ruled out that that is the case where a project, although of a private character, in fact by its very nature and by its economic and social context presents an overriding public interest and it has been shown that there are no alternative solutions.

78 In the light of those criteria, the mere construction of infrastructure designed to accommodate a management centre cannot constitute an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive.

79 The answer to Question 6 is therefore that Article 6(4) of the Habitats Directive must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.

Costs

80 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **For the interpretation of Articles 2(2) and 9(4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, it is permissible to take the Implementation Guide for that Convention into consideration, but that Guide has no binding force and does not have the normative effect of the provisions of that Convention.**

2. **Article 2(2) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of the Convention and the directive have been achieved by the legislative process, are excluded from the scope of those instruments. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the public interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific act of legislation within the meaning of the latter provision and is therefore not sufficient to exclude a project from the scope of that Convention and that directive as amended.**

3. **Articles 3(9) and 9(2) to (4) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:**

– **when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive as amended must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law, and**

– **if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.**

4. **Article 6(9) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters and Article 9(1) of Directive 85/337, as amended by Directive 2003/35, must be interpreted as not requiring that the decision should itself contain the reasons for the competent authority's decision that it was necessary. However, if an interested party so requests, the competent authority is obliged to communicate to him the reasons for that decision or the relevant information and documents in response to the request made.**

5. **Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora must be interpreted as not allowing a national authority, even if it is a legislative authority, to authorise a plan or project without having ascertained that it will not adversely affect the integrity of the site concerned.**

6. **Article 6(4) of Directive 92/43 must be interpreted as meaning that the creation of infrastructure intended to accommodate a management centre cannot be regarded as an imperative reason of overriding public interest, such reasons including those of a social or economic nature, within the meaning of that provision, capable of justifying the implementation of a plan or project that will adversely affect the integrity of the site concerned.**

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

24 November 2011 (*)

(Failure of a Member State to fulfil obligations – Directive 85/337/EEC – Assessment of the effects of certain projects on the environment – Directive 92/43/EEC – Conservation of natural habitats – Wild fauna and flora – Open-cast coal mines – 'Alto Sil' site – Special protection area – Site of Community importance – Brown bear (Ursus arctos) – Capercaillie (Tetrao urogallus))

In Case C-404/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 20 October 2009,

European Commission, represented by D. Recchia and by F. Castillo de la Torre and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, A. Prechal (Rapporteur), K. Schiemann, C. Toader and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2011

gives the following

Judgment

1 By its action the European Commission seeks a declaration from the Court that:

– by authorising the open-cast mines 'Fonfría', 'Nueva Julia' and 'Ladrones' but failing to subject that authorisation to an assessment in order to identify, describe and assess in an appropriate manner the direct, indirect and cumulative effects of the existing open-cast mining projects,

the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3 and 5(1) and (3) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5, 'Directive 85/337, as amended'),

– from 2000, the date of designation of the 'Alto Sil' as a special protection area ('SPA') under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) as amended by Commission Directive 97/49/EC of 29 July 1997 (OJ 1997 L 223, p. 9, 'the Birds Directive'),

– by authorising the 'Nueva Julia' and 'Ladrones' open-cast mining operations but failing to subject that authorisation to an appropriate assessment of the possible effects of those projects; and in any event failing to comply with the conditions under which the execution of a project is permitted, in spite of the risk which those projects represented for the capercaillie, which is one of the natural assets which justified the classification of the 'Alto Sil' SPA, namely that there are no alternative solutions, that there are imperative reasons of overriding public interest and only after having notified the Commission of the necessary compensatory measures to ensure that the overall coherence of the Natura 2000 network is protected, and

– by failing to adopt the necessary measures to prevent the deterioration of habitats, including the habitats of species, and to prevent significant disturbance of the capercaillie, the presence of which on the 'Alto Sil' site was the reason for the designation of that area as an SPA, caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Ampliación de Feixolín' and 'Nueva Julia' mines,

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' SPA under Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive') in conjunction with Article 7 of that directive;

– from January 1998, by failing in relation to the mining operations at the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines to adopt the necessary measures to safeguard the ecological interest which the proposed 'Alto Sil' site had at national level, and which was proposed as a site of Community importance ('the SCI') under the Habitats Directive, the Kingdom of Spain has, in relation to that site, failed to fulfil its obligations under that directive, as interpreted in Case C-117/03 *Dragaggi and Others* [2005] ECR I-167 and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445;

– from December 2004,

– by permitting open-cast mining (in the case of the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines) likely to have a significant impact on the natural assets which determined the designation of the 'Alto Sil' area as an SCI but failing to make an appropriate assessment of the possible impact of those mines, and in any event failing to comply with the conditions under which the execution of those projects would be permitted, in spite of the risk which they represented to those natural assets, namely that there are no alternative solutions, that there are imperative reasons of overriding public interest and only after having notified the Commission of the necessary compensatory measures to ensure that the overall coherence of the Natura 2000 network is protected, and

– by having failed to adopt, in relation to the above projects, the necessary measures to prevent the deterioration of natural habitats and the habitats of species, and the disturbances of species caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Nueva Julia' and 'Ampliación de Feixolín' mines,

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' SCI under Article 6(2), (3) and (4) of the Habitats Directive.

Legal context

Directive 85/337, as amended

2 Under Article 2(1) of Directive 85/337, as amended:

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

3 Article 3 of that directive provides:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.'

4 Article 4(1) of Directive 85/337, as amended, states that '[s]ubject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10'.

5 Annex I to Directive 85/337, as amended, contains the list of projects referred to in Article 4(1). Accordingly, paragraph 19 of that annex refers to 'quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares'.

6 With regard to other types of projects, Article 4(2) of that directive, as amended, provides:

'Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State, whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

...'

7 In respect of the projects covered by Article 4(2) of that directive, paragraph 13 of Annex II thereto refers to 'any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment'.

8 Article 5 of Directive 85/337, as amended, provides:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

...

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

– a description of the project comprising information on the site, design and size of the project,

– a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

– the data required to identify and assess the main effects which the project is likely to have on the environment,

– an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,

– a non-technical summary of the information mentioned in the previous indents.

...'

9 Annex IV to Directive 85/337, as amended, sets out the information that must be supplied pursuant to Article 5(1) of that directive:

‘1. Description of the project, including in particular:

– a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases,

– a description of the main characteristics of the production processes, for instance, nature and quantity of the materials used,

– an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

2. An outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description of the likely significant effects of the proposed project on the environment resulting from:

– the existence of the project,

– the use of natural resources,

– the emission of pollutants, the creation of nuisances and the elimination of waste,

and the description by the developer of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

6. A non-technical summary of the information provided under the above headings.

7. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information.’

10 With regard to the term ‘description’ appearing in paragraph 4 of Annex IV, that paragraph states that ‘[this] description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.’

The Birds Directive

11 Article 4(1) and (2) of the Birds Directive provides that Member States shall classify as SPAs those territories that are most suitable for the conservation of the bird species referred to in Annex I to that directive and of migratory birds.

12 Annex I to the Birds Directive refers in particular to the capercaillie (*Tetrao urogallus*).

13 Article 4(4), first sentence, of the Birds Directive specifies the protection enjoyed by SPAs:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article.'

The Habitats Directive

14 In accordance with the sixth recital in the preamble to the Habitats Directive 'in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable'.

15 The seventh recital of that directive reads as follows:

'... all the areas designated, including those classified now or in the future as special protection areas pursuant to [the Birds Directive] will have to be incorporated into the coherent European ecological network'.

16 The 10th recital in the preamble to the Habitats Directive notes that 'an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'.

17 Article 3 of the Habitats Directive provides:

'1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to [the Birds Directive].

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1.

...'

18 Article 4 of that directive states:

‘1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. ...

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. ...

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of [the SCIs] drawn from the Member States’ lists identifying those which host one or more priority natural habitat types or priority species.

...

The list of sites selected as [SCIs], identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

...

4. Once [an SCI] has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible ...

As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).’

19 Paragraphs 2, 3 and 4 of Article 6 of the Habitats Directive provide as follows:

‘2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site’s conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State

shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

20 Article 7 of the Habitats Directive provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of [the Birds Directive] in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under [the Birds Directive] where the latter date is later.'

21 Annex IV to the Habitats Directive, entitled 'animal and plant species of Community interest in need of strict protection', mentions under subparagraph (a) the brown bear (*Ursus arctos*) as a priority species.

Facts of the dispute and pre-litigation procedure

22 The 'Alto Sil' site, located in the north-west of the region of Castile- León, close to the regions of Galicia and Asturias, covers an area of over 43 000 hectares situated at the upper reaches of the river Sil.

23 In January 1998, the Kingdom of Spain proposed that site as an SCI under Article 4(1) of the Habitats Directive.

24 With effect from 1 January 2000, that Member State also designated that site as an SPA under the Birds Directive, due to the presence there of several bird species referred to in Annex I to that directive, including a breeding population of the capercaillie species.

25 On 7 December 2004, the Commission, by Decision 2004/813/EC adopting, pursuant to Directive 92/43, the list of sites of Community importance for the Atlantic biogeographical region (OJ 2004 L 387, p. 1), included the 'Alto Sil' site in that list under the code ES 0000210.

26 The standard data form relating to that site, sent by the Kingdom of Spain to the Commission when proposing the site as a SCI, makes reference, inter alia, to the presence of 10 to 15 specimens of the brown bear and 42 to 47 male specimens of the Cantabrian subspecies of the capercaillie (*Tetrao urogallus cantabricus*).

27 That form also mentions, in particular, the following habitat types:

– 4030 – European dry heaths (50% of the site),

– 4090 – Endemic oro-Mediterranean heaths with gorse (6% of the site),

– 6160 – Oro-Iberian *Festuca indigesta* grasslands (1% of the site),

– 8230 – Siliceous rock with pioneer vegetation of the *Sedo Scleranthion* or of the *Sedo albi Veronicion dillenii* (13% of the site) and

– 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica* (6% of the site).

28 It is also indicated in the form that the population of the capercaillie species present on the site is of regional importance (50% of the male specimens of the Autonomous Community of Castile-León) and of national importance (2% of the male specimens present on Spanish territory).

29 According to the same form, the vulnerability of the site 'is due essentially to open-cast mining'.

30 In 2001, the Commission was informed of the existence of several open-cast coal mining projects managed by the company Minero Siderúrgica de Ponferrada SA, now called Coto Minero Cantábrico SA, located in or in the immediate vicinity of the 'Alto Sil' site.

31 It is clear from the documents before the Court that the open-cast mining operations involved in these proceedings can be divided into two groups.

32 The first group of operations is located north of the river Sil and the municipality of Villablino (together, 'the northern mines'). They all fall within the 'Alto Sil' SCI.

33 The first of these is the open-cast mine called 'Feixolín' which was authorised on 1 January 1986 in respect of an area of 95.86 hectares and which was operational between 2000 and 2008. It is currently undergoing 'renaturation'.

34 The open-cast mine known as 'Ampliación de Feixolín', a project covering a total area of 93.9 hectares, is also one of the northern mines.

35 In relation to that mine, on 9 November 2009 the Spanish authorities imposed a fine and ordered that specific measures be adopted as mining had already taken place on 35.24 hectares even though that mine had not yet been authorised.

36 However, authorisation to operate that mine over part of the project area, namely 39.62 hectares, had been given on 11 June 2009. On 7 October 2009, specific measures to limit and offset the mine's effects on the environment were ordered.

37 The third northern mine is called 'Fonfría'. It extends over 350 hectares and was authorised on 21 July 1999. Extraction of coal at this site began in January 2001 and ended in December 2010.

38 The other open-cast coal mines that are the subject of these proceedings are located to the south of the river Sil, south-west of the municipality of Villaseca de Laciana ('the southern mines').

39 The first of these is the group of mines called 'Salguero-Prégame-Valdesegadas', which covers 196 hectares. Those mines were authorised between 1984 and 2002. Most of them have ceased activity since 2002. They are now largely undergoing 'renaturation'.

40 Mention should also be made of the mine called 'Nueva Julia' which was authorised on 16 September 2003 in respect of a total area of 405 hectares and which has been operated since 2006.

41 Finally, the mine known as 'Ladrones' was authorised on 24 December 2003 in respect of a total area of 117 hectares. It is not yet operational.

42 Those southern mines are all adjacent to each other. Of those mines, only the 'Ladrones' mine falls within the limits of the 'Alto Sil' SIC, the others being located on the external border of that SCI.

43 Believing that, in relation to those mines, the Spanish authorities had failed to fulfil their obligations under Directive 85/337, as amended, and under the Habitats Directive, the Commission, after examining the information forwarded by those authorities, sent a letter of formal notice to the Kingdom of Spain on 18 July 2003.

44 Taking the view, in particular, that the environmental impact assessment did not give sufficient consideration to the possible disturbances caused to the brown bear and that the cumulative effects of the mining were not sufficiently taken into account, the Commission, having examined the observations made by the Kingdom of Spain in reply to the letter of formal notice, sent a reasoned opinion to that Member State on 22 December 2004.

45 In reply, the Kingdom of Spain submitted, inter alia, a report examining the impact of the various projects and proposing measures to protect the site ('the 2005 report').

46 In order to take account, in particular, of the judgments in *Dragaggi and Others* and in *Bund Naturschutz in Bayern and Others*, the Commission sent a supplementary letter of formal notice to the Kingdom of Spain on 29 February 2008.

47 The Kingdom of Spain replied by letter of 7 May 2008 invoking, in particular, the absence of significant disturbances to the environment attributable to the open-cast mining, while declaring its intention to draw up a strategic plan to make the open-cast mining activity within the 'Alto Sil' area compatible with the system of protecting natural assets established by Community law.

48 On 1 December 2008 the Commission issued a supplementary reasoned opinion in which it reiterated the complaints set out in its supplementary letter of formal notice and called upon the Kingdom of Spain to comply with the reasoned opinion within two months of receipt thereof.

49 Having taken account, in particular, of the observations and documents provided by the Kingdom of Spain in reply to that supplementary reasoned opinion, and taking the view that the situation remained unsatisfactory, the Commission brought the present action.

The request for the adoption of a measure of inquiry and, alternatively, to have the oral procedure reopened

50 By act lodged at the Court Registry on 15 July 2011, the Kingdom of Spain requested the Court to order a measure of inquiry in accordance with Article 60 of the Rules of

Procedure of the Court and, alternatively, to have the oral procedure reopened under Article 61 of those rules.

51 In support of its request, the Kingdom of Spain argues that, contrary to the view taken by the Advocate General in her Opinion, it is not clear from the documents before the Court, as that Member State has already indicated, moreover, in its defence and in its rejoinder, that the open-cast coal mines 'Ampliación de Feixolín' and 'Ladrones' have already been the subject of mining activities.

52 According to the Kingdom of Spain, the analysis of the Advocate General is based on inaccurate factual premises.

53 The Kingdom of Spain applies to the Court seeking leave to produce new evidence concerning the factual situation of the open-cast mines 'Ampliación de Feixolín' and 'Ladrones' and, alternatively, to have the oral procedure reopened.

54 In that regard, it should be noted, first, that it is clear from the documents before the Court, and in particular from the table entitled 'Active mines' which appears on page 50 of the 2005 report, that the open-cast mine 'Ampliación de Feixolín' had indeed been the subject of certain mining activities that had led to the destruction of habitats, and particularly 19.9 hectares of habitat 9230 – Galicio-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*. Although it is clear from the documents before the Court that, by a decision of 9 November 2009, the operator of that mine was required to cease operations there and was sanctioned for having commenced without obtaining prior authorisation to that effect, nevertheless those operations actually took place in an area of 35.24 hectares. That is confirmed, moreover, by a site visit report produced by the Kingdom of Spain in the annex to its reply which confirms that, although coal extraction activities do not seem to have taken place on that site, other activities have led to the destruction of vegetation there.

55 Second, contrary to what the Kingdom of Spain maintains, it is not apparent from the Opinion of the Advocate General that this Opinion is based on the premise that the open-cast mine 'Ladrones' has already been operated. On the contrary, the complaints made by the Commission with regard to that mine, examined by the Advocate General, concern the shortcomings that undermine the environmental impact assessment of the mining project. Unlike other complaints, those complaints relate, therefore, to the authorisation procedure for that mine and not to any mining activity on the site of that mine carried out after it was authorised.

56 Consequently, there is no need to order the measure of inquiry requested by the Kingdom of Spain.

57 With regard to the request, which is framed in the alternative, to have the oral procedure reopened, it is appropriate to note that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 46, and Case C-306/08 *Commission* v *Spain* [2011] ECR I-0000, paragraph 60).

58 However, neither the Statute of the Court of Justice of the European Union nor its Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see, in particular, *Commission* v *Spain*, paragraph 61).

59 In the present case, the Court considers, having heard the Advocate General, that it has all the material necessary for it to decide the dispute before it and that the case does not have to be examined in the light of arguments that have not been the subject of discussion before it. Therefore, there is no need to order the reopening of the oral procedure.

The action

The first complaint, alleging non-compliance with Articles 2, 3 and 5(1) and (3) of Directive 85/337 as amended in respect of the assessments of the environmental impacts of the 'Fonfría', 'Nueva Julia' and 'Ladrones' open-cast mining projects

Arguments of the parties

60 By its first complaint, the Commission maintains that the assessments of the environmental impacts of the 'Fonfría', 'Nueva Julia' and 'Ladrones' projects contained major omissions, rendering them inadequate assessments not complying with Directive 85/337 as amended.

61 In that regard, the Commission refers to point 4 of Annex IV to that directive, and in particular to a note concerning the term 'description' appearing in that point, which implies that projects falling within the scope of the directive must be accompanied by a description of their significant effects on the environment, setting out their 'direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary ... effects'.

62 It infers that, in this case, the assessments of the environmental impacts of the mining projects concerned should have included an analysis of the significant cumulative impacts which the proximity of several open-cast coal mines simultaneously operated in the Laciana valley were likely to have. The 2005 report confirms that no such analysis was carried out prior to the authorisation of the three projects in question.

63 In addition, the Commission cites the following specific deficiencies of the environmental impact assessments for the three mines forming the subject-matter of this complaint:

– concerning the 'Fonfría' project, there is nothing in the initial assessment to indicate that an assessment was made of the possible disturbances for the capercaillie, even though the authorities were aware of the presence of that species on a breeding ground situated close to the extraction area of the mine. Moreover, the 2005 report stated without further explanation that that project is situated inside the recovery plan of the brown bear;

– although the 'Ladrones' project is very close to the breeding grounds of the capercaillie, justifying the designation of a critical area in the recovery plan for that species, there is nothing to indicate that that presence was taken into account in the initial assessment of that project. With regard to the brown bear, that assessment merely stated that the project is located within the recovery plan for that species, but that there would be no significant

disturbances for the latter since the mining extraction 'does not affect any critical area and does not involve any barrier effect between the various pockets';

– concerning the 'Nueva Julia' project, the assessment contains no information on the two most problematic species, namely the capercaillie and the brown bear. The effects of that project situated outside the SCI are obviously likely to be felt at a distance of several kilometres and could therefore affect habitats and species within the SCI. That eventuality does not appear to have been taken into account.

64 The Kingdom of Spain argues, first, concerning the interpretation of the term 'description' in point 4 of Annex IV to Directive 85/337 as amended, that the use of the conditional in the note concerning that point to the effect that '[t]his description should cover', indicates that the required description does not necessarily have to mention the cumulative effects of the various projects on the environment, but that it is merely desirable that it should contain such a description. The formulation used in other language versions of the directive confirms that interpretation.

65 Moreover, that Member State argues, such a description of the cumulative effects was not necessary in this case, since the mines in question were authorised in very different periods and the areas of the SCI which they affect are also different.

66 In any event, the 2005 report contains a detailed assessment of the potential effects of each of the projects in question and the potential cumulative effects which they might produce in combination with other projects.

67 As regards the 'Fonfría' project, the 2005 report concluded, at the end of a description of the cumulative effects, that the protected species were not significantly disturbed in the SCI.

68 That is also the case with the 'Nueva Julia' project. Concerning the brown bear, it was concluded in the 2005 report, following an assessment of the cumulative environmental effects of the mines and projects concerned, that no critical area or transit route was disturbed, so that the effect of that project on that species was not significant.

69 With regard to the bird species protected under the SPA and thus the 'Alto Sil' SCI, the Kingdom of Spain argues that no species has been significantly disturbed. As regards the 'Ladrones' project, the 2005 report concluded that there was no significant impact on habitat 4020, identified as a priority habitat of the capercaillie in the recovery plan for that species.

Findings of the Court

70 Concerning, first, the Commission's first complaint regarding the 'Fonfria' open-cast coal mining project, it should be noted that, according to Article 3(2) of Directive 97/11, the provisions of Directive 85/337, in its version prior to the amendments introduced by Directive 97/11, continue to apply to applications for authorisation submitted before the time-limit laid down in Article 3(1), namely 14 March 1999.

71 In this case, it is apparent from the documents before the Court that the application for authorisation for the 'Fonfría' mine project was submitted on 11 March 1998.

72 The Court cannot therefore uphold the Commission's application for a declaration that the provisions of Directive 85/337 have been infringed in relation to this project.

73 Moreover, the Commission's complaint concerning this project cannot be understood as seeking a finding of an infringement of Directive 85/337 in its version prior to the amendments introduced by Directive 97/11.

74 That is all the more so as certain amendments introduced by Directive 97/11 are directly relevant for assessing whether this complaint is well founded. That applies in particular to the insertion, in point 19 of Annex I to Directive 85/337, of the reference to open-cast mining projects with a surface area larger than 25 hectares, which implies that the latter do not have to form the subject-matter of an assessment pursuant to Article 4(1) of Directive 85/337 as amended unless they concern applications for authorisation submitted after 14 March 1999.

75 Therefore, the first complaint must be dismissed in so far as it concerns the 'Fonfría' project.

76 It needs to be examined, secondly, whether, in this case the environmental impact assessments carried out in accordance with Directive 85/337 as amended of the 'Nueva Julia' and 'Ladrones' mining projects are inadequate, as the Commission argues, because they do not include an analysis of the cumulative environmental effects capable of being produced by those projects and other operations, such as open-cast coal mines in operation or the commencement in operation of which is authorised or in the course of authorisation.

77 In that regard, contrary to what the Kingdom of Spain argues, it cannot be inferred from the use of the conditional, in the note concerning point 4 of Annex IV to Directive 85/337 as amended, to the effect that '[t]his description should cover ... any ... cumulative ... effects of the project', that the assessment of the environmental impacts does not necessarily have to cover the cumulative effects of the various projects on the environment, but that such an analysis is merely desirable.

78 The scope of that obligation to assess impacts on the environment follows from the provision contained in Article 3 of Directive 85/337 as amended, according to which the environmental impact assessment is to identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11 of that directive, the direct and indirect effects of a project on human beings, fauna and flora, soil, water, air, climate and the landscape, material assets and the cultural heritage, and the interaction between those factors.

79 Given the extended scope and very broad objective of Directive 85/337 as amended, which are apparent from Articles 1(2), 2(1) and 3 of the latter (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraphs 30 and 31), the mere fact that there may have been uncertainty as to the exact meaning of the use of the conditional in the expression '[t]his description should cover' used in a note to point 4 of Annex IV to Directive 85/337 as amended, even if that also appears in other language versions of that directive, cannot prevent a broad interpretation from being given to Article 3 of the latter.

80 Therefore, that provision should be taken as meaning that, where the assessment of the environmental impacts must, in particular, identify, describe and assess in an appropriate

manner the indirect effects of a project, that assessment must also include an analysis of the cumulative effects on the environment which that project may produce if considered jointly with other projects, in so far as such an analysis is necessary in order to ensure that the assessment covers examination of all the notable impacts on the environment of the project in question.

81 The Kingdom of Spain argues that, in this case, such a cumulative assessment was not necessary, since the mines concerned are distant from each other and were authorised in very different periods.

82 However, the documents before the Court do not show that to be the case with, in particular, the 'Nueva Julia' and 'Ladrones' projects, since those southern mines are situated in proximity to each other and the procedures for authorising them were carried out in parallel.

83 Moreover, even if, as the Kingdom of Spain argues, the 2005 report contained such an analysis, that report cannot remedy the lack of that analysis in the context of the initial assessment, since Article 2(1) of Directive 85/337 as amended requires that the assessment be a preliminary to the authorisation of the project.

84 Thirdly, it needs to be examined whether, as the Commission maintains, the possible and specific impacts of the 'Nueva Julia' and 'Ladrones' open-cast coal mining projects on the capercaillie and the brown bear have not been adequately examined in the environmental impact assessments for those projects.

85 Concerning, first, the 'Nueva Julia' mining project, the environmental impact assessment of 25 August 2003 refers only to the impact of that project on certain amphibians. That assessment contains no indication that an assessment was actually carried out as to the impacts of that project on the brown bear and the capercaillie.

86 An analysis of the impacts of that project on those species was, however, necessary, first, because the Spanish authorities could not have been unaware of the presence of those species on the territory of the 'Alto Sil' site. Indeed, during 1998, the Kingdom of Spain had proposed the classification of the 'Alto Sil' site and an SCI by reason, in particular, of the presence on that site of those two species, and that same Member State had, with effect from the year 2000, classified that site as an SPA by reason of the presence of the capercaillie.

87 Moreover, even if that operation is situated outside the SCI, it is undisputed that it is immediately adjacent to that site, so that it is possible that it may have impacts on the latter.

88 Such an analysis was all the more needed since, in the standard data formula for the 'Alto Sil' site, sent by the Kingdom of Spain to the Commission when it was proposed to classify that site as an SCI, that Member State had stated that the vulnerability of that site was fundamentally due to the open-cast coal mining operations.

89 Concerning, next, the 'Ladrones' open-cast coal mining project, it should be noted that the environmental impact statement of 9 October 2003 refers to the presence of the brown bear on the 'Alto Sil' site proposed as an SCI, but concludes that, as follows from a report of 5 June 2001, the operation causes only a small loss of habitat favourable to that species, does

not affect any area critical for the species and does not create any barrier effect between the various pockets.

90 In that respect, it must be held that, as regards the brown bear, the Commission has not produced any document capable of throwing doubt on the adequacy of that assessment of the project's environmental impact.

91 Concerning the capercaillie, it is mentioned in that environmental impact statement that a representative of an environmental organisation had referred in particular to the possible impact of the project on that species, that that claim was challenged by the promoter, and that the latter was examined and assessed in a satisfactory manner. However, it is not apparent from that statement or from other documents produced by the Kingdom of Spain that the assessment of the impacts of the project on the capercaillie was actually made. For the reasons already set out in paragraphs 86 and 88 of this judgment, an analysis of the impacts of that project on that species was clearly necessary.

92 Consequently, that assessment must be held to be inadequate as regards the capercaillie.

93 Finally, the defects thus identified in the environmental impact assessments for the 'Nueva Julia' and 'Ladrones' mining projects cannot be regarded as being compensated for by the 2005 report since, as has already been pointed out in paragraph 83 of this judgment, Article 2(1) of Directive 85/337 as amended requires the assessment to be a preliminary to the authorisation of the project.

94 Accordingly, the first complaint, in so far as it seeks a declaration of failure to fulfil obligations under Articles 2, 3 and 5(1) and (3) of Directive 85/337 as amended, as regards the environmental impact assessments for the 'Nueva Julia' and 'Ladrones' open-cast mining projects, must, save for the latter project in respect of the brown bear, be upheld.

The second complaint, alleging non-compliance with Article 6(2) to (4) of the Habitats Directive as regards the capercaillie as protected since the classification of the 'Alto Sil' site as an SPA from the year 2000 onwards

The first part of the second complaint

– Arguments of the parties

95 The Commission argues that, by authorising the 'Nueva Julia' and 'Ladrones' operations, the Kingdom of Spain infringed Article 6(3) and (4) of the Habitats Directive, having regard to the protection which the capercaillie has enjoyed since the classification of the 'Alto Sil' site as an SPA since 2000.

96 The Kingdom of Spain argues that the assessments of the projected operations contain a sufficient assessment of the possible impacts of those projects on that species.

– Findings of the Court

97 It follows from Article 7 of the Habitats Directive that Article 6(2) to (4) of that directive replaces the first sentence of Article 4(4) of the Birds Directive as from the date of implementation of the Habitats Directive or the date of classification by a Member State

under the Birds Directive, where the latter date is later (see, in particular, Case C-418/04 *Commission* v *Ireland* [2007] ECR I-10947, paragraph 173).

98 In this case, the complaint concerning the assessment of the impacts on the 'Nueva Julia' and 'Ladrones' projects on the species protected by virtue of the 'Alto Sil' SPA, particularly on the capercaillie, must therefore be examined having regard to the provisions of Article 6(3) and (4) of the Habitats Directive as regards these projects, in relation to which it is undisputed that the applications for authorisation relating thereto were brought after the 'Alto Sil' site was classified as an SPA.

99 Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, in particular, *Commission* v *Ireland*, at paragraph 243).

100 An assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned (see, to that effect, Case C-304/05 *Commission* v *Italy* [2007] ECR I-7495, paragraph 69).

101 In this case, protection of the capercaillie clearly constitutes a conservation objective which led the Kingdom of Spain to classify the 'Alto Sil' site as an SPA in 2000.

102 Moreover, it should be remembered that the national authorities had indicated, at the time of the proposal, formulated in 1998, to classify that site as an SCI, that the capercaillie population present on that site was of regional and even national importance and that the vulnerability of that same site was fundamentally due to the open-cast mining operations.

103 As has already been held in the consideration of the first complaint concerning Directive 85/337 as amended, particularly in paragraphs 76 to 93 of this judgment, the environmental impact assessments carried out before the approval of the 'Nueva Julia' and 'Ladrones' projects do not contain any analysis of the possible cumulative effects of the various operations on the capercaillie, whereas, in this case, such an analysis was necessary. Similarly, nor do those assessments contain sufficient indications to allow verification that the impacts of those operations on the capercaillie population present in the 'Alto Sil' SPA have actually been assessed.

104 Moreover, the 2005 report cannot make up for those deficiencies, since it was drawn up after the authorisation of those projects and cannot therefore be regarded as relevant in the context of Article 6(3) of the Habitats Directive (see, to that effect, *Commission* v *Italy*, paragraph 72).

105 It follows that the assessments concerning the 'Nueva Julia' and 'Ladrones' open-cast mining projects cannot be regarded as appropriate since they are characterised by gaps and by the lack of complete, precise and definitive findings and conclusions capable of removing all

reasonable scientific doubt as to the effects of those projects on the 'Alto Sil' SPA, and in particular on the capercaillie population, the protection of which constitutes one of the objectives of that area.

106 It cannot therefore be maintained that, before the authorisation of those operations, all the aspects of the plan or project capable, by themselves or in combination with other plans or projects, of affecting the conservation objectives of the 'Alto Sil' site were identified, taking into account the best scientific knowledge on the matter.

107 In those circumstances, the said assessments do not demonstrate that the competent national authorities could have acquired the certainty that those operations would be free of damaging effects for the integrity of the said site.

108 It follows that the authorisations for the said projects did not comply with Article 6(3) of the Habitats Directive.

109 The Kingdom of Spain, which has invoked the importance of mining activities for the local economy, needs to be reminded that, whilst that consideration is capable of constituting an imperative reason of overriding public interest within the meaning of Article 6(4) of the Habitats Directive, that provision can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified (*Commission* v *Italy*, paragraph 83).

110 It is clear from the considerations above that the national authorities did not have those data at the time the decisions to grant the authorisations in question were taken. It follows that those authorisations cannot be based on Article 6(4) of the Habitats Directive.

111 Consequently, those authorisations did not comply with Article 6(4) of the Habitats Directive.

112 In those circumstances, the first part of the second complaint must be regarded as well founded.

The second part of the second complaint

– Arguments of the parties

113 The Commission accuses the Kingdom of Spain of infringing Article 6(2) of the Habitats Directive by failing to take the necessary measures to prevent the operation of the 'Feixolín', 'Fonfría', 'Salguero-Prégame-Valdesesgadas', 'Ampliación de Feixolín' and 'Nueva Julia' open-cast mines after January 2000, the date from which classification of the 'Alto Sil' site as an SPA became effective, from affecting that site and in particular the capercaillie species protected by virtue of that SPA.

114 It refers to the recovery plan for the Cantabrian capercaillie, approved by Decree 4/2009, of 15 January 2009, of the Junta de Castilla y León (B.O.C. y L. n° 13, p. 1540). The latter states that, in 1982, the population of the Cantabrian capercaillie still amounted to about 1 000 specimens and that the occupation rate of the breeding grounds amounted to 85%. In 2002, however, that population did not exceed 500 to 600 specimens, spread between two sides of a mountain range, and the occupation rate of the breeding grounds was 45%. During that 20-year period, half of that population was located in the autonomous community of Castile-León. According to the said recovery plan, in 2005, the population present in that autonomous community amounted to about 164 adult specimens and risked becoming extinct in about 20 years.

115 The Commission argues, in particular, that certain breeding grounds of the capercaillie are close to the mining operations in question. That applies to the 'Robledo El Chano' breeding ground, situated close to the 'Fonfría' mine and still occupied in 1999.

116 As for the 2005 report, the Commission argues, inter alia, that the conclusion that the impact of open-cast mining operations on the capercaillie must be regarded as insignificant is incoherent. That report confirmed the risk of 'supra-local' effects being engendered by mining operations and the exclusion of the possibility, important for the conservation of the species, that an abandoned habitat might once again be used if its quality permitted.

117 The Commission also argues that scientific studies show that the fragmentation of forest enclaves available for the capercaillie in the 'Alto Sil' area has been made manifestly worse by the possibility of a barrier effect caused by the simultaneous and uninterrupted entry into operation of several mines.

118 The Kingdom of Spain acknowledges that the Cantabrian capercaillie has undergone a major decline, but argues that the populations suffering the greatest decline in the Castile-León region are those located in the areas with the highest levels of protection, such as national parks, whereas the capercaillie population present on the 'Alto Sil' site is the largest of the region and has undergone only a modest decline. It is moreover significant that the decline of the species on that site has been much greater in areas distant from the mining basin.

119 The Kingdom of Spain also maintains that, in the areas affected by the open-cast mining operations concerned by this complaint, the presence of the capercaillie is ancient and marginal. In those areas, there is only one known breeding ground, namely 'Robledo El Chano' which, in accordance with the national strategy for conservation of the species, forms part of a critical area for the safeguarding of the Cantabrian capercaillie. However, that breeding ground has been abandoned since the end of the 1980's and cannot, therefore, have been affected by the operation of 'Fonfría'.

– Findings of the Court

120 It needs first to be examined whether Article 6(2) of the Habitats Directive is applicable to the operations of the 'Feixolín', 'Fonfría', 'Salguero-Prégame-Valdesesgadas', 'Ampliación de Feixolín' and 'Nueva Julia' open-cast mines which took place subsequently to the classification of the 'Alto Sil' site as an SPA, effective from the year 2000.

121 In that regard, concerning first the 'Nueva Julia' operation, since it has been held in the context of the first part of the second complaint that authorisation for that project was granted without complying with Article 6(3) of the Habitats Directive, the case-law shows that a breach of Article 6(2) may be found where deterioration of a habitat or disturbance of the species for which the area in question was designated has been established (*Commission* v *Italy*, paragraph 94).

122 Next, as regards the 'Ampliación de Feixolín' operation, it should be recalled that the fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2) (*Commission* v *Ireland*, paragraph 250).

123 It follows that, in so far as the operation of the 'Ampliación de Feixolín' mine which the Commission criticises took place at a time when the latter had not yet been authorised, as has been pointed out in paragraph 35 of this judgment, the latter may constitute an infringement of Article 6(2) of the Habitats Directive.

124 Finally, it should be noted that Article 6(2) of the Habitats Directive applies to the 'Feixolín', 'Fonfría' and 'Salguero-Prégame-Valdesesgadas' open-cast mines, notwithstanding the fact that operation of the latter was authorised before the system of protection laid down by the Habitats Directive became applicable to the 'Alto Sil' site by reason of its classification as an SPA.

125 The Court has already held that, although such projects are not subject to the requirements relating to the procedure for prior assessment of the implications of the project for the site concerned, laid down by the Habitats Directive, their implementation nevertheless falls within the scope of Article 6(2) of that directive (see, to that effect, Case C-226/08 *Stadt Papenburg* [2010] ECR I-131, paragraphs 48 and 49).

126 Concerning, secondly, the complaint that, in relation to the operational activities of the open-cast mines in question, the Kingdom of Spain did not comply with Article 6(2) of the Habitats Directive, it should be recalled that an activity complies with that provision only if it is guaranteed that it will not cause any disturbance likely significantly to affect the objectives of that directive, particularly its conservation objectives (see, to that effect, Case C-241/08 *Commission* v *France* [2010] ECR I-1697, paragraph 32).

127 Moreover, by virtue of Article 6(2) of the Habitats Directive, the protective legal status of SPAs must guarantee the avoidance therein of the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which those areas have been classified (see, in particular, Case C-535/07 *Commission* v *Austria* [2010] ECR I-0000, paragraph 58 and case-law cited).

128 It follows that this complaint is well founded only if the Commission demonstrates to a sufficient legal standard that the Kingdom of Spain has not taken the appropriate protective measures, consisting in preventing the operational activities of the 'Feixolín', 'Fonfría', 'Salguero-Prégame-Valdesegadas', 'Ampliación de Feixolín' and 'Nueva Julia' mines, in so far as they took place after the classification of the 'Alto Sil' site as an SPA from the year 2000 onwards, from producing deteriorations of the habitats of the capercaillie and

disturbances of that species likely to have significant effects having regard to the objective of that directive consisting in ensuring the conservation of that species.

129 In that respect, is needs to be examined, first, whether the mines in question occupy surfaces which constitute appropriate habitats for the capercaillie but cannot be used by that species during the operation of those mines, or during their subsequent 'renaturation'.

130 The Commission maintains that that is the case in particular with habitat 9230, constituted by Galicia-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*.

131 In that respect, as the Advocate General states in points 81 and 82 of her Opinion, the Commission provides evidence of the destruction of that habitat after the classification of the 'Alto Sil' site as an SPA only as regards the 'Fonfría' mine. The 2005 report shows that, in the context of that operation, which took place from 2001 onwards, an area of 17.92 hectares of habitat type 9230 has in fact been destroyed.

132 The Kingdom of Spain argues that that loss of habitat is unimportant for the conservation of the capercaillie species, since the area concerned did not contain any breeding ground.

133 That argument cannot be accepted, because, even if that area were not usable as a breeding ground, it could conceivably be used by that species as a habitat for other purposes, such as a living or hibernating area.

134 Moreover, if that operation had not taken place in that area, the possibility cannot be excluded that, following measures taken by the authorities for that purpose, that area could have become usable as a breeding ground.

135 In that respect, it should be recalled that the protection of SPAs is not to be limited to measures intended to avoid external anthropogenic impairment and disturbance but must also, according to the situation that presents itself, include positive measures to preserve or improve the state of the site (*Commission* v *Austria*, paragraph 59 and case-law cited).

136 The Commission argues, secondly, that the mining operations concerned are, by reason of the noise and vibrations which they produce and which are felt within the 'Alto Sil' SPA, likely significantly to disturb the capercaillie population protected by virtue of that SPA.

137 In that regard, it is apparent from the documents before the Court that, as the Advocate General has stated in point 88 of her Opinion, bearing in mind the relatively short distances between various areas critical for the capercaillie and the open-cast mines in question, noise and vibrations caused by those operations are likely to be felt in those areas.

138 It follows that those nuisances are capable of causing disturbances likely significantly to affect the objectives of the said directive, particularly the objectives of conserving the capercaillie.

139 That is all the more so as it is undisputed that the capercaillie is a sensitive species and particularly demanding as to the tranquillity and quality of its habitats. It is further apparent from the documents before the Court that the degree of isolation and tranquillity required by

that species constitutes a factor of the very first order as it has a considerable impact on the ability of that species to reproduce.

140 The Kingdom of Spain expresses doubts in that regard by objecting that the decline in the populations of that species, including on the 'Alto Sil' site, has also been observed outside the mining basin and is even more marked there. That was confirmed by the 2005 report, which indicates that there is no relation of cause and effect between the existence of mining operations and the abandonment of breeding grounds by the Cantabrian capercaillie, that latter phenomenon being more significant in areas beyond those neighbouring the operations.

141 However, that circumstance in itself does not prevent the said nuisances produced inside the SPA by the mining operations in question from being capable of having had significant impacts on that species, even if the decline of that species may have been greater yet for populations relatively distant from those operations.

142 Moreover, in order to establish a failure to fulfil obligations within the meaning of Article 6(2) of the Habitats Directive, the Commission does not have to prove a cause and effect relationship between a mining operation and significant disturbance to the capercaillie. Since Article 6(2) and (3) of the Habitats Directive are designed to ensure the same level of protection, it is sufficient for the Commission to establish the existence of a probability or risk that that operation might cause significant disturbances for that species (see, to that effect, *Commission* v *France*, paragraph 32, and Case C-2/10 *Azienda Agro-Zootecnica Franchini and Eolica di Altamura* [2011] ECR I-0000, paragraph 41).

143 In any event, as the Advocate General has pointed out in points 90 to 92 of her Opinion, the documents before the Court show that the abandonment of the 'Robledo El Chano' breeding ground, still occupied by the capercaillie in 1999, results from the operation of the 'Fonfría' open-cast mine as from 2001.

144 That finding confirms that the operation of the mines in question, particularly the noises and vibrations produced, is capable of causing significant disturbances for that species.

145 Therefore, it must be held that the open-cast operations of the 'Feixolín', 'Fonfría', 'Salguero-Prégame-Valdesesgadas', 'Ampliación de Feixolín' and 'Nueva Julia' mines are contrary to Article 6(2) of the Habitats Directive by reason of the noises and vibrations which they produce and which are capable of significantly affecting the conservation of the capercaillie.

146 The Commission maintains, thirdly, that the open-cast mining operations contribute to isolating sub-populations of capercaillie by blocking communication corridors linking those sub-populations with other populations. It refers to the report of December 2004 on the impact of mining operations on the Cantabrian capercaillie, drawn up by the Ministry of the Environment and by the coordinators of the strategy for conserving the Cantabrian capercaillie in Spain.

147 In that respect, it must be held that that expert report, drawn up by recognised experts on the Cantabrian capercaillie of the national Ministry of the Environment and the Ministry of the Environment of the autonomous community of Castile- León, concludes that there is a risk that operations currently being carried out, including the 'Feixolín' and 'Fonfría' mines, in conjunction with projects the implementation of which is imminent, such as the 'Ampliación

de Feixolín' mine, form a continuous east-west barrier for the capercaillie, capable of leading to the isolation of population pockets of that species, and, over time, to the disappearance of pockets located to the south of that barrier.

148 Since the Kingdom of Spain does not produce evidence refuting the conclusions of that report, the scientific value of which is undisputed, it must be held that the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín' operations are capable of producing a barrier effect likely to contribute to the fragmentation of the habitat of the capercaillie and the isolation of certain sub-populations of that species.

149 The question arises, however, whether the Kingdom of Spain can be accused of the failures to fulfil obligations under Article 6(2) of the Habitats Directive thus determined in so far as they concern the 'Ampliación de Feixolín' open-cast mine.

150 Unlike the other mines concerned by this complaint, the 'Ampliación de Feixolín' open-cast mine was not authorised at the time when the operations criticised by the Commission took place. Moreover, the authorities penalised the operator of that mine for operating it without prior authorisation and ordered him to cease that operation.

151 However, as the Advocate General points out in point 105 of her Opinion, whereas the authorities were informed of the actual operation of that mine at least since 2005, the documents before the Court show that they did not prohibit it until November 2009, following an inspection carried out during September the same year.

152 Thus, by allowing a situation which caused significant disturbances in the 'Alto Sil' SPA to continue for at least four years, the Kingdom of Spain omitted to take, in good time, the measures necessary to bring those disturbances to an end. Thus, the Kingdom of Spain can be accused of the failures to fulfil obligations under Article 6(2) of the Habitats Directive in so far as they concern the 'Ampliación de Feixolín' mine.

153 Finally, the further question arises whether the failures to fulfil obligations under Article 6(2) of the Habitats Directive thus established can be justified by reason of the importance of mining activities for the local economy, as the Kingdom of Spain has pleaded.

154 Such a ground can in fact be relied upon by a Member State under the procedure laid down by Article 6(4) of the Habitats Directive. If the conditions laid down by that provision are met, its application may lead to the authorisation of activities which, as has already been held in paragraph 122 of this judgment, can no longer be halted having regard to Article 6(2).

155 However, as is apparent from the case-law referred to in paragraph 125 of this judgment, the procedures for prior assessment laid down by the Habitats Directive do not apply to projects such as 'Feixolín' and 'Fonfría', since they were authorised before the system of protection provided for by the Habitats Directive became applicable to the 'Alto Sil' site by reason of its classification as an SPA.

156 Concerning those projects, the possibility cannot be excluded that a Member State, by analogy with the procedure in derogation provided for in Article 6(4) of the Habitats Directive, may, in a procedure under domestic law for assessing the environmental impacts of a plan or project capable of significantly affecting the interests of conserving a site, invoke a

reason of public interest and, if the conditions laid down by that provision are essentially satisfied, authorise an activity which, subsequently, is no longer prohibited by Article 6(2).

157 However, as already stated in paragraph 109 of this judgment, in order to be able to verify whether the conditions laid down by Article 6(4) of the Habitats Directive have been met, the impacts of the plan or project must first have been analysed in accordance with Article 6(3) of that directive.

158 In this case, the documents before the Court show that, at the time of the assessment of the environmental impacts of the 'Feixolín' and 'Fonfría' projects carried out under the authorisation procedure of national law, the significant disturbances which those projects are capable of causing for the capercaillie, and which have been established in paragraphs 131, 145 and 148 of this judgment, could not be analysed because the Kingdom of Spain had not identified them and even denied their existence, including in the procedure before the Court.

159 In those circumstances, it appears that, in the context of the authorisation procedure under national law, the conditions laid down by Article 6(4) of the Habitats Directive have not been capable of verification.

160 Therefore, the failures to fulfil obligations under Article 6(2) of the Habitats Directive which have been established cannot be justified by reference to the importance of mining activities for the local economy.

The third complaint, alleging infringement of the obligations arising under the Habitats Directive from the proposal of the 'Alto Sil' site as an SCI in relation to the operation of the 'Fonfría', 'Feixolín', 'Salguero-Prégame-Valdesegadas' and 'Nueva Julia' open-cast mines

– Arguments of the parties

161 By its third complaint, the Commission accuses the Kingdom of Spain of failing, from January 1998 onwards, to take the necessary measures in relation to the extraction of coal from the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' mines, to preserve the national ecological interest represented by the proposed 'Alto Sil' site, particularly in relation to the brown bear, and did not therefore comply with its obligations under the Habitats Directive as described in the abovementioned judgments in *Dragaggi and Others* and *Bund Naturschutz in Bayern and Others*.

162 The Kingdom of Spain replies that it complied with the said obligations and observes in that respect that, according to official census data, the brown bear population, particularly in the western pocket of which the 'Alto Sil' site forms part, has experienced remarkable growth during the past 10 years.

– Findings of the Court

163 Under the Habitats Directive, Member States must take appropriate protective measures to preserve the characteristics of sites which host priority natural habitat types and/or priority species and which have been identified by Member States with a view to their inclusion on the Community list. Member States cannot therefore authorise intervention where there is a risk that the ecological characteristics of those sites will be seriously compromised as a result. That is particularly so where there is a risk that intervention of a particular kind will bring

about the extinction of priority species present on the sites concerned (Case C-308/08 *Commission* v *Spain* [2010] ECR I-0000, paragraph 21 and case-law cited).

164 In this case, it is undisputed that the brown bear is a priority species which is present on the 'Alto Sil' site and that its conservation was an objective envisaged by the Kingdom of Spain at the time of the proposal of that site as an SCI.

165 The question therefore arises whether, as the Commission argues, the operations of the 'Fonfría', 'Feixolín', 'Salguero-Prégame-Valdesegadas' and 'Nueva Julia' open-cast mines, in so far as they took place during the provisional period of protection between January 1998, when it was proposed to classify that site as an SCI, and December 2004, when the said site was in fact classified as an SCI, may be regarded as being interventions which risked seriously compromising the ecological characteristics of that site and, with regard in particular to the brown bear priority species, risked resulting in the disappearance of that species on that site.

166 In that respect, it is apparent from the documents before the Court, and in particular from the documents to which the Advocate General refers in point 130 of her Opinion, that the mining operations north of the River Sil, particularly 'Fonfría' and 'Feixolín', caused disturbances for the brown bear, especially by creating or aggravating a 'barrier effect' which risked preventing or severely impeding access to the Leitariegos corridor, whereas the latter is a north-south transit route of great importance for the western population of Cantabrian brown bears, of which the pocket of brown bears present on the 'Alto Sil' forms part.

167 However, having regard to the evidence produced by the Commission, it cannot be held that that 'barrier effect' seriously compromised the ecological characteristics of the said site as regards in particular the state of conservation of the brown bear.

168 As the Kingdom of Spain has argued without being contradicted by the Commission, between 1998 and 2004, the demographic evolution of the western population of Cantabrian brown bears, of which the pocket of bears present on the 'Alto Sil' site forms part, reveals a clearly positive trend.

169 As the file confirms, even if, between 1982 and 1995 that population regressed in the order of 4 to 5% per year, it has since experienced an annual and uninterrupted growth of 7.5%, causing it to rise from an estimated total of 50 to 65 specimens at the beginning of the 1990s to a total of about 100 to 130 specimens in 2008. It is currently regarded as a threatened, but viable, population. By contrast, according to the studies, the eastern population of Cantabrian brown bears remains precarious by reason primarily of its isolation in relation to the western population. It has not yet been able to re-establish itself at a level considered viable, the number of individuals belonging to that population having increased only from an estimated total of 20 to 25 specimens to a total of 30 during the said period.

170 It follows from these considerations that, bearing in mind the scientific studies submitted to the Court in the context of the present procedure concerning the western population of Cantabrian brown bears of which the population of brown bears present on the 'Alto Sil' site forms part, there is insufficient evidence that the operations of the 'Fonfría', 'Feixolín', 'Salguero-Prégame-Valdesegadas' and 'Nueva Julia' open-cast mines, in so far as they took place between January 1998, when it was proposed to classify that site as an SCI, and December 2004, when the said site was in fact classified as an SCI, risked seriously

compromising the ecological characteristics of that site and, with regard in particular to the brown bear priority species, risked resulting in the disappearance of that species on that site.

171 The third complaint must therefore be dismissed.

The fourth complaint, alleging non-compliance, as from the registration of the 'Alto Sil' site as an SCI in December 2004, with Article 6(2) to (4) of the Habitats Directive

The first part of the fourth complaint

172 The Commission argues that the Kingdom of Spain has failed to fulfil its obligations under Article 6(3) and (4) of the Habitats Directive in that it authorised the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' open-cast mining projects without first assessing the impacts which those projects were capable of having, and, in any event, without complying with the conditions in accordance with which those projects might be realised despite their negative impacts.

173 In that regard, it should be held that the mining operations concerned by this complaint were all authorised before December 2004, and thus before the 'Alto Sil' site was classified as an SCI.

174 As is apparent from the case-law referred to in paragraph 125 of this judgment, projects which were authorised before the system of protection provided for by the Habitats Directive become applicable to a site are not subject to the requirements concerning the procedure for prior assessment of the impacts of the project on the site concerned, laid down by the Habitats Directive.

175 Therefore, Article 6(3) and (4) of the Habitats Directive was not applicable to the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría' and 'Nueva Julia' open-cast mining projects, so that the Commission cannot accuse the Kingdom of Spain of failing to fulfil its obligations under those provisions.

176 Therefore, the first part of the fourth complaint must be dismissed.

The second part of the fourth complaint

– Arguments of the parties

177 The Commission also accuses the Kingdom of Spain of not taking, in regard to the operation of the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Nueva Julia' and 'Ampliación de Feixolín' open-cast mines after the classification of he 'Alto Sil' site as an SCI in December 2004, the measures which were necessary in application of Article 6(2) of the Habitats Directive.

178 It argues that those operations destroyed habitats protected by virtue of that SCI, including that of type 9230 – Galicia-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica* which is of particular importance for the brown bear as it is frequently used by that species as a transit route.

179 It also argues that the operations in question produced a 'barrier effect' which has contributed to the closing of the Leitariegos corridor which is a very important transit route for the western population of Cantabrian brown bears of which the pocket of brown bears present on the 'Alto Sil' site forms part, resulting in the fragmentation of the habitat of that population and the isolation of some of its pockets.

180 It argues that the barrier effect created by those operations makes exchanges between the western and eastern populations of Cantabrian brown bears even more difficult, causing the fragmentation of the species to continue and not allowing the eastern population of the species to re-establish itself in sufficient numbers to ensure its viability.

181 The Kingdom of Spain replies that the mining operations are situated in non-wooded areas, composed mainly of heathland, where females have never come to rear their young, not because of the operations but rather because of the lack of a habitat favourable to rearing, that having no connection to the potential disturbances which the operations might cause to the rearing of young.

182 The autonomous community of Castile- León has, moreover, adopted numerous measures for improving the habitat of the brown bear, including the re-establishment of the habitat of the latter in the Leitariegos corridor area.

183 The Kingdom of Spain considers that, whilst the northern part of the 'Alto Sil' site is important for the brown bear, it is however an area situated well to the north of the mining operations, at altitudes of over 1 800 metres, which is enclaved between the provinces of Asturias and Léon, and where bears feed in spring and autumn. The latter do not go to the southern part where the mines are situated, because the habitat there is completely different.

184 Finally, concerning the Commission's allegations concerning losses of habitat type 9230 – Galicia-Portuguese oak woods with *Quercus robur* and *Quercus pyrenaica*, those losses represent an area of 17.92 hectares for the 'Fonfría' operation and 19.90 hectares for the 'Ampliación de Feixolín' operation. Since the total area of that habitat on the 'Alto Sil' site amounts, according to the latest studies, to 4 000 hectares, or even 8 000 hectares, and not to 2 600 hectares as initially indicated when classification of the site as an SCI was proposed, those losses are, the Kingdom of Spain submits, negligible in relative terms.

– Findings of the Court

185 It is necessary first to examine the Commission's claim that, in breach of Article 6(2) of the Habitats Directive, habitats protected by virtue of the 'Alto Sil' SCI have been destroyed since the 'Alto Sil' site was classified as an SCI in December 2004.

186 In that respect, as the Advocate General has pointed out in points 144 and 145 of her Opinion, it is apparent from the documents before the Court, particularly from the table of current operations in the 2005 study, that, while operation of the 'Fonfría' and 'Ampliación de Feixolín' mines has affected that site in such a way, the effects, as regards the latter mine, arose after December 2004 and affected an area of at least 19 hectares.

187 The Commission argues, secondly, that, in areas adjacent to the mines concerned, noise and vibrations produced by mining activities have caused significant disturbances to the brown bear, a priority species protected by virtue of the classification as an SCI.

188 In that respect, it is apparent from the environmental report of 7 November 2008 on the 'Feixolín' open-cast coal-mining project in the Orallo mountains (Villablino, Léon), promoted by Minero Siderúrgica de Ponferrada, produced as an annex to the Commission's application, that the loss of habitats for the Cantabrian brown bear caused by the 'Feixolín' operation has been significant within what is called the 'Leitariegos corridor', that the bears move 3.5 to 5 kilometres from the areas of impact of the noise and vibrations caused by mining operations, and that that operation will prevent access for the brown bear to that corridor, or make it much more difficult, whereas that corridor is a north-south transit route of critical importance for the western population of that species.

189 That is confirmed by the 2005 study, in which it is indicated, in the context of an analysis of the impacts of the northern mines including 'Feixolín' and 'Fonfría', that the Leitariegos corridor, with a width of 10 kilometres, is a transit route of great importance for the western population of the said species, allowing in particular communication between two very important pockets of reproduction.

190 That report states that the risk of deterioration and closure of that corridor constitutes one of the main threats hanging over the re-establishment of the Cantabrian brown bear, in that it might result in the western population being fragmented into two sub-populations and even in the species finally being divided into three populations.

191 Consequently, the noise and vibrations caused by the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín' open-cast mines, and the closure of the Leitariegos corridor by reason of those mines, constitute disturbances of the 'Alto Sil' SCI, which are significant having regard to the conservation of the brown bear.

192 Since the 'Feixolín' and 'Fonfría' open-cast mines were authorised before the system of protection under the Habitats Directive became applicable to the 'Alto Sil' site by reason of its classification as an SCI in December 2004, the question arises whether, analogously with what has been stated in paragraph 156 of this judgment as regards the adverse effects suffered by the capercaillie by reason of the operations authorised before the site was classified as an SPA in the year 2000, it is possible to justify those disturbances by an application by analogy of Article 6(4) of the Habitats Directive in the context of the national procedure, from which it would follow that the Member State cannot be accused of an infringement of Article 6(2).

193 The Kingdom of Spain, basing its argument on the analysis contained in the 2005 report, invokes in that respect imperative reasons of major public interest in maintaining the mining operations, namely security of supply, the maintenance of employment and the definitive character of the authorisations, and proposals for measures to improve the habitat of the brown bear, in particular vegetation measures in the Leitariegos corridor.

194 However, it is apparent from the second subparagraph of Article 6(4) of the Habitats Directive that, where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

195 It follows that, since this complaint concerns the brown bear as a priority species protected by virtue of the 'Alto Sil' SCI since 2004, and since the Kingdom of Spain has not

invoked considerations of the same nature as those referred to in the second subparagraph of Article 6(4) of the Habitats Directive, the disturbances noted in paragraph 191 of this judgment cannot be justified by virtue of a national procedure in derogation analogous to that provided for in that provision.

196 Consequently, the second part of the fourth complaint must be upheld as regards the northern mines concerned by that part of the complaint, namely 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín'.

197 Having regard to the whole of the above considerations, it must be held that:

– by authorising the 'Nueva Julia' and 'Ladrones' open-cast mines but failing to subject that authorisation to an assessment in order to identify, describe and assess in an appropriate manner the direct, indirect and cumulative effects of the existing open-cast mining projects, save, in relation to the 'Ladrones' mine, as regards the brown bear,

the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3 and 5(1) and (3) of Directive 85/337 as amended,

– from 2000, the date of designation of the 'Alto Sil' area as an SPA under the Birds Directive,

– by authorising the 'Nueva Julia' and 'Ladrones' open-cast mining operations, without making the grant of the authorisations relating thereto subject to the carrying out of an appropriate assessment of the possible impacts of those projects, and, in any event, without complying with the conditions in which a project might be realised despite the risk posed by that project for the capercaillie, which constitutes one of the natural assets which motivated the classification of the 'Alto Sil' site as an SPA, namely the absence of alternative solutions, the existence of imperative reasons of major public interest and communication to the Commission of the necessary compensatory measures to ensure the overall coherence of the Natura 2000 network, and

– by failing to adopt the necessary measures to prevent the deterioration of habitats including the habitats of species, and to prevent significant disturbance of the capercaillie, the presence of which on the 'Alto Sil' site was the reason for the designation of that area as an SPA, caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Ampliación de Feixolín' and 'Nueva Julia' mines,

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' SPA under Article 6(2) to (4) of the Habitats Directive in conjunction with Article 7 thereof, and

– from December 2004, by failing to adopt the necessary measures to prevent the deterioration of habitats, including the habitats of species, and the disturbances caused to species by the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín' operations, the Kingdom of Spain has failed, in relation to the 'Alto Sil' SCI to fulfil its obligations under Article 6(2) of the Habitats Directive.

Costs

198 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs, inter alia, where each party succeeds on some and fails on other heads.

199 In this case, account must be taken of the fact that some of the Commission's complaints have not been upheld.

200 Therefore, the Kingdom of Spain must be ordered to pay, in addition to its own costs, two thirds of the Commission's costs. The Commission must pay one third of its own costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that, by authorising the 'Nueva Julia' and 'Ladrones' open-cast mines but failing to subject that authorisation to an assessment in order to identify, describe and assess in an appropriate manner the direct, indirect and cumulative effects of the existing open-cast mining projects, save, in relation to the 'Ladrones' mine, as regards the brown bear (Ursus arctos), the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3 and 5(1) and (3) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997;**

2. **Declares that, from 2000, the date of designation of the 'Alto Sil' area as a special protection area under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as amended by Commission Directive 97/49/EC of 29 July 1997,**

– **by authorising the 'Nueva Julia' and 'Ladrones' open-cast mining operations, without making the grant of the authorisations relating thereto subject to the carrying out of an appropriate assessment of the possible impacts of those projects, and, in any event, without complying with the conditions in which a project might be realised despite the risk posed by that project for the capercaillie, (Tetrao urogallus), which constitutes one of the natural assets which motivated the classification of the 'Alto Sil' site as a special protection area, namely the absence of alternative solutions, the existence of imperative reasons of major public interest and communication to the European Commission of the necessary compensatory measures to ensure the overall coherence of the Natura 2000 network, and**

– **by failing to adopt the necessary measures to prevent the deterioration of habitats including the habitats of species, and to prevent significant disturbance of the capercaillie, the presence of which on the 'Alto Sil' site was the reason for the designation of that area as a special protection area, caused by the 'Feixolín', 'Salguero-Prégame-Valdesegadas', 'Fonfría', 'Ampliación de Feixolín' and 'Nueva Julia' mines,**

the Kingdom of Spain has failed to fulfil its obligations in relation to the 'Alto Sil' special protection area under Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in conjunction with Article 7 thereof;

3. **Declares that, from December 2004, by failing to adopt the necessary measures to prevent the deterioration of habitats, including the habitats of species, and the disturbances caused to species by the 'Feixolín', 'Fonfría' and 'Ampliación de Feixolín' operations, the Kingdom of Spain has failed, in relation to the 'Alto Sil' site of Community importance, to fulfil its obligations under Article 6(2) of Directive 92/43;**

4. **Dismisses the action as to the remainder;**

5. **Orders the Kingdom of Spain to pay, in addition to its own costs, two thirds of the Commission's costs. The Commission is ordered to pay one third of its own costs.**

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

9 June 2011 (*)

(Failure of a Member State to fulfil obligations – Habitats Directive – Inadequacy of measures taken to protect the species Cricetus cricetus (European hamster) – Deterioration of habitats)

In Case C-383/09,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 25 September 2009,

European Commission, represented by O. Beynet and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and S. Menez, acting as Agents,

defendant,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen (Rapporteur), A. Prechal and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 21 October 2010,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2011,

gives the following

Judgment

1 By its application, the European Commission requests the Court to declare that, by failing to establish a programme of measures to ensure strict protection of the species *Cricetus cricetus* (the European hamster), the French Republic has failed to fulfil its obligations under Article 12(1)(d) of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368) ('the Habitats Directive').

Legal context

2 The main aim of the Habitats Directive, as stated in the third recital in the preamble thereto, is to promote the maintenance of biodiversity.

3 Article 1(a) to (i) of the directive provides:

'For the purpose of this Directive:

(a) conservation means a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i);

…

(g) species of Community interest means species which, within the territory referred to in Article 2, are:

(i) endangered, except those species whose natural range is marginal in that territory and which are not endangered or vulnerable in the western palearctic region; or

(ii) vulnerable, i.e. believed likely to move into the endangered category in the near future if the causal factors continue operating; or

(iii) rare, i.e. with small populations that are not at present endangered or vulnerable, but are at risk. The species are located within restricted geographical areas or are thinly scattered over a more extensive range; or

(iv) endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.

Such species are listed or may be listed in Annex II and/or Annex IV or V;

…

(i) conservation status of a species means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The conservation status will be taken as "favourable" when:

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

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

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

4 Article 2(2) of the Habitats Directive states that measures taken pursuant to that directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

5 The European hamster (*Cricetus cricetus*) is one of the species listed in Annex IV(a) to the Habitats Directive. That annex concerns, inter alia, animal species 'of Community interest in need of strict protection'.

6 Article 12(1) of the Habitats Directive provides:

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

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

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

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

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

The facts of the dispute and the pre-litigation procedure

7 The Commission was alerted to the conservation status of the European hamster in Alsace by a complaint, of which it informed the French authorities at a meeting held on 15 January 2007.

8 The French authorities submitted their observations thereon by notes of 15 February and 14 September 2007, by which they informed the Commission of the measures adopted in the context of the action plan for the conservation of the species concerned for 2007 to 2011.

9 By letter of formal notice of 23 October 2007 the Commission, firstly, stated that the results of the count of the European hamster made it clear that that species was threatened with complete extinction in the very near future and, secondly, requested the French Republic to submit its observations in that regard.

10 By letters of 24 December 2007 and 11 March 2008, the French authorities gave details of the protection measures already taken and those which were to be taken in order to safeguard that species.

11 By letter of 5 June 2008, the Commission sent a reasoned opinion to the French Republic, in which it stated that, by not adopting a programme of measures enabling strict protection of the European hamster, that Member State had failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive. As a consequence, the Commission requested the French Republic to take the measures necessary to comply with that reasoned opinion within two months of its notification.

12 The French Republic replied to the reasoned opinion by referring to the geographical constraints restricting opportunities to protect the European hamster, but also stating that it

had been observed in part of the territory of Alsace that the stock of that species had ceased to fall in 2008. In addition, that Member State informed the Commission of the progress of measures implemented in the context of the action plan for 2007 to 2011 for the conservation of that species.

13 Taking the view that the methods for conservation of the species implemented by the French Republic remained unsatisfactory, the Commission brought the present action.

The action

Arguments of the parties

14 The Commission submits that the species of European hamster is threatened with extinction in Alsace. The result of the stock counts shows a significant decrease in the species between 2001 and 2007. The causes of that deterioration are urbanisation and the changes in agricultural practices.

15 The measures adopted by the French Republic are inadequate and have not prevented the deterioration of the breeding sites or resting places of the species. One of the basic reasons for that inadequacy, which concerns both urbanisation and agricultural measures, is the over-restricted nature of the territory, in particular of the priority action areas ('PAAs') and the 'repopulation areas' subject to those measures. In addition, the latter are themselves inadequate. Thus, the objective of 22% of crops favourable to the European hamster within the PAAs has been achieved only in one of the three existing PAAs. Furthermore, the action plan for limiting pollution caused by nitrates for 2008 to 2010 is inadequate. Finally, urbanisation in the 'repopulation area' is not sufficiently restricted.

16 The French Republic contends that the measures which it has adopted constitute a coherent whole, which is proportionate and appropriate to the objective of strict protection of the European hamster, in accordance with the requirements of the Habitats Directive. In particular, the action plan for 2007 to 2011 enabled the particular habitat of that species to be precisely defined and three separate territories to be designated, namely the three PAAs, where all changes of use of land, other than those connected with agriculture, were abandoned, the 'repopulation area' to be delineated, in which, for any project covering an area of a hectare or more, there will be a requirement to prove its lack of harmful effect on the species by way of a specific study and the historic range to be determined, where all municipalities must, when renewing their town and country planning measures, provide for a specific study on the European hamster.

17 The French Republic states that, since the implementation of that action plan, the trend of the abundance index of the stock of the species in question in the 'main areas' is likely to show that the fall in stock numbers has ceased, and even that there is a slight increase therein. However, it is necessary to wait a number of years before it is possible to assess, with a sufficient degree of certainty, the impact of the measures taken by the French Republic on the conservation status of populations of that species. In any event, the Commission does not establish that the habitat of that species continued to deteriorate in the PAAs after 2007, nor does it show that pollution caused by nitrates is harmful to the species. Finally, the French Republic submits that, in the 'repopulation area', the requirement to submit any project for its impact on specimens, breeding sites or resting places of the European hamster to be checked is supplemented by the need to carry out a specific study, which must be done for all projects

involving an area greater than a hectare, with a view to ascertaining any damage caused to that species by such a project.

Findings of the Court

18 It must be borne in mind that Article 12(1)(d) of the Habitats Directive requires Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range, prohibiting deterioration or destruction of breeding sites or resting places.

19 The transposition of that provision requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (see, to that effect, Case C-183/05 *Commission* v *Ireland* [2007] ECR I-137, paragraph 29).

20 Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (judgment of 16 March 2006 in Case C-518/04 *Commission* v *Greece*, paragraph 16, and *Commission* v *Ireland*, paragraph 30).

21 Such a system of strict protection must therefore enable the effective avoidance of deterioration or destruction of breeding sites or resting places of the animal species listed in Annex IV(a) to the Habitats Directive (see, to that effect, Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraph 39).

22 Finally, it must be recalled that it is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-103/00 *Commission* v *Greece*, paragraph 23, and Case C-531/06 *Commission* v *Italy* [2009] ECR I-4103, paragraph 98).

23 It is established that the time-limit of two months set by the Commission in the reasoned opinion to enable the French Republic to comply therewith expired on 5 August 2008.

24 In that regard, it is apparent from the file that, between 2001 and 2007, the number of burrows of the European hamster in the 'main areas' which served as a reference for observation of the population of that species fell from more than 1 160 to less than 180. Furthermore, according to the result of the counts for 2009, drawn up by the Office national de la chasse et de la faune sauvage (National Authority for Hunting and Wildlife), the content of which is not disputed by the French Republic, there were no populations of the species in Alsace which reached its minimum viable population threshold, which is estimated at 1 500 individuals spread over an area of contiguous suitable land of 600 hectares.

25 In a letter of 28 August 2009, sent by the Secretary of State for Ecology to the Prefect of the Region of Alsace ('the letter of 28 August 2009'), it is stated that 'despite the application of the measures set out in the [European hamster] recovery plan (2007-2011) and the mutual obligations of the parties involved in the safeguarding of the species, the biological results obtained to date are insufficient to safeguard that species in France' and that, accordingly, 'it is vital that the measures in favour of the European hamster are markedly and

rapidly improved so as to obtain biological results in the short term which show the recovery of the species'.

26 The French Republic accepts that the development of maize crops, which has been carried out to the detriment of crop diversity, has been harmful to the European hamster, which depends on artificial grasslands, particularly those planted with lucerne, and has constituted one of the significant factors behind the decline in the population of that species. It is established that, even during recent years, such development has not been entirely halted in Alsace which is, in France, the only region where the species is present.

27 The measures intended to remedy this situation include, inter alia, the creation of three PAAs, which are areas where any changes of use of land, other than those connected with agriculture, have been abandoned and for which an objective of 22% of crops favourable to the European hamster, namely 2% of lucerne and 20% of standing cereals, has been established with a view to achieving, eventually, a viable population of approximately 1 200 to 1 500 specimens per area.

28 In that regard, according to the scientific data used to define the objective of 22% of favourable crops in the PAAs which have been submitted by the French Republic, 'during a study carried out in 1997 by the [National Authority for Hunting and Wildlife], on 12 sample squares of 25 hectares in loess terrain, … it was observed that the three squares on which more than 2 to 4% of lucerne and 20 to 30% of standing cereals was grown had the most significant populations of the European hamster. An increase in the number of burrows had been seen there between spring and summer, which permits the assumption that the environment was favourable to the maintenance and reproduction of the species. That was not the case of the remaining nine squares, in which there was little or no lucerne and standing cereals were very scarce'.

29 Although the Commission does not dispute that the so-called agro-environmental measures adopted with a view to achieving the objective of 22% of crops favourable to the species in question, in particular the financial support given to farmers to encourage the cultivation of lucerne and winter cereals, are such as to guide agricultural practices in a way favourable to the species, it is apparent from the file that, on 5 August 2008, that objective of 22% of crops favourable to the species had been achieved in only one of the three PAAs, which represent, moreover, only 2% of all the land favourable to the European hamster.

30 Furthermore, it must be noted in that respect that the French authorities were aware of the inadequacy of those measures since, firstly, in the letter of 28 August 2009, the Secretary of State for Ecology requested the Prefect of the Region of Alsace to prepare, for the following month of September, a proposal for changes to the perimeters of the PAAs, in particular to cover the sectors located near thereto which contained hamsters.

31 Secondly, with regard to the 'repopulation area', the French authorities stated, in letters sent to the Commission following notification of the reasoned opinion, that the dynamic of change to agricultural practices, which has contributed to the positive stabilisation of the numbers of the European hamster in the municipalities where its historical presence was abundant, was to be extended and widened, particularly by the implementation of localised agro-environmental measures intended to achieve, during 2011, 22% of crops favourable to the species over its entire living area.

32 The French Republic also accepts that the development of urbanisation and the infrastructures inherent thereto, by causing the disappearance and partition of agricultural land, constituted another decisive factor behind the decline in the population of the European hamster.

33 As regards the measures adopted by that Member State in the field of urbanisation with a view to halting the deterioration or destruction of the breeding sites or resting places of that species, it must be stated, firstly, that the prohibition of all new urbanisation in PAAs, even if it is truly binding, affects only 2% of all the land favourable to the European hamster, as pointed out in paragraph 29 of this judgment.

34 Secondly, it must be noted that although, in the 'repopulation area' which covers, according to the French Republic, 49% of the land favourable to the species, any urbanisation project of a hectare or more must prove its lack of harmful effect on that species by a specific study and, if that evidence is not adduced, can be carried out only provided a ministerial exemption is obtained, the documents in the file do not permit contradiction of the assertions of the Commission that, firstly, the conditions for the grant of such an exemption are not precisely specified and, secondly, there is no requirement for compensatory measures where such an exemption is granted.

35 Thirdly, it is common ground that, on 5 August 2008, urbanisation projects covering an area of less than a hectare were not subject to any formalities enabling their lack of impact on the conservation of the species in question to be ascertained. In any event, it is apparent from the letter of 28 August 2009 that the Secretary of State for Ecology requested the Prefect of the Region of Alsace to institute a system enabling the comprehensive monitoring and analysis of those projects with a view to confirming that they do not have such an impact. He also ordered that it be borne in mind that the presence of the hamsters in the sites covered by those projects 'justifies avoidance or an application for an exemption', whatever the surface area covered by the project.

36 Moreover, in that letter, it was stated that a supplementary decree concerning the conditions for making an application for an exemption to the strict protection of the European hamster and repeating the terms of the framework agreement on the management of the particular habitat of the species was being finalised and was to be published during September 2009.

37 It follows from the foregoing that the measures implemented on expiry of the period set in the reasoned opinion were not adequate to enable effective avoidance of deterioration or destruction of the breeding sites or resting places of the European hamster.

38 That being said, with regard to the alleged inadequacy of the action programme for 2008 to 2010 concerning the limitation of pollution caused by nitrates, the Commission has not, in any event, demonstrated to the requisite legal standard that there is a link between the use of nitrates in agriculture and the deterioration or destruction of the breeding sites or resting places of that species.

39 Having regard to the foregoing, the Commission's action must be upheld, subject to the reservation made in the preceding paragraph of this judgment.

40 Consequently, it must be held that, by failing to establish a programme of measures to ensure strict protection of the European hamster (*Cricetus cricetus*), the French Republic has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive.

Costs

41 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been essentially unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that, by failing to establish a programme of measures to ensure strict protection of the European hamster (*Cricetus cricetus*), the French Republic has failed to fulfil its obligations under Article 12(1)(d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006;**

2. **Orders the French Republic to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

20 May 2010 (*)

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Conservation of natural habitats – Wild fauna and flora – Protection arrangements before a habitat is placed on the list of sites of Community importance – Article 12(4) – Project for upgrading a country road)

In Case C-308/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 10 July 2008,

European Commission, represented by S. Pardo Quintillán and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris and L. Bay Larsen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission (formerly 'Commission of the European Communities') claims that the Court should declare that, in relation to the project for upgrading the country road between Villamanrique de la Condesa (Seville) and El Rocio (Huelva), the Kingdom of Spain has failed to fulfil its obligations under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive'), as interpreted by the judgments in Case

C-117/03 *Dragaggi and Others* [2005] ECR I-167 and Case C-244/05 *Bund Naturschutz in Bayern and Others* [2006] ECR I-8445, and under Article 12(4) of that directive.

Legal context

European Union law ('EU law')

2 According to the sixth recital in the preamble to the Habitats Directive, 'in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable'.

3 Under Article 3(1) of the Habitats Directive, '[a] coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.

4 Article 4 of the Habitats Directive is worded as follows:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. ...

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. …

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance [('SCIs')] drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

…

The list of sites selected as [SCIs], identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

…

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

5 The Lynx pardina ('Iberian lynx') is among the species of Community interest listed in Annex II to the Habitats Directive as a priority species. Article 1(h) of that directive defines 'priority species' as 'species referred to in [Article 1(g)(i)] for the conservation of which the

Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2'.

6 In Article 6 of the Habitats Directive, which lays down protection arrangements for SCIs, paragraph 2 provides:

'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.'

7 Article 12(4) of the Habitats Directive is worded as follows:

'Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV(a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.'

8 The Iberian lynx is among the species listed in Annex IV(a) to the Habitats Directive.

The facts underlying the dispute and the pre-litigation procedure

9 In December 1997, the Kingdom of Spain proposed the Doñana natural park as a SCI because of the presence there, inter alia, of Iberian lynx.

10 In November 1999 – that is to say, between the time when that site was proposed and when it was actually placed on the list of SCIs by the Commission – a project was adopted for the upgrading of the country road which runs alongside the edge of the Doñana natural park and cuts through a section of it.

11 On the view that the upgrading of the road had been carried out without all necessary measures being taken to prevent a negative impact on the environment and, in particular, on the Iberian lynx, the Commission sent a letter of formal notice to the Kingdom of Spain on 1 April 2004, alleging that it had failed to fulfil, inter alia, its obligations under Articles 6 and 12 of the Habitats Directive.

12 In order to take account of *Dragaggi and Others*, the Commission sent the Kingdom of Spain a supplementary letter of formal notice on 4 July 2006. In that letter, the Commission stated that the Kingdom of Spain had failed to fulfil its obligations under the Habitats Directive, as interpreted in that judgment, and under Article 12(4) of that directive. In that regard, the Commission referred to the importance of the presence of Iberian lynx in the area where the project for upgrading the road had been carried out and stated that the conversion of that byroad into a regional road led the natural habitat of that species to be fragmented and exposed the animals to the risk of fatal accidents, since the protective measures could not be regarded as appropriate.

13 On 19 July 2006, by Decision 2006/613/EC adopting, pursuant to Council Directive 92/43, the list of sites of Community importance for the Mediterranean biogeographical region (OJ 2006 L 259, p. 1), the Commission placed the Doñana natural park on that list.

14 By letter of 25 September 2006, the Kingdom of Spain replied that, after corrective measures had been taken, there had been no more cases of animals being struck by vehicles and that it appeared that, while not eliminating that risk, the protective measures reduced it enormously.

15 On 18 October 2006, on the view that the infringement of EU law was ongoing, the Commission delivered a reasoned opinion in which it reiterated its complaints and requested the Kingdom of Spain to comply with that opinion within a period of two months from its receipt.

16 On 18 December 2006, the Kingdom of Spain sent in reply a report from the Junta de Andalucía (Region of Andalucía), which restated the fact that, ever since corrective measures had been taken, there had been no more cases of Iberian lynx being struck by vehicles.

17 On the view that the situation remained unsatisfactory, the Commission brought the present action on 10 July 2008.

The action

The first plea in law, alleging failure to fulfil the obligation, binding on the defendant Member State under the Habitats Directive, not to authorise intervention of a kind which would seriously endanger the ecological characteristics of the site concerned

Arguments of the parties

18 The Commission claims that, in upgrading the country road at issue without at the same time taking appropriate protective measures, the Kingdom of Spain had intervened in a way which seriously altered the ecological characteristics of the SCI as proposed, a site considered to be essential for the Iberian lynx.

19 Despite the corrective measures adopted by the Spanish authorities, intervention of such a kind – in an area of particular sensitivity in relation to the survival of the Iberian lynx – leads to the fragmentation of the habitat of that species, making it difficult for the young lynx to disperse and for the connection between the various 'territorial nuclei' to be maintained and, above all, exposing young animals to the risk of being struck by a vehicle and killed. The result is that, contrary to the obligations imposed by the Habitats Directive as interpreted by the case-law of the Court, that priority species is in danger of becoming extinct.

20 The Kingdom of Spain contends that the regional transport link between Villamanrique de la Condesa and El Rocío was – and still is – an asphalt road which the Andalusian authorities have merely maintained in an appropriate manner. It cannot be said, therefore, that the ecological characteristics of the site have been seriously compromised because of intervention. Even if that were to be the case, the Kingdom of Spain has, in any event, adopted measures to prevent harm to the environment.

Findings of the Court

21 Under the Habitats Directive, Member States must take appropriate protective measures to preserve the characteristics of sites which host priority natural habitat types and/or priority species and which have been identified by Member States with a view to their inclusion on

the Community list. Member States cannot therefore authorise intervention where there is a risk that the ecological characteristics of those sites will be seriously compromised as a result. That is particularly so where there is a risk that intervention of a particular kind will bring about the extinction of priority species present on the sites concerned (see, to that effect, *Bund Naturschutz in Bayern and Others*, paragraphs 44 and 46).

22 However, the Commission criticises the Kingdom of Spain for authorising intervention of just such a kind, which has seriously altered the ecological characteristics of the SCI proposed and which risks bringing about the extinction of the Iberian lynx, a priority species the presence of which on the site at issue was one of the justifications for the Doñana natural park being proposed as a SCI by the defendant Member State.

23 According to established case-law, it is for the Commission to prove the alleged failure to fulfil obligations. It is the responsibility of the Commission to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (see Case C-179/06 *Commission* v *Italy* [2007] ECR I-8131, paragraph 37, and Case C-416/07 *Commission* v *Greece* [2009] ECR I-0000, paragraph 32).

24 It is not contested that the track between Villamanrique de la Condesa and El Rocío was first asphalted in 1989. As regards the upgrading project at issue, its implementation was authorised in February 2000, subject to the taking of measures such as the construction of wildlife crossings, the provision of appropriate road signs and the erection of animal fencing along the length of the section crossing the forest area, which is the area most favourable for the conservation of the Iberian lynx. Upgrading of the road was completed in July 2001. However, a number of additional corrective measures were gradually carried out, and finalised in November 2004. It is apparent from the case-file that, although the asphalting works have not altered either the route or the dimensions of the transport link at issue, they have brought about a change in use by converting a byroad into a regional road. That upgrading has led to an increase in traffic, particularly private cars, travelling at higher speeds.

25 It is common ground that, in general, linear transport infrastructures may constitute a real barrier for certain species referred to in the Habitats Directive and, by thus fragmenting their natural range, promote endogamy and genetic drift within those species. It does not appear, however, that the upgrading at issue has actually had a real impact on the habitat fragmentation of the Iberian lynx.

26 In that regard, it is necessary to state the following.

27 It follows from the study on the census of Iberian lynx populations in Spain and in Portugal (El Lince ibérico (Lynx pardinas) en España y Portugal – Censo – diagnóstico de sus poblaciones, J.N. Guzmán and Others, Ministerio de Medio Ambiente, 2004) that approximately half the population of Iberian lynx living in the Doñana natural park remain concentrated in 20% of the surface area of that park – precisely where the most abundant populations of rabbits, their main food source, are to be found.

28 Moreover, because of the lack of rabbits on 75% of the area on which Iberian lynx is present, the number of mating territories has dropped from approximately 12 to a maximum of 8.

29 In addition, it emerges from the summary of the final activity report drawn up by the Spanish authorities concerning the period from 1 July 2002 to 30 June 2006 (Recuperación de poblaciones de Lince ibérico en Andalucía, Proyecto Life No 02NAT/E/8609, Consejería de Medio Ambiente, Septiembre 2006) that it is important to promote the interconnection of the various territories which host the Iberian lynx population of the Doñana region, given that that population is composed of small 'territorial nuclei' between which the animals move when they are dispersing.

30 In particular, it emerges from the case-file that the most important original nucleus of small Iberian lynx is to be found in the forested areas of de Coto del Rey and Matasgordas, both of which are in the Doñana national park. From that nucleus, young Iberian lynx have two basic lines of dispersal, one towards the north, which leads across the asphalt road between Villamanrique de la Condesa and El Rocío, and the other towards the west.

31 In November 2006, however, eight wildlife crossings and two bridges were built in order to make sure that it was possible to cross the road at issue and thus to avoid the barrier effect resulting from its upgrading to a regional road.

32 Admittedly, according to a report of WWF/Adena of September 2007 (Informe sobre el camino agricola asfaltado Villamanrique de la Condesa (Seville) – El Rocío (Huelva)), the wildlife crossings built have proved to be unusable and useless because of design faults and lack of maintenance or failure to implement additional corrective measures.

33 However, the technical report drawn up in November 2006 by Inerco, a consultancy, at the request of the municipality of Villamanrique de la Condesa (Informe Técnico sobre las medidas correctoras adoptadas en las obras de adecuación del firme de la via Villamanrique – El Rocío (Sevilla – Huelva)), indicates that the number of wildlife crossings across the road at issue, as well as their design, were considered to be well adapted to the characteristics of the transport link which they are intended to make safe to cross. Their usefulness was limited only in the event of exceptionally heavy rainfall.

34 As the Commission observed when quoting the follow-up report on the effectiveness of the corrective measures implemented on the asphalt road between Villamanrique de la Condesa and El Rocío (Informe de seguimiento de la eficacia de las medidas correctoras establecidas en el camino agrícola asfaltado Villamanrique de la Condesa – El Rocío, Junta de Andalucía Consejería de Medio Ambiente, 16 March 2008), although proof that Iberian lynx had used the crossings between March 2006 and February 2007 was confined to only four occasions over a period of a year, it is also true that, at that time, the total estimated population of Iberian lynx in the Doñana parks did not even amount to 50 individual animals. Moreover, according to the final activity report referred to in paragraph 29 above, it has been established that individual specimens of Iberian lynx wander between the various territories of the Doñana region. In that regard, according to the follow-up report, the wildlife crossings have a sufficient covering of vegetation to encourage the animals to use them and the access slopes make the crossings perfectly accessible for lynx.

35 Moreover, as the final activity report states, thanks to the capture of 13 specimens and to the breeding in captivity programme, two cubs were born to broodstock originating respectively from the populations of the Andujar-Cardeña and the Doñana regions. That represents a step forward in the preservation of current genetic variability.

36 In the light of the foregoing, it cannot be regarded as established to the requisite legal standard that the upgrading of the road, as such, has had a real impact on the habitat fragmentation of the Iberian lynx in the Doñana region.

37 As regards the allegedly high risk of being struck by a vehicle to which Iberian lynx in that region are exposed following completion of the project for upgrading the road, it is necessary to state the following.

38 The Commission referred to the pilot study for the document entitled 'Sustainable mobility, road safety and conservation of wildlife in the Doñana region (Borrador, Movilidad sostenible, seguridad vial y conservación de la faune silvestre en la comarca de Doñana), forwarded by the Spanish authorities on 18 December 2006, which indicates that, for the Iberian lynx of the Doñana region, being struck by a vehicle has become one of the main causes of death and, accordingly, a determining factor for the future viability of the Iberian lynx population. According to that pilot study, the situation has been made worse by two main factors, namely, the increase in the number of asphalt roads, particularly in the final decade of the 20th century, and the growth of road traffic throughout the region, owing to the increase in tourist and commercial use of the main roads and the more frequent use of the asphalt country roads.

39 According to the study referred to in paragraph 27 above, during the period between 2000 and 2003, 10 Iberian lynx died because of being struck by a vehicle in the Doñana region. It is not contested that, during that period, only one Iberian lynx was killed on the country road between Villamanrique de la Condesa and El Rocío.

40 In 2004, another Iberian lynx was killed on that road.

41 However, it is common ground that, since implementation of the additional corrective measures was completed in November 2004, no Iberian lynx has been run over on that road, at least not before the end of the written procedure before the Court, which closed on 23 February 2009.

42 In that regard, it should be pointed out that the corrective measures consist in the adoption of measures to deter speeding; the provision of road signs; the erection of animal fencing; and in the improvement of wildlife crossings, bridges and drainage.

43 Thus, as regards the measures to deter speeding and the provision of road signs, it emerges from the Inerco report, referred to in paragraph 33 above, that the measures adopted by the Spanish authorities to discourage speeding have brought about a significant reduction in traffic speed on the road at issue as compared with that recorded a number of years earlier.

44 Nevertheless, it is apparent from the study of the Doñana natural park carried out in 2006 (Estudio de 2006 del Parque Natural de Doñana) that the average speeds recorded on that road exceed the authorised speed limits.

45 Against that background, the report referred to in paragraph 34 above concludes that, although the measures taken appear at the moment to yield good results, all the measures adopted could be improved by speed checks and more intensive maintenance of infrastructure, or even the adoption of new measures.

46 As regards the animal fencing, the WWF/Adena report referred to in paragraph 32 above indicates that this has not been erected along the entire length of the road between Villamanrique de la Condesa and El Rocío, one side of that road remaining unfenced for a section of approximately three kilometres. Thus, along that section, the Iberian lynx had unrestricted access to the road. According to the Inerco report, referred to in paragraphs 33 and 43 above, the road has been fully fenced off and the measures adopted in that connection must be considered appropriate in relation to the objectives pursued, even though it is necessary to check the fencing to ensure that it remains secure. Moreover, accidental gaps in certain fences have exceptionally allowed wildlife to pass through.

47 The follow-up report, referred to in paragraphs 34 and 45 above, indicates that, with regard to the 11 000 metre section of the country road which crosses the Doñana natural park, the first 9 300 metres – which correspond to the forested area constituting a favourable habitat for the Iberian lynx – are entirely bordered by animal fencing on both sides of the road. The remaining 1 700 metres are unfenced, since the road crosses a floodplain and serves as a ford during heavy floods. Moreover, there are no trees or bushes, the land being intended for grazing.

48 Furthermore, it emerges from the document drawn up on the initiative of the National Commission for nature protection of the Kingdom of Spain and entitled 'Technical specifications for the design of wildlife crossings and perimeter fencing' ('Prescripciones técnicas para el diseño de pasos de fauna y vallados perimetrales') – to which the Commission referred – that, for the Iberian lynx, twisted wire or soldered fences are recommended, which should reach two metres above the ground. However, it is undisputed that the animal fencing at issue in the present case complies with the recommended specifications, which – contrary to the Commission's assertions in its reply – are not prohibited for roads with the same characteristics as the road at issue.

49 Furthermore, it is indicated in the follow-up report that, by way of corrective measure in relation to the animal fencing and in order to facilitate escape if an Iberian lynx were to break through on to the road at issue, a sufficient number of escape points have been set up along the entire length of the fence, concentrated in the vicinity of possible points of access, such as crossroads or the places where the fencing ends. However, it has not yet been possible to test the effectiveness of those escape points, since the fences have fulfilled their function well and no Iberian lynx has been able to pass through them.

50 As for the wildlife crossings, bridges and drainage, reference should be made to paragraphs 32 to 34 above.

51 In the light of all of the foregoing, considered as a whole, it is clear that the Commission has failed to prove that the implementation of the project for upgrading the country road placed the Iberian lynx in great danger of being struck by vehicles.

52 Thus, although certain elements in the case-file appear to indicate that the overall situation of the Doñana site might not be satisfactory in the light of the requirements relating to conservation of the Iberian lynx – in particular, because of the relatively high number of cases in which animals of that priority species have died because of being struck by a vehicle – the evidence before the Court is not sufficient for it to find that the project for upgrading the country road, accompanied by the corrective measures, constitutes in itself intervention of a

kind which places the Iberian lynx on the site concerned in danger of extinction and which, accordingly, risks seriously compromising the ecological characteristics of that site.

53 The first plea in law must therefore be rejected.

The second plea, alleging failure to fulfil the obligations incumbent on the defendant Member State under Article 12(4) of the Habitats Directive

Arguments of the parties

54 The Commission claims that, although the Spanish authorities have acknowledged the accidental deaths of three Iberian lynx, in 1996, 2002 and 2004 respectively, on the country road between Villamanrique de la Condesa and El Rocío, they have not established a system for monitoring closely the incidental killing of Iberian lynx on the asphalt road at issue and have failed to take the conservation measures necessary to ensure that those accidental deaths do not have a significant negative impact on that protected species.

55 The Kingdom of Spain contends that it has adopted measures which are suitable and which drastically reduce the risk of incidental killing. In addition, the Spanish authorities are making sure that the measures adopted are satisfactorily monitored and continue to study new measures which may be even more appropriate with respect to the conservation and improvement of the species.

Findings of the Court

56 Under Article 12(4) of the Habitats Directive, read together with Annex IV(a) thereto, Member States are to establish a system to monitor, inter alia, the incidental killing of Iberian lynx. In the light of the information gathered, Member States are to undertake further research, or take the conservation measures required, to ensure inter alia that incidental killing does not have a significant negative impact on the species concerned.

57 As regards the establishment of a system for monitoring the incidental killing of Iberian lynx, it should be pointed out that, according to the summary of the final activity report, referred to in paragraph 29 above, a database has been created, according to geographical criteria, on deaths of Iberian lynx attributable to non-natural causes, such as being struck by a vehicle. This means that it has been possible to determine the areas within the natural range of the Iberian lynx where it is most at risk.

58 As regards the conservation measures needed to ensure that the incidental killing of Iberian lynx does not have a significant negative impact on the species, the findings made in relation to the first plea and on the basis of which it fell to be rejected may, in essence, be applied again in this connection.

59 In the present case, as the Kingdom of Spain has contended, the fact that the Spanish authorities continue to study new measures capable of further improving the conditions for conservation and improvement of the species cannot in itself lead to a finding that the measures adopted are inappropriate in relation to the aim underlying Article 12(4) of the Habitats Directive, specified in paragraph 58 above.

60 The second plea in law must therefore be rejected.

61 In the light of all the foregoing and there being no need now to rule on the plea of inadmissibility raised by the Kingdom of Spain in its rejoinder, on the ground that the first plea is vague and imprecise, the action brought by the Commission must be dismissed.

Costs

62 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has applied for costs to be awarded against the Commission and the latter has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the European Commission to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

4 March 2010 (*)

(Failure of a Member State to fulfil obligations – Directive 92/43/EEC – Article 6(2) and (3) – Incorrect transposition – Special areas of conservation – Significant effect of a project on the environment – 'Non-disturbing' nature of certain activities – Assessment of the effects on the environment)

In Case C-241/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 2 June 2008,

European Commission, represented by D. Recchia and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and A.-L. During, acting as Agents,

defendant,

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting as President of the Second Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris and L. Bay Larsen (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that, by failing to adopt all the laws and regulations necessary to transpose correctly Article 6(2) and (3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Habitats Directive'), the French Republic has failed to fulfil its obligations under that directive.

Legal context

Community legislation

2 Article 2(3) of the Habitats Directive provides that measures taken pursuant to that directive are to take account of economic, social and cultural requirements and regional and local characteristics.

3 Article 6(2) to (4) of the Habitats Directive provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

…'

National legislation

4 Article L. 414-1(V) of the Code de l'environnement (Environmental Code) provides:

'Natura 2000 sites shall be the subject of measures intended to conserve or restore, in a state favourable to their long-term maintenance, the natural habitats and populations of species of wild fauna and flora which have justified the designation of those sites. Natura 2000 sites shall also be subject to appropriate preventive measures to avoid deterioration of those natural habitats and disturbances likely significantly to affect those species.

Those measures shall be defined in consultation with, inter alia, the local authorities and groupings concerned, and with the representatives of the owners, operators and users of the lands and spaces within the site.

They shall take account of economic, social, cultural and defence requirements and of regional and local characteristics. They shall be adapted to the specific dangers which threaten those natural habitats and those species. They shall not result in human activities being prohibited, where those activities do not have a significant effect on the maintenance or restoration of those natural habitats

and those species at a favourable conservation status. Fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force shall not constitute activities causing disturbance or having such an effect.

The measures shall be taken in the context of the contracts or agreements provided for in Article L. 414-3 or in implementation of legislative and regulatory provisions, in particular those concerning national parks, natural marine parks, nature reserves, biotopes or listed sites.'

5 The first subparagraph of Article L. 414-2(I) of the Code de l'environnement provides that, for each Natura 2000 site, a statement of objectives is to establish the management policies, the measures provided for in Article L. 414-1, the means of implementing them and the accompanying financial provisions.

6 Article L. 414-3(I) of the code states:

'To implement the statement of objectives, the owners of rights in rem and personal rights over the lands within the site and professionals and users of the marine spaces within the site may conclude contracts with the administrative authority, called "Natura 2000 contracts". …

A Natura 2000 contract shall contain a series of commitments consistent with the policies and measures established in the statement of objectives, concerning the conservation and, if necessary, the restoration of the natural habitats and species which justified the creation of the Natura 2000 site. …

…'

7 Article L. 414-4(I) of the code states:

'Programmes and projects for works and developments which are subject to administrative authorisation or approval, the completion of which is likely significantly to affect a Natura 2000 site, shall be subject to an assessment of their implications in view of the site's conservation objectives. For any of those programmes which are provided for in legislative or regulatory provisions and are not subject to an impact study, the assessment shall be carried out in accordance with the procedure laid down in Article L. 122-4 et seq. of this code.

The works and developments provided for in Natura 2000 contracts shall be exempt from the assessment procedure referred to in the foregoing paragraph.'

8 Pursuant to point 1 of Article R. 414-21(III) of the Code de l'environnement, the person making the application must indicate the reasons for which there are no other satisfactory solutions for the completion of the plan or project, where that plan or project may have significant injurious effects on the conservation status of natural habitats and of species.

Pre-litigation procedure

9 On 18 October 2005, the Commission sent a letter of formal notice to the French Republic in which the Commission expressed its doubts as to whether the French legislation complied with Article 6(2) and (3) of the Habitats Directive.

10 As the Commission found the French Republic's reply of 7 February 2006 unconvincing, it sent a reasoned opinion to the French Republic on 15 December 2006, calling on it to take the measures necessary to comply with that opinion within a period of two months of receipt. The French authorities replied to that reasoned opinion by letter of 28 February 2007.

11 On 2 June 2008, the Commission brought the present action.

The action

Article 6(2) of the Habitats Directive

Admissibility

12 It must be noted that, while Law No 2006-1772 of 30 December 2006 on water and aquatic areas (JORF, 31 December 2006, p. 20285) amended the national provisions at issue, the amendments, as the Commission has pointed out without being contradicted by the French Republic, make no substantial change to those provisions and have no effect on the Commission's complaints set out in the letter of formal notice and in the reasoned opinion.

13 It follows that the complaints alleging that the third and fourth sentences of the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement do not comply with the Habitats Directive are admissible.

The first complaint: application of the 'significant effect' criterion indifferently to the deterioration of habitats and the disturbance of species.

– Arguments of the parties

14 The Commission claims that, by providing that human activities are prohibited in Natura 2000 sites only if they significantly affect the maintenance or restoration of natural habitats and species at a favourable conservation status, the third sentence of the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement applies the 'significant effect' criterion indifferently both to the deterioration of habitats and the disturbance of species, and is therefore imprecise and less strict than Article 6(2) of the Habitats Directive. Article 6(2) requires the Member States to take appropriate steps to avoid, in the special areas of conservation, first, the deterioration of natural habitats and the habitats of species and, second, the disturbance of species in so far as such disturbance could be significant in relation to the objectives of that directive. In other words, disturbances of species, which occur most often over a short period of time, may be tolerated up to a certain level, in contrast to the deterioration of habitats, which can be defined as a physical degradation affecting those habitats and which is systematically prohibited because placing a habitat in danger is more serious than disturbing a species.

15 Even though the Commission recognises that the first subparagraph of Article L. 414‑1(V) of the Code de l'environnement distinguishes, in accordance with Article 6(2) of the Habitats Directive, between the need to avoid the deterioration of habitats and the need to avoid disturbance of species with the 'significant effect' criterion only being laid down in respect of disturbance of species, it nevertheless criticises the French legislation at issue for not making that distinction when, in the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement, it specifically regulates human activities, which cannot be prohibited by the competent authorities where they do not have a significant effect.

16 The French Republic contends that, under the first subparagraph of Article L. 414‑1(V) of the Code de l'environnement, the deterioration of habitats must in all cases be avoided, in accordance with the requirements of Article 6(2) of the Habitats Directive. However, the third subparagraph of Article L. 414‑1(V) of that code means that an outright prohibition need not be imposed on human

activities which do not have a significant effect on the conservation of habitats. Such activities may, under the first subparagraph of Article L. 414‑1(V) of that code, be the subject of specific measures to prevent the deterioration of habitats and disturbance of species.

17 According to the French Republic, by reconciling the requirement of conservation of habitats and species with the maintenance of human activities which respect that requirement, the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement is consistent with the objectives pursued by the Habitats Directive, and with Article 2(3) of that directive, which provides that measures taken are to take account of economic, social and cultural requirements and regional and local characteristics. The Commission's position, by contrast, is not consistent with the requirements of the Habitats Directive.

– Findings of the Court

18 Article 6(2) of the Habitats Directive establishes a general obligation to take appropriate protective steps to avoid the deterioration of habitats and the disturbance of species, in so far as such disturbance could be significant in relation to the objectives of that directive.

19 It should be pointed out, in that regard, that the first subparagraph of Article L. 414‑1(V) of the Code de l'environnement provides that Natura 2000 sites are to be the subject of appropriate preventive measures to avoid the deterioration of natural habitats and disturbances likely significantly to affect the populations of species of wild fauna and flora which justified the designation of the sites.

20 As regards human activities, the third subparagraph of Article L. 414‑1(V) of the Code de l'environnement states that such measures are not to result in human activities being prohibited, where those activities do not have a significant effect on the maintenance or restoration of natural habitats and species at a favourable conservation status.

21 In that regard, the third subparagraph of Article L. 414-1(V) of the Code de l'environnement must be read in conjunction with the first subparagraph of that provision and in the light thereof.

22 For the purposes of determining whether the complaint raised by the Commission is well founded, it should be borne in mind that, according to settled case‑law, it is incumbent upon the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court all the information needed to enable the Court to establish

that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (see, inter alia, judgment of 11 December 2008 in Case C-293/07 Commission v Greece, paragraph 32 and the case-law cited).

23 In the present case, however, the Commission merely alleges, in essence, that, in order to ensure a correct transposition of Article 6(2) of the Habitats Directive, the third subparagraph of Article L. 414-1(V) of the Code de l'environnement must prohibit all deteriorations, even if they do not have a significant effect. By isolating that provision in that way, and not taking sufficient account of its immediate legislative context, the Commission has, inter alia, failed to show that the appropriate measures adopted pursuant to the first subparagraph of Article L. 414-1(V) of that code do not, in fact, allow the deterioration of habitats within the meaning of Article 6(2) of the Habitats Directive to be avoided.

24 In those circumstances, it has not been established that Article L. 414-1(V) of the Code de l'environnement, considered in its entirety, does not constitute a correct transposition of Article 6(2) of the Habitats Directive, as alleged in the first complaint.

25 Consequently, the first complaint must be rejected.

The second complaint: the general assertion that certain activities do not cause disturbance

– Arguments of the parties

26 The Commission claims that the fourth sentence of the third subparagraph of Article L. 414-1(V) of the Code de l'environnement, which provides that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force shall not constitute activities causing disturbance or activities having such an effect, does not ensure a clear, precise and complete transposition of Article 6(2) of the Habitats Directive. Compliance with rules without any assurance that those rules take account of the requirements specific to a particular site cannot, a priori, lead to the general assertion that those activities cause no disturbance.

27 The Commission takes the view, in particular, that the statement of objectives, on which the regulatory power is based, is not such as to take account of the requirements specific to a particular

site, inasmuch as that document, established on a contractual basis, is not intended to regulate activities such as hunting or fishing and has no binding force, as it has no accompanying sanction.

28 The French Republic contends that it correctly transposed Article 6(2) of the Habitats Directive by laying down the principle that, in so far as aquatic and hunting-related activities are carried out in accordance with the laws and regulations in force, they are not causing disturbance, and that, therefore, they are presumed to comply with the conservation objectives pursued in the context of the Natura 2000 European Ecological Network.

29 While recognising that the statement of objectives does not contain directly applicable regulatory measures, the French Republic submits that the necessary regulatory measures, specific to the site concerned, are approved subsequently by decision of the competent authorities, supplementing the existing general rules. It states, moreover, that the general rules on fishing and hunting-related activities can relate to areas which are delimited and demarcated according to ecological criteria and give rise to the setting of quotas.

– Findings of the Court

30 It should be recalled, first, that, in accordance with the Court's case-law, Article 6(2) and (3) of the Habitats Directive seek to ensure the same level of protection (see, to that effect, Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging [2004] ECR I-7405, paragraph 36, and Case C-418/04 Commission v Ireland [2007] ECR I-10947, paragraph 263).

31 Second, it should be noted that, as regards Article 6(3) of the Habitats Directive, the Court has already held that the option of exempting generally certain activities, in accordance with the rules in force, from the need for an assessment of the implications for the site concerned does not comply with that provision. Such an exemption is not such as to guarantee that those activities do not adversely affect the integrity of the protected site (see, to that effect, Case C-98/03 Commission v Germany [2006] ECR I-53, paragraphs 43 and 44).

32 Accordingly, taking into account the similar levels of protection required by Article 6(2) and 6(3) of the Habitats Directive, the fourth sentence of the third subparagraph of Article L. 414-1(V) of the Code de l'environnement by providing generally that certain activities such as fishing or hunting do not cause disturbance, can be regarded as consistent with Article 6(2) of that directive only if it is ensured that those activities cause no disturbance likely significantly to affect the objectives of the directive.

33 The French Republic submits in that regard that a statement of objectives is drawn up for each site and serves as the basis for the adoption of targeted measures taking account of the ecological requirements specific to the site concerned. It adds that where the activities in question are carried out in accordance with the general rules applicable to those activities, that allows account to be taken of areas which are delimited and demarcated according to ecological criteria and allows for quotas to be set.

34 It is therefore necessary to examine whether such measures or rules guarantee, in fact, that the activities in question do not cause any disturbance likely to have a significant effect.

35 As regards the statement of objectives, the French Republic indicates that it does not contain directly applicable regulatory measures and that it is a diagnostic tool which allows, on the basis of available scientific knowledge, measures to be proposed to the competent authorities which will enable the conservation objectives set by the Habitats Directive to be met. It adds that, currently, only half the sites concerned have a statement of objectives.

36 It follows that the statement of objectives cannot systematically guarantee in all cases that the activities in question will not cause disturbances likely significantly to affect those conservation objectives.

37 Such a conclusion applies all the more as regards targeted measures which take account of the ecological requirements specific to a particular site, since the adoption of those measures is based on the statement of objectives.

38 In relation to the general rules applicable to the activities in question, it must be held that, while those rules can admittedly reduce the risk of significant disturbance, they can however remove that risk altogether only it they provide for mandatory compliance with Article 6(2) of the Habitats Directive. The French Republic does not claim that that is the situation in this case.

39 It follows from the foregoing that by providing generally that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an affect, the French Republic has failed to fulfil its obligations under Article 6(2) of the Habitats Directive.

Article 6(3) of the Habitats Directive

First complaint: the exemption of works or developments under Natura 2000 contracts from the procedure of assessment of their implications for the site

– Arguments of the parties

40 The Commission criticises the second subparagraph of Article L. 414‑4(1) of the Code de l'environnement for not constituting a correct transposition of Article 6(3) of the Habitats Directive in that it systematically exempts works or developments provided for in the Natura 2000 contracts from the procedure of assessment of their implications for the site referred to in Article 6(3).

41 Under French law, Natura 2000 contracts are concluded 'to implement the statement of objectives' which contains, inter alia, one or more specifications applicable to Natura 2000 contracts, establishing good practice to be followed when executing contractual measures and defining the objective pursued and the species and habitats concerned. Although those contracts must comply with the statement of objectives, there is no indication, according to the Commission, that they are comprised exclusively of measures directly connected with or necessary for the management of the site.

42 The French Republic accepts that works and developments provided for in Natura 2000 contracts are exempt from the assessment of implications procedure and considers that Article 6(3) of the Habitats Directive does not require that those works and developments be subject to that assessment procedure since, in its view, they do not adversely affect the site in a significant way.

43 Natura 2000 contracts are concluded, in accordance with Article L. 414‑3 of the Code de l'environnement, to implement the statements of objectives and it is impossible for them to contravene the conservation objectives of habitats and species or to involve actions which are unnecessary for maintaining the conservation status of the site.

– Findings of the Court

44 It should be borne in mind that, under Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a

significant effect thereon must be subject to appropriate assessment of its implications for the site in view of that site's conservation objectives.

45 In that regard, it is not in dispute that works or developments provided for in Natura 2000 contracts can be categorised as plans or projects within the meaning of Article 6(3) of the Habitats Directive.

46 It is therefore necessary to examine whether the works or developments provided for in Natura 2000 contracts are directly connected with or necessary for the management of the site, so that their authorisation is not subject to the obligation to carry out the assessment of implications referred to in Article 6(3) of the Habitats Directive.

47 In accordance with Article L. 414‑3(I) of the Code de l'environnement a Natura 2000 contract is concluded 'to implement the statement of objectives', and comprises 'a series of commitments consistent with the policies and measures established in the statement of objectives concerning the conservation and, if necessary, the restoration of the natural habitats and species which justified the creation of the Natura 2000 site'.

48 Under the first subparagraph of Article L. 414‑2(I) of that code, the statement of objectives establishes, inter alia, the management policies and the conservation or restoration measures.

49 According to the French Republic, the systematic exemption of works and developments provided for in Natura 2000 contracts from the obligation, laid down in Article 6(3) of the Habitats Directive, to carry out an assessment of their implications for the site is justified by the notion that, in so far as those contracts are intended to achieve fixed conservation and restoration objectives for the site, they are directly connected with or necessary for the management of the site.

50 Such an approach presupposes therefore that the measures provided for in Natura 2000 contracts which seek to attain conservation and restoration objectives are also, under all circumstances, measures directly connected with or necessary for the management of the site.

51 However, it cannot be ruled out that, while they may have as their objective the conservation or restoration of a site, the works or developments provided for in those contracts may, nevertheless, not be directly connected with or necessary for the management of that site.

52 In that regard, the French Republic accepts, moreover, in the context of the complaint alleging a uniform application of the 'significant effect' criterion, that conservation measures for habitats may prove favourable for some habitats concerned but involve a deterioration in other types of habitats. It cites salt production as an example: the creation of basins called 'œillets' for the purposes of industrialised salt production leads to the deterioration of the habitat formed by lagoons, even if, otherwise, that activity may have beneficial effects for regenerating that environment owing to the retention of certain types of marsh.

53 It follows that determining the conservation and restoration objectives in the context of Natura 2000 may require, as the Advocate General pointed out in point 71 of her Opinion, the reconciliation of various conflicting objectives.

54 In order to ensure fully the attainment of the conservation objectives referred to in the Habitats Directive, it is therefore necessary, in accordance with Article 6(3) of the Habitats Directive, that each plan or project, not directly connected with or necessary for the management of the site, which is likely significantly to affect the site be subject to an individual assessment of its implications for the site concerned in view of the site's conservation objectives.

55 It follows that the mere fact that the Natura 2000 contracts comply with the conservation objectives of sites cannot be regarded as sufficient, in the light of Article 6(3) of the Habitats Directive, to allow the works and developments provided for in those contracts to be systematically exempt from the assessment of their implications for the sites.

56 Accordingly, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, the French Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive.

The second complaint: the existence of activities not subject to authorisation

– Arguments of the parties

57 The Commission claims that the first subparagraph of Article L. 414‑4(I) of the Code de l'environnement does not comply with Article 6(3) of the Habitats Directive, in that only activities which require administrative authorisation or approval are subject to the procedure of assessment of their implications for the site laid down in Article 6(3). Programmes or projects subject to a declaratory scheme are excluded. Those programmes or projects have a significant effect on the site

in view of the conservation objectives, which is the decisive criterion when applying Article 6(3) of the Habitats Directive.

58 The French Republic does not dispute the merits of that complaint and merely points to the legislative amendments which it has undertaken in order to comply with the Community rules, amendments which were introduced by Law No 2008-757 of 1 August 2008 concerning environmental liability and various provisions for adaptation to Community law in the environmental sector (JORF, 2 August 2008, p. 12361).

– Findings of the Court

59 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see judgment of 25 July 2008 in Case C-504/06 Commission v Italy, paragraph 24 and the case-law cited).

60 In the present case, the French Republic does not dispute that on 15 February 2007, at the end of the period laid down in the reasoned opinion, namely before Law No 2008-757 was adopted, the national provision at issue did not constitute a correct transposition of Article 6(3) of the Habitats Directive.

61 In those circumstances, without it being necessary to examine whether Law No 2008-757 complies with the Habitats Directive, it is sufficient to note that that law was adopted after the period laid down in the reasoned opinion had expired.

62 Accordingly, by systematically exempting works and development programmes and projects which are subject to a declaratory system from the procedure of assessment of their implications for the site, the French Republic has failed to fulfil its obligations under Article 6(3) of the Habitats Directive.

The third complaint: failure to examine alternative solutions

– Arguments of the parties

63 The Commission criticises point 1 of Article R. 414-21(III) of the Code de l'environnement for not requiring the person making the application, in the context of an appropriate assessment of the implications for the site laid down in Article 6(3) of the Habitats Directive, to provide a description of the various alternative solutions which can be envisaged for carrying out the plan or project. That assessment requires, first, that a description be made of the various alternative solutions examined and an analysis of their implications for the site be carried out and, second, that the public authorities, even in the absence of an adverse affect on the integrity of the site, study those alternative solutions before making a decision on the basis of Article 6(3) of the Habitats Directive.

64 The Commission considers that the mere obligation on the person making the application to indicate the reasons for which there is no other satisfactory solution does not suffice to ensure an examination of alternative solutions in the context of assessment of the implications for the site. The French legislation does not therefore comply with the obligation, arising from Article 6(3) of the Habitats Directive, to make sure that there are no alternative solutions.

65 The French Republic contends that the disputed provision represents a correct transposition of Article 6(3) of the Habitats Directive. Furthermore, the French legislation actually results in the person making the application studying, describing and mapping alternative solutions and explaining the advantages and drawbacks of each solution in view of the site's conservation objectives.

66 The French Republic states that, in any event, in order to remove all doubt in that regard, the decrees implementing Law No 2008-757 expressly lay down the obligation on the person making the application to describe the alternative solutions.

– Findings of the Court

67 By this complaint, the Commission claims that the appropriate assessment which must be carried out pursuant to Article 6(3) of the Habitats Directive must also include an examination of alternative solutions.

68 It must be held, in that regard, that that complaint arises from an incorrect interpretation of Article 6(3) of the Habitats Directive both in relation to the concept of appropriate assessment and in relation to the stage in the procedure at which the examination of alternative solutions must be carried out.

69 First, according to settled case-law, the appropriate assessment of the implications for the site which must be carried out pursuant to Article 6(3) implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field (Waddenvereniging and Vogelbeschermingsvereniging, paragraph 54, and Commission v Ireland, paragraph 243). Such an assessment does not therefore involve an examination of the alternatives to a plan or project.

70 Second, it must be pointed out that the obligation to examine alternative solutions to a plan or project does not come within the scope of Article 6(3) of the Habitats Directive, but within the scope of Article 6(4) (see, to that effect, Case C-441/03 Commission v Netherlands [2005] ECR I-3043, paragraph 27 et seq.).

71 In accordance with Article 6(4) of the Habitats Directive, the examination referred to in that provision, which concerns, in particular, the absence of alternative solutions, can only be undertaken where the assessment required under Article 6(3) of that directive is negative and where the plan or project must nevertheless be carried out for imperative reasons of overriding public interest (see, to that effect, Commission v Netherlands, paragraphs 26 and 27).

72 Thus, following the assessment of the implications undertaken pursuant to Article 6(3) of the Habitats Directive and in the event of a negative assessment, the competent authorities have the choice of either refusing authorisation for the plan or project or of granting authorisation under Article 6(4) of that directive, provided that the conditions laid down in that provision are satisfied (see Case C-239/04 Commission v Portugal [2006] ECR I-10183, paragraph 25, and, to that effect, Waddenvereniging and Vogelbeschermingsvereniging, paragraphs 57 and 60).

73 In those circumstances, the examination of alternative solutions, which is a requirement set out in Article 6(4) of the Habitats Directive, cannot constitute a factor which the competent national authorities are obliged to take into account when they undertake the appropriate assessment laid down in Article 6(3) of that directive (see, to that effect, Commission v Netherlands, paragraph 28).

74 It follows that the Commission is not justified in claiming that point 1 of Article R. 414-21(III) of the Code de l'environnement does not comply with Article 6(3) of the Habitats Directive in that regard.

75 Accordingly, this complaint cannot be upheld.

76 In the light of the foregoing considerations, it must be held that,

– first, by providing generally that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an effect, and

– second, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, and

– by systematically exempting works and development programmes and projects which are subject to a declaratory system from that procedure,

the French Republic has failed to fulfil its obligations under Article 6(2) and Article 6(3) respectively of the Habitats Directive.

Costs

77 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs, inter alia, where each party succeeds on some and fails on other heads.

78 In the present case, it must be taken into account that some of the Commission's complaints have not been upheld.

79 Accordingly, the French Republic should be ordered to pay two thirds of the costs and the Commission to pay the other third.

On those grounds, the Court (Second Chamber) hereby:

1. Declares that,

– first, by providing generally that fishing, aquaculture, hunting and other hunting-related activities practised under the conditions and in the areas authorised by the laws and regulations in force do not constitute activities causing disturbance or having such an effect, and

– second, by systematically exempting works and developments provided for in Natura 2000 contracts from the procedure of assessment of their implications for the site, and

– by systematically exempting works and development programmes and projects which are subject to a declaratory system from that procedure,

the French Republic has failed to fulfil its obligations under Article 6(2) and Article 6(3) respectively of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;

2. Dismisses the action as to the remainder;

3. Orders the French Republic to pay two thirds of the costs and the European Commission to pay the other third.

[Signatures]

* Language of the case: French.

JUDGMENT OF THE COURT (Second Chamber)

14 January 2010 (*)

(Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Decision of the Member State concerned to give its agreement to the draft list of sites of Community importance drawn up by the Commission – Interests and points of view which must be taken into account)

In Case C-226/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgericht Oldenburg (Germany), made by decision of 13 May 2008, received at the Court on 26 May 2008, in the proceedings

Stadt Papenburg

v

Bundesrepublik Deutschland,

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting for the President of the Second Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris and L. Bay Larsen (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 26 March 2009,

after considering the observations submitted on behalf of:

– Stadt Papenburg, by K. Füßer, Rechtsanwalt,

– Bundesrepublik Deutschland, by W. Ewer, Rechtsanwalt,

– the Commission of the European Communities, by B. Eggers and D. Recchia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 9 July 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 2(3), 4(2) and 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of

natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368) ('the Habitats Directive').

2 The reference was made in the course of proceedings between Stadt Papenburg (the municipality of Papenburg) and Bundesrepublik Deutschland (the Federal Republic of Germany), concerning the agreement that that State intends to give to the draft list of sites of Community importance ('SCIs') drawn up by the Commission of the European Communities and including a site on the river Ems downriver from that municipality's local authority area.

Legal context

Community law

3 Article 2(3) of the Habitats Directive is worded as follows:

'Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

4 According to Article 3(1) of the Habitats Directive, 'a coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range'.

5 Article 4(1) and (2) of that directive provides:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. …

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. …

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the nine biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of [SCIs] drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the [SCIs] in their territory.

The list of sites selected as [SCIs] … shall be adopted by the Commission in accordance with the procedure laid down in Article 21.'

6 Annex III to the Habitats Directive states in Stage 2, entitled 'Assessment of the Community importance of the sites included on the national lists':

'1. All the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as [SCIs].

2. The assessment of the Community importance of other sites on Member States' lists, i.e. their contribution to maintaining or re-establishing, at a favourable conservation status, a natural habitat in Annex I or a species in Annex II and/or to the coherence of Natura 2000 will take account of the following criteria:

(a) relative value of the site at national level;

(b) geographical situation of the site in relation to migration routes of species in Annex II and whether it belongs to a continuous ecosystem situated on both sides of one or more internal Community frontiers;

(c) total area of the site;

(d) number of natural habitat types in Annex I and species in Annex II present on the site;

(e) global ecological value of the site for the biogeographical regions concerned and/or for the whole of the territory referred to in Article 2, as regards both the characteristic or unique aspect of its features and the way they are combined.'

7 Article 6(2), (3) and (4) of the Habitats Directive provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety,

to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

National law

8 Article 28(2) of the Basic Law (Grundgesetz) is worded as follows:

'Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility, within the limits prescribed by the laws. Within the limits of their functions designated by law, associations of municipalities shall also have the right to administrative autonomy according to the laws. The guarantee of administrative autonomy shall extend to the basic elements of financial autonomy; these basic elements shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.'

9 The referring court interprets that provision as meaning that the administrative autonomy which is constitutionally guaranteed to the municipalities grants them a right to have their interests taken into account where measures going beyond the level of the municipal territory have a lasting effect on their development or cause lasting interference with plans which are sufficiently concrete and established. That also applies to measures implemented outside the municipal territory, in so far as the municipality is clearly and particularly affected.

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Papenburg is a port town in Lower Saxony on the river Ems, where there is a shipyard.

11 In order to enable ships with a draught of 7.3 metres to navigate between the shipyard and the North Sea, the Ems must be deepened by means of 'required dredging operations'. By a decision of 31 May 1994 of the Wasser und Schifffahrtsdirektion Nordwest (Waterways and Navigation Directorate for the North-West Region), Stadt Papenburg, Landkreis Emsland (the district of Emsland) and the Wasser und Schifffahrtsamt Emden (Emden Waterways and Navigation Office) were granted permission to dredge that river, where required. That decision is definitive and means, in accordance with German law, that future 'required dredging operations' are considered to have been granted permission.

12 On 17 February 2006, the Federal Republic of Germany indicated to the Commission that parts of the Ems situated downriver from Stadt Papenburg's local authority area, under the description 'Unterems und Außenems' (Lower Ems and Outer Ems), could be accepted as a possible SCI within the meaning of the Habitats Directive.

13 The Commission included those parts of the Ems in its draft list of SCIs. It requested the Federal Republic of Germany to give its agreement thereto, pursuant to the first subparagraph of Article 4(2) of the Habitats Directive.

14 On 20 February 2008, Stadt Papenburg brought an action before the Verwaltungsgericht Oldenburg (Administrative Court, Oldenburg) seeking to prevent the Federal Republic of Germany from giving its agreement. It claimed that an agreement on the part of that Member State would amount to a breach of the administrative autonomy which it has under German constitutional law.

15 According to Stadt Papenburg, as a seaport with a shipyard its planning and investments and its economic development depend on the Ems remaining navigable for large seagoing ships. It fears that, if the Lower Ems and Outer Ems were included in the list of SCIs, the dredging operations required for that purpose would in future, and in every case, have to undergo the assessment provided for in Article 6(3) and (4) of the Habitats Directive.

16 The Federal Republic of Germany contends that the action should be dismissed. It is of the opinion that to take into account the interests asserted by Stadt Papenburg when deciding whether to give the agreement at issue in the main proceedings would contravene Community law. Under the first subparagraph of Article 4(2) of the Habitats Directive, the Member State is permitted to take the decision whether to give agreement only on the basis of nature conservation criteria.

17 By order of 31 March 2008, which has become definitive, the Verwaltungsgericht Oldenburg granted Stadt Papenburg interim relief and prohibited the Federal Republic of Germany from giving its agreement until judgment has been delivered in the main proceedings.

18 In those circumstances, the Verwaltungsgericht Oldenburg decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Does the first subparagraph of Article 4(2) of [the Habitats Directive] allow a Member State to refuse to agree to the Commission's draft list of [SCIs], in relation to one or more sites, on grounds other than nature conservation?

(2) If Question 1 is answered in the affirmative: Do those grounds include the interests of municipalities and associations of municipalities, in particular their plans, planning intentions and other interests with regard to the further development of their area?

(3) If Questions 1 and 2 are answered in the affirmative: Do the third recital in the preamble to [the Habitats Directive], Article 2(3) of the directive or other provisions of Community law even require that such grounds be taken into account by the Member States and the Commission when giving agreement and establishing the list of [SCIs]?

(4) If Question 3 is answered in the affirmative: Would it be possible – under Community law – for a municipality which is affected by the inclusion of a particular site in the list to claim in legal proceedings after final adoption of the list that the list infringes Community law, because its interests were not, or not sufficiently, taken into account?

(5) Must ongoing maintenance works in the navigable channels of estuaries, which were definitively authorised under national law before the expiry of the time-limit for transposition of [the Habitats Directive], undergo an assessment of their implications pursuant to Article 6(3) or (4) of the directive where they are continued after inclusion of the site in the list of [SCIs]?'

The request to have the oral procedure reopened

19 By document lodged at the Court Registry on 17 September 2009, Stadt Papenburg requested the Court to order that the oral procedure be reopened, pursuant to Article 61 of the Rules of Procedure.

20 In support of its request, Stadt Papenburg states that the Advocate General, in her Opinion, expressed the answer that she proposes the Court should give to the fifth question on the basis of a description of the facts which in such as to mislead the Court. In particular, Stadt Papenburg states that, contrary to what the Advocate General suggests, the approval of the Wasser- und Schifffahrstsdirektion Nordwest of 31 May 1994 by which Stadt Papenburg, Landkreis Emsland and the Wasser- und Schifffahrstsamt Emden were granted permission to dredge the Ems where required is not the first such decision concerning the navigability of the river Ems. Furthermore, the Ems cannot be considered to be a river which naturally enables ships with a draught of 6.3 metres to be navigated. Such a situation is the result of previously authorised dredging operations. Finally, Stadt Papenburg also disputes the arguments raised by the Advocate General in support of her reply to the first question referred.

21 The Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 37, and Case C-42/07 *Liga Portuguesa de Futebol Profissional and Bwin International* [2009] ECR I-0000, paragraph 31).

22 In the present case, it is evident that Stadt Papenburg is contending, in essence, first, that certain facts underlying the Advocate General's assessment are incorrect, and, second, that the view expressed by the Advocate General concerning the interpretation of the first subparagraph of Article 4(2) of the Habitats Directive is incorrect.

23 As regards the first point, it should be noted that, under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, the latter is empowered only to give rulings on the interpretation or the validity of a Community provision on the basis of the facts which the national court puts before it (see, inter alia, Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 31); those facts, in conjunction with the legal material provided by the referring court, are to enable the Court to give a useful answer to the questions submitted to it (see, to that effect, inter alia, Case C-11/07 *Eckelkamp and Others* [2008] ECR I-6845, paragraph 28).

24 The order for reference contains all the information necessary to enable the Court to give a useful answer to the questions submitted to it and, in particular, to the first question.

25 With regard to the second point, suffice it to state that Stadt Papenburg's request contains nothing to indicate that it would be useful or necessary to reopen the oral procedure.

26 Therefore, the Court, after hearing the Advocate General, holds that there is no need to order that the oral procedure be reopened.

The questions referred for a preliminary ruling

The first question

27 The first subparagraph of Article 4(2) of the Habitats Directive provides that, on the basis of the criteria set out in Annex III (Stage 2) to that directive, the Commission is to

establish, in agreement with each Member State, a draft list, drawn from the Member States' lists, of SCIs for each of the biogeographical regions referred to in Article 1(c)(iii) of the directive.

28 Annex III to the Habitats Directive, which relates to the criteria for selecting sites eligible for identification as SCIs and designation as special areas of conservation, lists, so far as concerns Stage 2 in that annex, criteria for assessing the Community importance of the sites included on the national lists.

29 Those assessment criteria were defined on the basis of the objective of conserving the natural habitats or the wild fauna and flora listed respectively in Annex I or Annex II to the Habitats Directive, and of the objective of coherence of Natura 2000, namely the European ecological network of special areas of conservation which is provided for in Article 3(1) of the Habitats Directive.

30 It follows that the first subparagraph of Article 4(2) of the Habitats Directive, as such, does not provide for requirements other than those relating to the conservation of natural habitats and wild fauna and flora or to the setting up of the Natura 2000 network to be taken into account when the Commission, in agreement with each of the Member States, draws up a draft list of SCIs.

31 If, in the phase of the classification procedure that is governed by the first subparagraph of Article 4(2) of the Habitats Directive, the Member States were permitted to refuse to give their agreement on grounds other than environmental protection, the achievement of the objective referred to in Article 3(1) of the Habitats Directive would be put in danger, namely the setting up of the Natura 2000 network, which is composed of sites hosting the natural habitat types listed in Annex I to the directive and habitats of the species listed in Annex II and which must enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

32 That would, in particular, be the case were the Member States able to refuse to give their agreement on the basis of economic, social and cultural grounds and regional and local characteristics as referred to in Article 2(3) of the Habitats Directive, a provision which, moreover, as was stated by the Advocate General in point 38 of her Opinion, does not constitute an autonomous derogation from the general system of protection put in place by that directive.

33 The answer to the first question is therefore that the first subparagraph of Article 4(2) of the Habitats Directive must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of SCIs drawn up by the Commission.

The second, third and fourth questions

34 In the light of the answer given to the first question, it is not necessary to reply to the second, third and fourth questions.

The fifth question

35 By its fifth question, the referring court asks, in essence, whether ongoing maintenance works in respect of the navigable channel of the estuary at issue in the main proceedings, which are not directly connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they are likely to have a significant effect on the site concerned, undergo an assessment of their implications for the site pursuant to Article 6(3) and (4) of the Habitats Directive where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of Article 4(2) of that directive.

36 Under the first sentence of Article 6(3) of the Habitats Directive, a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its implications for the site (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 22).

37 Therefore, it is necessary, first, to assess whether the dredging works at issue in the main proceedings are covered by the concept of 'plan' or 'project' referred to in the first sentence of Article 6(3) of the Habitats Directive.

38 It should be recalled that the Court, after noting that the Habitats Directive does not define the terms 'plan' and 'project', has stated that the definition of 'project' in the second indent of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) is relevant to defining the concept of 'plan' or 'project' as provided for in the Habitats Directive (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 23, 24 and 26).

39 An activity consisting of dredging works in respect of a navigable channel may be covered by the concept of 'project' within the meaning of the second indent of Article 1(2) of Directive 85/337, which refers to 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

40 Therefore, such an activity may be considered to be covered by the concept of 'project' in Article 6(3) of the Habitats Directive.

41 Next, the fact that that activity has been definitively authorised under national law before the expiry of the time-limit for transposition of the Habitats Directive does not constitute, in itself, an obstacle to regarding it, at the time of each intervention in the navigable channel, as a distinct project for the purposes of the Habitats Directive.

42 If it were otherwise, those dredging works in respect of the channel concerned, which are not directly connected with or necessary to the management of the site, would, in so far as they are likely to have a significant effect on the latter, automatically be excluded from any prior assessment of their implications for that site within the meaning of Article 6(3) of the Habitats Directive, and from the procedure provided for in Article 6(4).

43 Furthermore, the objective of the conservation of natural habitats and of wild fauna and flora pursued by the Habitats Directive would be at risk of not being fully achieved.

44 Contrary to what Stadt Papenburg and the Commission claim, no reason based on the principle of legal certainty or the principle of protection of legitimate expectations precludes the dredging works at issue in the main proceedings, although they have been permanently

authorised under national law, from being subject to the procedure provided for in Article 6(3) and (4) of the Habitats Directive as distinct and successive projects.

45 With regard to the principle of legal certainty, this requires in particular that rules involving negative consequences for individuals should be clear and precise and their application predictable for those subject to them (Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 80). The Habitats Directive fulfils those requirements with regard to the situation in the main proceedings.

46 With regard to the principle of the protection of legitimate expectations, it follows from settled case-law that a new rule applies immediately to the future effects of a situation which arose under the old rule and that the scope of the principle of the protection of legitimate expectations cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules (see, inter alia, Case C-162/00 *Pokrzeptowicz-Meyer* [2002] ECR I-1049, paragraphs 50 and 55).

47 Finally, if, having regard in particular to the regularity or nature of the maintenance works at issue in the main proceedings or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, those maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.

48 In that case, as such a project has been authorised before the expiry of the time-limit for transposing the Habitats Directive, it would not be subject to the requirements relating to the procedure for prior assessment of the implications of the project for the site concerned, set out in that directive (see, to that effect, Case C-209/04 *Commission* v *Austria* [2006] ECR I-2755, paragraphs 53 to 62).

49 Nevertheless, if the site concerned were, pursuant to the third subparagraph of Article 4(2) of the Habitats Directive, included in the list adopted by the Commission of sites chosen as SCIs, the implementation of such a project would be covered by Article 6(2) of that directive, a provision which makes it possible to satisfy the fundamental objective of preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, and establishes a general obligation of protection consisting in avoiding deterioration and disturbance which could have significant effects in the light of the directive's objectives (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 37 and 38, and Case C-117/03 *Dragaggiand Others* [2005] ECR I-167, paragraph 25). Before the Commission adopts that list, in so far as such a site is already included in a national list transmitted to the Commission for the purpose of being included in the Community list, it must not, by virtue of Article 4(1) of the Habitats Directive, be subject to interventions which risk seriously compromising its ecological characteristics (Case C-244/05 *Bund Naturschutzin Bayern and Others* [2006] ECR I-8445, paragraphs 44 and 47).

50 In the light of the above, the answer to the fifth question is that Article 6(3) and (4) of the Habitats Directive must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing the Habitats Directive, must, to the extent that they

constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of SCIs pursuant to the third subparagraph of Article 4(2) of that directive.

51 If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of the Habitats Directive.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The first subparagraph of Article 4(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2006/105/EC of 20 November 2006, must be interpreted as not allowing a Member State to refuse to agree on grounds other than environmental protection to the inclusion of one or more sites in the draft list of sites of Community importance drawn up by the European Commission.**

2. **Article 6(3) and (4) of Directive 92/43, as amended by Directive 2006/105, must be interpreted as meaning that ongoing maintenance works in respect of the navigable channels of estuaries, which are not connected with or necessary to the management of the site and which were already authorised under national law before the expiry of the time-limit for transposing Directive 92/43, as amended by Directive 2006/105, must, to the extent that they constitute a project and are likely to have a significant effect on the site concerned, undergo an assessment of their implications for that site pursuant to those provisions where they are continued after inclusion of the site in the list of sites of Community importance pursuant to the third subparagraph of Article 4(2) of that directive.**

If, having regard in particular to the regularity or nature of those works or the conditions under which they are carried out, they can be regarded as constituting a single operation, in particular where they are designed to maintain the navigable channel at a certain depth by means of regular dredging necessary for that purpose, the maintenance works can be considered to be one and the same project for the purposes of Article 6(3) of Directive 92/43, as amended by Directive 2006/105.

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)
13 December 2007 *

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In Case C-418/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 September 2004,

Commission of the European Communities, represented by B. Doherty and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, assisted by E. Cogan, Barrister, and G. Hogan SC,

defendant,

supported by:

Hellenic Republic, represented by E. Skandalou, acting as Agent, with an address for service in Luxembourg,

and

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

interveners,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, R. Schintgen, R. Silva de Lapuerta and P. Kūris (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 July 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

Judgment

1 By its application the Commission of the European Communities is seeking a declaration from the Court that, by failing:

— to classify, since 1981, in accordance with Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended by Commission Directive 97/49/EC of 29 July 1997 (OJ 1997 L 223, p. 9) ('the Birds Directive'), all the most suitable territories in number and size for the species in Annex I to that directive ('Annex I'), as well as regularly occurring migratory species;

— to establish, since 1981, in accordance with Article 4(1) and (2) of the Birds Directive, the necessary legal protection regime for those territories;

— to ensure that, since 1981, the provisions of the first sentence of Article 4(4) of the Birds Directive are applied to areas requiring classification as special protection areas ('SPAs') under that directive;

— to transpose and apply the requirements of the second sentence of Article 4(4) of the Birds Directive fully and correctly;

— in respect of classified SPAs under the Birds Directive, to take all the measures necessary to comply with the provisions of Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive'), and, in respect of recreational use of all sites intended to be subject to Article 6(2) of that directive, to take all the necessary measures to comply with the provisions of the said Article 6(2); and

— to take all the measures necessary to comply with Article 10 of the Birds Directive;

Ireland has failed to fulfil its obligations under those articles of the said directives.

2 By order of the President of the Court of 17 March 2005, the Hellenic Republic and the Kingdom of Spain were granted leave to intervene in support of the form of order sought by Ireland, which has asked the Court to dismiss the action or, in the alternative, to limit the scope of any order made to the specific issues upon which it finds that Ireland has failed to comply with its obligations under the relevant directives.

Legal framework

Community legislation

The Birds Directive

3 The ninth recital in the preamble to the Birds Directive states that 'the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds; ... certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution; ... such measures must also take account of migratory species and be coordinated with a view to setting up a coherent whole'.

4 According to Article 4 of the Birds Directive:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

...

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

5 Article 10 of the Birds Directive provides:

'1. Member States shall encourage research and any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1.

2. Particular attention shall be paid to research and work on the subjects listed in Annex V. Member States shall send the Commission any information required to enable it to take appropriate measures for the coordination of the research and work referred to in this Article.'

6 The topics of research and work listed in Annex V to the Birds Directive are as follows:

'(a) National lists of species in danger of extinction or particularly endangered species, taking into account their geographical distribution.

(b) Listing and ecological description of areas particularly important to migratory species on their migratory routes and as wintering and nesting grounds.

(c) Listing of data on the population levels of migratory species as shown by ringing.

(d) Assessing the influence of methods of taking wild birds on population levels.

(e) Developing or refining ecological methods for preventing the type of damage caused by birds.

(f) Determining the role of certain species as indicators of pollution.

(g) Studying the adverse effect of chemical pollution on population levels of bird species.'

The Habitats Directive

7 Article 6 of the Habitats Directive is worded as follows:

'...

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

National legislation

The European Communities Act

8 The European Communities Act 1972 empowers ministers to legislate independently of the national Parliament where obligations under Community law so require.

The Wildlife Act

9 Section 11(1) and (3) of the Wildlife Act 1976, as amended by the Wildlife (Amendment) Act 2000 ('the Wildlife Act'), provides:

'1. It shall be a function of the Minister to secure the conservation of wildlife and to promote the conservation of biological diversity.

...

3. The Minister may, either directly or in association with or through the agency of another person:

(a) carry out or cause to be carried out research which he considers desirable for the performance of his functions under this Act;

...'

10 Sections 15 to 17 of the Wildlife Act give the competent minister the power to create nature reserves on State-owned land by means of establishment orders. It also gives the minister a power to recognise nature reserves on other land and to designate areas of land as refuges for fauna.

The Birds Regulations

11 The European Communities (Conservation of Wild Birds) Regulations 1985 ('the Birds Regulations') prohibit the deposit of food, waste and deleterious matter in the SPAs concerned.

The Habitats Regulations

12 The preamble to the European Communities (Natural Habitats) Regulations 1997, as amended by the Wildlife (Amendment) Act 2000 ('the Habitats Regulations'), states that the regulations were enacted with a view to giving effect to the Habitats Directive in domestic law.

13 Regulation 2 of the Habitats Regulations defines 'European site' as: (a) a site notified for the purposes of Regulation 4; (b) a site adopted by the Commission as a site of Community importance for the purposes of Article 4(2) of the Habitats Directive, in accordance with the procedure laid down in Article 21 of that directive; (c) a special area of conservation; (d) an area classified pursuant to Article 4(1) and (2) of the Birds Directive.

14 Regulation 4 of those regulations provides:

'1. The Minister shall cause a copy of the candidate list of European sites or a modified list under Regulation 3(3) to be sent to the Minister for the Environment, the Minister for Agriculture, Food and Forestry, the Minister for the Marine, the Minister for Transport, Energy and Communications, the Commissioners of Public Works in Ireland, the Environmental Protection Agency and to any planning authority within whose functional area the land to which the list relates, or any part of such land, is situated and the Minister shall, where appropriate, consult with all or any of them.

2. (a) The Minister by notice shall notify every owner and occupier of any land mentioned in the candidate list of European sites and any holder of a valid prospecting licence or exploration licence duly issued under any enactment which relates to such land of the proposal to include the land in such a list and to transmit the list to the Commission pursuant to the provisions of the Habitats Directive;

(b) Where the address of any person to whom subparagraph (a) of this paragraph relates cannot be found after reasonable inquiry, notices and maps showing the site concerned shall be displayed in a conspicuous place:

(i) in one or more Garda Síochána stations, local authority offices, local offices of the Department of Social Welfare, local offices of the Department of Agriculture, Food and Forestry and offices of Teagasc which are located within or contiguous to the site concerned, or

(ii) where in any case there is no such station or office so located, in one or more of each such station or office within the vicinity or closest to such site, and

advertisements shall be broadcast on at least one radio station duly broadcasting in the area of the site concerned and be placed in at least one newspaper circulating in that area and every such advertisement shall request any person affected by the candidate list of European sites to contact the Department of Arts, Culture and the Gaeltacht.

...

3. The candidate list of European sites sent by the Minister under paragraph (1) and the notification issued by the Minister under paragraph (2) shall, in respect of each site:

(a) be accompanied by an ordnance map of appropriate scale in the circumstances, upon which is marked the site, so as to identify the land comprising the site to which the notice relates and the boundaries thereof;

(b) indicate the operation or activity which the Minister considers would be likely to alter, damage, destroy or interfere with the integrity of the site;

(c) indicate the habitat type, or types, the site hosts or the species the site hosts and for which the site is proposed to be identified as a site of Community importance;

(d) indicate the procedures by which a person may object.

...'

15 Regulation 5 provides that any person to whom notice is given under Regulation 4(2) has the right to object to the inclusion of the site in the candidate list of European sites, and defines the procedure for deciding on objections.

16 Regulation 7 of the Habitats Regulations provides that the minister may appoint 'authorised officers' to enter onto land and inspect it.

17 Regulation 9 provides:

'1. Not later than six years from the date a site is adopted by the Commission in accordance with the procedure laid down in paragraph 2 of Article 4 of the Habitats Directive the Minister shall designate the site as a special area of conservation and the Minister shall publish, or cause to be published, in the *Iris Oifigiúil* a copy of every such designation.

...'

18 Regulation 13 is worded as follows:

'1. The Minister shall establish the conservation measures which the Minister considers appropriate in respect of special areas of conservation designated under Regulation 9 including, if necessary, management plans ... either specifically designated for the sites or integrated into appropriate plans.

2. The Minister shall establish the administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I to the Habitats Directive and the species in Annex II to that Directive present on the sites.

3. The Minister shall take the appropriate steps to avoid, in the special areas of conservation designated under Regulation 9, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated in so far as such disturbance could be significant in relation to the objectives of the Habitats Directive.'

19 According to Regulation 14 of the Habitats Regulations:

'1. A person shall not carry out, cause to be carried out or continue to carry out, on any land included in a special area of conservation or a site placed on a list in accordance with Chapter I of this Part an operation or activity mentioned in a notice issued under Regulation 4(2) unless the operation or activity is carried out, or caused

or permitted to be carried out or continued to be carried out, by the owner, occupier or user of the land and:

(a) one of them has given the Minister written notice of a proposal to carry out the operation, or activity, specifying its nature and the land on which it is proposed to carry it out, and

(b) one of the conditions specified in paragraph (2) is fulfilled.

2. The conditions referred to in paragraph (1) are as follows:

(a) that the operation or activity is carried out with the written consent of the Minister, or

(b) that the operation or activity is carried out in accordance with the terms of a management agreement provided for under Regulation 12.

3. A person who, without reasonable excuse, contravenes paragraph (1) shall be guilty of an offence.

4. The provisions of this Regulation shall not apply to an operation or activity to which Regulation 15(2) relates.'

20 Regulation 15(1) provides that, where an application to the Irish authorities for consent under Regulation 14 relates to a proposed activity which is likely to have a significant effect on the site, those authorities are to assess the implications for the site in view of that site's conservation objectives. Regulation 15(2) further provides that, where the proposed activity has already been authorised under other legislation, the competent minister under whose authority the authorisation was issued is to assess that activity and, where appropriate, modify or revoke the authorisation in question.

21 Regulation 16 states that if, in the light of the assessment under Regulation 15, the proposed activity would harm the site, the activity must not be allowed. There is, however, an exception for 'imperative reasons of overriding public interest'.

22 Regulation 17 provides:

'1. Where the Minister considers that an operation or activity is being carried out or may be carried out on:

(a) a site placed on a list in accordance with Chapter I of this Part, or

(b) a site where consultation has been initiated in accordance with Article 5 of the Habitats Directive, or

(c) a European site,

which is neither directly connected with nor necessary to the management of such sites but likely to have a significant effect thereon either individually or in combination with other operations or activities the Minister shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

2. An environmental impact assessment in respect of a proposed operation or activity shall be an appropriate assessment for the purposes of this Regulation.

3. If the Minister, having regard to the conclusions of the assessment undertaken under paragraph (1), is of the opinion that the operation or activity will adversely affect the integrity of the site concerned, the Minister shall make application to a court of competent jurisdiction to prohibit the continuance of the operation or activity.

4. An application to a court of competent jurisdiction for a prohibition under this Regulation shall be in a summary manner and the Court when considering the matter may make such interim or interlocutory order (if any) as it considers appropriate having regard to paragraph 4 of Article 6 of the Habitats Directive and to the overall requirement of safeguarding the integrity of the site concerned and ensuring that the overall coherence of Natura 2000 is protected.

5. For the purposes of this section "a court of competent jurisdiction" means either a Judge of the Circuit Court within whose Circuit the lands or part of the lands concerned are situated or the High Court.'

23 Regulation 18 is worded as follows:

'1. Where an operation or activity is being carried out, or is proposed to be carried out, on any land that is not within:

(a) a site placed on a list in accordance with Chapter I of this Part, or

(b) a site where consultation has been initiated in accordance with Article 5 of the Habitats Directive, or

(c) a European site,

and is liable to have an adverse effect on the integrity of the site concerned either alone or in combination with other operations or activities the Minister shall ensure that an appropriate assessment of the implications for the site in view of the site's conservation objectives is undertaken.

2. Having regard to the conclusions of the assessment undertaken under paragraph (1) the provisions of paragraphs (2) to (5) of Regulation 17 shall apply.'

24 Regulation 34 provides:

'The provisions of Regulations 4, 5, 7, 13, 14, 15 and 16 shall, where appropriate, apply with any necessary modifications to areas classified pursuant to paragraph 1 and 2 of Article 4 of the Birds Directive.'

25 Regulation 35 is worded as follows:

'The Minister shall:

(a) promote education and general information on the need to protect species of wild flora and fauna and to conserve their habitats and natural habitats;

(b) encourage the necessary research and scientific work for the purpose of meeting the requirements of Article 11 of the Habitats Directive with particular attention to scientific work necessary for the implementation of Articles 4 and 10 of that Directive;

(c) supply information, where appropriate, for the purpose of proper co-ordination of research carried out at Member State and Community level to other Member States and the Commission.'

Pre-litigation procedure and written procedure before the Court

26 After receiving complaints, the Commission initiated two sets of infringement proceedings against Ireland and sent it, between 11 November 1998 and 18 April 2002, four letters of formal notice relating, first, to a failure fully and correctly to transpose and apply the Birds and Habitats Directives and, secondly, to specific infringements concerning damage caused to habitats by recreational users.

27 As the explanations provided by the Irish authorities in their replies were not considered to be satisfactory, and following bilateral meetings between Ireland and the Commission, the latter sent Ireland, on 24 October 2001, a reasoned opinion and, on 11 July 2003, an additional reasoned opinion and a reasoned opinion concerning recreational activities.

28 As it took the view that the arguments put forward by Ireland in its replies to the reasoned opinions were not wholly satisfactory and, accordingly, that there was a continuing failure on Ireland's part to comply with a number of its obligations under the Birds and Habitats Directives, the Commission decided to bring the present action.

29 Given the close connection between the two cases, the Commission decided to join both infringements in a single set of proceedings before the Court.

The action

30 In support of its application, the Commission relies on six complaints concerning the failure of Ireland to comply with a number of obligations imposed on it by Articles 4(1), (2) and (4) and 10 of the Birds Directive and by Article 6(2) to (4) of the Habitats Directive.

Preliminary observations

31 Under Article 18(1) of the Birds Directive the Member States were required to comply with that directive within two years of its notification. Accordingly, the period within which Ireland was required to transpose the Birds Directive into national law expired on 6 April 1981.

32 Under Article 23(1) of the Habitats Directive the Member States were required to comply with that directive within two years of its notification. Accordingly, the period within which Ireland was required to transpose the Habitats Directive into national law expired on 10 June 1994.

33 It is not disputed that, in the present case, the date of expiry of the period laid down in the reasoned opinions must be set at 11 September 2003.

The first complaint: inadequate number and size of areas classified as SPAs, contrary to Article 4(1) and (2) of the Birds Directive

34 The Commission claims that Ireland has failed, since 1981, to classify, in accordance with Article 4(1) and (2) of the Birds Directive, all the most suitable areas in number and size for the conservation of the species referred to in Annex I as well as regularly occurring migratory species not listed in that annex. There are two aspects to the first complaint. The Commission states, firstly, that there has been a failure to make any classification in respect of certain sites and, secondly, that there has been a failure to make a complete classification of other sites.

35 Ireland denies the alleged failure to comply with its obligations. It states that when it informs the Commission of its intentions regarding SPA classification, it does so as part of the cooperation and consultation between the Member States, as provided for by the Birds and Habitats Directives. Moreover, when it informs the Commission that research is being carried out, it does not follow that the present SPA network is inadequate or that Ireland has failed to fulfil its obligations under the Birds Directive.

Preliminary observations

36 The Court notes, as a preliminary point, that, according to its settled case-law, Article 4(1) and (2) of the Birds Directive requires the Member States to classify as SPAs the territories meeting the ornithological criteria specified by those provisions (Case C-378/01 *Commission* v *Italy* [2003] ECR I-2857, paragraph 14 and case-law cited).

37 Secondly, Member States are obliged to classify as SPAs all the sites which, in accordance with the ornithological criteria, appear to be the most suitable for conservation of the species in question (Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraph 62).

38 Thirdly, the obligation imposed on Member States to classify sites as SPAs cannot be avoided by the adoption of other special conservation measures (see, to that effect, *Commission* v *Netherlands*, paragraph 55).

39 Fourthly and lastly, although Member States do have a certain margin of discretion with regard to the choice of SPAs, the classification of those areas is nevertheless subject exclusively to the ornithological criteria determined by the Birds Directive (see, to that effect, Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 26). The economic requirements mentioned in Article 2 of that directive may therefore not be taken into account when selecting an SPA and defining its boundaries (*Commission* v *Netherlands*, paragraph 59 and case-law cited).

IBA 2000

40 In support of its complaint the Commission refers, inter alia, to the judgment in *Commission* v *Netherlands*, in which the Court took account of the *Inventory of Important Bird Areas in the European Community*, published in 1989 ('IBA 89'), finding that, although it was not legally binding on the Member States concerned, it could, by reason of its scientific value in that case, be used by the Court as a basis of reference for assessing the extent to which a Member State had complied with its obligation to classify SPAs. According to the Commission, a similar inventory is under consideration in the present case.

41 Ireland disagrees with the Commission on certain aspects of the *Review of Ireland's Important Bird Areas*, drawn up in 1999 in the context of a European census and published in 2000 ('IBA 2000'). It argues that neither the existence of such a list alone nor the existence of such disagreement is evidence of a failure on Ireland's part to comply with its obligations under the Birds Directive.

42 The Hellenic Republic and the Kingdom of Spain take the view that IBA 2000 is deficient and therefore cannot be attributed the same value as IBA 1989.

43 The Greek and Spanish Governments contend that IBA 2000 differs from IBA 89 on a number of points. In their view, IBA 2000 contains scientific data which may well provide a reference attesting to the existence of species in each territory, but which are merely indicative and general in nature in terms of the size of the population of the various species and boundaries and, therefore, the size of the areas to be classified as SPAs. IBA 2000, by contrast, does not contain scientific information sufficient to enable a delimitation of areas important for bird conservation to be made with certainty, it includes areas which are too large and of limited ornithological interest and the list of areas should be updated in accordance with the most recent scientific analysis. Accordingly, the content of the list in question cannot be used in the present case to draw certain conclusions as to the populations and exact boundaries of the SPAs.

44 The Hellenic Republic and the Kingdom of Spain infer therefrom that IBA 2000 is not a sufficient or unique basis on which to establish that Ireland has failed to fulfil its obligations, as alleged by the Commission.

45 Since the merits of the first complaint depend in large measure on whether the discrepancy between IBA 2000 and the SPAs actually classified by Ireland establishes that that Member State has not fulfilled its obligation to classify sites as SPAs to a sufficient degree, it is appropriate to consider whether IBA 2000 carries scientific value comparable to that of IBA 89 and whether it may thus be used as a reference to appraise the alleged failure to fulfil obligations.

46 It must be borne in mind that Article 4 of the Birds Directive lays down a protection regime which is specifically targeted and reinforced both for the species listed in Annex I and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the Community (Case C-191/05 *Commission* v *Portugal* [2006] ECR I-6853, paragraph 9 and case-law cited). Furthermore, it is clear from the ninth recital in the preamble to that directive that the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. The Member States are therefore required to adopt the measures necessary for the conservation of those species (Case C-235/04 *Commission* v *Spain* [2007] ECR I-5415, paragraph 23).

47 For that purpose, the updating of scientific data is necessary to determine the situation of the most endangered species and the species constituting the common heritage of the Community in order to classify the most suitable areas as SPAs. It is therefore necessary to use the most up-to-date scientific data available at the end of the period laid down in the reasoned opinion (Case C-235/04 *Commission* v *Spain*, paragraph 24).

48 In that regard, it should be borne in mind that the national inventories, including IBA 2000 prepared by BirdLife International, revised the initial Europe-wide study carried out in IBA 89 by presenting more specific and up-to-date scientific data. IBA 2000 states that that inventory lists 48 new sites in Ireland in comparison with IBA 89.

49 As noted by the Advocate General in point 20 of her Opinion, the areas listed in both inventories result from the application of specific criteria to information on the presence of birds. The criteria of IBA 2000 are largely the same as those of IBA 89. It follows that the increase in the number and territory of the areas stems essentially from better knowledge of the presence of birds.

50 Ireland maintains that the Commission is wrong to argue that IBA 2000 is not exhaustive. It adds that IBA 2000 is merely a reference for establishing correctly a network of areas of importance for the conservation of birds and that other ornithological studies may serve as a basis for the classification of the most suitable areas for the conservation of certain bird species.

51 That lack of completeness, as pointed out by the Advocate General in point 25 of her Opinion, does not undermine the probative value of IBA 2000. The situation would be different if Ireland had adduced scientific evidence tending in particular to show that the obligations flowing from Article 4(1) and (2) of the Birds Directive could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area (see *Commission* v *Italy*, paragraph 18).

52 In view of the scientific nature of IBA 89 and of the absence of any scientific evidence adduced by a Member State tending in particular to show that the obligations flowing from Article 4(1) and (2) of the Birds Directive could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area, the Court has held that that inventory, although not legally binding, could be used by the Court as a basis of reference for assessing whether a Member State has classified a sufficient number and size of areas as SPAs for the purposes of the abovementioned provisions of that directive (Case C-235/04 *Commission* v *Spain*, paragraph 26 and case-law cited).

53 In the present case, it is common ground that Ireland has not put forward any other ornithological criteria which are objectively verifiable, as compared with those used in IBA 2000, to serve as a basis for a different classification; nor has it presented a complete national inventory contradicting IBA 2000, established according to scientific methods and designating all the most suitable areas with a view to classification as SPAs.

54 The Court accordingly finds that IBA 2000 provides an up-to-date inventory of the areas of importance for the conservation of birds in Ireland which, in the absence of scientific evidence to the contrary, provides a point of reference which makes it possible to assess whether that Member State has classified as SPAs sufficient areas of territory in terms of number and size to provide protection to all the species of birds listed in Annex I and also to migratory species not listed in that annex.

55 This finding cannot be affected by the Spanish Government's argument that the various non-governmental organisations involved in bird conservation chose to modify unilaterally the previous inventory concerning the various Member States, without any competent State environmental body having supervised that process or having guaranteed the accuracy and correctness of the data contained therein.

56 The Court finds in that regard, firstly, that IBA 2000 was published by BirdLife International, an association of national organisations for the protection of birds which had already been involved in drawing up IBA 89 under the designation of the International Council for Bird Preservation. The Eurogroup for the Conservation of Birds, which was also involved at that time, was an ad hoc group of experts of that council. Consequently, BirdLife International provides continuity in respect of the work on the area inventories, as noted by the Advocate General in point 22 of her Opinion.

57 Secondly, it is common ground that the IBA 2000 chapter on Ireland was drawn up in collaboration with Dúchas, the heritage service of the Department of Arts, Heritage, Gaeltacht and the Islands (now National Parks and Wildlife Service of the Department of the Environment, Heritage and Local Government) ('National Parks and Wildlife'). That part of the inventory was drawn up with the help of high-level Irish ornithological experts and is based mostly on available data on numbers and distribution of birds and on studies carried out with the financial support of the competent authorities. The list of scientific references shows, moreover, that the experts relied largely on studies published and carried out with the participation of scientists from the competent conservation authorities.

58 At the hearing, Ireland maintained its position that the nature of a Member State's obligation in the light of Article 4(1) of the Birds Directive and the recitals in the preamble thereto must be assessed at European level and not in the light of the territory of the Member State concerned alone. It is thus possible that a specific area may be eligible but may not be the most suitable area for classification as an SPA.

59 Yet even if, as Ireland correctly points out, the Member States' obligation under Article 4(1) of that directive concerns only the classification of the most suitable areas for the conservation of birds and it is possible that areas which, in the light of species protection requirements, would in fact be suitable for such conservation never become classified as SPAs, it nevertheless follows from Article 4(1) of the Birds Directive, as interpreted by the Court, that, if species mentioned in Annex I occur on the territory of a Member State, it is obliged inter alia to define SPAs for them (see *Commission* v *Netherlands*, paragraph 56 and case-law cited).

60 As noted by the Advocate General in point 32 of her Opinion, in the Member States in which these species occur relatively frequently, the SPAs ensure above all that large sections of the overall population are conserved. However, SPAs are also necessary where these species are rather rare. In that case the SPAs help the geographical distribution of the species.

61 Indeed, if each Member State could escape the obligation to classify SPAs to ensure protection of the species listed in Annex I and present on its territory on the sole ground that there were numerous other sites in other Member States which were much more appropriate for the conservation of those same species, the objective of creating a coherent network of SPAs, as referred to in Article 4(3) of the Birds Directive, might not be achieved (see, by analogy, *Commission* v *Netherlands*, paragraph 58).

62 The Greek Government submits that the obligation on Ireland, within the framework of cooperation with the competent Commission departments, and the timetable which Ireland set for delimiting new SPAs and extending existing SPAs must be taken into account, as that Member State must verify the content of IBA 2000 for the suppose of being able to determine areas of importance for the conservation of birds and classification as SPAs.

63 The Court finds on this point that, although any classification presupposes that the competent authorities are convinced, based on the best scientific knowledge available, that the site in question is among the most suitable areas for the protection of birds (see, to that effect, Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 27), that does not however mean that the obligation to classify does not, as a rule, arise so long as those authorities have not completed their evaluation and check of the new scientific knowledge.

64 On the contrary, as the Court has held previously, faithful transposition becomes particularly important in the case of the Birds Directive, where management of the common heritage is entrusted to the Member States in their respective territories (see Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 9, and Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53).

65 In view of the fact that the obligation to classify the most suitable areas for species conservation as SPAs has been in place for Ireland since 6 April 1981, Ireland's request for an additional period in which to assess the best scientific source available cannot succeed, as that request is not compatible with the objectives pursued by the Birds Directive or with the responsibility which that directive imposes on the Member States to manage the common heritage on their territory.

66 Moreover, as has just been held in paragraph 47 of this judgment, it is necessary to use the most up-to-date scientific data available at the end of the period laid down in the reasoned opinion.

67 It follows from all the foregoing that, in the absence of scientific studies capable of rebutting the results of IBA 2000, that inventory is the most up-to-date and accurate reference for identifying the most suitable sites in number and in size for the conservation of the species listed in Annex I and for the regularly occurring migratory species not listed in that annex.

The first part of the first complaint

— Arguments of the parties

68 The Commission acknowledged, during the pre-litigation procedure, that Ireland had classified a relatively high number of sites as SPAs. It takes the view, however, that other areas also should have been thus classified. After noting that IBA 2000 listed a total of 140 areas of importance for the conservation of birds covering an area of 4 309 km^2, or approximately 6% of Ireland's total land area (approximately 60% of those areas are coastal areas, in line with the fact that Ireland has 7 100 km of coast; internal waters account for another 20%), the Commission maintains that 42 of those areas had not been classified as SPAs. It its view, even if all of those areas were to be classified as SPAs, Ireland's SPA network would still suffer from shortcomings with regard to a number of bird species referred to in Annex I and regularly occurring migratory species because they are not entirely covered by the classification made in IBA 2000.

69 It further observes that, in terms of territorial coverage, Ireland's SPA network is the second smallest of the group of 15 Member States prior to enlargement in 2004. The level of territorial coverage of Ireland's SPA network has in fact already been surpassed by several of the 10 new Member States.

70 Lastly, the Commission notes that, during the pre-litigation procedure, the Irish authorities proposed a timetable for the classification, re-classification and extension of a certain number of sites. In reality that timetable has not been adhered to and Ireland has not made or notified any classification.

71 After stating that it is well aware that its obligation to classify appropriate areas for species conservation follows from the Birds Directive and not from IBA 2000, Ireland replies that the overall research work for extending, if necessary, Ireland's SPA network is currently being carried out and should be completed soon.

72 Ireland adds, however, that the kingfisher (*Alcedo athis*) is the least appropriate species for an attempt at conservation using SPA classification and that there is good reason for not classifying other SPAs for the corncrake (*Crex crex*). Ireland adds that it may lawfully deem the Cross Lough area not to be one of the most suitable territories for classification on the basis of information available to it.

— Findings of the Court

A —
The sites identified in IBA 2000

73 The Court finds, as a preliminary point, that the Commission acknowledged, in its additional reasoned opinion, that there was en error in Table 1 in its reasoned opinion notified on 24 October 2001 concerning the Bull and Cow Rocks site, already classified as an SPA, and that, consequently, that site no longer forms part of the subject-matter of the present action.

74 According to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, inter alia, Case C-282/02 *Commission* v *Ireland* [2005] ECR I-4653, paragraph 40).

75 In the present case, it is clear from the indications given as to the abovementioned grounds for failure to fulfil obligations that Ireland does not dispute the allegation that it had not classified 42 of the 140 sites identified in IBA 2000 as SPAs within the period laid down in the additional reasoned opinion notified on 11 July 2003.

76 In the light of what has been stated in paragraph 67 of this judgment, the mere fact that Ireland has embarked upon an extensive SPA classification and re-classification programme cannot justify the failure to classify the sites identified in IBA 2000 as SPAs.

77 By contrast, the interest in classifying the Cross Lough area, as well as the three sites suitable for conservation of the corncrake, namely Falcarragh to Min an Chladaigh, Malin Head and the Fanad Head Peninsula, is the subject of a detailed challenge by Ireland.

78 Accordingly, the Commission's action must be upheld in respect of 38 of the 42 sites identified in IBA 2000 and it is appropriate to examine the merits of the action in respect of the four sites the ornithological interest of which is specifically challenged by Ireland.

1. The Cross Lough area

(a) Arguments of the parties

79 The Commission has referred to the Cross Lough area for two reasons. Firstly, Ireland has specifically challenged the need to classify that area as an SPA, even though it was, up to quite recently, an important breeding ground for the sandwich tern (*Sterna sandvicensis*). Secondly, the failure to classify the area in a timely manner was likely to have a negative impact on the protection of the species.

80 The Commission states that, according to the information available to it, the disappearance of the sandwich tern colony, which, according to IBA 89, had been present in the area since 1937, can be traced to predatory activity on the part of the American mink (*Mustela vison*) and that no measures were ever put in place to protect the colony. According to the Commission, with appropriate restoration measures, the sandwich tern might resettle this important long-standing breeding ground. Ireland should not be allowed to benefit from the fact that it failed to ensure classification and protection of the Cross Lough area in a timely manner.

81 Ireland states that the Commission has failed to provide scientific substantiation for its assertion that Ireland is required to classify as an SPA an area which is no longer of interest to the species in question and is no longer an important area for bird conservation but to which birds, after having bred and even though they have moved, might return. Although the Commission might be right in believing that, according to its information, the Cross Lough (or any other) area might be recolonised by the sandwich tern and enjoy the protection of classification as an SPA, it has not succeeded in establishing hat that area would be one of the most

suitable for the conservation of the species in question. Ireland adds that the Commission has not proven that the disappearance of the sandwich tern colony was caused by the predatory activity of the American mink in that area.

(b) Findings of the Court

82 It is common ground that the Cross Lough area was identified in both IBA 89 and IBA 2000 as being one of the most suitable areas for conservation of the sandwich tern, a species referred to in Annex I, according to the ornithological criteria drawn up in 1984 and 1995 respectively. It must accordingly be held that the area has featured among the most suitable areas for conservation of that species since 6 April 1981. Consequently, pursuant to the case-law resulting from the judgment in *Commission* v *Netherlands*, paragraph 62, Ireland should have classified that area as an SPA.

83 As noted by the Advocate General in point 58 of her Opinion, that classification obligation does not necessarily cease to apply if the area is no longer most suitable.

84 According to settled case-law, areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive, since otherwise the protection objectives of that directive, as expressed in the ninth recital in the preamble thereto, could not be achieved (see Case C-355/90 *Commission* v *Spain*, paragraph 22, and Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraphs 47 and 57).

85 It follows that Ireland ought, at the very least, to have adopted appropriate measures pursuant to the first sentence of Article 4(4) of the Birds Directive in order to avoid pollution or deterioration of the habitats in the Cross Lough area or any disturbances affecting the sandwich tern, in so far as those disturbances may have been significant with regard to the objectives of that article.

86 In the present case, having failed to take such measures for that area, Ireland has not provided proof that the area would no longer be suitable even if protection measures had been taken (see, to that effect, Case C-191/05 *Commission* v *Portugal*, paragraphs 13 and 14).

87 Moreover, according to the results of scientific studies and observations submitted by the Commission during the proceedings, which have not been disputed by Ireland, protection measures were possible. Relying on two articles written by an Irish naturalist, the Commission explained the predatory effect of the American mink on the nests of ground-breeding sandwich terns and, referring to recent observations carried out in an area of County Donegal, showed that management (trapping of minks) reduced the problems of predators and that most of the local population of sandwich terns always nest in the same area.

88 Relying on the aforementioned observations, not disputed by Ireland, which confirm the potential for recolonisation of areas by the sandwich tern, the Commission adds that there is a genuine chance that the sandwich tern may resettle in the area. It adds that the species must have a number of nesting sites within one area, not all of which are necessarily used in a given breeding season.

89 In those circumstances, the Court finds that the action is well-founded in respect of the Cross Lough area.

2. The three suitable areas for conservation of the corncrake

(a) Arguments of the parties

90 The Commission states that the corncrake is the only bird species endangered at world level which is present in Ireland. Its population has declined sharply in recent years and it is now to be found only in limited pockets. Only a much reduced population now survives in Ireland, a fact which justifies a high level of site protection.

91 In its view, a Member State may not validly rely on the low number and vulnerability of a corncrake population to justify a failure to classify the most suitable areas for the conservation of that species. In its reply, the Commission adds that the successful conservation and management of core areas are essential for the corncrake to recover and expand from its current, precarious population.

92 Ireland, for its part, contends that any further designation of SPAs must be considered in the context of available species information (which is extensive) and the positive species conservation steps taken by the National Parks and Wildlife Service. The application of the term 'globally endangered' to the corncrake is no longer valid in the light of available species information and it is therefore misleading to describe it as such. The use of the relevant land is changing substantially. The insistence by the Commission that other areas suitable for

conversation of the corncrake must be classified as SPAs is misguided and is in any event not supported by adequate evidence.

93 After observing that there is indeed a small and unpredictable distribution of corncrakes outside current SPAs, Ireland goes on to state that it is the unpredictability, not the precariousness, of a site's occupation by corncrakes which presents the difficulty. In other words, sound ornithological criteria, and not speculation, should form the basis for classification.

(b) Findings of the Court

94 Although new studies on the presence of the corncrake in Europe have changed its classification category, the fact remains that the 'near threatened' category in which it is currently classified, as much as the 'vulnerable' category in which it was classified previously, meets the conditions for identification of areas of importance for the conservation of birds according to the C.1 criterion used in IBA 2000. This also does not affect the application of the C.6 criterion used in that same inventory. The sites identified in IBA 2000 accordingly cannot be called into question.

95 This finding cannot be rebutted by Ireland's argument that the requirements of the Birds Directive are met with regard to the needs of the corncrake by designating as SPAs the lands used by a significant proportion of the corncrake population through the State funding of the Corncrake Grant Scheme, which involves funding for three fieldworkers, administration costs and payments to farmers, funding and facilitating research and the inclusion of a corncrake tier in the latest Rural Environment Protection Scheme.

96 As evidenced by the case-law referred to in paragraphs 37 to 39 of this judgment, such conservation measures cannot be considered to be sufficient.

97 Ireland's argument that the distribution of corncrakes outside current SPAs is small and unpredictable must also be rejected.

98 The Commission submitted, without being contradicted by Ireland on the point, ornithological publications indicating that, between 1999 and 2001, an average of 39% of the corncrake population present on Irish territory was outside SPAs and that, between 2002 and 2004, that figure was closer to 50%.

99 Ireland's argument that major changes have affected the distribution of the species over short periods (less than 10 years), and that it would be premature to recommend classification of other areas as SPAs as long as the situation has not stabilised, must also be rejected.

100 It is clear in this regard that there has been a sufficiently stable presence of the corncrake in the sites in question over brief periods. Ireland has not disputed that, according to the results of a study carried out by BirdWatch Ireland and submitted

by the Commission, in the period from 1993 to 2001, the reduced presence of the corncrake in the area of Falcarragh to Min an Chladaigh accounted for 8% of its population in Ireland, in Malin Head 4% of the population in Ireland, and on the Fanad Head Peninsula 3% of the population in Ireland. According to the same source, the figures are similar for the period 2002 to 2004.

101 As to Ireland's argument that the goodwill and cooperation of landowners is conducive to the success of future conservation schemes and the application of protective instruments, the Court observes that, even if that were the case, that fact does not release a Member State from its obligations under Article 4 of the Birds Directive.

102 In those circumstances, the Court finds that the action is also well-founded in respect of the sites of Falcarragh to Min an Chladaigh, Malin Head and the Fanad Head Peninsula.

B — *The birds to be protected in other sites*

103 The Commission submits that for the red-throated diver (*Gavia stellata*), the hen harrier (*Circus cyaneus*), the merlin (*Falco columbarius*), the peregrine falcon (*Falco peregrinus*), the golden plover (*Pluvialis apricaria*), the corncrake, the kingfisher, the white-fronted goose (Greenland race) (*Anser albifrons flavirostris*) and the short-eared owl (*Asio flammeus*), protected species referred to in Annex I, and also for the lapwing (*Vanellus vanellus*), the redshank (*Tringa totanus*), the snipe (*Gallinago gallinago*), the curlew (*Numenius arquata*) and the dunlin (*Calidris alpina*), regularly occurring migratory species, the areas of importance for the conservation

of birds identified in IBA 2000 clearly do not offer a sufficient set of sites in number and in size to satisfy the conservation needs of those species.

104 Ireland states that studies have been carried out on six of the nine abovementioned species included in Annex I as well as on the dunlin, a regularly occurring migratory species. The completion of that work henceforth allows for the identification of sites which may be classified as SPAs for the conservation of the red-throated diver, the hen harrier, the merlin, the golden plover and the dunlin. During the pre-litigation procedure, Ireland stated that the SPAs which will be proposed for the conservation of the hen harrier would also allow for conservation of the short-eared owl. Moreover, at the current time, the golden plover is already a 'qualifying interest' in three classified SPAs and the merlin is a 'qualifying interest' at four sites with a multi-species interest. The peregrine falcon is likely to be a qualifying species in most of the SPAs concerning the red-billed chough (*Pyrrhocorax pyrrhocorax*).

105 Although Ireland provides evidence of a number of partial initiatives, these had not been completed at the end of the period laid down in the additional reasoned opinion notified on 11 July 2003. Since the question whether there has been a failure to fulfil obligations must be examined solely on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion, the Court finds that, in the light of the information referred to in the preceding paragraph of this judgment, Ireland has failed to fulfil its obligations in respect of the designation of SPAs to ensure the conservation of the red-throated diver, the hen harrier, the merlin, the peregrine falcon, the golden plover and the short-eared owl, species referred to in Annex I, and the protection of the dunlin, a regularly occurring migratory species not listed in Annex I. The complaint is also well-founded on this point.

106 Furthermore, it does not appear that the Commission, which has the burden of proof in proceedings for failure to fulfil obligations (Case C-288/02 *Commission* v *Greece* [2004] ECR I-10071, paragraph 35 and case-law cited), has succeeded in

demonstrating to the requisite legal standard that Ireland has failed to fulfil its obligations in respect of the designation of SPAs to ensure the conservation of the white-fronted goose (Greenland race), a species referred to in Annex I, and the protection of the lapwing, the redshank, the snipe and the curlew, regularly occurring migratory species not listed in Annex I. Consequently, the complaint is not well-founded on this point.

107 As regards the kingfisher and the corncrake, Ireland disputes the need to classify other sites as SPAs for their conservation.

1. Suitable sites for conservation of the kingfisher

108 The Commission takes the view that the Irish SPA network should include a representative set of river corridors that could be used by the kingfisher. Ireland, however, has taken no steps towards classifying the most suitable territories for the conservation of the kingfisher and does not even know the current population of the species.

109 Ireland considers that a species as widely dispersed as the kingfisher is the least appropriate of the dispersed species to attempt to conserve through SPA classification. This conclusion is based on available information including two 'breeding atlases' compiled between 1988 and 1991. Although the current population of the kingfisher is not known, it is understood that BirdWatch Ireland intends to carry out a survey. In the event that the survey shows a more significant kingfisher population, the Irish authorities would reconsider the matter of the creation of SPAs for the purpose of kingfisher conservation in the future.

110 As has just been pointed out in paragraph 59 of this judgment, it is clear from Article 4(1) of the Birds Directive, as interpreted by the Court, that if species listed in Annex I occur on the territory of a Member State, it is obliged to define SPAs for them. It follows that Ireland ought to have identified the most suitable territories for conservation of the kingfisher and classified them as SPAs.

111 It follows that Ireland, which acknowledges that the kingfisher is present in its territory, had failed to comply with that obligation at the end of the period laid down in the additional reasoned opinion notified on 11 July 2003. The action is therefore also well-founded as regards the suitable sites for conservation of the kingfisher.

2. Suitable sites for conservation of the corncrake

112 The Commission observes that the current SPA network for protection of the corncrake is weak. It states that IBA 2000 identifies five additional areas: Falcarragh to Min an Chladaigh, Malin Head, the Fanad Head Peninsula, the Mullet Peninsula and the Moy Valley.

113 As regards the five additional areas referred to in the preceding paragraph, the Court finds, first, that they are areas of importance for the conservation of birds and, second, that for three of them — Falcarragh to Min an Chladaigh, Malin Head and the Fanad Head Peninsula — the failure to fulfil obligations has already been declared in paragraph 102 of this judgment.

114 With regard to the Mullet Peninsula, the Commission states, in its reply, that part of this area is subject to SPA classification for other purposes. It is clear, therefore, that the Mullet Peninsula is an example of part classification.

115 Next, the C.6 criterion is applicable to the Mullet Peninsula. That criterion designates an area which is one of the five most important areas in each European region for a species or subspecies listed in Annex I. Therefore, under the criteria used in IBA 2000, it is sufficient that the area in question hosts a significant number of individuals of such a species or subspecies (at least 1% of the national breeding population of a species referred to in Annex I or 0.1% of the biogeographical population) in order for it to have to be classified as an SPA.

116 Thus, in the present case, in its reply, the Commission submitted results — which were not challenged by Ireland — of a study by BirdWatch Ireland, according to which, in the period from 1993 to 2001, the reduced presence of the corncrake on the Mullet Peninsula accounted for 4% of the national population. According to the same source, similar figures can be shown for the years 2002 to 2004.

117 Accordingly, the Commission's action must be upheld in respect of the Mullet Peninsula.

118 With regard to the Moy Valley, the Commission acknowledges that the census data show an absence of corncrakes for several years. However, the BirdWatch figures indicate that the Moy Valley had important numbers of corncrakes in the 1980s and up to the mid-1990s. In particular, up to 1993, the area held the second largest concentration of corncrakes in the country after the Shannon Callows and therefore would have unreservedly qualified for classification on any reasonable application of ornithological criteria. Thus there was evidence to justify classification of the Moy Valley as an SPA for a long period after the Birds Directive came into force. The loss of corncrakes in the Moy Valley was the result of changes in agricultural practices

which Ireland took no steps to remedy. The Commission submits that Ireland ought not to derive any advantage from its failure to classify and protect this site. Ireland has not demonstrated the infeasibility of re-establishing a corncrake presence in that area.

119 It is clear that the figures from BirdWatch Ireland, submitted by the Commission in its reply and showing that the Moy Valley area had numerous corncrakes in the 1980s until the mid-1990s, are not disputed by Ireland. It follows that that site was one of the most suitable areas for conservation of the corncrake and that, in line with the case-law cited in paragraph 37 of this judgment, Ireland ought to have classified it as an SPA.

120 According to the settled case-law referred to in paragraph 84 of this judgment, areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive, since otherwise the protection objectives of that directive, as expressed in the ninth recital in the preamble thereto, could not be achieved. It follows that Ireland ought at the very least to have adopted appropriate measures under the first sentence of Article 4(4) of the Birds Directive in order to prevent the deterioration of habitats in the Moy Valley and disturbances affecting the corncrake, in so far as they have significant effects in the light of the objectives of that article.

121 The case-file shows that in the Moy Valley, which should have been classified as an SPA, the loss of corncrake was the result of changes in agricultural practices which Ireland took no steps to remedy.

122 Nor has Ireland demonstrated that it would be impossible to re-establish the presence of the corncrake in that area. Accordingly, the Commission's action must be upheld on this point.

123 It follows that the action is also well-founded in respect of the Mullet Peninsula and the Moy Valley.

The second part of the first complaint

— Arguments of the parties

124 The Commission argues that Ireland has failed to fulfil its obligation under Article 4(1) and (2) of the Birds Directive because it classified certain sites as SPAs only partially. In its view, the SPA boundaries were in many cases drawn so as to exclude equivalent adjacent areas of ornithological interest as identified in IBA 2000. These criticisms cover a total of 37 sites.

125 After pointing out that SPA boundaries should be defined by ornithological considerations and not economic ones, the Commission notes that the Irish authorities, by contrast, have in many cases limited SPAs to sites in public ownership and have not classified sites seriously contested by economic interests.

126 The Commission adds that, during the proceedings, the Irish authorities stated that they intended to extend and re-designate a large number of sites by the end of June 2004, but do not appear to have followed up on that intention in practice.

127 Ireland states that the relevant survey work is in progress and that it is intended that fresh SPAs will be classified for the purpose of conservation of the species concerned. All reclassifications and new classifications will be carried out in accordance with the requirements of the Habitats Regulations. Nevertheless, it disputes the alleged failure to classify a sufficiently large area for the Sandymount Strand and Tolka Estuary SPA.

— Findings of the Court

128 In acknowledging that certain SPAs must be extended, Ireland admits that it has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive. Accordingly, the Commission's action must be upheld in respect of 36 of the 37 sites.

129 Next, the situation of the Sandymount Strand and Tolka Estuary SPA must be examined.

130 The Commission claims that the boundaries of the Sandymount Strand and Tolka Estuary SPA have not taken proper account of ornithological interests, contrary to Article 4(1) and (2) of the Birds Directive.

131 In its view, evidence indicates that the approach taken by the Irish authorities for the demarcation of the boundaries of the Sandymount Strand and Tolka Estuary SPA, an internationally important wetland for waterfowl, situated in Dublin Bay and regularly supporting over 20 000 wintering birds, leads to the exclusion of two areas earmarked for development in connection with major public works; that exclusion was decided upon on the basis of an isolated consideration of the ornithological value of those areas, whereas the boundaries of the SPAs should have been drawn up in the light of the natural boundaries of the wetland ecosystem.

132 According to the Commission, the first area of 4.5 hectares, the inclusion of which in the SPA had been proposed previously, was excluded from the initial extension project for the Sandymount Strand and Tolka Estuary SPA following representations by the Dublin Port Company, which wished to infill the area for a port extension.

133 Ireland, for its part, contends that that area should not have been included in the proposed extended area in the first instance and that its inclusion has no scientific basis. The adjustment of the proposed extended SPA was subjected to close examination and it was concluded that the inclusion of the area was not scientifically justified on the ground that only a small part is exposed briefly at low spring tides.

134 Ireland observes in particular that common adaptable wader species can use the area only when it is exposed at low tide. Those species find the bulk of their food elsewhere. Further, the area may not relate to significant habitats located nearby which provide better conditions for the species concerned. In Ireland's view, no real attempt has been made by the Commission to dispute the underlying scientific basis for this view.

135 As regards the first area, the Court finds, as a preliminary point, that the complaints expressed by the Commission in its reply regarding other sites in that area are inadmissible at the stage of proceedings before the Court on the ground that they were not the subject-matter of the action.

136 In accordance with the Court's settled case-law, the subject-matter of an action under Article 226 EC for failure to fulfil obligations is delimited by the pre-litigation procedure provided for by that provision, so that the application must be based on the same grounds and pleas as the reasoned opinion (see Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 35 and case-law cited).

137 Next, as evidenced by the case-file, the Commission produced an ornithological study carried out in November 2002 by Dublin Bay Watch, which, on the basis of an examination of the ornithological implications of the infilling project, called for the inclusion of those areas in the Sandymount Strand and Tolka Estuary SPA. That study, which has not been disputed by the Irish authorities, shows, as noted by the Advocate General in point 72 of her Opinion, that various species make above-average use of the land, which is exposed infrequently. Furthermore, at least parts of this land are exposed also on less extreme tides and can be used by birds. Lastly, the areas in question are used not only by wading birds but also by sandwich terns, for example, which do not rely on the land being exposed.

138 Accordingly, the first area in question is an integral part of the wetland ecosystem and should have been classified as an SPA. It follows that the action is well-founded in respect of the first area excluded from the initial proposal to extend the Sandymount Strand and Tolka Estuary SPA.

139 The second area comprised 2.2 hectares of inter-tidal mudflat at the entry to the estuary of the Tolka, destroyed, according to the Commission, in the construction of the Dublin Port Tunnel, the promoter of which is Dublin Corporation (now the Dublin City Council). The Commission argues that, although small, the excluded area had features similar to those of a complete ecosystem, namely mudflats, and had confirmed usage by birds that depend on the overall ecosystem, that is to say, the oystercatcher (*Haematopus ostralegus*) and the redshank. Such piecemeal exclusions of portions of an integrated wetland system undermine the objectives of the Birds Directive.

140 Ireland contends that only very small numbers of oystercatcher and redshank occur in the 2.2 hectare inter-tidal mudflat area, which is exposed as a feeding area only for very short periods of time at low tide. The area is therefore not regarded as significant for the purposes of inclusion in the relevant SPA. The criteria applied in reaching that decision were scientifically sound ornithological criteria. Ireland submits that the Commission's view that the loss of the 2.2 hectare area constitutes a significant deterioration of bird habitats and source of disturbance is not accepted and that the Commission has not identified any scientific or objectively verifiable evidence for its view.

141 In respect of the second area, it should be borne in mind that, according to the case-law referred to in paragraph 39 of this judgment, the classification of areas as SPAs is subject solely to the ornithological criteria determined by the Birds Directive.

142 The Commission is therefore correct in claiming, first, that SPA classification cannot be the result of an isolated study of the ornithological value of each of the areas in question but must be carried out in the light of the natural boundaries of the wetland ecosystem and, second, that the ornithological criteria which form the

foundation of the classification must have a scientific basis. The use of flawed, allegedly ornithological criteria might lead to an incorrect demarcation of the boundaries of SPAs.

143 In the present case, it is common ground that the area in question is separated from the rest of the classified estuary by a road which crosses the river and, being a mudflat, has the same characteristics as the Dublin Bay site as a whole.

144 It is furthermore clear from the environmental impact assessment published in July 1998, on which both parties relied during the proceedings, that that area is used as a feeding ground by some of the wild birds present in the Sandymount Strand and Tolka Estuary SPA.

145 The Court accordingly finds that the second area is used as a feeding ground by three of the nine bird species which are decisive for the classification of Dublin Bay as an area of ornithological importance. That area is used by those species within the average limits which could be expected, if not more. Consequently, it is an integral part of the entire wetland ecosystem and for that reason ought also to have been classified as an SPA.

146 It follows that the action is also well-founded in respect of the second area not included in the Sandymount Strand and Tolka Estuary SPA.

147 Consequently, the Court finds that the second part of the first complaint is well-founded.

148 In the light of all the foregoing considerations, the Court finds that the first complaint is well-founded, except for the point relating to the classification of SPAs to ensure conservation of the Greenland white-fronted goose, a species referred to in Annex I, and protection of the lapwing, the redshank, the snipe and the curlew, regularly occurring migratory species not listed in Annex I.

The second complaint: failure to establish the necessary legal protection regime in accordance with Article 4(1) and (2) of the Birds Directive

Arguments of the parties

149 The Commission argues that, since 1981, Irish legislation has failed adequately to give effect to Article 4(1) and (2) of the Birds Directive and that, moreover, Ireland has not applied those provisions in practice by establishing a specific legal protection regime for SPAs such as to ensure survival and reproduction of the bird species concerned.

150 In the Commission's view, ensuring the survival and reproduction of bird species within SPAs may require not only preventive measures, but also active or positive measures, which, with one exception, have not been taken in Ireland. Secondly, there is a doubt as to whether the relevant Irish legislation actually provides a legal basis for taking such measures.

151 Ireland disputes the alleged failure to fulfil obligations. Regarding the obligation to establish an effective legal protection regime for SPAs, whilst accepting that the preventive approach is not sufficient to protect birds in all situations, it contends

that that view informed the creation of the voluntary Corncrake Grant Scheme. To that may be added a number of plans, at the draft stage, for bird management and conservation in a number of SPAs.

152 As regards the scope of the Irish legislation transposing Article 4(1) and (2) of the Birds Directive, Ireland denies that the sole purpose of the Habitats Regulations is to implement the Habitats Directive and contends that those regulations provide an adequate legal basis in national law for the creation and implementation of SPA management plans. Ireland states that the Habitats Regulations clearly apply a number of key protective and enforcement measures to SPAs, including Regulation 13, which is expressly listed in Regulation 34 as a provision applying to areas classified pursuant to the Birds Directive.

Findings of the Court

153 According to the case-law of the Court, Article 4(1) and (2) of the Birds Directive requires the Member States to provide SPAs with a legal protection regime that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I to the directive and the breeding, moulting and wintering of migratory species not listed in Annex I which are, nevertheless, regular visitors (Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 21 and case-law cited).

154 As observed by the Advocate General in point 77 of her Opinion, the protection of SPAs may not be limited to avoiding harmful human effects but must also include positive measures to preserve or improve the state of the area, as the case may be.

155 It is common ground that Regulation 13 of the Habitats Regulations would have adequately transposed Article 4(1) and (2) of the Birds Directive if that provision had been applicable to SPAs. However, contrary to Ireland's position that Regulation 13 applies also to SPAs essentially by virtue of Regulation 34, the Commission takes the view that the Habitats Regulations are intended to implement only the Habitats Directive.

156 Regulation 34 of the Habitats Regulations provides that '[t]he provisions of Regulations 4, 5, 7, 13, 14, 15 and 16 shall, where appropriate, apply with any necessary modifications to areas classified pursuant to paragraph 1 and 2 of Article 4 of the Birds Directive'.

157 According to the wording of the third paragraph of Article 249 EC, a directive, in binding all addressee Member States as to the result to be achieved, leaves it to the national authorities to decide the form and methods. It follows that Ireland, just like any other Member State, may choose the form and methods for implementing the Birds Directive (see, to that effect, Case C-296/01 *Commission* v *France* [2003] ECR I-13909, paragraph 55).

158 However, according to the case-law of the Court, the transposition of a directive into domestic law must guarantee the full application of the directive in a sufficiently clear and precise manner (see, to that effect, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 15).

159 The Court has also held, as mentioned in paragraph 64 of this judgment, that faithful transposition becomes particularly important in the case of the Birds Directive, where management of the common heritage is entrusted to the Member States in their respective territories.

160 It is therefore appropriate to examine whether Regulation 34 of the Habitats Regulations does not guarantee the application of Regulation 13 of those regulations to the areas classified as SPAs under Article 4(1) and (2) of the Birds Directive, as claimed by the Commission.

161 A literal reading of Regulation 34 shows that it does not, on the face of it, exclude from the scope of application of the Habitats Regulations the application of Regulation 13 to areas classified under Article 4(1) and (2) of the Birds Directive.

162 Consequently, it is not possible to accept the Commission's argument that, due to the lack of reference in the Habitats Regulations to a distinct objective of giving effect also to the Birds Directive and in the light of the limitations imposed by the European Communities Act, those regulations cannot provide a legal basis allowing the adoption of management plans for bird conservation in the SPAs.

163 For the same reason, it is also not possible to accept the Commission's argument that the Habitats Regulations do not allow for application to SPAs of the management measures provided for in Article 6(1) of the Habitats Directive, as the sole declared purpose of those regulations is to implement that directive. As observed by the Advocate General in point 82 of her Opinion, if measures similar to those provided for in Article 6(1) are to be applied to SPAs pursuant to Article 4(1) and (2) of the Birds Directive, the national legislature is not prevented from creating a single provision to transpose the rules of both directives.

164 The Court also cannot accept the Commission's argument relating to the limitations imposed by the European Communities Act. Ireland contends in its statement in

defence, without being contradicted on the point by the Commission, that the Habitats Regulations are not a statute but are, in their entirety and undoubtedly, of full force and effect unless and until they are successfully challenged before a court of competent jurisdiction.

165 Lastly, on the same ground as that referred to in paragraph 161 of this judgment, the Court cannot accept the Commission's argument that the application to SPAs of Regulation 13 of the Habitats Regulations, which relates to conservation measures to be taken by the Minister in relation to Special Areas of Conservation, is not automatic since, according to the wording of Regulation 34 of those regulations, some provisions of those regulations apply 'where appropriate' and 'with any necessary modifications' to areas classified under Article 4(1) and (2) of the Birds Directive.

166 Moreover, the Court has consistently held that the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (Case C-300/95 *Commission* v *United Kingdom* [1997] ECR I-2649, paragraph 37 and case-law cited). In the present case, the Commission has not put forward in support of its action any decisions of national courts which interpreted the disputed national provision in a manner contrary to the Birds Directive.

167 In those circumstances, it does not appear that the Commission, which has the burden of proof in proceedings for failure to fulfil obligations (*Commission* v *Greece*, paragraph 35 and case-law cited), has demonstrated to the requisite legal standard that, at the date of expiry of the period laid down in the additional reasoned opinion notified on 11 July 2003, the Habitats Regulations had the scope attributed to them by the Commission.

168 The second complaint must accordingly be rejected.

The third complaint: failure to apply the first sentence of Article 4(4) of the Birds Directive to the areas which should have been classified as SPAs

Arguments of the parties

169 The Commission argues that, since 1981, Ireland has failed to ensure the application of the first sentence of Article 4(4) of the Birds Directive as regards sites which should have been classified as SPAs under that directive, but have not been. It considers that, given the extent of the inadequacy of the classification of SPAs by the Irish authorities, that omission has potentially important implications for the conservation of the bird species concerned.

170 In its view, although there is Irish legislation of relevance to the protection of habitats other than classified SPAs, that legislation lacks the ornithological specificity required by the first sentence of Article 4(4) of the Birds Directive. In particular, the Irish legislation fails to impose any specific duties in respect of the habitats of the wild bird species which should benefit from the protection conferred on SPAs in areas not covered by Ireland's existing SPA network. The Commission cites the specific example of the difficulties faced by the hen harrier and adds that unclassified areas requiring classification do not enjoy in Ireland the protection required by the first sentence of Article 4(4) of the Birds Directive, even in respect of the actions of public authorities.

171 Ireland replies, essentially, that important hen harrier survey work is nearing completion and that draft guidelines in relation to the development of wind energy are soon to be concluded.

Findings of the Court

172 As already noted in paragraph 84 of this judgment, the protection objectives of the Birds Directive, as expressed in the ninth recital in the preamble thereto, cannot be achieved if Member States are required to comply with their obligations under Article 4(4) thereof only where an area has been previously classified as an SPA.

173 As is also clear from the Court's case-law, the text of Article 7 of the Habitats Directive states that Article 6(2) to (4) of that directive replaces the first sentence of Article 4(4) of the Birds Directive as from the date of implementation of the Habitats Directive or the date of classification by a Member State under the Birds Directive, where the latter date is later. It is clear, therefore, that areas which have not been classified as SPAs but which should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the Birds Directive (Case C-374/98 *Commission* v *France*, paragraphs 46 and 47).

174 In the present case, however, Ireland has not even asserted that it ensured the application of the first sentence of Article 4(4) of the Birds Directive to areas requiring classification as SPAs under that directive.

175 Consequently, and without its being necessary to consider the specific examples provided by the Commission, the Court finds that the third complaint is well-founded.

The fourth complaint: failure to transpose and apply the second sentence of Article 4(4) of the Birds Directive

Arguments of the parties

176 The Commission complains that Ireland has failed to transpose and apply fully and correctly the second sentence of Article 4(4) of the Birds Directive relating to appropriate steps to be taken by the Member States to avoid pollution or deterioration of habitats outside SPAs.

177 In support of its complaint, the Commission states that the various domestic legal measures, in particular integrated pollution control licences, the Control of Farmyard Manure scheme, and provisions of planning legislation including environmental impact assessment requirements, which are deemed to transpose the second sentence of Article 4(4) of the Birds Directive, do not have any specifically ornithological content from that article. In the absence of any specific ornithological considerations, entities playing a role in the context of environmental measures cannot be expected to take account of ornithological interests. In the Commission's view, several of the domestic measures transposing the second sentence of Article 4(4) are partial and numerous lacunae remain. The shortcomings of those measures are borne out by the deterioration of habitats and, despite denials by Ireland, it cannot validly be disputed in the present case that human intervention has led to a deterioration of the habitats.

178 Ireland replies by stating that Article 4(4) of the Birds Directive is in practice transposed by a number of statutory schemes and measures. It adds that the second sentence of Article 4(4) of the Birds Directive is implemented by the Wildlife Act, which provides a sound legal basis for the protection of bird species in the wider countryside.

Findings of the Court

179 Although the second sentence of Article 4(4) of the Birds Directive does not require that certain results be achieved, the Member States must nevertheless make a serious attempt at protecting those habitats which lie outside the SPAs. It is thus clear, in the present case, that Ireland must endeavour to take suitable steps to avoid pollution or disturbances of the habitats (see, to that effect, Case C-166/97 *Commission* v *France*, paragraph 48).

180 First of all, it is appropriate to consider whether Ireland has transposed that provision fully and correctly by taking suitable steps to avoid pollution or deterioration of the habitats lying outside the SPAs.

181 It is clear, in the light of all the evidence submitted, assessed as a whole, that that is not so in the present case.

182 As regards the licences issued by the Environmental Protection Agency under the integrated pollution control scheme, it is not disputed, as pointed out by the Commission, that that scheme covers only a limited range of polluting activities and does not contain any specific reference to the ornithological considerations referred to in Article 4 of the Birds Directive. It would appear, moreover, that Ireland refers to the transposition of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), the objectives of which are different. Accordingly, the national rules relating to those licences cannot be regarded as being an adequate transposition of the second sentence of Article 4(4) of the Birds Directive.

183 With regard to the cross-compliance aspect of the single payment under the common agricultural policy, Ireland states that the various statutory management requirements (SMRs), the first key element of cross-compliance, referred to in Article 4 of Council Regulation (EC) No 1782/2003 of 29 September 2003 establishing common rules for direct support schemes under the common agricultural policy and establishing certain support schemes for farmers and amending Regulations (EEC) No 2019/93, (EC) No 1452/2001, (EC) No 1453/2001, (EC) No 1454/2001, (EC) No 1868/94, (EC) No 1251/1999, (EC) No 1254/1999, (EC) No 1673/2000, (EEC) No 2358/71 and (EC) No 2529/2001 (OJ 2003 L 270, p. 1), the list of which is contained in Annex III to that regulation, are to be introduced progressively over three years, starting on 1 January 2005. Ireland adds that the list of those regulatory requirements includes a reference to the Birds Directive. However, for the same reasons as those referred to in paragraph 74 of this judgment, the progressive introduction in national law of those requirements may not be taken into account.

184 The same holds true for the second key element of cross-compliance of the single payment, relating to good agricultural and environmental condition referred to in Article 5 of Regulation No 1782/2003, the minimum requirements of which must be defined on the basis of the framework laid down in Annex IV to that regulation, with transposition measures for that article entering into force only as of 1 January 2005.

185 Regarding the steps taken under the Rural Environment Protection Scheme, designed to reward farmers for carrying out their farming activities in an environmentally friendly manner and to bring about environmental improvements on existing farms, the Commission acknowledges that they have advantages for wild birds in that they make it possible to avoid pollution and deterioration of habitats. It is common ground, however, that that scheme does not apply generally to all farmlands or to territories not classified as SPAs. Accordingly, those steps also cannot be regarded as transposing the second sentence of Article 4(4) of the Birds Directive.

186 The arguments concerning the Farm Waste Management Scheme and the planning legislation, including the provisions on environmental impact assessment, must also be rejected. In those texts, Ireland has not introduced any ornithological considerations in respect of the second sentence of Article 4(4) of the Birds Directive.

187 Lastly, with regard to the Wildlife Act, it is clear that the only provision of that act relevant in this context and referred to by Ireland during the proceedings is section 11(1). However, that provision is not sufficiently specific to be regarded as guaranteeing the transposition of the second sentence of Article 4(4) of the Birds Directive.

188 Secondly, it is appropriate to consider whether the Commission has established that Ireland has not made sufficient efforts in practice to avoid pollution or deterioration of habitats lying outside SPAs.

189 The Commission puts forward in this regard, by way of example, the habitats of the cuckoo (*Cuculus canorus*), skylark (*Alauda arvensis*), swallow (*Hirundo rustica*) and sand martin (*Riparia riparia*), widespread bird species contained in the 'orange list' of the *Birds of Conservation Concern in Ireland* inventory published in 1999 by BirdWatch Ireland and the Royal Society for the Protection of Birds. That inventory states that those species suffer greatly from the changes in agricultural practices. In addition, the Commission refers to the report *Ireland's Environment 2004*, drawn up by the Environmental Protection Agency, which attributes the general deterioration of habitats in Ireland to a number of developments.

190 It is also clear that the mere fact that a number of programmes and regulatory measures may have been implemented and taken, as contended by Ireland, does not

establish that Ireland has made sufficient efforts to avoid pollution or deterioration of habitats. As noted by the Advocate General in point 111 of her Opinion, serious endeavours, namely the taking of all reasonable measures to achieve the success being sought, require targeted action.

191 The Court finds in the present case that the measures taken by Ireland are partial, isolated measures, only some of which promote conservation of the bird populations concerned, but which do not constitute a coherent whole.

192 That finding is supported by the fact that Ireland has not contradicted the content of the inventory *Birds of Conservation Concern in Ireland*, published in 1999, or the report *Ireland's Environment 2004*, two ornithological studies referred to above and submitted by the Commission.

193 Accordingly, in the light of all the evidence adduced by the Commission, the Court finds that Ireland has not transposed or applied fully and correctly the second sentence of Article 4(4) of the Birds Directive. Consequently, the failure to fulfil obligations in regard to this complaint is well-founded.

The fifth complaint: inadequate transposition and application of Article 6(2) to (4) of the Habitats Directive

194 The fifth complaint concerns, in respect of the SPAs classified under the Birds Directive, the fact that Ireland has not adopted all the measures required to comply with Article 6(2) to (4) of the Habitats Directive. This complaint also concerns the inadequate transposition of Article 6(2) of that directive as regards the use of all the sites covered by that provision for recreational purposes.

Preliminary observations

195 Article 7 of the Habitats Directive provides that obligations arising under Article 6(2) to (4) of that directive are to replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive in respect of areas classified pursuant to Article 4(1) of that directive or similarly recognised under Article 4(2) thereof, as from the date of implementation of the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive, where the latter date is later.

196 It follows that Article 6(2) to (4) of the Habitats Directive has applied to SPAs in Ireland since 10 June 1994, the date on which the period for transposition of that directive in Ireland expired, or since the date of their classification or recognition under the Birds Directive, where the latter date is later.

Inadequate transposition and application of Article 6(2) of the Habitats Directive

— Arguments of the parties

197 The Commission submits that Ireland has not transposed or applied correctly, as at 10 June 1994 or after that date, Article 6(2) of the Habitats Directive to all the areas classified under Article 4(1) of the Birds Directive or recognised under Article 4(2) thereof.

198 It submits that, according to the wording of the Habitats Regulations, which, Ireland asserts, implement Article 6(2) of the Habitats Directive, the ability to control potentially damaging activities on the part of landowners is to a significant extent dependent on notices being served on landowners at the time an area is proposed to become a site subject to Article 6(2) of the Habitats Directive. Regulation 14 of those regulations provides for ministerial power to issue notices and impose conditions concerning the use of land. That power is subject to two limitations, however.

199 The first of those limitations is a limitation de jure in that Regulation 14 of the Habitats Regulations is worded in such a manner as to apply only to SPAs so classified after the entry into force of those regulations, so that it does not cover SPAs classified before that date. In the case of existing SPAs, there is no provision for issuing notices to landowners expressly informing them of the activities which require authorisation under the transposing legislation, so as to make the system of controls on damaging activities operational for these.

200 The second is a limitation de facto in that that regulation has not been applied to all SPAs.

201 According to the Commission, in the absence of any use of restrictive notices, Irish legislation does not contain any provision giving full effect to Article 6(2) of the Habitats Directive for State-owned land situated inside SPAs. It also takes the view that, in so far as those activities take place on State-owned land or State-controlled land, the national legislation does not provide for any explicit statutory obligation requiring the authorities responsible for regulating those activities to take enforcement action to ensure compliance with Article 6(2) of that directive.

202 The Commission refers, by way of example of an activity which infringes Article 6(2) of the Habitats Directive, to unauthorised mechanical cockle harvesting in the Bannow Bay SPA and also refers to the damaging development of the Glen Lough SPA.

203 Ireland rejects all of the Commission's allegations. It contends that, in addition to Regulation 14 of the Habitats Regulations, Regulation 13(3) of those regulations, which applies to both Special Areas of Conservation and SPAs, transposes Article 6(2) of the Habitats Directive. Ireland also refers, for the same purposes, to Regulations 17 and 18 of the Habitats Regulations and maintains its position that the Foreshore Acts ensure protection of SPAs.

— Findings of the Court

204 Article 6(2) of the Habitats Directive, like the first sentence of Article 4(4) of the Birds Directive, requires Member States to take appropriate steps to avoid, in the areas classified pursuant to Article 4(1) or recognised pursuant to Article 4(2), the deterioration of habitats and disturbances having a significant effect on the species for which the SPAs were classified or recognised (see, to that effect, Case C-117/00 *Commission* v *Ireland* [2002] ECR I-5335, paragraph 26).

205 As regards Ireland's argument that Regulation 13(3) of the Habitats Regulations transposes Article 6(2) of the Habitats Directive, it is clear that the sole purpose of Regulation 13(3) of those regulations is to require the competent minister to take appropriate steps to avoid the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been

designated, with the result that that provision has effect only when that minister has direct responsibility over the SPAs concerned. Moreover, under the Habitats Regulations scheme, Regulation 13(3) thereof complements the provisions of Regulations 4 and 14, which provide for a notice-based scheme of landowner liability. In the present case, since it is common ground that notices were not issued for all the SPAs, Regulation 13(3) of the Habitats Regulations cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive.

206 With regard to the argument that Regulation 14 of the Habitats Regulations provides for the control of operations and activities listed in a notice issued by the competent minister pursuant to Regulation 4 and that listed activities may only be carried out with ministerial consent or pursuant to a management agreement provided for in Regulation 12 of those regulations, suffice it to hold that Regulation 14 is also dependent on the existence of a notice. Accordingly, and for the same reason as stated in the preceding paragraph of this judgment, the latter provision cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive.

207 As to the argument that Regulation 17 of the Habitat Regulations empowers the competent minister to seek injunctive relief to stop operations or activities that appear on assessment to be damaging to a European site, including an SPA, and that Regulation 18 of those regulations provides for similar ministerial powers in the event that an operation or activity damaging to an SPA is being carried out in an area outside the SPA, the Court finds that, as rightly pointed out by the Commission and the Advocate General in point 127 of her Opinion, those provisions do not make it possible to avoid the deterioration of natural habitats and the habitats of species as well as significant disturbance of the species for which the areas concerned have been designated.

208 Although Ireland states, in its rejoinder, that the powers of the competent minister, as described in the preceding paragraph of this judgment, can be used to apply immediately for injunctive relief on an interim basis, it is clear that those provisions necessarily can come into play only after the activities in question have already commenced and thus only after any deterioration has already occurred. Moreover, the competent minister is not entitled to prohibit a harmful activity unilaterally and the abovementioned powers presuppose that an appropriate assessment of the environmental impact of that activity has been carried out before any judicial relief is sought. The reactive protection of SPAs may be delayed considerably by those procedural steps. Moreover, those provisions do not ensure protection of SPAs against the activities of individuals, as such protection requires that individuals be prevented in advance from engaging in potentially harmful activities.

209 Accordingly, Regulations 17 and 18 of those regulations also cannot be regarded as constituting an adequate transposition of Article 6(2) of the Habitats Directive.

210 Moreover, Ireland's argument that the Foreshores Acts ensure protection of SPAs cannot be accepted either. Those statutes ensure protection of coastal areas only and therefore do not apply to SPAs situated outside such areas.

211 Lastly, as regards the unauthorised mechanical harvesting of cockles in the Bannow Bay SPA, referred to by the Commission as an activity which infringes Article 6(2) of the Habitats Directive, the Court finds, as noted by the Advocate General in point 140 of her Opinion, that this is mere illustrative use which is not the subject-matter of the application. In any event, the Commission has not adduced any evidence such as to establish the failure to fulfil obligations on this point.

212 It follows that, as at 10 June 1994 or after that date, Ireland had not correctly transposed Article 6(2) of the Habitats Directive in respect of all the areas classified under Article 4(1) of the Birds Directive or recognised under Article 4(2) of that directive.

213 Consequently, the Court finds that the complaint is well-founded on this point.

Inadequate transposition of Article 6(2) of the Habitats Directive in the field of recreational activities

— Arguments of the parties

214 The Commission takes the view that Ireland has not adequately transposed Article 6(2) of the Habitats Directive in respect of the use for recreational purposes of all the sites covered by that provision. It considers that the Irish legislation covers only the activities of landowners and that the legislation suffers from a number of shortcomings in terms of prevention of damage to habitats caused by users of the land for recreational purposes. The application of Regulations 14 and 17 of the Habitats Regulations has not resulted in the compilation of exhaustive lists of prohibited activities. Moreover, the mechanisms provided for in Regulation 17 of those regulations are reactive in nature and no other legislative provision referred to by Ireland appears to protect the SPAs against recreational activities engaged in by users.

215 Notwithstanding indications regarding proposals for appropriate legislative amendments, including the 2004 draft Maritime Safety Bill, Ireland denies that the current legislation is inadequate for implementing Article 6(2) of the Habitats Directive in the context of recreational use of land situated in the SPAs. Ireland explains that the

national authorities have powers to control recreational and other activities in European sites by persons other than the landowner and to impose penalties. In that context, Ireland refers to Regulation 4(3)(b) of the Habitats Regulations and to Regulations 14, 17 and 18 of those regulations, to the Wildlife Act and to the Criminal Justice (Public Order) Act 1994.

— Findings of the Court

216 With regard to Ireland's argument that Regulation 14 of the Habitats Regulations, which places restrictions on operations and activities, does not cover only landowners, occupiers or licence-holders, but also applies to all persons provided that the operation or activity is referred to in a notice issued pursuant to Regulation 4(2) of those regulations, suffice it to hold that Regulation 14(3) of those regulations does not allow for proceedings to be brought against third parties who were not aware of that notice. The latter may, in fact, rely on the defence of 'reasonable excuse' contained in Regulation 14(3). Accordingly, the transposition of Article 6(2) of the Habitats Directive is, at the very least, not sufficiently precise.

217 As to Ireland's argument that the procedure provided for in Regulations 17 and 18 of the Habitats Regulations is a separate and distinct procedure which may be implemented in respect of anyone and does not depend on the content of any particular 'notice', it is clear that there is no guarantee that it may be applied to persons who have not received the notice provided for in Regulation 4 of those regulations. Moreover, as has just been found in paragraphs 208 and 209 of this judgment, that procedure is a merely reactive measure; consequently, Regulations 17 and 18 of the Habitats Regulations cannot be regarded as ensuring adequate transposition of Article 6(2) of the Habitats Directive.

218 With respect to the argument that the Wildlife Act provides, in sections 22, 23 and 76, for a power to act where there is evident and wilful interference with the breeding place or the resting place of a protected wild animal, or where there is disturbance of protected birds as they nest, and under which the powers conferred by that statute include the power to seize equipment and vehicles used by the perpetrators, suffice it to hold that it is common ground that that statute does not cover all types of damage likely to be caused by recreational use.

219 Lastly, regarding the argument that trespass on private property was reclassified as a crime under Irish law by section 19A of the Criminal Justice (Public Order) Act, 1994, and that penalties on conviction include fines and the seizure of vehicles and equipment, the Court notes that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise (see Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 26).

220 An examination of the criminal-law provisions on trespass on private property relied on by Ireland shows that those provisions are not specifically linked to the protection of natural habitats and of habitats of species against deterioration or against disturbances affecting species and that they are therefore not designed to avoid damage caused to habitats by the use of SPAs for recreational purposes. Consequently, they do not constitute a clear and precise implementation of the provisions of the Habitats Directive such as to satisfy in full the requirements of legal certainty.

221 The complaint is, accordingly, also well-founded on this point.

Inadequate transposition and application of Article 6(3) and (4) of the Habitats Directive

— Arguments of the parties

222 The Commission states that Ireland has not correctly transposed or applied Article 6(3) and (4) of the Habitats Directive.

223 In terms of transposition, the Commission argues that the national legislation does not contain any provisions designed to ensure that plans, as distinct from projects, are assessed in accordance with Article 6(3) and (4) of the Habitats Directive. The national legislation also fails to make proper provision for the application of those Community provisions to projects situated outside SPAs but having significant effects inside them.

224 As regards application, the Commission takes the view that Ireland fails to ensure systematically that plans and projects likely to have significant effects on SPAs, either by themselves or in combination with other plans and projects, undergo appropriate prior assessment.

225 Ireland maintains that no action or project under any plan can have any effect in law or substance without having been subjected to assessment. Although plans can stimulate certain activities, they do not override or obviate controls applying to sites under relevant regulatory regimes. They have no bearing on whether a project which can have an effect on a site is agreed or not. Before any plan or project can affect a site, it will have gone through a full assessment procedure either under the regulatory system provided by the Habitats Regulations, the planning system or under another regulatory system, in compliance with the provisions of the Habitats

Directive. Therefore, no plan or project can affect a site without having been subject to assessment.

— Findings of the Court

226 As regards the transposition of Article 6(3) and (4) of the Habitats Directive, it should be noted at the outset that the Court has already held that Article 6(3) of that directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that that plan or project will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (Case C-6/04 *Commission* v *United Kingdom*, paragraph 54 and case-law cited).

227 It follows that the Habitats Directive requires that any plan or project undergo an appropriate assessment of its implications if it cannot be excluded on the basis of objective information that that plan or project will have a significant effect on the site concerned.

228 On this point, Ireland maintains that the plans are made subject to an appropriate assessment of their implications on a site under Regulations 27 to 33 of the Habitats Regulations, which provide for various development proposals. However, Ireland has not demonstrated that such projects are plans within the meaning of Article 6(3) of the Habitats Directive.

229 Next, Ireland contends that the Planning and Development Act 2000 introduced requirements in relation to the consideration of the likely significant effects on the environment of certain plans including regional planning guidelines, development plans and local area plans. Since 1 January 2001, each of those plans is required to include information on the likely significant effects on the environment of its implementation. Those requirements were included in anticipation of the terms of Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment (OJ 2001 L 197, p. 30). Despite the existence of such legislation, however, it cannot be said that Ireland has satisfied its obligations under Article 6(3) of the Habitats Directive. The obligation provided for in the Planning and Development Act concerns only information relating to likely significant effects on the environment, whereas Article 6(3) of the Habitats Directive requires a prior assessment of the implications of development plans.

230 Ireland adds that it implements the assessments pursuant to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) and to Directive 2001/42, also transposed by the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 and by the Planning and Development Strategic Environmental Assessment Regulations 2004.

231 Those two directives contain provisions relating to the deliberation procedure, without binding the Member States as to the decision, and relate to only certain projects and plans. By contrast, under the second sentence of Article 6(3) of the Habitats Directive, a plan or project can be authorised only after the national authorities have ascertained that it will not adversely affect the integrity of the site.

Accordingly, assessments carried out pursuant to Directive 85/337 or Directive 2001/42 cannot replace the procedure provided for in Article 6(3) and (4) of the Habitats Directive.

232 Lastly, regarding the Commission's assertion that the Irish legislation does not make adequate provision for the application of Article 6(3) and (4) of the Habitats Directive to projects situated outside SPAs but having significant effects inside them, the Court finds that it is common ground that the environmental impact assessment report, which must be commissioned by the private persons concerned, who must bear the costs thereof, amounting to a minimum of EUR 15 000, is required only for plantations of over 50 hectares, whereas the average surface area of a plantation in Ireland is approximately 8 hectares.

233 It therefore follows that, since the Irish legislation does not make plans subject to an appropriate assessment of their effects on SPAs, Article 6(3) and (4) of the Habitats Directive has not been adequately transposed in the Irish domestic legal order.

234 Accordingly, the action is well-founded on this point.

235 As to the application of Article 6(3) and (4) of the Habitats Directive, the Commission relies on examples of aquaculture programmes and drainage work inside the Glen Lough SPA. It is, accordingly, appropriate to consider them in turn.

236 Firstly, regarding the aquaculture programmes, the Commission relies, essentially, on the *Review of the Aquaculture Licensing System in Ireland* carried out in 2000 by BirdWatch Ireland as the basis for its view that Ireland has systematically failed to

carry out a proper assessment of those projects situated in SPAs or likely to have effects on SPAs, contrary to Article 6(3) and (4) of the Habitats Directive. In that context, it emphasises the importance of a prior assessment for the purpose of weighing the implications of a project with the conservation objectives fixed for the SPA concerned.

237 The Court notes that that study covered 271 authorisations for aquaculture programmes issued by the Department of Communications, Marine and Natural Resources during the period from June 1998 to December 1999 and 46 applications yet to be decided on. Moreover, 72 licences and nine pending applications concerned aquaculture programmes situated inside or near an SPA. The authorisations issued concern, in 84% of the activities authorised in SPAs, oyster and clam farms.

238 It should also be borne in mind that, under the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site is to be made subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 45).

239 The study carried out by BirdWatch Ireland refers to a number of potential negative effects of shellfish farming, including the loss of feeding areas and disturbances caused by increased human activity and states that, even when an aquaculture programme is inside an SPA, very little protection is provided for bird habitats. Ireland, for its part, does not allege that no aquaculture programmes have any effects on SPAs.

240 It follows that the authorisation procedure ought to have included an appropriate assessment of the implications of each specific project. It is clear that Ireland merely stated, without offering further explanation, that the Irish scheme for authorising mollusc farms, including the provisions on consultation, does in fact provide for detailed consideration of all aspects of an aquaculture development project before a decision is taken on authorisation.

241 Accordingly, the Court finds that Ireland fails to ensure systematically that aquaculture programmes likely to have a significant effect on SPAs, either individually or in combination with other projects, are made subject to an appropriate prior assessment.

242 This finding is supported by the fact that Ireland has not put forward any specific scientific studies showing that a prior, detailed ornithological study was carried out, in order to challenge the failure to fulfil obligations alleged by the Commission.

243 Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 61).

244 As to Ireland's argument that no environmental impact assessment had been required for shellfish farms because they are small in size and are of only limited impact on the environment, the Commission is correct in arguing that that is not an adequate reason not to assess the effects of such a plan or project. As just pointed out in paragraph 238 of this judgment, the first sentence of Article 6(3) of the Habitats Directive requires an appropriate assessment of any plan or project in combination with other plans and projects.

245 It is also clear from the Court's case-law that the failure to take account of the cumulative effect of projects in practice leads to a situation where all projects of a certain type may escape the obligation to carry out an assessment, whereas, taken together, they are likely to have significant effects on the environment (see, by analogy, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 76).

246 Lastly, regarding Ireland's argument that maintenance authorisation for development projects carried out without prior authorisation is compatible with the Habitats Directive, the Court finds that the assessment of an already-completed development project cannot be regarded as being equivalent to the assessment of a plan or project within the meaning of the first sentence of Article 6(3) of the Habitats Directive.

247 Accordingly, the complaint must be regarded as being well-founded on this point.

248 Secondly, regarding the drainage work in the Glen Lough SPA, the Commission argues that in 1992 and 1997 Ireland carried out, contrary to Article 6(3) and (4) of the Habitats Directive, drainage work likely to have a significant effect on the Glen Lough SPA without having previously carried out an appropriate assessment of that

project or employed an adequate decision-making procedure, which led to habitat deterioration, contrary to Article 6(2) of that directive. Moreover, Ireland has failed to demonstrate that this deterioration has been remedied.

249 The Court notes, as a preliminary point, that at the time of the drainage works undertaken by the Office of Public Works in 1992, the Habitats Directive was not yet applicable. Consequently, those works do not form part of the subject-matter of the present proceedings.

250 It is, moreover, clear from the Court's case-law that the fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2) (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 35).

251 Accordingly, in so far as the complaint relating to the drainage works carried out in 1997 are concerned, it is appropriate to ascertain whether such activities may be contrary to Article 6(3) and (4) of the Habitats Directive.

252 Infringement of Article 6(3) and (4) of that directive presupposes that the drainage works in question are a project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects.

253 In this regard, it is common ground that those works are a project and that they are not directly connected with or necessary to the management of the site. It follows that, in accordance with the case-law referred to in paragraph 226 of this judgment, they had to be made subject to an assessment of their effects on the conservation objectives fixed for the Glen Lough SPA if it could not be ruled out, on the basis of objective information, that they would have a significant effect thereon, either individually or in combination with other plans or projects.

254 In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such an assessment must be carried out if there is doubt as to the absence of significant effects (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 44).

255 The case-file shows that the Glen Lough SPA, which comprises approximately 80 hectares and was classified in 1995, is an important over-wintering site for migratory species of wild birds in the Irish midlands. In particular, it held internationally important numbers of whooper swan (*Cygnus cygnus*) and is especially valuable to birds because of its water.

256 In the present case, however, Ireland, after stating that the works in question were merely maintenance work on existing drains, as part of a system of earlier drainage which preceded the classification of Glen Lough as an SPA, and did not have a significant impact on the wild bird habitats in that SPA, recognises, in its statement in defence, that the drain maintenance of the Silver River carried out by the Office of Public Works in 1997 seems to have reduced the hydrological response times and hence the usage of the site by whooper swans.

257 Accordingly, the Court finds that Ireland, in failing to assess the impact of the drains maintenance works on the conservation objectives of the Glen Lough SPA before those works were carried out, infringed the first sentence of Article 6(3) of the Habitats Directive.

258 Next, it follows from the second sentence of Article 6(3) of the Habitats Directive that, in a situation such as that in the present case, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of those works for the site concerned in the light of the site's conservation objectives, could have authorised such an activity only if they had made certain that it would not adversely affect the integrity of that site, which would have been the case if there had remained no reasonable scientific doubt as to the absence of such effects (see *Waddenvereniging and Vogelbeschermingsvereniging*, paragraph 67).

259 As noted by the Advocate General in point 182 of her Opinion, in the absence solely of an assessment of the impact on the site of the drain maintenance works carried out in 1997, authorisation would have been unlawful under the second sentence of Article 6(3) of the Habitats Directive. Ireland's submission shows, as just noted in paragraph 256 of this judgment, that authorisation was not possible also on account of the adverse effects that the works in question were likely to have on the Glen Lough SPA. Since conservation of the whooper swans' wintering area is the principal conservation objective of the SPA, its integrity was adversely affected within the meaning of the second sentence of Article 6(3) of the Habitats Directive.

260 It also follows that, in spite of a negative assessment of the implications for the site, an authorisation under Article 6(4) of the Habitats Directive would have been possible only if there had been no alternative solutions and if the project had had to be carried out for imperative reasons of overriding public interest, and on the

condition that the Member State took all necessary compensatory measures to ensure that the overall coherence of Natura 2000 was protected.

261 In that regard, and even if there was a public interest in the drainage, as noted by the Advocate General in point 183 of her Opinion, such an interest can justify a deterioration of the SPA within the meaning of Article 6(4) of the Habitats Directive only if there are no alternative solutions.

262 However, Ireland itself states that the National Parks and Wildlife Service, after having installed a dyke in 1998 along the Silver River where it runs through the SPA and holds back the lake water while allowing that river to fulfil its arterial drainage role for the lands upstream, in early 2005 entered into a contract to have the dyke repaired and a sluice and weir installed as well as the overflow pipe. According to Ireland, this will enable the close regulation of the lake level and the hydrological regime will be designed to optimise the usage of the lake by whooper swans. Ireland has not, however, put forward any arguments showing that such alternatives could not have been implemented before the drain maintenance works were carried out in 1997.

263 It follows that, contrary to Article 6(3) and (4) of the Habitats Directive, Ireland carried out a drain maintenance project in 1997 which was likely to have a significant effect on the Glen Lough SPA without having carried out beforehand an appropriate assessment of its implications on the site or employed an adequate decision-making procedure, which resulted in habitat deterioration, contrary to Article 6(2) of that directive.

264 Accordingly, the complaint is also well-founded on this point.

265 In those circumstances, the fifth complaint is well-founded.

The sixth complaint: failure to transpose Article 10 of the Birds Directive

Arguments of the parties

266 The Commission submits that the use of the verb 'shall' in Article 10 of the Birds Directive imposes an obligation on Member States to encourage research and any work required as a basis for the protection, management and use of the population of all species of bird as referred to in Article 1 of that directive. The national regulatory provisions, however, do not reflect that obligation. In its view, the position under Irish law is ambiguous, to say the least.

267 The Commission submits that the wording of the Wildlife Act makes the promotion of research an optional activity for the competent minister.

268 Conversely, Ireland denies that it has failed to comply with its obligation to encourage research. It contends that its legislation is not flawed, and that section 11(3) of the Wildlife Act constitutes a satisfactory transposition into national law of Article 10 of the Birds Directive and fully reflects, and arguably exceeds, the degree of obligation imposed by that Community provision.

Findings of the Court

269 As a preliminary point, section 11(3) of the Wildlife Act, read literally, clearly provides for the possibility for the competent minister to carry out or cause to be carried out research which he considers desirable for the performance of his functions under that statute. It does not, however, lay down any obligation for the competent minister to encourage such activities.

270 As correctly pointed out by the Commission, however, Article 10 of the Birds Directive creates an obligation for Member States to encourage research and any work required as a basis for the protection, management and use of the population of all species of bird as referred to in Article 1 of that directive.

271 It follows that Ireland cannot be deemed to have transposed Article 10 of the Birds Directive into its domestic legal order.

272 This finding cannot be affected by Ireland's argument that the competent minister's role is further extended by section 11(1) of the Wildlife Act. That provision merely states that it is his function to secure the conservation of wildlife and to promote the conservation of biological diversity.

273 Furthermore, the Court cannot accept Ireland's argument that the use of the word 'may', for the purpose of interpreting the national legislation, does not necessarily mean that the competent minister may, at his discretion, decide to carry out, or not to carry out, research.

274 The national case-law referred to by Ireland does not show that such an interpretation of Irish law is systematic, or refer specifically to the national provision in question.

275 Consequently, the sixth complaint is well-founded.

276 In the light of all the foregoing considerations, the Court finds that, by failing:

— to classify, since 6 April 1981, in accordance with Article 4(1) and (2) of the Birds Directive, all the most suitable territories in number and size for the species mentioned in Annex I, with the exception of those intended to ensure conservation of the Greenland white-fronted goose, as well as for regularly occurring migratory species not mentioned in Annex I, with the exception of those intended to ensure protection of the lapwing, the redshank, the snipe and the curlew;

— to ensure that, since 6 April 1981, the provisions of the first sentence of Article 4(4) of the Birds Directive are applied to areas requiring classification as SPAs under that directive;

— to transpose and apply the provisions of the second sentence of Article 4(4) of the Birds Directive fully and correctly;

— to take all the measures necessary to comply with Article 6(2) of the Habitats Directive in respect of all SPAs classified under Article 4(1) of the Birds Directive or recognised under Article 4(2) of that directive;

— to take all the measures necessary to comply with Article 6(2) of the Habitats Directive in respect of recreational use of all sites intended to be subject to that article;

— to take all the measures necessary to comply with Article 6(3) and (4) of the Habitats Directive in respect of plans;

— to take all the measures necessary to comply with Article 6(3) of the Habitats Directive in respect of authorisation of aquaculture projects;

— to take all the measures necessary to comply with Article 6(2) to (4) of the Habitats Directive in respect of the drain maintenance works in the Glen Lough SPA; and

— to take all the measures necessary to comply with Article 10 of the Birds Directive,

Ireland has failed to fulfil its obligations under Articles 4(1), (2) and (4), and 10 of the Birds Directive and Article 6(2) to (4) of the Habitats Directive.

Costs

277 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Ireland and the latter has, in essence, been unsuccessful, Ireland must be ordered to pay the costs.

278 Pursuant to the first subparagraph of Article 69(4) of the Rules of Procedure, the Member States which have intervened in the proceedings are to bear their own costs. The Hellenic Republic and the Kingdom of Spain must accordingly bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. Declares that, by failing:

— **to classify, since 6 April 1981, in accordance with Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as amended by Commission Directive 97/49/EC of 29 July**

1997, all the most suitable territories in number and size for the species mentioned in Annex I to that directive, with the exception of those intended to ensure conservation of the Greenland white-fronted goose (*Anser albifrons flavirostris*), as well as for regularly occurring migratory species not mentioned in Annex I, with the exception of those intended to ensure protection of the lapwing (*Vanellus vanellus*), the redshank (*Tringa totanus*), the snipe (*Gallinago gallinago*) and the curlew (*Numenius arquata*);

— **to ensure that, since 6 April 1981, the provisions of the first sentence of Article 4(4) of Directive 79/409, as amended by Directive 97/49, are applied to areas requiring classification as special protection areas under that directive;**

— **to transpose and apply the provisions of the second sentence of Article 4(4) of Directive 79/409, as amended by Directive 97/49, fully and correctly;**

— **to take all the measures necessary to comply with Article 6(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora in respect of all special protection areas classified under Article 4(1) of Directive 79/409, as amended by Directive 97/49, or recognised under Article 4(2) of that directive;**

— **to take all the measures necessary to comply with Article 6(2) of Directive 92/43 in respect of recreational use of all sites intended to be subject to that article;**

— **to take all the measures necessary to comply with Article 6(3) and (4) of Directive 92/43 in respect of plans;**

— **to take all the measures necessary to comply with Article 6(3) of Directive 92/43 in respect of authorisation of aquaculture programmes;**

— **to take all the measures necessary to comply with of Article 6(2) to (4) of Directive 92/43 in respect of the drain maintenance works in the Glen Lough special protection area; and**

— **to take all the measures necessary to comply with Article 10 of Directive 79/409, as amended by Directive 97/49,**

Ireland has failed to fulfil its obligations under Articles 4(1), (2) and (4), and 10 of Directive 79/409, as amended by Directive 97/49, and Article 6(2) to (4) of Directive 92/43.

2. **Dismisses the remainder of the action.**

3. **Orders Ireland to pay the costs.**

4. **Orders the Hellenic Republic and the Kingdom of Spain to bear their own costs.**

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

4 October 2007 *

In Case C-179/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 5 April 2006,

Commission of the European Communities, represented by D. Recchia, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by G. Fiengo, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, R. Silva de Lapuerta (Rapporteur), G. Arestis and J. Malenovský, Judges,

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 June 2007,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, as a result of approval by the municipality of Altamura and the region of Apulia, with effect from December 2000, of an alteration to an urban development plan comprising a series of industrial construction projects likely to have a significant effect on the Special Protection Area ('SPA') and proposed site of Community importance ('SCIp') IT 9120007 Murgia Alta without having first

carried out an impact assessment at least in respect of the SPA, the Italian Republic has failed to fulfil its obligations under the combined provisions of Articles 6(3) and 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Directive').

Community legal context

2 The aim of Directive 92/43 is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States where the EC Treaty applies.

3 Article 4 of the Directive lays down the procedure for establishing a network, known as 'Natura 2000', provided for in Article 3 thereof, and for the designation of special areas of conservation.

4 Article 6 of the Directive, which lays down the conservation measures for those areas, provides:

'...

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well

as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

...'

5 Article 7 of Directive 92/43 provides that obligations arising under Article 6(2) to (4) thereof are to replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of Directive 92/43 or the date of classification or recognition by a Member State under Directive 79/409, where the latter date is later.

The Murgia Alta area

6 In 1998, the Murgia Alta site was classified as an SPA pursuant to Article 4(1) of Directive 79/409 (code IT 9120007). It is part of the Mediterranean biogeographical region and has a surface area of 143 152 ha.

7 That SPA is home to numerous bird species listed in Annex I to Directive 79/409, including the largest population of the lesser kestrel (Falco naumanni) species in Italy.

8 Two priority habitats referred to in Annex I to Directive 92/43 are in that SPA, namely habitat 6210, 'Semi-natural dry grasslands and scrubland facies: on calcareous substrates *(Festuco-Brometalia)*', and habitat 6220, 'Pseudosteppe with grasses and annuals *Thero-Brachypodietea*', and also a priority plant referred to in Annex II to Directive 92/43: Stipa austroitalica Martinovsky.

9 The Murgia Alta site is described as follows in the data form established pursuant to Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1997 L 107, p. 1):

'General site character

Habitat classes	% cover
Heath, scrub, maquis and garrigue, phrygana	20.00
Dry grassland, steppes	65.00
Evergreen woodland	15.00
Total habitat cover	100

Other site characteristics

Evocative landscape made up of slightly rolling terrain and depressions in the shape of dolines, with superficial karstic phenomena represented by karstic basins and sink-holes. The substratum is formed by cretaceous limestone, generally covered by Pleistocene limestone. The bioclimate is sub-Mediterranean.

Quality and importance

Sub-region strongly characterised by the vast dry, limestone plateau which culminates at 679 m at Monte Caccia. It appears mainly to be a high, rocky calcareous plateau. It is one of the largest sub-steppe areas in Italy, with herbaceous vegetation due to the Festuco brometalia. The area's flora is particularly rich, totalling some 1 500 species. Over 90 species of nesting aviary fauna have been recorded, which places this area in second position in the region, after Gargano. The residual woodland formations are characterised by the prevalence of Quercus pubescens, often accompanied by Fraxinus ornus. Rare Quercus cerris and Q. frainetto have also been observed.

Vulnerability

The principal factor of destruction is the removal of the calcareous substratum, which is then reduced to powder by mechanical means. In this manner, vast stretches comprising sub-steppe vegetation are destroyed by the cultivation of new areas. The operation also often involves drystone walls and other forms of delimitation, which carry serious dangers of hydrogeological catastrophe. Recurring fires, related to prevalent grain farming; the construction of secondary residences in the most attractive tourist areas. Improper use of the karstic cavities as dumps for urban solid waste and solid waste.'

Facts

10 On 27 December 2000, the municipality of Altamura, by a series of decisions taken by its municipal council, approved framework agreements for the purposes of Article 27 of Law No 142 of 8 June 1990 on arrangements for local autonomy (Ordinamento delle autonomie locali, ordinary supplement to GURI No 135 of 12 June 1990) concerning approximately 100 industrial construction projects, many of which were situated within the Murgia Alta SPA and SCIp. Those agreements concerned in particular 34 sites covering 60 ha, falling within the project of the Consorzio di Sviluppo Murgiano and 11 sites, covering 8 ha, coming within the project of the Consorzio San Marco. Those agreements were subsequently approved by a decree of the Giunta regionale (regional government) of the region of Puglia.

11 In order to promote employment in industrial and trade production units, the mayors of the municipalities concerned may ask the Giunta regionale to adopt a framework agreement to authorise major projects which provide an immediate significant boost to employment.

12 The signature of a framework agreement, which must be authorised by the Giunta regionale, is allowed only if the urban development plan in effect does not provide for areas intended for specific purposes which are operational and legally effective for the works to be carried out or if it is necessary to expand existing structures in adjacent areas which are not intended for industrial and trade activities.

13 In the period from 1998 to 2001, a large number of undertakings submitted applications to the municipality of Altamura with a view to obtaining industrial- and trade-related framework agreements, some of which involved amendments to the

general urban development plan. The procedures undertaken on the basis of those applications did not comprise any general programming phase, although they did contain various procedures for amending that plan.

14 The regional administration subjected the Consorzio di Sviluppo Murgiano projects to a verification procedure concerning the need for an environmental impact assessment, taking the view that other projects, such as the Consorzio San Marco projects, did not need to undergo such a procedure. On the basis of those agreements, the municipality of Altamura granted a certain number of construction permits.

Pre-litigation procedure

15 Pursuant to Article 226 EC, on 9 July 2004 the Commission sent a letter of formal notice to the Italian Republic, asking it to provide its observations on the situation of the area in question in the light of the obligations laid down in Articles 6(3) and (7) of the Directive.

16 The Italian Republic replied to that letter of formal notice by correspondence of 14 October 2004 and 9 June 2005, to which it attached memoranda from the Ministry of the Environment and the Protection of Natural Resources.

17 The Commission sent the Italian Republic a reasoned opinion on 13 July 2005, requesting it to adopt the measures necessary to comply with that opinion within a period of two months from its notification.

18 The Italian Republic replied to that opinion by forwarding two new ministerial memoranda dated 3 and 7 October 2005.

19 Finding that the situation remained unsatisfactory, the Commission brought the present action.

The action

Arguments of the parties

20 The Commission states that no impact assessment within the meaning of Article 6(3) of Directive 92/43 was made in relation to the series of operations provided for in the relevant framework agreements which are likely to have a significant effect on the area in question.

21 The Commission observes that the various administrative decisions by which those operations were approved are contrary to Article 6(3) of the Directive, in that the interventions referred to were not subjected to an environmental impact assessment, even though they are likely to have a significant effect on the Murgia Alta SPA and SCIp.

22 The Commission states that whether or not the framework agreements and the measures resulting therefrom are of a legal nature is irrelevant, in the light of the Member States' obligations under Article 6(3) of the Directive.

23 The Commission adds that the parts of the area affected by the projects in question are contiguous and that it is therefore possible that there may be overall significant effects.

24 The Commission adds that it is not relevant that the municipality of Altamura issued only a limited number of construction permits, that no further construction permits were issued in 2003, that the other construction permit applications have been made subject to an impact assessment and that a mission is under way to conduct an overall assessment of the sites affected by installations covered by earlier plans.

25 The Commission also notes that no grounds have been put forward to justify the lack of impact assessment and that no information has been provided to demonstrate that the industrial and trade construction operations in question were not likely to have significant effects on the protected area.

26 The Italian Republic notes that a framework agreement is not a measure defining a legal situation, or an administrative measure, or a contract, but a procedural module under which public and private persons define beforehand the conduct and commitments by which they will be bound in order to attain a final result. Consequently, other administrative measures will be necessary for the works covered by the framework agreements which are the subject of the present action to be actually carried out.

27 The Italian Republic adds that the legislative provisions relating to the promotion of employment may not derogate from the rules governing the protection of the environment and natural resources. Under Italian law, moreover, the SPAs and sites of Community importance enjoy protection similar to that provided by the stringent legal rules applicable to parks and other natural areas.

28 That Member State observes that the municipality of Altamura granted only a limited number of construction permits for individual projects, some of which were linked to expansions of current plants and some of which were situated in areas intended for industrial installations. Since June 2003 no construction permits have been granted and no authorisations given for projects proposed by the Consorzio di Sviluppo Murgiano and the Consorzio San Marco.

29 The Italian Republic observes that only 15 projects have actually been carried out, relating to different parts of the area and involving different methods of completion, according to whether new construction or expansions are involved. There is no contiguity between those projects; nor is there any general or territorial plan covering them. An impact assessment has been carried out for some of them, whereas in other cases various authorisations have been granted in keeping with environmental and landscape aspects.

30 That Member State states that the municipality of Altamura is preparing to carry out an overall impact assessment and to promote initiatives aimed at mitigating any effects on the environment.

31 The Italian Republic adds that all the procedures relating to applications for plant construction in the municipality of Altamura have ben suspended pending the results of scientific studies concerning the environmental impact assessments for the projects in question.

Findings of the Court

32 The Court observes, as a preliminary point, that the provision infringement of which is alleged by the Commission is part of a complex set of rules the purpose of which is the establishment and management of areas forming part of the European network Natura 2000, as reflected in the third to sixth recitals in the preamble to the Directive.

33 Article 6(3) of Directive 92/43 provides that the obligation to carry out an appropriate assessment of the impact of a plan or project on a protected site subject is conditional on the plan or project in question being likely to have a significant effect on that site (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 40).

34 The Court also held, in paragraph 43 of that judgment, that the environmental protection mechanism provided for in Article 6(3) of the Directive requires that there be a probability or a risk that a plan or project will have significant effects on the site concerned.

35 In respect of the latter criterion, the Court stated, in paragraphs 46 to 48 of the same judgment, that, as is clear from the first sentence of Article 6(3) of the Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project must be linked to the site's conservation objectives. Consequently, where a plan or project has an effect on that site but is not likely to undermine its conservation objectives, that plan or project cannot be considered likely to have a significant effect on the site. That risk must be assessed in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.

36 In order to determine whether the complaint directed against the Italian Republic is well founded, it is appropriate to situate the obligation under Article 6(3) of the Directive, as clarified in the preceding paragraphs of this judgment, in the context of the action for failure to fulfil obligations brought by the Commission under Article 226 EC.

37 It is clear from established case-law that in such an action it is for the Commission to prove the existence of the alleged infringement. It is the Commission which must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (Case C-342/05 *Commission* v *Finland* [2007] ECR I-4713, paragraph 23 and case-law cited).

38 Moreover, the burden of proof borne by the Commission in an action for failure to fulfil obligations must be determined according to the types of obligations which directives impose on the Member States and therefore in the results which must be achieved by them (see, to that effect, Case C-60/01 *Commission* v *France* [2002] ECR I-5679, paragraph 25).

39 Under Article 6(3) of Directive 92/43, then, it is for the Commission to furnish the proof that, in the light of the characteristics and the specific environmental conditions of the site affected by a plan or project, that plan or project is likely to have a significant effect on that site, in the light of the conservation objectives fixed for the site.

40 With regard to the measures which are the subject of the present action and in order to determine whether it is well founded, it is appropriate to distinguish between the various framework agreements, on the one hand, and the works carried out subsequent to the granting of construction permits by the municipality of Altamura, on the other.

41 First, as regards the framework agreements, which are at varying stages of preparation, in the light of the defendant's line of argument that those agreements do not bear the legal hallmarks of a plan or project referred to in Article 6(3) of the Directive, the Court notes that the Commission, in an action for failure to fulfil obligations laid down in that provision, cannot simply allege the mere existence of such agreements, but must also provide sufficiently specific evidence to show that they are more than at the stage of preliminary administrative reflection and carry a degree of precision in the planning in question which calls for an environmental assessment of their effects.

42 Thus, without its being necessary to determine the scope and legal consequences stemming from the disputed framework agreements under national law, it is clear that the Commission, in merely alleging the existence of such agreements, did not furnish sufficiently specific evidence enabling the Court to consider that measures likely to have a significant effect on the site concerned within the meaning of Article 6(3) of the Directive were at issue.

43 Second, as regards projects carried out and the evidence supporting the burden of proof of the obligation to carry out an assessment of environmental implications, the Court finds that the Commission did not give the Court specific indications as to the geographic location and the scope of the construction work carried out in relation to the site. It moreover acknowledged at the hearing that it did not have this information.

44 Nor has the Commission provided data on the technical nature of the works in question or provided explanations as to what extent those works, in the light of the characteristics and specific environmental conditions of the site, are likely to have a significant effect on it.

45 In those circumstances, it is clear that the Commission has not satisfied the obligation to adduce evidence concerning the alleged infringement.

46 Therefore, the action must be dismissed as unfounded in its entirety.

Costs

47 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Italian Republic has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Dismisses the action.

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

20 September 2007 *

In Case C-304/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 29 July 2005,

Commission of the European Communities, represented by M. van Beek and D. Recchia, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia and G. Fiengo, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, R. Silva de Lapuerta (Rapporteur), J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 19 April 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, in relation to the project for the extension and improvement of the Santa Caterina Valfurva skiing area (the 'Bucaneve' and 'Edelweiss' runs) and for the provision of associated facilities with a view to the holding of the 2005 World Alpine Ski Championships in Special Protection Area ('SPA') IT 2040044 Parco Nazionale dello Stelvio ('the park'), by:

— authorising measures likely to have a significant impact on that area without making them subject to an appropriate assessment of their implications for the

site in the light of the site's conservation objectives and, in any event, without complying with the provisions which allow a project to be carried out in spite of a negative assessment of the implications and in the absence of alternative solutions only for imperative reasons of overriding public interest and only after adopting and communicating to the Commission all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected;

— failing to adopt measures to avoid the deterioration of natural habitats and habitats of species and the disturbance of species for which that area was designated;

— failing to endow that area with a protective legal status capable of ensuring, in particular, the survival and reproduction of the species of birds mentioned in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), and the breeding, moulting and migration of the regularly-occurring migratory species not covered by Annex I,

the Italian Republic has failed to fulfil its obligations under Articles 6(2) to (4) and 7 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) and Article 4(1) and (2) of Directive 79/409.

Community legal context

2 The aim of Directive 92/43 is to contribute to ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies.

3 The 10th recital in the preamble to that directive states:

'... an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'.

4 Article 3(1) of that directive provides:

'A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types mentioned in Annex I and habitats of the species mentioned in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.'

5 Article 4 of Directive 92/43 governs the procedure permitting the establishment of the Natura 2000 network and the designation of special areas of conservation by the Member States.

6 Article 6 of that directive, which establishes the conservation measures for those areas, provides:

'...

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

7 Article 7 of that directive provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

8 Directive 79/409 aims to guarantee the protection, management and control of all species of naturally occurring birds in the wild in the European territory of the Member States to which the Treaty applies.

9 Article 4 of that directive requires, for the bird species mentioned in Annex I thereto, special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. Article 4 provides:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not mentioned in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration

routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

...

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

The park

The status of the park in national law

10 The park was created by Law No 740 of 24 April 1935, initially on the territory only of the provinces of Trento and Bolzano, with the aim of protecting and promoting flora, of increasing fauna and of preserving the special geological formations and the beauty of the landscapes.

11 By decree of the President of the Republic of 23 April 1977, the territory of the park was extended to the areas of Cancano and Livigno and to Mounts Sobretta, Gavia and Serottini, situated in the provinces of Sondrio and Brescia in the Region of Lombardy.

12 The park is a protected area within the meaning of Framework Law No 394 of 6 December 1991 on national protected areas. That law sets out the fundamental principles governing those areas in order to guarantee and promote, in a coordinated manner, the conservation and utilisation of the natural heritage of the country.

13 By decree of the President of the Council of Ministers of 23 November 1993 the Consorzio del Parco Nazionale dello Stelvio ('the Consorzio') was constituted. Its powers and tasks are defined by its statutes.

14 In accordance with Article 4 of the statutes, the Consorzio is required to ensure, in its management of the park, the protection of nature and conservation of the countryside.

The status of the park in Community law

15 In 1998, the park was classified as an SPA within the meaning of Article 4 of Directive 79/409. It is designated, in the 'Region of Lombardy' chapter, under number IT 2040044.

16 According to a data form completed by the Italian Republic in 1998 in accordance with Commission Decision 97/266/EC of 18 December 1996 concerning a site information format for proposed Natura 2000 sites (OJ 1996 L 107, p. 1), the park hosts a large number of species of birds protected pursuant to Annex I to Directive 79/409 — the golden eagle (*Aquila chrysaetos*), the peregrine (*Falco peregrinus*), the honey buzzard (*Pernis apivorus*), the hazel hen (*Bonasa bonasia*), the ptarmigan (*Lagopus mutus helveticus*), the black grouse (*Tetrao tetrix*), the capercaillie (*Tetrao*

urogallus) and the black woodpecker (*Dryocopus martius*) — and three species of migratory birds — the sparrowhawk (*Accipiter nisus*), the common buzzard (*Buteo buteo*) and the wallcreeper (*Tichodroma muraria*).

17 Another data form, of 14 May 2004, indicates the presence in that area of other species mentioned in Annex I to Directive 79/409, that is to say the bearded vulture (*Gypaetus barbatus*), the kite (*Milvus mulvus*), the dotterel (*Charadrius morinellus*), the boreal owl (*Aegolius funereus*), the Eurasian pygmy owl (*Glaucidium passerinum*), the eagle owl (*Bubo bubo*), the grey-headed woodpecker (*Picus canus*) and the rock partridge (*Alectoris graeca saxatilis*).

Facts

18 On 4 October 1999, a proposal for the improvement of the Santa Caterina Valfurva skiing area and its facilities was lodged with the regional authorities with a view to the holding of the 2005 World Alpine Ski Championships.

19 That project provided for the creation of a corridor in a forest area for the ski runs. It also involved the construction of a cable car which, from the entrance of Santa Caterina, was to run to Plaghera and, over a second section, to Valle dell'Alpe. In addition, it provided for a link between Valle dell'Alpe and Costa Sobretta by way of a single-cable four-seat chairlift. The project involved further work closely linked to the proposed improvements, namely the provision of a departure station, a ski stadium and a car park near to the departure station, modification to the 'Edelweiss' run, and construction of a bridge over the Frodolfo stream, of a refuge at Valle dell'Alpe and service routes, of a programmable artificial snow machine and of a depot for vehicles.

20 By Decree No 13879 of 30 May 2000, the Region of Lombardy, on the basis of a study carried out by an architect for the undertakings Montagne di Valfurva and Santa Caterina Impianti, gave a favourable opinion with regard to the environmental compatibility of the project, subject to compliance with a series of general conditions and specific conditions linked to the carrying out of the various elements of the project. That decree stated that, in the context of later authorisation procedures, compliance with those conditions would be monitored, as would compliance with certain prohibitions and the environmental compensation required.

21 In the preamble to the study referred to in Decree No 13879, it was stated that the condition of the ski installations and of the facilities of the area concerned had deteriorated and that their modernisation was necessary, this having the additional objective of obtaining a subsidy for the proposed project.

22 According to that study, account had not been taken of the effect of the increase of anthropogenic pressure on species whose reproductive activity is sensitive to human presence, in particular the ptarmigan and the marmot, nor of the possible consequences for invertebrates and amphibians, nor of the effect on the migration routes of wading birds.

23 According to the study, the environmental impact and questions relating to mitigation, compensatory and monitoring measures in respect of the effects of the proposed works on the various environmental components had been examined in a summary manner and the 'flora, vegetation and habitat' component had been analysed merely in an ad hoc way. The study thus concluded that a morphological and environmental recovery project, dealing with the replanting of the area once the works were completed, was necessary.

24 The study contained the following conclusions:

'...

If the works are not carried out, the consequence could be a slow but unavoidable economic decline, not only of the region of Santa Caterina, but of the entire skiing area. Consequently, it is essential to support the carrying out of the proposed development of the lifts and the creation of the new ski runs, with associated facilities, because of the proposal's socio-economic value, particularly from the point of view of tourism.

...

The works proposed may be regarded as respecting the environment on the following conditions:

— the entire project to improve the installations and put the new installations and services into operation must be subject to the creation of the car park down the valley from the urban centre of Santa Caterina, as a logical support for the construction of the new installations. Having regard to the type and economic scale of the parking project and given the limits on authorised contributions at Community level, it must be stressed that it is possible that the installations will be financed mainly by the applicants themselves.

...

— in order to limit to the maximum extent possible the felling of trees, soil movements and the width of the bridge over the Frodolfo, the linking run, proposed initially to have a minimum width of 40 metres, must be reduced to a width of 20 metres. ...

...

— the valley facilities (stands, commentators' and timekeepers' cabins) must be the subject of a specific proposal. ...

— the width of the corridor to be deforested for the creation of the lifts must be strictly limited to that required by the safety standards of those installations. ...

— the dimensions of the linking run between the existing ski runs and the new arrival/departure station of Plaghera must be altered to reduce soil movements.

...

— in order to reduce soil movements and consequent impairment of the sites, neither the linking road between the arrival station and the Valle dell'Alpe refuge nor the depot for the cabins must be built. ...

— the proposed new road for traffic to the worksite for the Valle dell'Alpe-Costa Sobretta chairlift must not be built, in light of the excessive impairment of the sites which it would cause. ...

— given the great natural quality of the sites (ground cover in the natural meadows, perennial plants, rupestral and moraine plants, typical landscape having the massive vertical lines of rock faces and the broken lines of ridges) and the various risks for the environmental framework which are set out above, the final project ... must comply with all directions in the various domains (flora, fauna, ecosystems, geology, hydrogeology, stability of slopes ...), in order to permit an assessment of the works proposed consistent with high levels of protection for the Alpine nature of the sites.

If the works can be carried out, the final project must also include ... the following:

— compensation must be made for the loss of forest resulting from the tree felling by planting twice the number of trees felled. ...

— all the [places where] soil [will be moved] must be landscaped and replanted. ...

— the service routes (aqueducts, drainage, electricity, artificial snow machines) must be underground. The siting of overhead electricity cables near to lifts must be prohibited.

— it is necessary and vital to provide for a morphological and environmental recovery project, dealing definitively with the replanting of the area once the works have been completed. ...

The following conditions must be met before the definitive project is carried out:

— with regard to hydrogeology, the problems relating to the consequences of the creation of the ski runs and to the impact of the construction sites on the hydrogeological system at Valle dell'Alpe and on the south slope of Costa Sobretta must be dealt with;

— specific studies must be made with regard to the hydrogeological system and geomechanics, with studies of groundwater circulation. ...

— an appropriate check of the alterations to the geomorphological state of the outcrop formations on the rock faces affected must be made. ...

With regard to the environmental component of fauna, it is vital again to measure the effect of the works in their global context ...'

25 Subsequently, in September 2000, the Region of Lombardy instructed the Istituto di Ricerca per l'Ecologia e l'Economia Applicate alle Aree Alpine (Research Institute for Applied Ecology and Economics in Alpine Regions; 'the IREALP') to draw up a report relating to assessment of the environmental impact of the project in question.

26 That report was conceived as a feasibility study which was to cover the environmental-improvement matters, corrective action, environmental engineering works and environmental restoration considered necessary, with a view to drawing up a preliminary proposal followed by a definitive project.

27 The project was subsequently amended, in particular to include the widening of the 'Edelweiss' ski run, the width of which was increased from 20 to almost 50 metres.

28 In September 2002, the IREALP published its report on the assessment of the impact of the proposed measures. That report described, in a summary manner, that part of the area affected by the project in question as a 'spruce forest containing few rare species but with the characteristically wide diversity of subalpine forests, very fragile and slow to regenerate'.

29 The report referred to the 'presence of particularly interesting nesting fauna in the forest: goshawk, black woodpecker, great spotted woodpecker, green woodpecker'. Amongst the main effects of the project during the work phase, the report mentioned the 'reduction of the forest habitat used for nesting by species of conservation interest'.

30 It follows from the conclusions of the IREALP report that the guidelines which the study was able to take into consideration had not yet been fully defined, but were in the course of progressive development, in particular on the basis of the knowledge and details coming to light during the process of implementing the project. It was also pointed out that the report constituted an opportunity to introduce other proposals for improvement of the environmental impact of the management of the whole of the skiing area.

31 The report also stated as follows:

'Although the process may be regarded as positive, it does, however, show less positive aspects, since it reflects the necessity for other determinations on certain equally important technical aspects which will probably require technical clarification during the next phases. Clearly, the present study also expresses that limitation and must, consequently, be considered a guidance document for decisions, which highlights risks and provides suggestions in order to resolve problems, rather than a precise measurement of the impact which the works proposed will have on the environment. More exact assessments of that impact ... can be supplied in the future in environmental impact studies which will accompany the development of the current guidelines ...'

32 The report's conclusions set out a series of assessments regarding the feasibility from an environmental point of view of the guidelines for the project studied. They state as follows:

'In any event, further design activities must provide for a significant reduction in environmental interference in relation to the initial hypotheses, an aim [for the achievement of which] proposals on the subject contained in the present report can also be used. [That objective must be pursued] with determination as regards the

works in Valle dell'Alpe, for which it will be necessary to carry out another specific study of the environmental impact once all the works proposed have been decided.'

33 On 3 October 2002, the Consorzio stated that it approved the general guidelines and the steps recommended by the IREALP report and the proposals contained therein.

34 On 14 February 2003, the Consorzio granted authorisation relating to the project for extension and modification of the 'Bucaneve' and 'Edelweiss' Alpine ski runs and associated facilities in the area of Santa Caterina Valfurva ('the authorisation of 14 February 2003'). The Consorzio took the view that the works proposed complied with the content of the IREALP report. However, it stated that the authorisation was granted provided that there was such compliance. The authorisation was, in addition, subject to compliance with a series of conditions and requirements.

35 As early as February 2003, almost 2 500 trees were felled in an area 50 metres wide and 500 metres long, at an altitude of between 1 700 and 1 900 metres. Furthermore, the effect of the improvement of the ski runs and facilities at Santa Caterina Valfurva, within SPA IT 2040044, was to split completely the habitat of the birds present on the site.

36 On 19 June 2003, after the guidance contained in the IREALP report, a new proposal was published, accompanied by a supplementary study by the municipality of Valfurva on the environmental impact. In July 2003, an environmental impact assessment procedure was opened, to obtain an opinion relating to the part of the project sited between Plaghera, Costa Sobretta and Valle dell'Alpe.

37 On 20 August 2003, the Consorzio gave an unfavourable opinion with regard to the environmental compatibility of the project, on the ground of non-compliance with the guidance given in the IREALP report.

38 On 16 October 2003, a memorandum of understanding was signed between the Region of Lombardy, the Consorzio, the organising committee of the World Ski Championships and the party responsible for the framework programme for the project in order to settle the controversial elements of the project. That understanding provided for:

— establishment of the method of gathering opinions with a view to completing the regional assessment procedures;

— adoption of an overall view of the works subject to examination, coordinating so far as possible the procedures in question;

— a guarantee that the conditions laid down by the board of the Consorzio would be observed;

— confirmation of the siting of the intermediate station at Plaghera and of the refuge at Valle dell'Alpe;

— re-examination and adaptation of the projects regarding the works on the Santa Caterina-Plaghera site in accordance with the monitoring requirements laid down by the Consorzio.

39 By Decree No 20789 of 28 November 2003, the Region of Lombardy determined that the project to improve the lifts and associated services on the territory of the municipality of Valfurva was compatible with the environment of SPA IT 2040044.

40 That decree, which sets out the conclusions of an impact assessment carried out by the Direzione Generale Agricoltura (Directorate-General for Agriculture) of the Region of Lombardy, gave responsibility to the municipality of Valfurva for monitoring compliance with the conditions laid down during both the approval phase of the projects and their implementation phase. Furthermore, it provided that the definitive projects were to be supplemented by a series of requirements, including submission of a study of the impact of the works.

Pre-litigation procedure

41 In accordance with Article 226 EC, by letter of 19 December 2003 the Commission gave the Italian Republic formal notice to submit its observations on the situation in SPA IT 2040044.

42 As it received no response to that letter, on 9 July 2004 the Commission sent a reasoned opinion to the Italian Republic.

43 The Italian Republic responded to the complaints raised by the Commission in the reasoned opinion by sending a number of ministerial communications.

44 Taking the view that the response thus supplied was not satisfactory, the Commission brought the present action.

The action

45 The Commission raises four complaints against the Italian Republic, the first three of which relate to Directive 92/43 and the fourth to Directive 79/409.

The first complaint, alleging breach of Article 6(3) of Directive 92/43 in conjunction with Article 7

Arguments of the parties

46 The Commission takes the view that the authorisation of 14 February 2003 was not based on an appropriate assessment of the environmental impact of the decision to widen the 'Bucaneve' and 'Edelweiss' ski runs and to construct a number of associated facilities.

47 The Commission states that the IREALP report does not contain an appropriate assessment of the effect on SPA IT 2040044 of the works proposed.

48 It notes that that area forms the habitat of numerous species of protected birds, as is apparent from the details appearing in the *Atlas of European Breeding Birds*, a work which combines studies carried out by more than 10 000 ornithologists from all over Europe and which is considered to be an extremely reliable document with regard to birds nesting in Europe.

49 Furthermore, the Commission notes that, although the IREALP report contains useful recommendations, these have not been duly taken into account in the context of the authorisation of 14 February 2003.

50 The Commission concludes therefrom that the authorisation was granted without the national authorities being certain that the works envisaged would not adversely affect the integrity of the SPA concerned.

51 The Italian Republic submits that two types of works must be distinguished, that is to say, on the one hand, works for which the procedure of environmental impact assessment took place and for which the measures to be adopted to limit that impact were laid down and, on the other, works for which, on the basis of the IREALP report, adjustments were envisaged.

52 The Italian Republic states that, with regard to the first category of works, which includes the works carried out between Plaghera and Valle dell'Alpe, it must be determined whether the competent authorities undertook an assessment of the environmental interests present in SPA IT 2040044. For the other works, that is to say the works carried out between Santa Caterina and Plaghera, it should be ascertained whether the same procedure took place and whether the postponement of determination of the measures to reduce the environmental repercussions to a later phase of refinement of the project is compatible with the provisions of Directive 92/43.

53 The Italian Republic submits that Regional Decree No 13879 of 30 May 2000 was adopted after analysis of the criteria laid down in that directive, even though it does not expressly refer to the environmental impact assessment.

54 In the view of the Italian Republic, it follows that the assessment which constitutes the basis of that decree is vital to any later decision giving authorisation.

Findings of the Court

55 It must be stated, as a preliminary point, that the parties are in agreement on the fact that the works to modify the ski runs and construct associated facilities were such as to create the obligation to carry out a prior assessment of their environmental impact, in accordance with Article 6(3) of Directive 92/43.

56 Article 6(3) provides for an assessment procedure intended to ensure, by means of a prior examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site (see Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405 ('*Waddenzee*'), paragraph 34, and Case C-239/04 *Commission* v *Portugal* [2006] ECR I-10183 ('*Castro Verde*'), paragraph 19).

57 With regard to the concept of 'appropriate assessment' within the meaning of Article 6(3) of Directive 92/43, it should be noted that the latter does not define any particular method for the carrying out of such an assessment.

58 The Court has, however, held that that assessment must be organised in such a manner that the competent national authorities can be certain that a plan or project will not have adverse effects on the integrity of the site concerned, given that, where doubt remains as to the absence of such effects, the competent authority will have to refuse authorisation (see, to that effect, *Waddenzee*, paragraphs 56 and 57, and *Castro Verde*, paragraph 20).

59 With regard to the factors on the basis of which the competent authorities may gain the necessary level of certainty, the Court has stated that no reasonable scientific doubt may remain, those authorities having to rely on the best scientific knowledge in the field (see *Waddenzee*, paragraphs 59 and 61, and *Castro Verde*, paragraph 24).

60 Accordingly, it is necessary to ascertain whether, in the present case, the impact of the disputed works on the integrity of the site concerned was examined in a manner compatible with the parameters set out above before authorisation was granted on 14 February 2003.

61 It is apparent from the documents submitted to the Court that prior consideration was given to the matter on a number of occasions before authorisation was granted. The assessments which might be considered appropriate within the meaning of Article 6(3) of Directive 92/43 are, firstly, an environmental impact study prepared in 2000 and, secondly, a report submitted in 2002 (see paragraphs 21 to 24 and paragraphs 25 to 32 of this judgment).

62 With regard, firstly, to the abovementioned study, which was carried out by an architect on behalf of two public works undertakings, it should be noted that, although the study addresses the question of the impact of the proposed works on the fauna and flora of the area, it highlights itself the summary and selective nature of the examination of the environmental repercussions of the widening of the ski runs and of the construction of associated facilities.

63 It should also be noted that that study itself mentions a large number of matters which were not taken into account. It thus recommends, in particular, additional morphological and environmental analyses and a new examination of the impact of the works, in their global context, on the wild fauna in general and on the situation of certain protected species, in particular in the area of forest to be felled.

64 Furthermore, the study takes the view that the carrying out of the proposed works, desirable from an economic point of view, must comply with a large number of conditions and protection requirements.

65 The inescapable conclusion is that the study does not constitute an appropriate assessment on which the national authorities could rely for granting authorisation for the disputed works pursuant to Article 6(3) of Directive 92/43.

66 With regard, secondly, to the IREALP report submitted in 2002, it must be noted that it also describes the proposed works, examining their impact on the hydrological regime, geomorphology and the area's vegetation. As regards the birds for which the SPA has been designated, the report does not contain an exhaustive list of the wild birds present in the area.

67 Although it is true that the IREALP report states that the main disturbance threatening fauna comes from the destruction of nests during the deforestation phase and from habitat fragmentation, it nonetheless contains numerous findings that are preliminary in nature and it lacks definitive conclusions. The report refers to the importance of assessments to be carried out progressively, in particular on the basis of knowledge and details likely to come to light during the process of implementation of the project. Furthermore, the report was designed as an opportunity to introduce other proposals for improvement of the environmental impact of the operations proposed.

68 These factors mean that the IREALP report cannot be considered an appropriate assessment of the impact of the disputed works on SPA IT 2040044 either.

69 It follows from all the foregoing that both the study of 2000 and the report of 2002 have gaps and lack complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned.

70 Such findings and conclusions were essential in order that the competent authorities might gain the necessary level of certainty to take the decision to authorise the works.

71 In the circumstances, the authorisation of 14 February 2003 did not comply with Article 6(3) of Directive 92/43.

72 With regard to the other studies, it is sufficient to note that they cannot be considered relevant, given that they were prepared either during the works or after their completion, that is to say after grant of the authorisation of 14 February 2003.

73 The failure to fulfil obligations under Article 6(3) of Directive 92/43 must, accordingly, be considered established.

The second complaint, alleging breach of Article 6(4) of Directive 92/43 in conjunction with Article 7

Arguments of the parties

74 The Commission takes the view that it was clear that the works which were proposed could well seriously harm the integrity of the area in question. However, no alternative was seriously suggested. Regional Decree No 13879 of 30 May 2000 raised the possibility that the 'Bucaneve' and 'Edelweiss' ski runs might not be modified but rather maintained, so far as possible, in their current route, departing from that route further on.

75 The Commission deduces therefrom that the project was authorised although there were other solutions less harmful to the environment in that area, which, however, were not taken into consideration by the national authorities.

76 The Commission also submits that the carrying out of the works was not justified by imperative reasons of overriding public interest. In addition, provision was not made for any compensatory measures.

77 The Italian Republic points out that the disputed works were the subject of a double authorisation procedure. Thus, the initial part of the routes and installations between Santa Caterina and Plaghera were considered compatible with the environment by virtue of Regional Decree No 13879 of 30 May 2000, supplemented by a later, favourable opinion from the Regional Council of Lombardy. A revision phase, for that part of the project sited between Plaghera and Valle dell'Alpe, was

begun after the guidance contained in the IREALP report, in order to initiate an environmental impact assessment procedure.

78 The Italian Republic points out that the Region of Lombardy had imposed the condition, laid down in Regional Decree No 20789 of 28 November 2003 which contains an environmental impact assessment with regard to the area between Plaghera and Valle dell'Alpe, that an impact study be submitted for all the works, relating also to the area between Santa Caterina and Plaghera.

79 The Italian Republic adds that the competent authorities had become certain that it was necessary to subject all the works, including those authorised by the regional decree, to an environmental impact assessment.

Findings of the Court

80 Having regard to the fact that the complaint alleging breach of Article 6(3) of Directive 92/43 is well founded, it must be ascertained whether the authorisation of 14 February 2003 complied with the requirements set out in Article 6(4) of the directive.

81 That provision states that, if, in spite of a negative assessment carried out in accordance with the first sentence of Article 6(3) of the directive, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, and there are no alternative solutions, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

82 As the Court has pointed out in paragraphs 35 and 36 of the judgment in *Castro Verde*, Article 6(4) of the directive must, as a derogation from the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly.

83 Furthermore, Article 6(4) of Directive 92/43 can apply only after the implications of a plan or project have been studied in accordance with Article 6(3) of that directive. Knowledge of those implications in the light of the conservation objectives relating to the site in question is a necessary prerequisite for application of Article 6(4) since, in the absence thereof, no condition for application of that derogating provision can be assessed. The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified.

84 It follows from the foregoing that the national authorities did not have that information at the time of the decision to grant the authorisation of 14 February 2003. Accordingly, that authorisation cannot be based on Article 6(4) of Directive 92/43.

85 Consequently, the authorisation of 14 February 2003 did not comply with Article 6(4) of the directive.

86 The Commission's action is therefore also well founded in this regard.

The third complaint, alleging breach of Article 6(2) of Directive 92/43 in conjunction with Article 7

Arguments of the parties

87 The Commission submits that the national authorities did not have power to grant the authorisation for the extension and improvement works to the Alpine skiing area since those works were likely seriously to harm the integrity of the park.

88 The Commission states that the area in question suffered significant degradation following the works authorised by the Consorzio. It recalls that the modification of the 'Bucaneve' and 'Edelweiss' Alpine ski runs entailed the felling of almost 2 500 trees which constituted an important habitat for numerous species of protected birds.

89 The Italian Republic notes that the fact that the carrying out of the disputed works entailed certain critical aspects and that these have not yet been remedied does not mean that the works proposed were not correctly assessed. When public works involving negative implications for the environment are necessary, the provisions of Directive 92/43 do not involve a prohibition on carrying out those works, but an obligation to adopt suitable compensatory measures.

90 The Italian Republic takes the view that such measures must be implemented, in accordance with what is possible, before, during and after the carrying out of the works concerned.

Findings of the Court

91 In order to determine whether the complaint raised is well founded, it must be examined whether activities affecting an SPA can infringe both Article 6(3) and (4) of Directive 92/43, as has been found in the present case in paragraphs 73 and 85 of this judgment, and Article 6(2).

92 The latter provision establishes an obligation to take appropriate protective measures, consisting in avoiding deterioration and disturbance which could be significant in the light of the objectives of Directive 92/43.

93 That obligation corresponds to the objective set out in the seventh recital in the preamble to the directive, according to which each special area of conservation must form part of a coherent European ecological network.

94 Where, as is apparent in the present case from examination of the first complaint, authorisation for a plan or project has been granted without complying with Article 6(3) of Directive 92/43, a breach of Article 6(2) in relation to a special area of conservation may be found where deterioration of a habitat or disturbance of the species for which the area in question was designated has been established.

95 With regard to the present case, it should be recalled that almost 2 500 trees were felled in an afforested part of the area concerned, which constitutes the habitat of protected species of birds, inter alia the goshawk, the ptarmigan, the black woodpecker and the black grouse. Consequently, the disputed works destroyed the breeding sites of those species.

96 The inevitable conclusion is that the works and their repercussions on SPA IT 2040044 were incompatible with the protective legal status from which that area should have benefited pursuant to Article 6(2) of Directive 92/43.

97 Accordingly, the Commission's action must also be upheld on this point.

The fourth complaint, alleging breach of Article 4(1) and (2) of Directive 79/409

Arguments of the parties

98 The Commission takes the view that analysis of the measures taken by the national authorities shows that SPA IT 2040044 did not benefit from a protective legal status under national law capable of ensuring, in particular, the survival and reproduction of the bird species mentioned in Annex I to Directive 79/409 and the breeding, moulting and wintering of regularly-occurring migratory species not mentioned in that annex.

99 The Commission takes the view that the works carried out following the authorisation of 14 February 2003 are such as seriously to damage the species of birds present in that SPA, in particular during the breeding period.

100 The Commission states that, although that area is subject to a certain number of rules, the decision of 14 February 2003 shows that the national authorities did not take the necessary measures to put in place an appropriate legal regime to ensure not only protection of the area, but also effective protection of the bird species present there.

101 The Italian Republic asserts that the disputed area is heavily regulated.

102 It states that it follows from the legislation which led to creation of the park that the area in question enjoys a protective status which is appropriate for guaranteeing the objectives laid down by Community legislation. The creation of the park was intended to protect the fauna by putting into place a management system based around conservation of animal and plant species.

Findings of the Court

103 As a preliminary point, it must be noted that the area which is the subject of the present action was designated as an SPA in accordance with Article 4 of Directive 79/409.

104 It must also be noted that, although it is true that Article 7 of Directive 92/43 substitutes the obligations arising from Article 6(2) to (4) of that directive for those arising from Article 4(4) of Directive 79/409, the obligations which arise from Article 4(1) and (2) of Directive 79/409 remain fully applicable. The latter obligations are autonomous in nature and pursue objectives different from those envisaged in Article 6(2) to (4) of Directive 92/43.

105 In order to determine whether the complaint raised is well founded, it must be pointed out that, in accordance with established case-law, it is incumbent upon the Commission to prove the allegation that an obligation has not been fulfilled. It is the Commission's responsibility to place before the Court all the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption (see, inter alia, Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21; Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, paragraph 80; and Case C-135/05 *Commission* v *Italy* [2007] ECR I-3475, paragraph 20).

106 In that regard, it must be noted that, as the Commission has pointed out itself, the management of the SPA in question is subject to regulation under a number of instruments of Italian law.

107 In those circumstances, it is for the Commission to prove that the legal framework determined by those various instruments is not such as to confer an appropriate protective status on that area.

108 The Commission has not shown how that legal framework would be insufficient in the light of the provisions of Article 4(1) and (2) of Directive 79/409. It has merely pleaded the adoption by the administrative authority of a decision giving authorisation contrary to Article 6(2) to (4) of Directive 92/43, a fact which cannot, however, be sufficient to establish the incompatibility of that legal framework with Article 4 of Directive 79/409.

109 The inevitable conclusion is that the Commission's fourth complaint must be rejected.

Costs

110 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs to be awarded against the Italian Republic and the latter has been essentially unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. Declares that:

— **by authorising measures likely to have a significant impact on Special Protection Area IT 2040044, Parco Nazionale dello Stelvio, without making them subject to an appropriate assessment of their implications in the light of the area's conservation objectives;**

— **by authorising such measures, without complying with the provisions which allow a project to be carried out, in spite of a negative assessment of the implications and in the absence of alternative solutions, only for imperative reasons of overriding public interest and then only after adopting and communicating to the Commission of the European Communities all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected; and**

— **by failing to adopt measures to avoid the deterioration of natural habitats and habitats of species and the disturbance of species for which SPA IT 2040044, Parco Nazionale dello Stelvio, was designated,**

the Italian Republic has failed to fulfil its obligations under Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in conjunction with Article 7 of that directive, and under Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

2. **Dismisses the remainder of the action;**

3. **Orders the Italian Republic to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

28 June 2007 *

In Case C-235/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 4 June 2004,

Commission of the European Communities, represented by M. van Beek and G. Valero Jordana, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by N. Díaz Abad, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris (Rapporteur), J. Klučka, R. Silva de Lapuerta and L. Bay Larsen, Judges,

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

Judgment

1 By its action, the Commission of the European Communities requests the Court to declare that, by failing to classify territories of a sufficient number and size as special protection areas for birds ('SPAs') in order to provide protection for all the species of birds listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended, inter alia, by

Commission Directive 97/49/EC of 29 July 1997 (OJ 1997 L 223, p. 9; 'Directive 79/409'), and for the migratory species not mentioned in the said Annex I, the Kingdom of Spain has failed to fulfil its obligations under Article 4(1) and (2) of Directive 79/409.

Legal context

2 Article 1(1) of Directive 79/409 provides:

'This Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.'

3 Article 2 of that directive provides:

'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level.'

4 Article 4(1) and (2) of that directive states as follows:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.'

Pre-litigation procedure

5 Following a number of complaints, on 26 January 2000 the Commission sent the Kingdom of Spain a letter of formal notice noting the incorrect application by that Member State of Directive 79/409 in that it had failed to classify territories of a sufficient number and size as SPAs.

6 Since the Commission took the view that the replies of the Spanish authorities and the information and proposals for classification of new SPAs, sent between 18 May 2000 and 10 January 2001, were not convincing, on 31 January 2001 the Commission issued a reasoned opinion requesting the Kingdom of Spain to take the measures necessary to comply therewith within a period of two months from notification of that opinion, the period for replying to which was extended to 3 May 2001.

7 By letters of 17 April and 15 May 2001, the Spanish authorities responded to the reasoned opinion and, between 28 May 2001 and 25 October 2002, sent additional information and details of classifications of and extensions to SPAs.

8 After having analysed all of those replies and taking the view that the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla y León, Castilla-La Mancha and Madrid had not yet fulfilled all the obligations arising out of Article 4(1) and (2) of Directive 79/409 and that the Autonomous Communities of the Asturias, Catalonia, Extremadura, Galicia and Valencia had classified SPAs in a wholly inappropriate and inadequate manner, the Commission decided, during January 2003, to bring the matter before the Court of Justice.

9 The Spanish authorities continued to send the Commission, between 13 January 2003 and 5 April 2004, proposals for SPA classifications, files relating to the redefinition and extension of the SPA network, including various data brought up to date and supplemented by cartographic documents, and information on the situation of the bird species.

10 After having analysed all these replies, the Commission, considering that the failure to fulfil obligations arising under Directive 79/409 was continuing, decided to bring, on 4 June 2004, the present action.

The action

11 By its action, the Commission alleges that the Kingdom of Spain has failed to classify sufficient SPAs, in number and in size, having regard to the objectives of protection of the bird species listed in Annex I to Directive 79/409 and of the migratory species not covered in that annex.

12 Since, at the hearing, the Commission withdrew its action with regard to the Autonomous Community of Extremadura, the present case for failure to fulfil obligations concerns only the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia.

Classification of SPAs

Arguments of the parties

13 The Commission takes the view that the Kingdom of Spain has not classified as SPAs territories sufficient in size and in number having regard to the areas of importance for the conservation of birds identified in the ornithological list published in 1998 ('the IBA 98').

14 The Spanish Government objects to the use of the IBA 98. That inventory, it submits, does not have the same value as the *Inventory of Important Bird Areas in the European Community* published in 1989 ('the IBA 89') since, because it was neither commissioned nor supervised by the Commission, the accuracy of its results is not guaranteed.

15 The IBA 98 was drawn up exclusively on the initiative of the Sociedad Española de Ornitología (Spanish Ornithological Society; 'SEO/BirdLife') which decided unilaterally to amend the IBA 89 in order to increase the number and size of the areas to be protected in Spain. No public authority having responsibility for environmental matters supervised the drawing-up of that list to ensure the precision and accuracy of its data. The increase in number and above all in size of new areas

requiring to be protected in the IBA 98 in comparison with the IBA 89 is therefore impossible to justify or check.

16 Next, still in the view of the Spanish Government, the use of incomplete information in the IBA 98 does not permit areas of interest for the conservation of birds to be correctly defined. The criteria used to define the SPAs are also incorrect, are of low ornithological value and do not comply with Directive 79/409.

17 The Spanish Government also takes the view that the surveys and the numerous population estimates carried out for all the areas of importance for the conservation of birds are not supported by any bibliographical reference, which prevents any checking or comparison of data. Furthermore, SEO/BirdLife explicitly accepted that the sources of the ornithological data were not cited for each of these areas.

18 Thus, there are serious lacunae in SEO/BirdLife's definition of the areas to be protected because of the lack of bibliographical references and the poor quality of the information used. The IBA 98 does not therefore have the minimum quality required of a scientific work with regard to accuracy of data and precision of the criteria used.

19 Finally the Spanish Government submits that SEO/BirdLife prohibited, without its express authorisation, the release to the autonomous communities, which have administrative jurisdiction in environmental matters, of the information which it used to identify and define the areas of importance for the conservation of birds.

20 According to the Commission, the IBA 98 relies on the best documented and most accurate references available to define the areas most appropriate to the survival and reproduction of bird species in accordance with Article 4(1) and (2) of Directive 79/409. The IBA 98 is based on balanced ornithological criteria such as population size, bird diversity and the risks to which the species are exposed on an international scale, allowing identification of the places most likely to ensure conservation of the species listed in Annex I to Directive 79/409 and of the migratory species not listed in that annex.

21 The Commission states that the assessment of the network of SPAs classified by the Kingdom of Spain was not carried out on the basis of the IBA 98 alone, but also on the basis of two other criteria relying, first, on an analysis of the presence in each area of the bird species mentioned in Annex I to Directive 79/409 and, second, on the taking into account of wetlands.

22 Finally, also in the view of the Commission, the fact that it is impossible to access the database used by SEO/BirdLife does not invalidate the scientific nature of the study and does not preclude the various Spanish authorities from drawing up or arranging for their own studies to comply with their obligations under Directive 79/409.

Findings of the Court

23 As a preliminary point, it must be borne in mind that Article 4 of Directive 79/409 lays down a regime which is specifically targeted and reinforced both for the species listed in Annex I and for the migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the European Community (Case C-191/05 *Commission* v *Portugal* [2006] ECR I-6853, paragraph 9, and case-law cited). Furthermore, it is

clear from the ninth recital in the preamble to that directive that the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds. The Member States are therefore required to adopt the measures necessary for the conservation of those species.

24 For that purpose, the updating of scientific data is necessary to determine the situation of the most endangered species and the species constituting the common heritage of the Community in order to classify the most suitable areas as SPAs. It is therefore necessary to use the most up-to-date scientific data available at the end of the period laid down in the reasoned opinion.

25 In that regard, it should be recalled that the national lists, including the IBA 98 drawn up by SEO/BirdLife, revised the first pan-European study carried out in the IBA 89 and provide more exact and up-to-date scientific data.

26 In view of the scientific nature of the IBA 89 and of the absence of any scientific evidence adduced by a Member State tending particularly to show that the obligations flowing from Article 4(1) and (2) of Directive 79/409 could be satisfied by classifying as SPAs sites other than those appearing in that inventory and covering a smaller total area, the Court has held that that inventory, although not legally binding, could be used by the Court as a basis of reference for assessing whether a Member State has classified a sufficient number and size of areas as SPAs for the purposes of the abovementioned provisions of Directive 79/409 (see, to that effect, Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraphs 68 to 70, and Case C-378/01 *Commission* v *Italy* [2003] ECR I-2857, paragraph 18).

27 It must be held that the IBA 98 provides an up-to-date list of the areas of importance for the conservation of birds in Spain which, in the absence of scientific proof to the

contrary, constitutes a basis of reference permitting an assessment to be made as to whether that Member State has classified areas of a sufficient number and size as SPAs to protect all the bird species listed in Annex I to Directive 79/409 and the migratory species not listed in that annex.

28 In that regard, it should be pointed out that the IBA 98 was used by the Autonomous Communities of Castilla-La Mancha, Catalonia, Galicia and Valencia to define SPAs and that, with regard to the Autonomous Communities of Aragon, Cantabria, Extremadura, Madrid, Murcia, the Basque Country and the Autonomous City of Ceuta, the Commission accepted up-to-date scientific information supplied to it in the place of that relating to the important bird areas listed in the IBA 98.

29 It is then appropriate to consider the arguments of the Spanish Government with regard to criteria C.1 and C.6 used in that inventory.

30 Under the IBA 98, criterion C.1 designates an area regularly visited by a significant number of birds of a globally threatened species or of a species whose preservation is of interest on a worldwide level. Criterion C.6 designates an area constituting one of the five most important areas in each European region for a species or a subspecies listed in Annex I to Directive 79/409.

31 With regard to criterion C.1, the Spanish Government considers that the identification threshold for SPAs cannot be less than 1% of the national reproducing population of a species listed in that annex.

32 That argument disregards the definition of that criterion and thus cannot be accepted. Since criterion C.1 relates to globally threatened species, it is sufficient that the area concerned be the habitat of a significant number of individual members of such a species. No threshold of 1% is laid down by criterion C.1 or imposed by virtue of Directive 79/409.

33 With regard to criterion C.6, the Spanish Government submits that the biogeographical regions defined in Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) are to be regarded as being equivalent to areas defined for the purposes of Directive 79/409. The use of a different method to define habitats and areas of importance for the conservation of birds would create considerable and unjustifiable disparities, taking into account the existence of numerous different administrative territorial divisions within the Member States.

34 As the Advocate General noted in point 90 of her Opinion, the Kingdom of Spain did not attempt to divide Spanish territory on an ornithological basis which would permit identification of SPAs, but merely referred to the existence of biogeographical regions, which do not constitute a basis comparable to the autonomous communities for the putting into place of a network covering the Community in a more or less uniform manner, which is necessary in order to obtain a comparable breadth of reference in all the Member States for application of criterion C.6.

35 In the light of all the foregoing, it must be found that, in the absence of the submission of scientific studies capable of contradicting the results of the IBA 98, that inventory constitutes the most up-to-date and exact reference for the identification of the sites most suitable in number and size for the conservation of birds.

36 That conclusion cannot be undermined by the argument that it was impossible to consult the database set up by SEO/BirdLife.

37 In that regard, it must be noted that, as the Spanish Government has confirmed, such access was not refused to the Spanish Government, but there was a prohibition on the passing of the information to the autonomous communities.

38 Furthermore, it is not in dispute that the Commission concluded a contract in 1991 with SEO/BirdLife for the carrying-out of a precise scientific study allowing maps of areas of importance for bird conservation to be produced, in which each site was to be described from the point of view of its ornithological value using the most complete information available.

39 To that must be added the fact that the IBA 98 was produced with the participation of a number of non-governmental organisations, local SEO/BirdLife groups, three national parks, six universities, the environmental departments of 12 autonomous communities, the Directorate-General for the Protection of Nature of the Ministry of the Environment and the autonomous body Parques Nacionales of the same ministry, which constitutes sufficient indication, in the absence of scientific proof to the contrary, as to the standing of the IBA 98 as a work of reference.

40 In those circumstances, the arguments of the Spanish Government alleging, first, a lack of control over the preparation of the IBA 98 by a competent public authority and, second, that it was impossible to access the database used by SEO/BirdLife must be rejected.

The lack of classification and the partial or inappropriate classification of territories as SPAs

Arguments of the parties

41 According to the Commission, the IBA 98 identifies 391 areas of importance for the conservation of birds in Spain, covering an area of 15 862 567 hectares, which represents approximately 31.5% of the surface area of the country. An examination of the 427 SPAs classified by the Kingdom of Spain, representing a total surface area of approximately 7 977 789 hectares, that is to say 15.8% of the national territory, shows that 148 areas of importance for the conservation of birds are classified as SPAs over more than 75% of their surface area (2 730 612 hectares of a total of 2 967 119 hectares), 194 areas of importance for the conservation of birds are classified as SPAs over less than 75% of their surface area (4 388 748 hectares of a total of 10 739 054 hectares) and 99 areas of importance for the conservation of birds have not been classified as SPAs (2 684 713 hectares). The SPA network is therefore insufficient.

42 The Spanish Government submits that the surface area of the network of SPAs in Spain represents a proportion of the national territory two and a half times greater than the Community average (15.51% as against 6.89%), and up to 10 times greater than the proportion of the territory of certain neighbouring Member States. Furthermore, that government points out that, for the period between April 2000 and May 2004, the Spanish network grew from 179 to 416 SPAs, that is to say 237 new areas, which represents an increase of 132.4% and 35% of the number of new SPAs declared by all Member States. With regard to the increase in surface area of the areas classified as SPAs, the Spanish share of new declarations corresponds to 43% of the total surface area declared in all the Community. The Spanish contribution alone corresponds to 35% of the total surface area of the SPAs in the Community, while the surface area of the Kingdom of Spain represents only 16% of that of the Community. These data show that the Kingdom of Spain has made an effort greater, firstly, than the Community average and, secondly, than the individual effort of each Member State to comply with the obligations arising under Directive 79/409.

43 With regard to the areas partially or inappropriately classified as SPAs, the Commission takes the view that, in the light of the IBA 98, the current degree of cover of areas of importance for the conservation of birds by the Spanish SPAs is very low, which represents an additional danger for the survival of the species whose habitat they are, since the measures necessary for the protection of their habitat have not been adopted.

Findings of the Court

44 By its action for failure to fulfil obligations, the Commission seeks a declaration that territories sufficient in size and number to offer protection to all the bird species listed in Annex I to Directive 79/409 and the migratory species not covered by that annex have not been classified as SPAs in the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia.

45 As a preliminary point, it should be pointed out that a Member State may not rely on the situation in other Member States to exonerate itself from its obligation to classify SPAs. Only ornithological criteria such as those laid down in Article 4(1) and (2) of Directive 79/409 permit the definition of the most suitable sites with a view to their classification as SPAs.

46 Next, it should be noted, on the one hand, that the Commission claims that all the autonomous communities have defined SPAs of an insufficient size compared with that given in the IBA 98 whereas, on the other, it accepts the updated scientific arguments which have shown that the current limits of the SPAs classified in the Autonomous Communities of Castilla-La Mancha, Catalonia, Galicia and Valencia are sufficient to ensure compliance with Directive 79/409.

47 Such a contradiction in the heads of claim put forward by the Commission in support of its action for failure to fulfil obligations does not satisfy the requirements of Article 21 of the Statute of the Court of Justice and Article 38(1)(c) of the Rules of Procedure.

48 The Court has held that the Commission must, in the heads of claim in an application made under Article 226 EC, indicate the specific complaints on which the Court is asked to rule. Those heads of claim must be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (see Case C-255/04 *Commission* v *France* [2006] ECR I-5251, paragraph 24 and case-law cited).

49 It follows that the complaint that the classification of areas of importance for the conservation of birds as SPAs by the Autonomous Communities of Castilla-La Mancha, Catalonia, Galicia and Valencia is insufficient in size is inadmissible.

50 Accordingly, it is appropriate to consider that complaint in turn as regards the Autonomous Communities of Andalusia, the Balearics and the Canaries only.

51 First of all, with regard to the Autonomous Community of Andalusia, the Spanish Government gave notification, after expiry of the period laid down in the reasoned opinion, of the classification of 39 new SPAs and the enlargement of other areas, which represents an increase in the area protected of 560 000 hectares. Furthermore, it indicated that a declaration procedure is under way for new SPAs whose main value lies in the protection of steppe-land birds.

52 According to consistent case-law, in the context of an action under Article 226 EC, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, inter alia, Case C-168/03 *Commission* v *Spain* [2004] ECR I-8227, paragraph 24). The Commission's claim with regard to the Autonomous Community of Andalusia must therefore be accepted.

53 Next, with regard to the Autonomous Community of the Balearics, although it is established that 40 SPAs, of a total size of 121 015 hectares and covering in whole or in part 20 areas of importance for the conservation of birds and almost 54% of the total surface area of the network of areas to be protected, had been classified before expiry of the period laid down in the reasoned opinion, the fact remains that those areas do not cover the areas of habitat of the red kite (*Milvus milvus*), a species referred to in Annex I to Directive 79/49, which was protected after expiry of that period. The Commission's claim with regard to the Autonomous Community of the Balearics must therefore be accepted.

54 Finally, with regard to the Autonomous Community of the Canaries, the IBA 98 identifies 65 sites covering a surface area of 133 443 hectares as areas of importance for the conservation of birds. Before expiry of the period laid down in the reasoned opinion, 28 SPAs of a total surface area of 211 598 hectares covered in part 41 areas of importance for the conservation of birds and approximately 59.5% of the surface area of the network of areas to be protected. The Commission therefore takes the view that coverage remains insufficient, in particular, for the Houbara (*Chlamydotis undulata*), the Egyptian vulture (*Neophron percnopterus*), the Fuerteventura chat (*Saxicola dacotiae*), the cream-coloured courser (*Cursorius cursor*) and the Bulwer's petrel (*Bulweria bulwerii*).

55 Although the Spanish Government submits that there were internal difficulties in the classification of certain SPAs, it must be recalled that, according to the Court's settled case-law, a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify failure to observe obligations and time-limits laid down by a directive (see, inter alia, Case C-374/98 *Commission* v *France* [2000] ECR I-10799, paragraph 13).

56 Nevertheless, the Spanish Government accepts that certain SPAs must be extended. Accordingly, the Commission's claim in respect of the Autonomous Community of the Canaries must be accepted.

57 In those circumstances, it must be held that the complaint that the classification of areas of importance for the conservation of birds as SPAs by the Autonomous Communities of Andalusia, the Balearics and the Canaries is insufficient in size must be upheld.

58 Finally, the Commission claims that the Kingdom of Spain classified an insufficient number of areas of importance for the conservation of birds as SPAs in the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia.

59 With regard to the Autonomous Communities of Andalusia and Galicia, the authorities of those communities, after expiry of the period laid down in the reasoned opinion, classified new SPAs and enlarged part of the existing SPAs. However, it is clear from the case-law cited in paragraph 52 of the present judgment that the existence of a failure to fulfil obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes. The Commission's claim in that regard must be accepted.

60 With regard to the Autonomous Community of the Balearics, although the authorities of that community, after expiry of the period laid down in the reasoned opinion, did indeed declare new SPAs specifically in order to protect the red kite and new SPAs were proposed in Majorca and Minorca to protect the nesting sites of that species, since the existence of a failure to fulfil obligations must be determined only by reference to the situation obtaining in a Member State at the end of the period laid down in the reasoned opinion, it must be found that there was a failure to fulfil obligations in that regard.

61 Furthermore, with regard to the Autonomous Community of the Canaries, 23 areas of importance for the conservation of birds were not covered at all by an SPA following expiry of the period laid down in the reasoned opinion. The Spanish Government, whilst recognising that it is necessary to classify new SPAs, has produced in support of its defence a detailed study of the areas of importance for the conservation of birds which have not yet been covered. As the Advocate General observed in point 106 of her Opinion, since the Commission did not challenge that study, its content must be regarded as having been accepted and it constitutes, in respect of the ongoing failures to classify, more up-to-date and precise evidence than the IBA 98.

62 That complaint stands in respect only of those SPAs which ought to have been classified before expiry of the period laid down in the reasoned opinion.

63 With regard to the Autonomous Community of Valencia, although, before expiry of the period laid down in the reasoned opinion, new SPAs had been classified, there are still, nevertheless, areas not classified, which, as the Spanish authorities have recognised, are part of a process of extension of the current network of SPAs.

64 In those circumstances, it must be held that the complaint alleging insufficient classification of areas of importance for the conservation of birds as SPAs by the Autonomous Communities of Andalusia, the Balearics, the Canaries, Galicia and Valencia should be upheld.

65 With regard to the Autonomous Community of Castilla-La Mancha, the Commission takes the view that 10 areas of importance for the conservation of birds have not been classified as SPAs. The Spanish Government has recognised the need to classify as an SPA area No 183 (Hoces del Río Mundo y del Río Segura). With regard to area No 189 (Parameras de Embid-Molina), the Spanish Government admits the need for classification of part of that area, recognising the presence of a colony of Dupont's lark (*Chersophilus duponti*) estimated at 1 250 birds over an area of 1 800 hectares.

66 However, the Spanish Government disputes the need to classify areas No 70 (El Escorial — San Martín de Valdeiglesias), No 72 (Carrizales y Sotos de Aranjuez), No 157 (Hoces del Turia y Los Serranos), No 210 (Sierras de Cazorla y Segura) and No 305 (Bajo Tietar y Rampa de la Vera), since they cover areas which are also located in other autonomous communities and the part within the autonomous community concerned is very small.

67 That argument must be rejected. Because of the importance and homogeneity of a site considered the most suitable for the conservation of certain species such as the Spanish imperial eagle (*Aquila adalberti*), threatened on a global scale, the black stork (*Ciconia nigra*), Bonelli's eagle (*Hieraaetus fasciatus*), the golden eagle (*Aquila chrysaetos*), the Griffon vulture (*Gyps fulvus*) the Egyptian vulture and the peregrine falcon (*Falco peregrinus*), the fact that a site covers a number of regions cannot constitute a ground on which Member States may exonerate themselves from their obligations under Article 4(1) and (2) of Directive 79/409.

68 The Spanish Government also disputes the classification as an SPA of area No 185 (San Clemente-Villarrobledo) in which the populations of lesser kestrel (*Falco naumanni*), little bustard (*Tetrax tetrax*) and pin-tailed sandgrouse (*Pterocles alchata*) mentioned in the IBA 98 are of little interest and represent only 6%, 4% and 4% respectively of the population in the entire Autonomous Community of Castilla-

La Mancha. What is more, that area is of no interest in ornithological terms since it includes urban areas, industrial zones and stretches of vineyards as well as large expanses of irrigable land under intensive cultivation.

69 Such an argument must also be rejected. That area has significant populations of species threatened on a global and European scale and constitutes one of the main feeding areas of those species.

70 With regard to area No 78 (Puebla de Beleña), the Spanish authorities dispute the need for its classification because of the seasonal nature of the lagoons and the very irregular presence of cranes (*Grus grus*), without providing scientific data capable of contradicting the results of the IBA 98. Accordingly, the claim of the Commission must be accepted on that point.

71 It is also necessary to reject the arguments of the Spanish Government that the population of certain species is not significant and does not need protection by way of classification of new SPAs in area No 199 (Torrijos). It must be pointed out that, firstly, the population of 150 to 200 great bustards (*Otis tarda*) exceeds the existing worldwide threshold of 50 individuals. Secondly, it should be noted that the population of little bustards amounts to 1 200 birds, whilst the threshold value is 200 birds. All those elements therefore make it necessary to classify new SPAs to meet the requirements of protection of those species.

72 According to the Commission, other species, such as the lesser kestrel, are still insufficiently protected and it points out that since the expiry of the period laid down in the reasoned opinion the Autonomous Community of Castilla-La Mancha has not classified any new SPAs. The Spanish Government raises the objection that that species is found within urban areas which cannot be classified as SPAs.

73 Such an argument must be rejected. In order to protect species, classification as an SPA is necessary where an area constitutes a specific nesting area, as is the case of the lesser kestrel. In addition, as the Advocate General noted in point 118 of her Opinion, if measures of urban development were to override the interest in protecting that species, they would have to be implemented under Article 6(4) of Directive 92/43, that is to say in the absence of alternatives and with the adoption of compensatory measures. That is not the case here.

74 The Commission's claim with regard to insufficient classification of areas of importance for the conservation of birds as SPAs by the Autonomous Community of Castilla-La Mancha must therefore be accepted.

75 With regard to the Autonomous Community of Catalonia, the Commission takes the view that 10 areas of importance for the conservation of birds have not been designated as SPAs. Thus, of 62 breeding species listed in Annex I to Directive 79/409, the lesser grey shrike (*Lanius minor*), the capercaillie (*Tetrao urogallus*), the shag (*Phalacrocorax aristotelis*), the little bustard, the Calandra lark (*Melanocorypha calandra*), Dupont's lark, the European roller (*Coracias garrulus*), the short-toed lark (*Calandrella brachydactyla*) and the collared pratincole (*Glareola pratincola*) are inadequately protected.

76 However, as the Advocate General observed in point 121 of her Opinion, the IBA 98 does not list the lesser grey shrike, the capercaillie, Dupont's lark, or the collared pratincole. No complaint can therefore be levelled against the Kingdom of Spain for failing to classify SPAs because of the presence of those four species.

77 The argument of the Spanish Government that the action is inadmissible because of the lack of precision with regard to the species, among the 62 listed in Annex I to Directive 79/409, for which new SPAs should have been classified, must be rejected. As is apparent from the foregoing, the Commission stated precisely which species are inadequately protected and for which additional SPAs must be classified.

78 Finally, the Spanish Government submits that most of the habitats which are not yet classified as SPAs are protected by virtue of Directive 92/43 in the context of the Natura 2000 network.

79 Such an argument must be rejected. It should be recalled that the Court has held that the legal regimes of Directives 79/409 and 92/43 are separate (see, to that effect, Case C-374/98 *Commission* v *France*, paragraphs 50 to 57). It follows that a Member State cannot exonerate itself from its obligations under Article 4(1) and (2) of Directive 79/409 by relying on measures other than those laid down by that directive.

80 The Commission's claim with regard to insufficient classification of areas of importance for the conservation of birds as SPAs by the Autonomous Community of Catalonia must therefore be accepted.

81 With regard to wetland areas, it is clear from Article 4(2) of Directive 79/409 that the Member States are to pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

82 According to the Commission, the wetlands of international importance, identified as areas of importance for the conservation of birds, of Albufera de Adra and Embalses de Cordobilla y Malpasillo in Andalusia and Complejo húmedo de Corrubedo in Galicia were not classified as SPAs on expiry of the period laid down in the reasoned opinion.

83 In that regard, it is clear from the proceedings that it is common ground that the classification as SPAs of wetlands of international importance in Andalusia and in Galicia took place after expiry of the period laid down in the reasoned opinion. Accordingly, the Commission's claim in this regard must therefore be accepted.

84 It follows that the Kingdom of Spain failed to classify as SPAs all the areas which, by application of ornithological criteria, appear the most suitable for the conservation of the species in question.

85 In the light of all foregoing, it must be held that, by failing to classify as SPAs territories of adequate size in the Autonomous Communities of Andalusia, the Balearics and the Canaries, and territories of sufficient number in the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia to provide protection for all the species of birds listed in Annex I to Directive 79/409 and the migratory species not covered by that annex, the Kingdom of Spain has failed to fulfil its obligations under Article 4(1) and (2) of Directive 79/409.

Costs

86 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for costs to be awarded against the Kingdom of Spain and the latter has been unsuccessful in its main pleas, the Kingdom of Spain must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by failing to classify as special protection areas for birds territories of adequate size in the Autonomous Communities of Andalusia, the Balearics and the Canaries, and territories of sufficient number in the Autonomous Communities of Andalusia, the Balearics, the Canaries, Castilla-La Mancha, Catalonia, Galicia and Valencia to provide protection for all the species of birds listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as amended, inter alia, by Commission Directive 97/49/EC of 29 July 1997, and the migratory species not covered by that annex, the Kingdom of Spain has failed to fulfil its obligations under Article 4(1) and (2) of Directive 79/409, as amended;**

2. **Dismisses the remainder of the action;**

3. **Orders the Kingdom of Spain to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

14 June 2007 *

In Case C-342/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 September 2005,

Commission of the European Communities, represented by M. van Beek and I. Koskinen, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Finland, represented by E. Bygglin, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Finnish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schiemann, J. Makarczyk, L. Bay Larsen (Rapporteur) and J.-C. Bonichot, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 30 November 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration that, by authorising wolf hunting in breach of the grounds of derogation laid down in Article 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive'), the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1) of that directive.

Legislative background

The Habitats Directive

2 Under Article 12(1) of the Habitats Directive:

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

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

...'.

3 Annex IV to the Habitats Directive is entitled 'Animal and Plant Species of Community Interest in Need of Strict Protection'. Annex IV(a), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('Annex IV(a)'), mentions the following species: 'Canis lupus (except the ... Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management)'.

4 Article 16(1) of the Habitats Directive states:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

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

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

...'

5 The conservation status of species is defined in Article 1(i) of the Habitats Directive:

'(i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as "favourable" when:

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

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

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

Finnish law

6 It is clear from the documents before the Court that Articles 12 and 16 of the Habitats Directive have been transposed in substantially identical terms in the Finnish legislation on hunting.

7 However, there are specific regulations as regards authorisation to kill wolves. Wolf hunting is authorised on a case-by-case basis by the competent game management district. On the other hand, the upper regional limits, that is to say the maximum number of wolves which may be hunted in each district during the hunting season from 1 November until 31 March, are set by the Ministry of Agriculture and Forestry. The limits are set so that the wolf population is not threatened in those districts. All information on mortality is taken into account, particularly mortality resulting from road accidents and human activities.

8 In order to authorise hunting the game management districts must consider whether the conditions set out in Article 16(1) of the Habitats Directive, which has been transposed into national law, are satisfied. Furthermore, where an upper regional limit has been reached it may be exceeded only if the conditions laid down in Article 16(1) are complied with and a special ministerial authorisation is granted.

9 Moreover, although the police may kill animals in exceptional circumstances, they may only do so if the conditions set out in paragraph 8 of this judgment are respected.

The pre-litigation procedure

10 The Commission initiated the procedure for failure to fulfil obligations by sending the Republic of Finland a letter of formal notice on 10 April 2001. After that Member State had responded, by a letter of 6 July 2001, the Commission issued a reasoned opinion on 26 June 2002. In that opinion the Commission stated that since (i) the conservation status of the wolf was not favourable in Finland, (ii) alternative approaches could be employed and (iii) hunting permits were issued without any relationship to the particular wolves causing serious damage being established, wolf hunting as authorised did not satisfy the conditions laid down in Article 16(1) of the Habitats Directive. The Republic of Finland responded to the reasoned opinion by a letter of 28 August 2002.

11 However, taking the view that the failure to fulfil obligations complained of persisted, the Commission brought the present action on 14 September 2005.

The action

Arguments of the parties

12 The Commission states, first of all, that in Finland the wolf is an endangered species and, consequently, its conservation status cannot be regarded as favourable in that Member State.

13 Next, the Commission submits that the practice in Finland consisting in authorising hunting as a preventive measure is contrary to Article 16(1) of the Habitats

Directive. Where it is thought highly likely that a wolf will cause serious damage, the latter may generally be avoided by means other than preventive killing. The use of repellents, scents, electric or other fences, the confinement of cattle or dogs at night or even compensation for damage sustained could be considered. Where hunting permits are issued on preventive grounds, it is highly unlikely that the wolves killed are those which cause the serious damage. In any event, those permits are issued by the Finnish authorities without any relationship with the particular wolves causing such damage being duly established. In those circumstances hunting is not a very effective means to prevent such damage.

14 Finally, the Commission states that the annual regional quotas set in advance by the Ministry of Agriculture and Forestry for a specific period are not justified, since derogations from the system of strict protection must be assessed regardless of the period concerned and be considered separately with respect to each hunting permit, in accordance with Article 16(1) of the Habitats Directive. Furthermore, the practice of the Finnish authorities leads to a situation in which wolves may be legally killed even though the maximum limit set by the Ministry of Agriculture and Forestry has been exceeded substantially. Thus, in the 2003-04 season in particular, although the maximum limit had been fixed at eight wolves, in addition eleven derogatory permits were issued and two permits were issued by the police. Ultimately, twelve wolves were killed during that season.

15 The Commission concludes that since the conservation status of the wolf in Finland is not favourable, alternative approaches may be employed and the hunting permits are issued without any relationship to the particular wolves causing serious damage being properly established, wolf hunting is authorised in Finland to an extent which infringes the conditions laid down in Article 16(1) of the Habitats Directive.

16 The Finnish Government argues that wolf hunting requires a permit, which may be obtained by written request to the local game management district stating the reasons for the request and the territory and number of animals concerned. The local game management district, having the appropriate information relating to its area, examines whether hunting impedes the maintenance of the species at a favourable conservation level, whether it is possible to find another satisfactory solution, and whether the conditions for derogation laid down in Article 16(1) of the Habitats Directive have been satisfied.

17 Furthermore, decisions to issue hunting permits are also taken with regard to an upper regional limit of specimens that may be hunted in each game management district, which is set by the Ministry of Agriculture and Forestry and corresponds to the number of specimens which may biologically be removed without the populations being endangered. It is not, therefore, a quota which must be attained or exhausted.

18 The Finnish Government submits that its practice does not prevent the maintenance in Finland of a favourable conservation status of the wolf population. That population has increased considerably in recent years. The same is true for the geographic population area. Moreover, the dynamics data on the species concerned indicates that it is likely to maintain itself on a long-term basis as a viable component of its natural habitats.

19 As regards the condition that there is 'no satisfactory alternative', the Finnish Government contends that many different means are used as far as possible, either alone or in combination, in order to prevent or reduce the damage caused by wolves. In any event, the game management districts consider all satisfactory alternatives before issuing a hunting permit. In that connection, the Finnish Government stresses the fact that the alternatives to which the Commission refers in the present case are not appropriate to each individual instance.

20 According to the Finnish Government, and contrary to the Commission's submissions, Article 16(1) of the Habitats Directive does not prohibit derogations from the system of strict protection in order to prevent serious damage. Further, it is not the case that the decisions by which the competent national authorities issue wolf hunting permits do not identify the wolves which cause serious damage. The decisions precisely determine the geographical areas covered by the permits where wolves causing such damage are present. However, since wolves live in packs the hunting permit cannot always identify the specimen(s) causing the damage. Nevertheless, where the particular wolves in question belonging to the pack are known, they are the subject of the hunting permit issued. Furthermore, where the animal concerned moves about alone, the hunting permit may also refer to it individually.

Findings of the Court

21 As the Advocate General rightly observes in point 16 of her Opinion, in this case the Commission does not challenge either Finnish legislation or a specific case of killing wolves, but criticises the administrative practice of the Finnish authorities regarding wolf hunting.

22 A failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law (see Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraph 47).

23 It is clear from established case-law that in an action for failure to fulfil obligations it is for the Commission to prove the existence of the alleged infringement. It is the Commission which must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see, inter alia, Case C-434/01 *Commission* v *United Kingdom* [2003] ECR I-13239, paragraph 21, and *Commission* v *Germany*, paragraph 48).

24 Thus, in the context of this action, it is incumbent upon the Commission to prove that the practice followed in Finland adversely affects the system, laid down by Article 12(1) of the Habitats Directive, providing strict protection for the wolf as a species listed in Annex IV(a), on the ground that derogations from that system are not granted in compliance with the conditions laid down in Article 16(1) of the directive (see, to that effect, *Commission* v *United Kingdom*, paragraph 22).

25 Since the latter provision provides for exceptional arrangements which must be interpreted strictly and must impose on the authority taking the decision the burden of proving that the necessary conditions are present for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 16(1) of the Habitats Directive (see, to that effect, Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 34).

26 In this case it is common ground that:

— the Finnish authorities authorise wolf hunting each year, to a limited extent, by way of derogation;

— according to the report on the threat to species in Finland in 2000, published in 2001 by the Ministry of the Environment and the Finnish Environment Centre (Pertti Rassi, Aulikki Alanen, Tiina Kanerva ja Ilpo Mannerkoski: (toim.): Suomen lajien uhanalaisuus 2000. Uhanalaisten lajien II seurantaryhmä. Ympäristöministeriö & Suomen ympäristökeskus, Helsinki 2001), the wolf is classified as an endangered species in Finland;

— in that report, it is stated that the number of wolves capable of reproducing is less than 50, a figure which is the limit below which an acute danger of extinction exists;

— according to point 7.2 of the Management Plan for the Wolf Population, published in 2005 by the Ministry of Agriculture and Forestry ('the management plan'), it can be estimated that Finland requires 20 breeding pairs in order to ensure the maintenance in the long term of a wolf population as a viable component of its natural habitats;

— as regards 2001, 2002, 2003 and 2004, the number of breeding pairs was estimated, according to point 2.1.5 of the management plan, at 11, 12, 13 and 16 respectively.

27 It appears therefore, having regard to the criterion laid down in the first indent of Article 1(i) of the Habitats Directive, that at the end of the period set in the reasoned opinion the conservation status of the wolf in Finland was not favourable.

28 Article 16(1) of the directive makes the favourable conservation status of the populations of the species concerned in their natural range a necessary precondition in order for the derogations for which it provides to be granted (see Case C-508/04 *Commission* v *Austria* [2007] ECR I-3787, paragraph 115).

29 None the less, the grant of such derogations remains possible by way of exception where it is duly established that they are not such as to worsen the unfavourable conservation status of those populations or to prevent their restoration at a favourable conservation status. Following the example of the views formulated by the Commission, in particular in paragraphs 47 to 51 of Section III of its Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (final version, February 2007), it is possible that the killing of a limited number of specimens may have no effect on the objective envisaged in Article 16(1) of the Habitats Directive, which consists in maintaining the wolf population at a favourable conservation status in its natural range. Such a derogation would therefore be neutral for the species concerned.

30 It is clear from two decisions to issue wolf hunting permits, which were taken by the Finnish authorities before the Commission sent the letter of formal notice to the Republic of Finland and were produced before the Court by the Commission, that in both those cases the authorities permitted the hunting of a fixed number of wolves in a well defined geographical area, but without relying on an assessment of the conservation status of the species, without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative and without specifically identifying the wolves causing serious damage which could be killed.

31 Such decisions, which are not based on an assessment of the effect of the killing of the wolves that they authorise on the maintenance at a favourable conservation

status of the population of that species in its natural range, and which do not contain a clear and sufficient statement of reasons as to the absence of a satisfactory alternative, are contrary to Article 16(1) of the Habitats Directive.

32 However, as is clear from paragraph 21 of this judgment, by this action the Commission does not seek to complain of specific cases, but criticises the administrative practice of the Finnish authorities regarding wolf hunting.

33 In that connection, the Court has held that, although a State's action consisting in an administrative practice contrary to the requirements of Community law can amount to a failure to fulfil obligations for the purposes of Article 226 EC, that administrative practice must be, to some degree, of a consistent and general nature (see, in particular, *Commission* v *Germany*, paragraph 50).

34 Furthermore, as is clear from settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 29).

35 In this case, the Commission has not produced any of the decisions relating to the issuing of wolf hunting permits that the Finnish authorities have taken after the decisions noted in paragraph 30 of this judgment, with the exception of two decisions in 2006, to which it refers in order to emphasise the progress made in the matter by the Finnish authorities in the meantime.

36 Furthermore, the Commission, which in these proceedings has never pleaded a lack of sincere cooperation by the Finnish authorities as regards the communication of decisions relating to the issuing of hunting permits, has not provided the Court with any decision of that kind dating from the period corresponding to the end of the pre-litigation procedure and capable of providing the Court with the evidence necessary to ascertain whether the complaints are well founded.

37 Moreover, it must be recalled, as stated in paragraph 26 of this judgment, that the number of breeding pairs rose from 11 to 16 in the period from 2001 to 2004. Nor is it disputed that during the same period the total number of wolves present on Finnish territory rose from between 110 and 130 specimens to between 185 and 200 specimens.

38 Although that data is not in itself conclusive, it is in any event capable of showing that, in spite of the wolf hunting authorised by way of derogation in Finland, the conservation status of the species concerned substantially and consistently improved in that Member State during the pre-litigation phase and a significant part of the period before the present action was brought.

39 Therefore, the Commission has not adduced sufficient evidence as to the existence of an administrative practice by the Finnish authorities of issuing wolf hunting permits without relying on an assessment of the conservation status of the species or without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative.

40 As regards the complaint by the Commission relating to the fact that hunting permits are issued on a preventive basis or, in any event, without any relationship

with the particular wolves causing serious damage being duly established, it must be observed, as the Advocate General has also noted in point 29 of her Opinion, that Article 16(1) of the Habitats Directive does not require serious damage to be sustained before derogating measures can be adopted.

41 However, it is the case that the Finnish Government admits that, as the wolf is an animal which generally lives in a pack, hunting permits cannot always target the specimen(s) which cause serious damage.

42 Although it cannot be automatically ruled out that authorising the killing of one or several wolves in a pack certain of whose members cause or are likely to cause such damage may prevent, eliminate or reduce that damage, it must be stated that the information on the file is not capable of confirming that hypothesis.

43 In that regard, as stated in point 5.4.5 of the management plan, certain parties are of the opinion that continued hunting keeps wolves wary of humans and thus helps to reduce damage, while others consider that hunting of wolves which belong to packs only increases damage. Furthermore, it is stated that little biological research on this topic is available.

44 In those circumstances, the Commission's complaint relating to the fact that hunting permits are issued on a preventive basis must be upheld.

45 As to the fact that decisions to issue wolf hunting permits are also subject to a maximum regional limit of specimens which may be killed in each game management district, this cannot be regarded as contrary to Article 16(1) of the Habitats Directive. That limit, which is set according to the number of specimens which may be killed without endangering the species in question, is, as the Advocate General has observed in point 33 of her Opinion, only the framework within which the game management districts may issue hunting permits where, in addition, the conditions in Article 16(1) of the Habitats Directive are fulfilled.

46 Having regard, in particular to what is stated in paragraph 8 of this judgment, the fact that during the 2003-04 season the limit in question was in fact exceeded cannot in itself be sufficient to prove that the Finnish authorities have issued hunting permits to an extent which may harm the maintenance at a favourable conservation status of wolf populations in their natural range.

47 Accordingly, by authorising wolf hunting on a preventive basis, without it being established that the hunting is such as to prevent serious damage within the meaning of Article 16(1)(b) of the Habitats Directive, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1)(b) of that directive; the remainder of the Commission's application must be dismissed.

Costs

48 Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order that the costs should be shared or that the parties are to bear their own costs where each party succeeds on some and fails on other heads.

49 Since both parties have failed in one or several of their claims, they must be ordered to bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. Declares that, by authorising wolf hunting on a preventive basis, without it being established that the hunting is such as to prevent serious damage within the meaning of Article 16(1)(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1)(b) of that directive;

2. Dismisses the action as to the remainder;

3. Orders the Commission of the European Communities and the Republic of Finland to bear their own costs.

[Signatures]

JUDGMENT OF THE COURT (Fourth Chamber)

10 May 2007 *

In Case C-508/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 December 2004,

Commission of the European Communities, represented by M. van Beek and B. Schima, acting as Agents, and by M. Lang, Rechtsanwalt, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by E. Riedl and H. Dossi, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, R. Silva de Lapuerta (Rapporteur), G. Arestis, J. Malenovský and T. von Danwitz, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 11 January 2007,

gives the following

Judgment

1 By its application, the Commission of the European Communities requested the Court to declare that the Republic of Austria has failed to fulfil its obligations under Articles 1, 6(1) to (4), 7, 11, 12, 13, 15, 16(1) and 22(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Directive').

Legal context

Community legislation

2 Article 1 of the Directive contains a number of definitions, including the following:

'(e) *conservation status of a natural habitat* means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.

The conservation status of a natural habitat will be taken as "favourable" when:

— its natural range and areas it covers within that range are stable or increasing, and

— the specific structure and functions which are necessary for its long-term maintenance exist and are likely to continue to exist for the foreseeable future, and

— the conservation status of its typical species is favourable as defined in (i);

...

(g) *species of Community interest* means species which, within the territory referred to in Article 2, are:

(i) endangered, except those species whose natural range is marginal in that territory and which are not endangered or vulnerable in the western palearctic region; or

(ii) vulnerable, i.e. believed likely to move into the endangered category in the near future if the causal factors continue operating; or

(iii) rare, i.e. with small populations that are not at present endangered or vulnerable, but are at risk. The species are located within restricted geographical areas or are thinly scattered over a more extensive range; or

(iv) endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.

Such species are listed or may be listed in Annex II and/or Annex IV or V;

(h) *priority species* means species referred to in (g)(i) for the conservation of which the Community has particular responsibility in view of the proportion of their natural range which falls within the territory referred to in Article 2; these priority species are indicated by an asterisk (*) in Annex II;

(i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as "favourable" when:

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

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

— there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis;

...

(l) *special area of conservation* means a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated'.

3 Article 6(1) of the Directive states that, 'for special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites'.

4 Article 6(2) of the Directive provides that 'Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of [the] Directive'.

5 Article 16(1) of the Directive states:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

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

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

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

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

6 Article 22(b) of the Directive states in particular that the Member States are to 'ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction'.

The provisions of Laws and regulations of the various Austrian provinces the compatibility of which with the Directive's provisions is contested

Province of Lower Austria

7 The following provisions are at issue: Paragraph 95 of the Law of Lower Austria on Hunting (Niederösterreichisches Jagdgesetz 1974, LGBl. (Niederösterreich) No 76/74; 'the Nö JagdG'); Paragraphs 9(5), 17(5), 20(4), 21 and 22 of the Law of Lower Austria on Nature Protection (Niederösterreichisches Naturschutzgesetz 2000, LGBl. (Niederösterreich) No 87/2000; 'the Nö NSchG').

8 Paragraph 95 of the Nö JagdG provides:

'1. All non-selective hunting methods are prohibited; in particular it is prohibited:

...

(3) to hunt at night, that is to say during the period from 90 minutes after sundown until 90 minutes before sunrise; the hunting of wild boar, predatory game, capercaillie, black grouse, wild goose, wild duck and snipe is excluded from this prohibition;

(4) to use, when capturing or killing game, devices for illuminating targets (with the exception of mobile lamps ...), artificial night-time sighting aids, such as infra-red apparatus, electronic sight units, sighting devices for night shooting comprising an electronic image magnifier or image converter, such as residual light amplifiers;

...

(8) to use blind or mutilated animals as live decoys, or anaesthetic bait; to use tape recorders, or electric or electronic devices capable of killing or stunning; to use mirrors or other dazzling devices, explosives, or nets that operate non-selectively; to gas or smoke animals out;

(9) to hunt game birds with snares, limes, hooks, nets or traps;

(10) to hunt from aircraft, moving motor vehicles, or boats that can be operated at a speed of more than five kilometres per hour.

...'

9 Paragraph 9 of the Nö NSchG provides:

'...

2. ... the following definitions shall apply:

...

(6) "conservation status of a natural habitat" means the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species;

(7) "priority species" means wild fauna and flora for the conservation of which the Community has particular responsibility and which are indicated by an asterisk (*) in Annex II to the Habitats Directive;

(8) "conservation status of a species" means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations;

(9) "conservation objectives" means the maintenance or restoration at a favourable conservation status of the natural habitats listed in Annex I to the Habitats Directive

and the species of fauna and flora listed in Annex II to that directive which a site of Community importance hosts, and of the species of birds listed in Annex I to the Birds Directive or referred to in Article 4(2) of that directive and their habitats which a European bird protection area hosts.

3. Sites referred to in subparagraph 1 shall, by regulation of the Provincial Government, be declared special areas of conservation called "European areas of conservation". In particular, existing nature conservation areas and landscape conservation areas may also be declared European areas of conservation.

4. The regulation adopted in accordance with subparagraph 3 shall lay down the boundaries of the area of conservation, the subject-matter of protection in each case, in particular priority natural habitat types and priority species, the conservation objectives and, if need be, the obligations and prohibitions necessary in order to achieve a favourable conservation status. In particular, measures which may lead to destruction of, or substantial detriment to, the area of conservation or its components are to be prohibited. More stringent protective provisions under this Law shall not be affected.

5. European areas of conservation shall, if need be, be the subject of appropriate maintenance, development and conservation measures of a governmental or contractual nature which reflect the ecological requirements of the natural habitat types under Annex I and the species under Annex II to the Habitats Directive, and of the species of birds in Annex I to the Birds Directive, which those areas host (management plan). In so far as those measures have implications for land-use planning, they shall be submitted to the Land-Use Planning Advisory Board, with the exception of measures for the administration of European areas of conservation.

6. The Provincial Government shall monitor and document the conservation status of the natural habitats and wild fauna and flora. In so doing, particular regard shall be had to priority natural habitat types and priority species.'

10 Paragraph 17 of the Nö NSchG provides:

'...

(5) The planting and promotion of non-native plants and plants inappropriate to the location and the release and promotion in the wild of non-native fauna require authorisation from the Provincial Government. Authorisation shall be refused if native populations appropriate to the location, the natural (genetic) characteristics of native species of fauna and flora or the beauty and characteristics of a landscape area will suffer lasting harm.'

11 Paragraph 20 of the Nö NSchG states:

'...

(4) The Provincial Government may by decision grant derogations ..., in particular for scientific or pedagogical purposes, when there is no reason to fear a material risk to protected flora growing in the wild and protected fauna living in the wild ... The authorisation shall lay down at least:

1. the species which are subject to the derogation,

2. the means, arrangements or methods authorised for capture or killing and

3. the controls which will be carried out.'

12 Paragraph 21 of the Nö NSchG provides:

'1. Without prejudice to specific rules laid down by the provisions of this Law or to regulations or decisions adopted on the basis of this Law, measures connected with commercial use of land shall remain in principle unaffected ... This exemption clause does not apply where protected flora and fauna or protected habitats are deliberately harmed or fauna and flora threatened with extinction ... are affected by measures.

2. Without prejudice to specific rules laid down by the provisions of this Law or to regulations or decisions adopted on the basis of this Law, measures connected with an up-to-date and sustainable agricultural or silvicultural use of land within the framework of an agricultural or silvicultural operation shall remain in principle unaffected ... This exemption clause does not apply where protected flora and fauna or protected habitats are deliberately harmed or fauna and flora threatened with extinction ... are affected by measures.

3. Agricultural or silvicultural use shall be considered to be up-to-date and sustainable where the activities in an agricultural or silvicultural operation serve to produce or obtain plant or animal products and are organised in accordance with processes which are customary in a particular area and at a particular time or on the

basis of traditional experience, and the use, adapted to the natural conditions, durably ensures performance in a functioning system, without the productive base being exhausted and nature and landscape being unduly burdened.'

13 Paragraph 22 of the Nö NSchG states:

'1. Instead of, or in addition to, the governmental safeguarding of nature protection interests, agreements under private law may also be concluded by the Province of Lower Austria in order to achieve nature protection objectives, in particular in order to conserve, maintain, safeguard and develop sites which are valuable from the point of view of nature protection or are important to the landscape. Such agreements must above all be concerned with the conservation and maintenance, subject to appropriate conditions, of fairly small natural or semi-natural expanses of stagnant surface water, of wet meadowland and of dry and nutrient-poor sites, and also of coppices located in open farmland, and hedges, that are valuable from the point of view of nature protection. Other support measures include:

— payment for measures to create, conserve or improve other areas and objects valuable for nature protection;

— the promotion of a method of use or management that is appropriate particularly to the interests of nature protection, in areas that are ecologically important or important in landscape terms;

— the promotion of measures to improve important rural ecology functions (for example, biotope network, extensification, switch to natural methods for pursuing agricultural and silvicultural activity).

...'

Province of Upper Austria

14 The provision at issue is Paragraph 15(2) of the Law of Upper Austria on Nature and Countryside Protection (Oberösterreichisches Natur- und Landschaftsschutzgesetz 2001, LGBl. (Oberösterreich) No 129/2001; 'the Oö NSchG').

15 That provision states:

'For countryside conservation areas ..., protected countryside zones ..., European areas of conservation ... or nature reserves ..., the Provincial Government may prepare countryside maintenance plans defining those measures which in accordance with subparagraph 1 are necessary in the public interest and which do not significantly hamper the authorised economic use of the affected land. In the absence of an agreement under private law or statutory provisions to the contrary, the costs of implementing such countryside maintenance plans must be borne by the Province as the holder of private rights. The landowner (person with the power of disposal) must permit such measures.'

Province of Salzburg

16 The following provisions are at issue: Paragraphs 3a, 5(8) to (10), 22a, 22b, 29 and 34 of the Law of Salzburg on Nature Protection (Salzburger Naturschutzgesetz 1999, LGBl. (Salzburg) No 73/1999; 'the Sbg NSchG'); Paragraph 104(4) of the Law of Salzburg on Hunting (Salzburger Jagdgesetz 1993, LGBl. (Salzburg) No 100/1993; 'the Sbg JagdG').

17 Paragraph 3a of the Sbg NSchG provides:

'1. When applying this Law and regulations adopted on the basis of this Law, the guiding principle is that the public interest in nature protection may be accorded precedence over all other interests.

2. Measures which, demonstrably, directly serve particularly important public interests are to be approved or taken into account, subject to the interests of nature protection ... being largely safeguarded, if:

(1) in the specific case, the other public interests have precedence over the interests of nature protection and

(2) it is demonstrated that there is no appropriate alternative to the measure in question that would have a lesser adverse effect on the interests of nature protection.

3. Where it can be anticipated that measures under subparagraph 2 will have a significant adverse effect on priority natural habitat types ... or priority species ... in European areas of conservation within the meaning of Paragraph 5(10)(a) and (c), only considerations connected with the following matters of public interest can be included in the weighing of interests:

(1) human life and health,

(2) public safety,

(3) beneficial consequences of primary importance for the environment.

Other public interests can be included in the weighing of interests only if an opinion from the ... Commission has first been obtained. The decision must have regard to that opinion.

4. Where, following a weighing of interests under subparagraph 2 or 3, the interests of nature protection do not have precedence, the adverse effect anticipated to result from the interference is, except in a case covered by subparagraph 6, to be compensated for by appropriate substitute measures. The compensation shall be prescribed by decision. Where the interference concerns particular habitats and populations of fauna and flora, above all the creation of replacement habitats comes into question as a substitute measure. These replacement habitats shall, where possible, be created in the immediate vicinity of the place of the interference. If no

replacement habitats can be created, the applicant shall be required, by decision, to pay a sum of money of an amount corresponding approximately to the costs of an appropriate substitute measure. Where replacement habitats can be created only to an insufficient extent, an appropriately reduced sum of money shall be required to be paid.

5. Where subparagraph 4 applies, the Provincial Government shall, in the case of European areas of conservation, safeguard the coherence of the European ecological network "Natura 2000". The measures adopted for that purpose shall be communicated to the ... Commission.

6. Substitute measures shall not be prescribed in respect of measures which:

(1) are necessary and unavoidable because of a risk to human life or health or in order to avert serious damage to the national economy, and

(2) have no effects on European areas of conservation.'

18 Paragraph 5 of the Sbg NSchG provides:

'For the purposes of this Law:

...

(8) "Interference with a protected site or object" means temporary or permanent measures which, individually or together with other measures, can have not merely insignificant effects, on the protected site or object or with regard to the protective purpose, or can be expected to have such effects through the multiple repetition or accumulation of such measures. Interference also takes place where the measures themselves originate from outside the protected site or object.

(9) "Conservation objectives of a European area of conservation" means the maintenance or restoration at a favourable conservation status:

(a) of the natural habitats specified in Annex I to the Habitats Directive or of the species of fauna and flora specified in Annex II to that directive;

(b) of the species of birds in Annex I to the Birds Directive, of regularly occurring migratory species (Article 4(2) of that directive), and of their habitats, paying particular attention to wetlands of international importance.

(10) "European areas of conservation" means:

(a) sites of Community importance which are entered on the list envisaged in Article 4(2) of the Habitats Directive;

(b) sites which, until the list referred to in (a) exists, have been included in a list pursuant to Article 4(1) of the Habitats Directive;

(c) bird protection areas under Article 4(1) and (2) of the Birds Directive.

...'

19 Paragraph 22a of the Sbg NSchG provides:

'...

2. For European areas of conservation, the Provincial Government shall enact by regulation protective provisions which in any event contain the protective purpose and the necessary requirements and prohibitions. The regulation shall also define the boundaries of the area of conservation. The protective purpose shall indicate the conservation objectives (Paragraph 5(9)) of the area of conservation in question. ...

3. The regulation governing a European area of conservation may prohibit or require measures, and allow certain interference generally or by dispensation granted by the Provincial Government. It shall be ensured by prohibitions, requirements and provisos to dispensations that those natural habitats and those

species of fauna and flora in respect of which, in accordance with the protective purpose, a favourable conservation status is to be maintained or restored are, respectively, not impaired and not significantly disturbed.

4. Before a dispensation is granted, the Provincial Government shall examine whether the interference may have a significant effect on the components of the European area of conservation that are essential for the conservation objectives (Paragraph 5(9)) (assessment of implications). The dispensation shall be granted only if no significant effect is to be anticipated.

5. The adoption of a regulation in accordance with subparagraphs 2 and 3 is not required if adequate protection and achievement of the conservation objective are already ensured for the area by other measures. More stringent protective provisions shall remain unaffected.

6. If necessary, countryside maintenance plans and also detailed plans ... shall be drawn up and implemented for European areas of conservation, having regard to Article 4(1) and (2) of the Birds Directive and Article 6(1) of the Habitats Directive. The conservation status of European areas of conservation shall be regularly monitored by the Provincial Government and, in so doing, particular regard is to be had to priority natural habitat types and priority species.'

20 Paragraph 22b of the Sbg NSchG states:

'1. Until adequate protective provisions have been enacted ..., measures in enjoyment of land may be carried out only in the way, and to the extent, that they were lawfully undertaken ...

2. All measures going beyond what is referred to in subparagraph 1 which may have a significant effect on natural habitats or species of fauna or flora in respect of which, in accordance with the Habitats Directive or the Birds Directive, a favourable conservation status is to be maintained or restored may be undertaken only with authorisation from the Provincial Government.

3. Authorisation is to be granted where the measure can cause no deterioration of the habitats covered by subparagraph 2 or significant disturbance of the species covered by subparagraph 2 and, in addition, it does not run counter to the objective of maintaining or creating a favourable conservation status for those habitats or species.

4. More stringent protective provisions shall remain unaffected.'

21 Paragraph 29 of the Sbg NSchG provides:

'1. Wild plants growing in the open whose population is threatened generally or in specific areas and in whose conservation there is a public interest on grounds of nature protection, and plants which are necessary for maintaining a balanced ecosystem, in particular for safeguarding the population of other plant species and of animals, may be protected entirely or partially by regulation of the Provincial Government. The protection can be limited both in time and in area.

2. The protection of plants in their entirety extends to all their parts, above and below ground. It encompasses a prohibition on damaging them, destroying them,

removing them from their location or treating the location of such plants in such a way that their further existence is jeopardised or precluded, and on keeping or transporting plants taken in the wild or accepting or furnishing such plants against or without payment. The prohibition on keeping or transporting plants or accepting or furnishing them against or without payment also relates to any derivative of the plant and any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of the plant.'

22 Paragraph 34 of the Sbg NSchG provides:

'1. The competent nature protection authority may, on application, authorise derogations from the prohibitions under [inter alia] Paragraph 29(2) and (3) ... Authorisation may ... only be granted for measures which serve one of the following purposes:

(1) public health including the production of medicinal products;

(2) the production of beverages;

(3) public safety;

(4) air safety;

(5) the protection of wild flora and fauna or the conservation of their habitats;

(6) research or teaching;

(7) the building up of populations or resettlement elsewhere;

(8) the prevention of serious damage to crops and forests, to animals for production or domestic animals, to fishing grounds or to waters;

(9) the construction of installations;

(10) other grounds of overriding public interest.

2. Points 9 and 10 of subparagraph 1 are inapplicable to birds. Points 2 and 9 of subparagraph 1 do not apply to plant species named in Annex IV to the Habitats Directive.

3. Authorisations under subparagraph 1 may be granted only if the purpose of the measure cannot be satisfactorily achieved by other means and the relevant population of the animal or plant species in question also does not suffer deterioration in the area of the interference.

4. Applications for authorisation under subparagraph 1 must state grounds and contain the following details:

...

6. Authorisation cannot be granted to the following persons:

...

7. The authorisation must contain all the details laid down in subparagraph 4 and state that it does not replace the agreement under private law of the person having the power of disposal over the land in question. In the case of authorisations for scientific purposes, the authority shall in addition require that the documentation is to be held in safekeeping, in agreement with a recognised scientific institution.

...'

23 Paragraph 104 of the Sbg JagdG provides:

'...

4. The authority may authorise further derogations from the prohibitions ... where that does not jeopardise the population of the species of game concerned and there is no satisfactory alternative for achieving the purpose pursued. Such derogations may be granted only for the following purposes:

(a) to protect other wild animals and plants and to conserve their natural habitats;

(b) to avoid serious damage to crops, livestock, forests, fishing waters and, in the case of furred game, to other forms of property;

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

(d) for the purposes of research and teaching;

(e) to increase the population of those species or reintroduce them, and for the breeding required to that end;

(f) for trade in a small number of animals (or parts of animals or products obtained from those animals) of those species of feathered game which ... are allowed to be captured or killed.'

Province of Tyrol

24 The following provisions are at issue: Paragraphs 1(1), 2(2), 5 to 9, 22 to 24 and 28(3) of the Law of Tyrol on Nature Protection (Tiroler Naturschutzgesetz 1997, LGBl. (Tirol) No 33/1997; 'the Tiroler NSchG'); Paragraph 1(1) and (2)(a) and (b), Paragraph 3, the first sentence of Paragraph 6(1) and Paragraph 6(2) of the Regulation of Tyrol on Nature Protection (Tiroler Naturschutzverordnung 1997, LGBl. (Tirol) No 95/1997; 'the Tiroler NSchVO').

25 Paragraph 1(1) of the Tiroler NSchG provides:

'This Law has the objective of conserving and maintaining nature, a foundation of human life, in such a way that:

(a) its diversity, special features and beauty,

(b) its recreational value,

(c) the richness of species in the indigenous animal and plant world and its natural habitats, and

(d) its balance, as unimpaired and efficient as possible,

are preserved and sustainably safeguarded or restored. The conservation and maintenance of nature extend to all its manifestations, in particular to the landscape, and indeed irrespective of whether the landscape is in its original state or has been fashioned by man. Environmentally friendly agriculture and silviculture have particular importance in this regard. Demands can be made on nature only to the extent that its value remains preserved for subsequent generations.'

26 Paragraph 2(2) of the Tiroler NSchG provides:

'Measures that are customary in agriculture and silviculture require no authorisation under this Law.

That does not apply to measures in alluvial forests ..., in wetlands ..., in nature reserves and special protection areas ...'

27 Paragraph 5 of the Tiroler NSchG provides:

'The following are prohibited throughout the territory of the Province:

(a) the conduct of sporting competitions with motor vehicles powered by an internal combustion engine, except on areas for which an authorisation ... exists;

(b) the use of helicopters to transport persons for tourism purposes, except between airports;

(c) the use of watercraft which are powered by a combustion engine on natural watercourses, except to implement schemes for which an authorisation under nature protection law exists and to the extent necessary for those schemes;

(d) any lasting impairment of glaciers and their drainage basins, except in the case of the operation, maintenance and repair of existing installations and their alteration ...'

28 Paragraph 22 of the Tiroler NSchG provides:

'1. The Provincial Government shall by regulation declare to be protected plant species those species of wild plants whose population is threatened generally or in specific areas but whose conservation is required in order to safeguard the interests of nature protection in accordance with Paragraph 1(1).

2. In regulations adopted under subparagraph 1, the Provincial Government may, in so far as this is necessary in order to safeguard the population of particular species of plants, prohibit any person from:

...'

29 Paragraph 23 of the Tiroler NSchG states:

'1. The Provincial Government shall by regulation declare to be protected animal species those species of non-huntable wild animals whose population is threatened generally or in specific areas but whose conservation is required in order to safeguard the interests of nature protection in accordance with Paragraph 1(1).

2. In regulations adopted under subparagraph 1, the Provincial Government may, in so far as this is necessary in order to safeguard the population of particular species of animals, prohibit any person from:

(a) disturbing, pursuing, capturing, holding, keeping whether alive or dead, transporting, offering for sale, selling, acquiring or killing animals of protected species;

(b) removing from their natural surroundings, damaging or destroying, keeping, transporting, offering for sale, selling or acquiring developing forms (such as eggs, larvae and chrysalises) of animals of protected species;

(c) keeping, transporting, offering for sale, selling or acquiring parts of animals of protected species (such as feathers, skins);

(d) removing or destroying breeding places or nests of animals of protected species;

(e) treating the habitat ... of animals of protected species ... in such a way that their continued existence in that habitat becomes impossible.

Prohibitions under (a) to (d) above may be limited to a specific number of animals and their developing forms, to specific developing forms and to specific periods and areas; prohibitions under (e) above may be limited to specific periods and areas.

3. Any person who claims that animals of protected species which he, for the purposes of his occupation, transports, holds, uses or offers for sale have been obtained by him from rearing in Tyrol or have been brought by him into Tyrol from another province or from abroad must, upon request, prove that to the authority.

4. An authorisation under nature protection legislation is required for the release into the wild of animals which are not subject to the provisions of hunting or fisheries law and are not of a native species. Such an authorisation may be granted only if neither a major alteration to existing plant life and wildlife nor prejudice to the interests of nature protection in accordance with Paragraph 1(1) is to be anticipated.

5. In regulations under subparagraph 1, the Provincial Government may enact provisions on the capture and gathering of wild animals of protected species,

including their developing forms, in order to ensure that those activities are carried out properly. In this context, certain methods of capture and the use of certain means of capture may be prohibited.'

30 Paragraph 24 of the Tiroler NSchG provides:

'It is prohibited deliberately to disturb or to pursue wild non-huntable animals of unprotected species, to capture them without justified reason and to remove, damage or destroy their breeding places, nets or developing forms without justified reason.'

Pre-litigation procedure

31 After analysing the various Laws and regulations relating to the transposition of the Directive of which the Republic of Austria had produced copies, on 13 April 2000 the Commission sent that Member State a letter of formal notice complaining that it had not transposed a number of the Directive's provisions completely or correctly.

32 By letter of 27 July 2000, the Republic of Austria submitted observations in this connection to the Commission. It informed the Commission in particular that measures were being taken to amend a number of domestic provisions. However, it put forward arguments divergent from those of the Commission as regards other aspects of the Directive's transposition.

33 By letter of 17 October 2003, the Commission delivered a reasoned opinion in which it concluded that, by not transposing a number of the Directive's provisions completely or correctly, the Republic of Austria had failed to fulfil its obligations under the Directive.

34 By letter of 23 December 2003, the Republic of Austria replied to the reasoned opinion along similar lines to its reply to the letter of formal notice.

35 In those circumstances, the Commission decided to bring the present action.

Procedure before the Court

36 In its application the Commission put forward 27 grounds of infringement against the defendant.

37 In its defence, the defendant accepted that 17 of those grounds were well founded and adhered to its position as to the remainder.

38 In its reply, the Commission withdrew two grounds of infringement.

39 Following a request, made by the Court under Article 54a of the Rules of Procedure, to submit additional information concerning the domestic legal instruments covered by the action the Commission also withdrew its action in so far as it concerned the grounds of infringement relating to Articles 6(3) and (4), 7, 11 and 15 of the Directive.

40 As a result, the action in fact concerns 14 grounds of infringement, which relate to the transposition of Article 1, Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of the Directive.

41 The Republic of Austria does not dispute that Austrian law, as it stood on expiry of the period laid down in the reasoned opinion, was not consistent with the Directive's requirements with regard to a number of points, which are covered by seven grounds of infringement.

The action

Uncontested grounds of infringement

Arguments of the Commission

— Breach of Article 12 of the Directive in the Provinces of Styria and Tyrol

42 The Commission observes that Paragraph 13d(1) of the Law of Styria on Nature Protection (Steiermärkisches Naturschutzgesetz; 'the Stmk NSchG') provides that

the Government of the Province of Styria is to transpose Article 12 of the Directive by adopting a regulation for that purpose. However, Paragraph 4 of the Regulation of Styria on Nature Protection (Steiermärkische Naturschutzverordnung; 'the Stmk NSchVO'), which sets out the list of animals protected throughout the year, does not fully transpose Article 12 of the Directive, because it does not concern all the species protected by virtue of Annex IV(a) to the Directive.

43 The Commission states that, under Paragraph 23(l)(a) of the Tiroler NSchG, the Government of the Province of Tyrol must, by regulation, declare to be protected species those mentioned in Annex IV(a) to the Directive. However, the provisions of the Tiroler NSchVO do not set out all the species referred to.

— Breach of Article 13 of the Directive in the Provinces of Carinthia, Styria and Tyrol

44 The Commission submits that Annex 1 to the Regulation of the Province of Carinthia on the Protection of Plant Species (Kärntner Pflanzenartenschutzverordnung), which concerns Paragraph 1 of that regulation, does not adequately protect all the plant species listed in Annex IV(b) to the Directive.

45 The Commission asserts that, in accordance with Paragraph 13c(1) of the Stmk NSchG, the Government of the Province of Styria must adopt a regulation transposing Article 13 of the Directive. However, no such regulation has been adopted. Nor do Paragraphs 1 and 2 of the Stmk NschVO, which lay down the plant species that are wholly or partially protected, fully transpose the Directive, given that they do not set out all the protected species referred to in Annex IV(b) to the Directive.

46 The Commission states that, under Paragraph 22(l)(a) of the Tiroler NSchG, the Government of the Province of Tyrol must, by regulation, declare to be protected plant species those listed in Annex IV(b) to the Directive. However, the Tiroler NSchVO does not establish a regime protecting all the species included in Annex IV (b).

— Breach of Article 16(1) of the Directive in the Provinces of Styria and Tyrol

47 The Commission observes that Paragraph 62(2) of the Law of Styria on Hunting (Steiermärkisches Jagdgesetz) fails to take account of the fact that derogations are permitted only if it is ensured that the populations of the protected species are maintained at a 'favourable conservation status'.

48 The Commission submits that, for priority natural habitat types, the prohibition laid down in Paragraph 3 of the Tiroler NSchVO fails to take account of the requirement of a 'favourable conservation status'. The same applies to the plant species referred to in Paragraph 1(2)(b) of the Tiroler NSchVO and the animal species referred to in Paragraph 6(2)(e) of that regulation.

49 The Austrian Government states that a number of measures transposing the Directive are in the process of being drawn up within the competent bodies of the provinces concerned. Those provinces are thereby seeking to make all the domestic enactments at issue consistent with the Directive.

Findings of the Court

50 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, and that the Court cannot take account of any subsequent changes in primary or secondary legislation (see, inter alia, Case C-323/01 *Commission* v *Italy* [2002] ECR I-4711, paragraph 8, and Case C-23/05 *Commission* v *Luxembourg* [2005] ECR I-9535, paragraph 9).

51 Since the reasoned opinion was notified to the Republic of Austria on 17 October 2003, and given the period laid down in the opinion, the date by which the defendant had to ensure that provisions of domestic law were consistent with the Directive's requirements was 17 December 2003.

52 It is apparent from the information provided regarding the aforementioned grounds of infringement that the Austrian Government does not dispute that the measures necessary to transpose the Directive in respect of all the points concerned had not been adopted within the period set in the reasoned opinion.

53 It must therefore be held that the action is well founded so far as concerns the grounds of infringement relating to the transposition of Article 12 of the Directive in the Provinces of Styria and Tyrol, Article 13 of the Directive in the Provinces of Carinthia, Styria and Tyrol and Article 16(1) of the Directive in the Provinces of Styria and Tyrol.

Contested grounds of infringement

Breach of Article 1 of the Directive in the Province of Salzburg

— Arguments of the parties

54 The Commission states that Paragraph 5 of the Sbg NSchG lays down a set of definitions which do not transpose correctly the definitions set out in Article 1(e), (g), (i) and (l) of the Directive of the terms 'conservation status of a natural habitat', 'species of Community interest', 'conservation status of a species' and 'special area of conservation'.

55 The Commission adds that, while it is true that Paragraph 5(9) of the Sbg NSchG refers to the concepts of maintenance and restoration of a favourable conservation status, it does not define them. Furthermore, neither Paragraph 3(a) of the Sbg NSchG, which merely provides for a weighing of interests, nor Paragraphs 22a, 22b and 29 of that Law, which relate to a number of complementary protective measures, amount to a correct transposition of Article 1 of the Directive.

56 The Austrian Government submits that the transposition of Article 1 of the Directive into the law of the Province of Salzburg is consistent with Community law. All the elements of that provision are reproduced in the applicable Law, as a result of the use of the concept of 'interference' in conjunction with the conservation objectives. The following legal terms in the Directive and national provisions are involved:

— 'conservation status of a natural habitat': Article 1(e) of the Directive; Paragraphs 5(8) and (9) and 22a(3) and (4) of the Sbg NSchG;

— 'species of Community interest': Article 1(g) of the Directive; 'conservation status of a species': Article 1(i) of the Directive; Paragraphs 3a, 22a, 22b and 29 of the Sbg NSchG;

— 'special area of conservation': Article 1(l) of the Directive; Paragraphs 5(9) and (10) and 22a of the Sbg NSchG.

— Findings of the Court

57 It should be remembered at the outset that, as is apparent from the 4th and 11th recitals in the preamble to the Directive, the habitats and species covered by the Directive form part of the Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States.

58 With regard to the field under consideration, the Court has pointed out that faithful transposition is particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 25, and Case C-98/03 *Commission* v *Germany* [2006] ECR I-53, paragraph 59).

59 The Court has held with regard to the definitions set out in Article 1 of the Directive that the terms concerned must be transposed into the Member States' national law (see Case C-72/02 *Commission* v *Portugal* [2003] ECR I-6597, paragraph 17).

60 So far as concerns, first, the terms defined in Article 1(e) and (i) of the Directive ('conservation status of a natural habitat' and 'conservation status of a species'), it is to be noted that, while the words 'favourable conservation status' are used in Paragraph 5(9) of the Sbg NSchG, the wording of the contested provisions of national law does not, however, encompass all the features set out in Article 1(e) and (i) of the Directive.

61 Such a legislative technique does not ensure that all the elements of the definitions in question are actually taken into account when the Directive is implemented, although those elements are decisive for the meaning and scope of the protection afforded to the habitats and species covered.

62 Consequently, Paragraph 5(8) and (9) and Paragraphs 3a, 22a, 22b and 29 of the Sbg NSchG cannot be regarded as amounting to an adequate legislative transposition of Article 1(e) and (i) of the Directive.

63 So far as concerns, second, Article 1(g) of the Directive, this provision equally contains a large number of parameters, intended to define the term 'species of Community interest'.

64 Paragraphs 3a, 22a, 22b and 29 of the Sbg NSchG, on the other hand, concern solely a weighing of interests, supplementary measures of delegated legislation that relate to European areas of conservation, detailed rules governing the grant of dispensations from the prohibitions laid down by the Law, and the specific protection of wild plants. The concept of species of Community interest is not mentioned there.

65 Those provisions accordingly cannot be regarded as transposing Article 1(g) of the Directive.

66 So far as concerns, third, Article 1(l) of the Directive, it is to be noted that Paragraph 5(10) of the Nbg NSchG, which must be read in conjunction with Paragraph 5(9) which lays down as objective the maintenance or restoration of a favourable conservation status, uses the words 'European area of conservation' instead of 'special area of conservation'. The areas referred to by Paragraph 5(10) include the sites which have been entered by the Commission on the list of sites of Community importance, pursuant to Article 4(2) of the Directive, and the sites proposed by the Province of Salzburg for entry on that list, in accordance with Article 4(1) of the Directive.

67 In addition, Paragraph 22a(2) to (4) of the Sbg NSchG indicates with precision the measures to be taken in order to achieve the protective objectives relating to 'European areas of conservation'.

68 It follows from the foregoing that Paragraphs 5(9) and (10) and 22a of the Sbg NSchG provide with sufficient legal precision a definition of the sites which are included in the term 'special area of conservation' within the meaning of Article 1(l) of the Directive.

69 That provision has therefore been transposed correctly in the Province of Salzburg.

70 Accordingly, the present complaint is well founded only with regard to the failure to transpose Article 1(e), (g) and (i) of the Directive.

Breach of Article 6(1) of the Directive in the Province of Lower Austria

— Arguments of the parties

71 The Commission states that Paragraph 9(5) of the Nö NSchG confines itself to laying down an obligation to take, 'if need be', appropriate maintenance, development and conservation measures. However, it is apparent from Article 6(1) of the Directive that the 'necessary conservation measures' must be adopted in all cases, and not 'if need be'. In Article 6(1) the words 'if need be' concern only management plans and cannot be understood as a general restriction on the obligation to adopt the necessary statutory, administrative or contractual measures.

72 The Austrian Government contends that the obligation laid down in Article 6(1) of the Directive is not to adopt conservation measures in all cases, but only the 'necessary' conservation measures. In any event, where such measures are required in addition to the obligations and prohibitions to be laid down pursuant to Paragraph 9(4) of the Nö NSchG, they are indeed taken by the competent authorities of the Province in order to achieve a favourable conservation status.

— Findings of the Court

73 It should be noted first of all that the Directive lays down complex and technical rules in the field of environmental law and that, accordingly, the Member States are under a particular duty to ensure that their legislation intended to transpose the Directive is clear and precise (see *Commission* v *United Kingdom*, paragraph 26).

74 Regarding the complaint set out by the Commission, both Article 6(1) of the Directive and Paragraph 9(5) of the Nö NSchG use the words 'if need be'. However, in the provision of domestic law, those words refer generally to all conservation measures, which means that under that provision the implementation of such measures is not mandatory.

75 In Article 6(1) of the Directive, on the other hand, the same words relate only to particular cases, that is to say to certain means or technical choices for achieving conservation which are defined as 'appropriate management plans specifically designed for the sites or integrated into other development plans'.

76 Thus, the Directive requires the adoption of necessary conservation measures, a fact which excludes any discretion in this regard on the part of the Member States and restricts any latitude of the national authorities when laying down rules or taking decisions to the means to be applied and the technical choices to be made in connection with those measures.

77 It follows that Paragraph 9(5) of the Nö NSchG cannot be regarded as adequately transposing the obligation to take, in all cases, the conservation measures necessary for special areas of conservation.

78 The argument put forward by the Austrian Government that, in any event, this provision of domestic law is interpreted in a manner consistent with the Directive where conservation measures are necessary cannot be upheld.

79 Such interpretation of provisions of domestic law in a manner consistent with a directive cannot in itself achieve the clarity and precision needed to meet the requirement of legal certainty (see, to this effect, Case C-236/95 *Commission* v *Greece* [1996] ECR I-4459, paragraph 13, and Case C-144/99 *Commission* v *Netherlands* [2001] ECR I-3541, paragraph 21).

80 Moreover, mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting fulfilment of the obligations owed by the Member States in the context of transposition of a directive (see Case C-197/96 *Commission* v *France* [1997] ECR I-1489, paragraph 14; Case C-145/99 *Commission* v *Italy* [2002] ECR I-2235, paragraph 30; and Case C-33/03 *Commission* v *United Kingdom* [2005] ECR I-1865, paragraph 25).

81 It must therefore be found that the legislation of the Province of Lower Austria is not consistent with Article 6(1) of the Directive.

82 The action is thus well founded in this regard.

Breach of Article 6(1) of the Directive in the Province of Upper Austria

— Arguments of the parties

83 The Commission states that Paragraph 15(2) of the Oö NSchG provides for the possibility of countryside management plans being drawn up. An option of that kind is not, however, sufficient in view of the obligation laid down in Article 6(1) of the Directive.

84 The Commission further observes that, under that provision, the Provincial Government may draw up for the protected areas countryside maintenance plans including measures which are 'necessary in the public interest and which do not significantly hamper the authorised economic use of the affected land'. The subordinate clause concerning 'economic use' is intended as a restriction on the obligation to draw up countryside management plans.

85 The Austrian Government submits that Article 6(1) of the Directive confers on the Member States the power to determine the nature of the protective measures to be taken.

86 It also pleads that Paragraph 15(2) of the Oö NSchG is consistent with the Directive since the term 'economic use' can only be understood as use complying with the protective rules applicable to the protected areas. Use contrary to the protective objectives which are laid down in Article 6(1) of the Directive cannot therefore be authorised by the competent legislative or administrative authorities.

— Findings of the Court

87 It should be noted at the outset that, by means of the words used in Article 6(1) of the Directive, the Community legislature sought to impose on the Member States the obligation to take the necessary conservation measures that correspond to the ecological requirements of the natural habitat types and species covered by Annex I and Annex II to the Directive respectively.

88 It is clear, however, that Paragraph 15(2) of the Oö NSchG, according to which 'European areas of conservation' and 'nature reserves' 'may' be the subject of countryside maintenance plans, confers discretion on the Provincial Government with regard to whether the taking of 'necessary conservation measures' is required.

89 As has been stated in paragraph 76 of the present judgment, consideration of that kind does not fall within a discretionary power of the Member States. On this basis alone, Paragraph 15(2) of the Oö NSchG does not transpose Article 6(1) of the Directive correctly.

90 In addition, Paragraph 15(2) of the Oö NSchG does not specify the scope of the term 'authorised economic use' and it is conceivable that operations of that kind may prevent necessary conservation measures from being taken. That provision is therefore incompatible with Article 6(1) of the Directive in this respect too.

91 It follows from the foregoing that the legislation of the Province of Upper Austria is not consistent with Article 6(1) of the Directive.

92 The Commission's action is therefore well founded in this regard.

Breach of Article 6(2) of the Directive in the Province of Tyrol

— Arguments of the parties

93 The Commission submits that it cannot be inferred either from Paragraphs 1 and 2 or from Paragraph 5 or 14 of the Tiroler NSchG that Article 6(2) of the Directive has been transposed in a manner consistent with Community law. Paragraphs 22, 23 and 24 of the Tiroler NSchG concern the protection of plant, animal and bird species and measures relating to unprotected species, but they do not lay down a prohibition to prevent the deterioration of special areas of conservation.

94 The Austrian Government contends that the obligation laid down in Article 6(2) of the Directive is taken into consideration in the abovementioned provisions of the Tiroler NSchG.

95 While the Austrian Government accepts that these provisions do not contain a specific prohibition to prevent the deterioration of special areas of conservation, it considers, however, that transposition of that obligation does not necessarily require the wording of Article 6(2) of the Directive to be reproduced verbatim. The provincial legislature took care to have due regard to this requirement for protection, and it is thus ensured that natural habitats and the habitats of species do not deteriorate and that the species for which the areas have been designated are not disturbed.

96 The Austrian Government adds that, in any event, the legislative amendments introduced by Paragraph 14 of the Tiroler NSchG have made that Law consistent with the Directive.

— Findings of the Court

97 It must be stated at the outset that Paragraph 14 of the Tiroler NSchG was not inserted until after the period laid down in the reasoned opinion had expired. In accordance with the Court's case-law set out in paragraph 50 of the present judgment, this legislative amendment is therefore irrelevant for the purposes of assessing the present ground of infringement.

98 With regard to the first obligation laid down in Article 6(2) of the Directive, requiring Member States to take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species, it must be stated, in light of the proposition advanced by the Austrian Government concerning the manner in which Article 6(2) of the Directive is transposed, that the law of the Province of Tyrol as in force at the end of the period laid down in the reasoned opinion did not contain a provision endowed with the necessary legal precision requiring the competent authorities to avoid the deterioration of those habitats (see, to this effect, *Commission* v *United Kingdom*, paragraph 37).

99 In those circumstances, the proposition that the general legal context resulting from the legislation in force in the Province of Tyrol meets the aforementioned requirements cannot be upheld.

100 As to the second obligation resulting from Article 6(2) of the Directive, requiring Member States to take appropriate steps to avoid disturbance of the species for which the special areas of conservation have been designated, Paragraphs 22 to 24 of the Tiroler NSchG likewise do not transpose this obligation, since they concern not species whose conservation makes designation of those areas necessary, that is to say species referred to in Annex II to the Directive, but species referred to in Annex IV(a) thereto, whose protection falls under Article 12 of the Directive.

101 Protection of the species for which special areas of conservation have been designated must be complete (see Case C-75/01 *Commission* v *Luxembourg* [2003] ECR I-1585, paragraph 43).

102 Consequently, the legislation of the Province of Tyrol does not comply with Article 6(2) of the Directive.

103 The Commission's action is therefore well founded in this regard.

Breach of Article 16(1) of the Directive in the Provinces of Lower Austria and Salzburg

— Complaint relating to the legislation of the Province of Lower Austria

Arguments of the parties

104 The Commission submits that Paragraphs 20, 21 and 22 of the Nö NSchG do not refer to the criterion of 'maintenance at a favourable conservation status' and that

the conditions and criteria to be met in order to be able to derogate from the system of protection laid down by the Directive are not listed exhaustively, contrary to Article 16(1) thereof.

105 The Commission adds that the prohibitions set out in Paragraph 95 of the Nö JagdG concern solely animal species living in the wild and therefore that they do not apply to other species.

106 The Austrian Government contends that, by virtue of the legislative technique chosen, the protection required by the Directive is ensured by Paragraph 20(4) of the Nö NSchG. The competent authorities must, first, act in a manner consistent with the Directive and, second, observe the prohibitions laid down in hunting legislation. In practice, derogations are granted only very restrictively, that is to say solely where no significant risk to protected species of wild plants and animals is to be feared.

107 The Austrian Government also maintains that Paragraph 20(4) of the Nö NSchG ensures that the principle of legal certainty is complied with, because it requires the competent authorities to specify expressly the means, devices and methods of capture or killing that are authorised.

108 The Austrian Government explains finally that the derogations provided for in Paragraph 21(1) and (2) of the Nö NSchG can never apply in the case of deliberate harm to protected flora, fauna or habitats.

Findings of the Court

109 Articles 12 to 14 and 15(a) and (b) of the Directive form a coherent body of provisions which require the Member States to establish strict regimes of protection for the animal and plant species concerned (see, to this effect, *Commission* v *United Kingdom*, paragraph 112).

110 Also, Article 16 of the Directive, which defines in a precise manner the criteria on the basis of which the Member States may provide for derogations from the prohibitions set out in Articles 12 to 15, is a provision constituting an exception to the system of protection which the Directive imposes. Consequently, Article 16 must be interpreted restrictively (see *Commission* v *United Kingdom*, paragraph 111).

111 It should be added in this regard that under Article 16(1) of the Directive any measure adopted at national level which derogates from the prohibitions laid down by the Directive must be conditional on there being no satisfactory alternative.

112 It follows that national provisions under which the grant of derogations from the prohibitions established by Articles 12 to 14 and 15(a) and (b) of the Directive is subject not to all the criteria and conditions set out in Article 16 of the Directive but, incompletely, to certain elements of them, cannot constitute a regime consistent with Article 16.

113 Furthermore, as has been pointed out in paragraph 80 of the present judgment, an administrative practice consistent with a directive's provisions is not sufficient to transpose Community law correctly.

114 So far as concerns Paragraph 20(4) of the Nö NSchG, it is to be noted, first, that while it provides that derogations may be granted when there is no reason to fear a risk to flora and fauna in the wild, it does not thereby preclude such derogations where the populations of the species concerned do not have a favourable conservation status.

115 However, Article 16(1) of the Directive makes the favourable conservation status of those populations in their natural range a necessary precondition in order for the derogations for which it provides to be granted.

116 Accordingly, the ambiguity which characterises the wording of Paragraph 20(4) of the Nö NSchG is incompatible with the requirement for a precise and clear transposition of Article 16(1) of the Directive (see, by analogy, Case C-365/93 *Commission* v *Greece* [1995] ECR I-499, paragraph 9).

117 Second, regarding grounds of derogation, Paragraph 20(4) of the Nö NSchG mentions, by way of example, derogations for scientific or pedagogical purposes.

118 While it is true that such derogations are capable of being tied to Article 16(1)(d) of the Directive, the wording of the domestic provision in question does not preclude that derogations may be authorised on grounds other than those which are nevertheless listed exhaustively in Article 16(1)(a) to (d) of the Directive.

119 Third, nor does Paragraph 20(4) of the Nö NSchG reproduce the conditions for a derogation which are included in Article 16(1)(e) of the Directive, namely the requirement that any derogation be under strictly supervised conditions and of a selective and limited nature.

120 So far as concerns, next, Paragraph 21 of the Nö NSchG, it need merely be pointed out that Article 16(1) of the Directive does not provide for a ground of derogation in favour of a commercial operation of an agricultural or silvicultural nature.

121 Finally, so far as concerns the arguments put forward by the Austrian Government which are derived from the provisions of hunting legislation, it is to be pointed out that application of Paragraph 20(4) of the Nö NSchG is liable to infringe Articles 12 to 15 of the Directive outside the field of hunting. Furthermore, even if the competent authorities comply with the domestic nature protection provisions that relate to engaging in hunting, a body of rules of that kind is not capable of establishing a legal framework consistent with the Community provision which lists exhaustively the permitted grounds of derogation: Paragraph 95 of the Nö JagdG does not contain such a list of grounds, but merely prohibits a number of hunting methods for certain animal species.

122 It follows from the foregoing considerations that the legislation of the Province of Lower Austria is not consistent with Article 16(1) of the Directive.

123 The Commission's action is therefore well founded in this regard.

— Complaint relating to the legislation of the Province of Salzburg

Arguments of the parties

124 The Commission observes that Paragraph 34 of the Sbg NSchG and Paragraph 104(4) of the Sbg JagdG do not reproduce the criterion of 'maintenance at a favourable conservation status' set out in Article 16(1) of the Directive. Nor can the grounds of derogation laid down in points 2 and 9 of Paragraph 34(1) of the Sbg NSchG concerning the production of beverages and the construction of installations be tied to any of the grounds included in Article 16(1) of the Directive.

125 The Austrian Government contends that, inasmuch as Article 16(1) of the Directive provides for the possibility of derogation from the prohibitions prescribed by the Directive, it would be contrary to the logic of the system of protection thereby established to lay down an obligation to restore a favourable conservation status within the framework of a provision relating to the authorising of derogations. Furthermore, Paragraph 34(3) of the Sbg NSchG is stricter than Article 16(1) of the Directive since any derogating measure must avoid deterioration in respect of the populations of plant or animal species that are present in the area concerned.

Findings of the Court

126 The words 'maintenance ... at a favourable conservation status' in Article 16(1) of the Directive relate to a situation which is defined in Article 1(i) of the Directive and which involves, first, general factors referred to in the first subparagraph of Article 1(i) and second, a number of cumulative criteria. As is apparent from paragraph 59

of the present judgment, the Member States have the task of transposing those concepts into national law with sufficient legal precision.

127 Paragraph 104(4) of the Sbg JagdG, on the other hand, provides that derogations may be authorised 'where that does not jeopardise the population of the species of game concerned'. This provision deviates from the system of protection prescribed by the Directive since it allows derogations from the general prohibitions without making them dependent on a requirement to maintain the populations of the species concerned at a favourable conservation status.

128 As regards Paragraph 34(1) of the Sbg NSchG, the grounds of justification relating to, respectively, the production of beverages and the construction of installations do not fall within any of the grounds exhaustively listed in Article 16(1) of the Directive.

129 The failure to fulfil obligations that has been alleged must therefore be held to be proved.

Breach of Article 22(b) of the Directive in the Province of Lower Austria

— Arguments of the parties

130 The Commission observes that Paragraph 17(5) of the Nö NSchG makes the grant of authorisation to introduce non-native species dependent on a criterion not

envisaged by the Directive, namely that any harm must not be 'lasting'. In addition, that provision does not prohibit all prejudice to natural habitats within their natural range and to the wild native fauna and flora that is due to the deliberate introduction of non-native species.

131 The Austrian Government submits that, when Paragraph 17(5) of the Nö NSchG is interpreted consistently with the Directive, authorisation to introduce into the wild a species that is not native or not suited to local conditions will always be refused if that adversely affects native fauna and flora.

— Findings of the Court

132 Paragraph 17(5) of the Nö NSchG permits the deliberate introduction of non-native animal or plant species provided that natural habitats and native wild fauna and flora will not suffer lasting harm.

133 Such a regime does not transpose correctly the system of protection laid down by the Directive. That system requires any derogating measure to comply with the conditions prescribed in Article 22(b) of the Directive, in particular the condition under which authorisation may be granted only in so far as this does not prejudice natural habitats.

134 The words 'not ... prejudice' constitute an unambiguous protective requirement which goes further than that laid down in Paragraph 17(5) of the Nö NSchG.

135 This alleged failure to fulfil obligations must accordingly be held to be proved.

136 It follows from the foregoing considerations that the Republic of Austria has failed to fulfil its obligations under Article 1, Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of the Directive.

Costs

137 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Austria has been essentially unsuccessful in its pleas remaining at issue in the proceedings, the Republic of Austria should be ordered to pay the costs.

138 As regards the grounds of infringement set out in the application which were withdrawn by the Commission at a subsequent stage in the proceedings, it must be stated that the Commission ceased pursuing the complaints concerned as a result of amendments to the domestic legal instruments at issue. The withdrawal is

accordingly attributable to the defendant, given that the provisions of domestic law were brought into line with the requirements of Community law only belatedly. In accordance with Article 69(5) of the Rules of Procedure, the Republic of Austria should therefore be ordered to bear all the costs of the present proceedings.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that the Republic of Austria has failed to fulfil its obligations under Article 1(e), (g) and (i), Article 6(1) and (2), Articles 12 and 13, Article 16(1) and Article 22(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;**

2. **Dismisses the remainder of the action;**

3. **Orders the Republic of Austria to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

11 January 2007 *

In Case C-183/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 22 April 2005,

Commission of the European Communities, represented by M. van Beek, acting as Agent, assisted by M. Wemaëre, avocat, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. Kūris, J. Klučka (Rapporteur), J. Makarczyk and G. Arestis, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that:

— by limiting the transposition of the provisions of Articles 12(2) and 13(1)(b) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural

habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) to the species listed in Annex IV to that directive that occur in Ireland,

— by failing to take all the requisite specific measures for the effective implementation of the system of strict protection required by Article 12(1) of that directive ('the system of strict protection'), and

— by retaining provisions of Irish legislation that are inconsistent with those of Articles 12(1) and 16 of that directive,

Ireland has failed to comply with those articles and with its obligations under the EC Treaty.

Legal context

2 The 4th and 11th recitals in the preamble to Directive 92/43 are worded as follows:

'... in the European territory of the Member States, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously threatened; ... given that the threatened habitats and species form part of the Community's natural

heritage and the threats to them are often of a transboundary nature, it is necessary to take measures at Community level in order to conserve them;

...

... it is recognised that the adoption of measures intended to promote the conservation of priority natural habitats and priority species of Community interest is a common responsibility of all Member States; ...'

3 Article 12(1) and (2) of Directive 92/43 states:

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

...

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

...

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

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this Directive is implemented.'

4 Article 13 of Directive 92/43 provides for the establishment of a system of strict protection for the plant species listed in Annex IV(b) to that directive.

5 Article 16(1) of Directive 92/43 provides as follows:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

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

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

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

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

Pre-litigation procedure

6 On 18 October 2002, following complaints, the Commission sent Ireland a letter of formal notice in which it informed it of its doubts regarding several aspects of that Member State's implementation of Articles 12, 13 and 16 of Directive 92/43.

7 As the Commission did not consider the Irish authorities' response of 20 December 2002 to be convincing, on 11 July 2003 it sent Ireland a reasoned opinion calling on it to take the requisite measures to comply with its terms within two months of the date of its notification.

8 Ireland responded to the reasoned opinion by letters of 12 September 2003 and 8 January 2004. However, the Commission did not consider that response to be satisfactory and decided to bring the present action.

The action

9 In its action the Commission puts forward three complaints:

— the first complaint relates to the incomplete transposition of Articles 12(2) and 13(1)(b) of Directive 92/43 with regard to the species listed in Annex IV to that directive which do not naturally occur in Ireland;

— the second complaint relates to Ireland's failure to adopt specific measures for the effective implementation of the system of strict protection;

— the third plea relates to the existence in Irish legislation of provisions which are inconsistent with both Article 12(1) and Article 16 of Directive 92/43.

10 The Commission withdrew the first complaint during the procedure in the light of Ireland's response to that point in its statement in defence. There is therefore no need to consider it.

The second complaint

11 The second complaint put forward by the Commission consists of seven parts. The second part of that complaint will be examined together with the third complaint since the wording of the two is identical.

The first part of the second complaint

12 As regards the first part, which alleges that Ireland has failed to fulfil its obligation to establish a system of strict protection in respect of the species listed in Annex IV to Directive 92/43, in that neither the leatherback turtle nor the Kerry slug was listed among the species in the First Schedule to the European Communities (Habitats) Regulations 1997, as amended by the European Communities (Natural Habitats) (Amendment) Regulations 1998 ('the (Habitats) Regulations'), the Commission indicates that the response provided by Ireland in that respect is satisfactory. Ireland pointed out that the field of application of the national legislation which transposes Directive 92/43 had been widened to cover those species. It is therefore not necessary to consider the first part of the second complaint.

The third, fourth and sixth parts of the second complaint

13 By the third, fourth and sixth parts of the second complaint the Commission submits that the measures taken by Ireland in respect of monitoring the species listed in Annex IV(a) to Directive 92/43 are, on the whole, disparate and patchy and cannot be regarded as effectively implementing the system of strict protection.

14 As regards, first, the third part of that complaint, the Commission points out that the species action plans which Ireland intends to prepare for the species listed in Annex IV(a) to Directive 92/43 may, on condition that they are correctly established and applied, constitute an effective means of implementing specifically the requirements regarding protection laid down in Article 12(1) of that directive. However, in the absence of such plans, the system of strict protection contains gaps, except in relation to the natterjack toad, which is covered by an appropriate specific monitoring system.

15 Ireland submits that those plans are currently being published. It also puts forward several government initiatives which have not yet been completed and which, in its opinion, will lead to improved concerted action and a more systematic monitoring of the species listed in Annex IV(a) to Directive 92/43.

16 However, such arguments cannot be upheld.

17 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion, and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-282/02 *Commission* v *Ireland* [2005] ECR I-4653, paragraph 40).

18 The third part of the second complaint must therefore be held to be well founded.

19 As regards the sixth part, which needs to be examined before the fourth, the Commission submits that, with the exception of the horseshoe bat and the natterjack toad, the Irish authorities are not in possession of the necessary information in relation to several of the species listed in Annex IV(a) to Directive 92/43, their resting places and breeding sites and the threats to which those species are subject, which prevents the effective implementation of the system of strict protection.

20 Ireland first of all acknowledges that, with regard to bats other than the horseshoe bat, its pilot monitoring project is no substitute for more detailed survey work. Ireland states that it will provide, in due course, vital information on the population trends of those species and refers to several initiatives for the compilation of information regarding bats. According to the Commission, such an indication shows neither that Ireland is sufficiently informed about the species of bats nor that that Member State will implement a coherent long-term programme in order to obtain the necessary information.

21 Second, Ireland submits that the national study, which was launched in 2004 and was due to come to a close in autumn 2005, is part of the framework of a pre-existing programme and is capable of forming the basis of a future programme for the monitoring of otters. According to the Commission, that assertion is not sufficient to establish with certainty that an adequate monitoring system and programme will be put in place for the species in question.

22 Third, Ireland points out that a national expert on Kerry slugs is preparing an action plan which is due to be published in spring 2006 and will include recommendations in respect of a continuous monitoring programme for that species. According to the Commission, the measures and actions taken by Ireland do not provide any certainty

as to the regular provision of monitoring information compiled in a coherent and integrated manner on the presence of that species, its breeding sites and resting places and the threats to which that species might be subject.

23 Fourth, Ireland refers to current initiatives, such as the decision to establish a national biological records database and the setting up of the National Biological Records Centre or the collection of observer data on incidental catches of cetaceans in certain fishing activities, which have been adopted since the entry into force of Council Regulation (EC) No 812/2004 of 26 April 2004 laying down measures concerning incidental catches of cetaceans in fisheries and amending Regulation (EC) No 88/98 (OJ 2004 L 150, p. 12).

24 In that regard, it should be pointed out that, for the purpose of challenging the sixth part of the second complaint, Ireland refers to a number of initiatives which had not yet been concluded by the date on which the period prescribed in the reasoned opinion expired. Such initiatives cannot, according to the case-law cited in paragraph 17 of this judgment, be taken into account by the Court in its assessment of the failure to act alleged by the Commission.

25 Consequently, the sixth part of the second complaint must be held to be well founded.

26 As regards, finally, the fourth part of that complaint, the Commission submits that, although a network of full-time officials responsible for conservation is of general importance for the implementation of the legislation concerning wild fauna and flora, the existence of such a network does not, as alleged by Ireland, in itself demonstrate that the specific measures required have been adopted for the purpose of transposing Article 12(1) of Directive 92/43.

27 Ireland responds that its officials are highly effective and also protect the natterjack toad by playing a vital role in the enforcement of the protection of that species. Similarly, by reason of the direct knowledge which conservation rangers and district conservation officers have of the zones for which they are responsible, the national network of such rangers and officers is aware of the conservation status of the animal and plant species in those zones.

28 In that regard, it should be recalled that Article 12(1) of Directive 92/43 requires the Member States to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range.

29 As noted by the Advocate General in point 24 of his Opinion, the transposition of Article 12(1) of the Directive requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures (see, to that effect, Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraphs 34 to 39).

30 Similarly, the system of strict protection presupposes the adoption of coherent and coordinated measures of a preventive nature (Case C-518/04 *Commission* v *Greece*, not published in the ECR, paragraph 16).

31 In the present case, the existence of a network of full-time rangers and officers responsible for monitoring and protecting species does not, in itself, demonstrate effective implementation of the system of strict protection for all of the species listed in Annex IV(a) to Directive 92/43 that occur in Ireland.

32 As pointed out by the Advocate General in points 45 to 48 of his Opinion, those species are not covered by an appropriate monitoring system, with the exception of the horseshoe bat, the natterjack toad and the leatherback turtle, given the limited numbers of the latter species in Irish waters. Such is the case for the otter, the Kerry slug, various species of bats other than the horseshoe bat, and cetaceans, as is apparent from paragraphs 20 to 24 of this judgment.

33 The fourth part of the second complaint must therefore be held to be well founded.

The fifth part of the second complaint

34 By the fifth part of the second complaint, the Commission submits that, although environmental impact assessments undertaken pursuant to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) can play a useful role in alerting the competent authorities to specific threats to the breeding sites and resting places of the species listed in Annex IV to Directive 92/43, only a limited number of projects are subject to such assessments in Ireland. In addition, even where such assessments are undertaken, the Irish authorities require property developers to provide information on protected species only after development consent has been granted for the project concerned. Therefore, that procedure does not prevent certain developments which may be harmful to the environment.

35 The Commission refers, in particular, to three projects having negative impacts on bat populations (the Lough Rynn Estate project), horseshoe bat roosts (the Ennis

Bypass project) and the breeding sites and resting places of cetaceans (the project for the construction of a gas pipeline in Broadhaven Bay).

36 In that regard, as noted by the Advocate General in points 53 to 61 of his Opinion, the authorisation of a project prior to the environmental impact assessment concluding that that project would have negative impacts on the environment (the Lough Rynn Estate project), or the authorisation of other projects without a derogation, even though the preliminary assessment also concluded that that project would have negative impacts on the environment (the Ennis Bypass project and the project for the construction of a gas pipeline in Broadhaven Bay), shows that the species listed in Annex IV(a) to Directive 92/43 and their breeding sites and resting places are subject to disturbances and to threats which the Irish rules do not make it possible to prevent.

37 Consequently, as regards the projects put forward by the Commission in its application, it cannot be concluded that all measures have been taken to implement effectively the system of strict protection. Consequently, the fifth part of the second complaint must be held to be well founded.

The seventh part of the second complaint

38 By the seventh part of the second complaint the Commission submits that Ireland has failed to demonstrate that it instituted any appropriate strategy for responding to the types of threat to the breeding sites and resting places of bat species. It claims, in particular, that timber treatment, building renovations and demolition work constitute threats to bat roosts.

39 In that regard, it must be borne in mind that, according to settled case-law, in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove that the obligation has not been fulfilled without being able to rely on any presumption (Case C-221/04 *Commission* v *Spain* [2006] ECR I-4515, paragraph 59 and the case-law cited).

40 In the present case, it must be held that the Commission has not put forward any concrete evidence to substantiate the seventh part of its second complaint.

41 The seventh part of the second plea must therefore be held to be unfounded.

The third complaint

42 By its third complaint, the wording of which is identical to that of the second part of the second complaint, the Commission alleges that there exists a parallel regime of derogations which are incompatible with the scope and the conditions of application of Article 16 of Directive 92/43. That regime is to be found, first, in section 23(7) of the 1976 Wildlife Act, as amended by the 2000 Wildlife (Amendment) Act ('the Wildlife Act'), and, second, in section 42 of that act.

43 In the light of Ireland's defence in respect of the failure relating to section 42 of the Wildlife Act, the Commission has withdrawn that part of its third complaint. Therefore, it is not necessary to consider it.

44 As regards the part of the third complaint relating to section 23(7)(a) to (c) of the Wildlife Act, the Commission submits that, under those provisions, it is not an offence for a person: unintentionally to injure or kill a protected wild animal while engaged in agriculture, fishing, aquaculture, forestry or turbary (section 23(7)(a)); to interfere with or destroy the breeding place of such an animal while engaged in such activities (section 23(7)(b)); or unintentionally to kill or injure such an animal or unintentionally to destroy or injure the breeding place or resting place of such an animal while constructing a road or carrying on any archaeological operation, building operation or work of engineering construction, or while constructing or carrying on such other operation or work as may be prescribed (section 23(7)(c)).

45 Ireland submits that the Commission has misinterpreted the purpose of section 23(7). However, in order to remove any ambiguity in that regard, Ireland states that it has made amendments to the (Habitats) Regulations in order to define clearly the regime under section 23 of the Wildlife Act and the provisions of Regulation 23 of the (Habitats) Regulations. The 2005 European Communities (Natural Habitats) Regulations inserted a new provision into the Wildlife Act, namely section 23(8).

46 In that regard, it must, first, be pointed out that the amendment of section 23 of the Wildlife Act brought about by the 2005 Regulations cannot, according to the case-law cited in paragraph 17 of this judgment, be taken into account by the Court in its assessment of the alleged failure to fulfil obligations inasmuch as that amendment was made after the two-month period laid down in the reasoned opinion had expired.

47 Second, suffice it to state that, by providing that acts which unintentionally interfere with or destroy breeding sites or resting places of wild species do not constitute an offence, section 23(7)(b) of the Wildlife Act does not satisfy the requirements of Article 12(1)(d) of Directive 92/43, which prohibits such acts, whether they are intentional or not (see, to that effect, Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 79).

48 In addition, it appears that the derogations laid down in section 23 of the Wildlife Act go beyond what is provided for in Article 16 of Directive 92/43, since the latter determines, in an exhaustive manner, the conditions under which derogations may be made from Article 12 of that directive.

49 It follows that the Commission is correct in law to allege that there is a parallel regime of derogations under Irish legislation which are inconsistent with Articles 12 and 16 of Directive 92/43.

50 The third complaint advanced by the Commission in support of its action is therefore well founded.

51 In the light of all of the foregoing, it must be held that:

— by failing to take all the requisite specific measures for the effective implementation of the system of strict protection, and

— by retaining the provisions of section 23(7)(a) to (c) of the Wildlife Act which are incompatible with those in Articles 12(1) and 16 of Directive 92/43,

Ireland has failed to comply with those articles of Directive 92/43 and to fulfil its obligations under that directive.

Costs

52 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the Commission has applied for costs to be awarded against Ireland, and as the latter has been unsuccessful in the essential aspects of its submissions, Ireland must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. Declares that

— by failing to take all the requisite specific measures for the effective implementation of the system of strict protection laid down in Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and

— **by retaining the provisions of section 23(7)(a) to (c) of the 1976 Wildlife Act, as amended by the 2000 Wildlife (Amendment) Act, which are incompatible with those in Articles 12(1) and 16 of Directive 92/43,**

Ireland has failed to comply with those articles of Directive 92/43 and to fulfil its obligations under that directive;

2. Orders Ireland to pay the costs.

[Signatures]

AUTO DEL TRIBUNAL DE JUSTICIA (Sala Sexta)

de 7 de noviembre de 2006 (*)

«Recurso de casación – Reglamento (CE) nº 864/2004 – Recurso de anulación – Régimen de ayudas en el sector del aceite de oliva – Personas físicas y personas jurídicas – Falta de afectación individual»

En el asunto C-418/05 P,

que tiene por objeto un recurso de casación interpuesto, con arreglo al artículo 56 del Estatuto del Tribunal de Justicia, el 25 de noviembre de 2005,

Centro Provincial de Jóvenes Agricultores de Jaén (ASAJA),

Salvador Contreras Gila,

José Ramiro López,

Antonio Ramiro López,

Cristóbal Gallego Martínez,

Benito García Burgos,

Antonio Parras Rosa,

con sede y domicilio en Jaén, representados por el Sr. J. Vázquez Medina, abogado,

partes recurrentes,

y en el que la otra parte en el procedimiento es:

Consejo de la Unión Europea, representado por la Sra. M. Balta y el Sr. F. Florindo Gijón, en calidad de agentes,

parte demandada en primera instancia,

apoyado por

Comisión de las Comunidades Europeas, representada por los Sres. M. Nolin y F. Jimeno Fernández, en calidad de agentes, que designa domicilio en Luxemburgo,

parte coadyuvante en casación,

EL TRIBUNAL DE JUSTICIA (Sala Sexta),

integrado por el Sr. J. Malenovský, en funciones de Presidente de la Sala Sexta, los Sres. U. Lõhmus y A. Ó Caoimh (Ponente), Jueces;

Abogado General: Sra. J. Kokott;

Secretario: Sr. R. Grass;

oído el Abogado General;

dicta el siguiente

Auto

1 Mediante su recurso de casación, los recurrentes solicitan la anulación del auto del Tribunal de Primera Instancia de las Comunidades Europeas de 8 de septiembre de 2005, ASAJA y otros/Consejo (T-295/04 a T-297/04, Rec. p. II-3151; en lo sucesivo, «auto recurrido»), mediante el cual éste desestimó su recurso de anulación del artículo 1, apartado 7, del Reglamento (CE) nº 864/2004 del Consejo, de 29 de abril de 2004, por el que se modifica, y se adapta con motivo de la adhesión de la República Checa, de Estonia, de Chipre, de Letonia, de Lituania, de Hungría, de Malta, de Polonia, de Eslovenia y de Eslovaquia a la Unión Europea, el Reglamento (CE) nº 1782/2003 por el que se establecen disposiciones comunes aplicables a los regímenes de ayuda directa en el marco de la política agrícola común y se instauran determinados regímenes de ayuda a los agricultores (DO L 161, p. 48, y corrección de errores DO L 206, p. 20; en lo sucesivo, «disposición impugnada»).

Marco jurídico

2 Los principios de la reforma de la política agrícola común (en lo sucesivo, «PAC») emprendida en 1992 pretendían, en esencia, sustituir el régimen de sostenimiento de los precios y la producción por un régimen de sostenimiento de las rentas de los agricultores. Dicha reforma condujo, en relación con determinados productos agrícolas, a la adopción del Reglamento (CE) nº 1782/2003 del Consejo, de 29 de septiembre de 203, por el que se establecen disposiciones comunes aplicables a los regímenes de ayuda directa en el marco de la PAC y se instauran determinados regímenes de ayuda a los agricultores y por el que se modifican los Reglamentos (CEE) nº 2019/93, (CE) nº 1452/2001, (CE) nº 1453/2001, (CE) nº 1454/2001, (CE) nº 1868/94, (CE) nº 1251/1999, (CE) nº 1254/1999, (CE) nº 1673/2000, (CEE) nº 2358/71 y (CE) nº 2529/2001 (DO L 270, p. 1).

3 Para adaptar las organizaciones comunes de mercados en los sectores del aceite de oliva, del tabaco, del lúpulo y del algodón a la reforma de la PAC, el Consejo de la Unión Europea adoptó el Reglamento nº 864/2004.

4 Este Reglamento derogó el antiguo régimen de ayuda a la producción de aceite de oliva para introducir un sistema denominado de «pago único» o de «ayuda disociada», es decir, una ayuda no vinculada a la cantidad efectivamente producida de aceite de oliva. Sin embargo, para determinadas clases de producción se mantuvo, bajo determinadas condiciones y dentro de ciertos límites, un sistema denominado «de ayuda vinculada» o «de ayuda ligada a la producción».

5 Por lo que respecta al aceite de oliva, la disposición impugnada modificó el artículo 37, apartado 1, del Reglamento nº 1782/2003, estableciendo como importe de referencia para el cálculo del importe de la ayuda disociada «el promedio cuatrienal de los importes totales de los pagos concedidos al agricultor con arreglo al régimen de ayuda al aceite de oliva indicado en el anexo VI [del Reglamento nº 1782/2003, en su versión modificada por el Reglamento nº 864/2004], calculado y ajustado con arreglo al anexo VII [del Reglamento nº 1782/2003, en su versión modificada por el Reglamento

nº 864/2004], durante las campañas de comercialización 1999/2000, 2000/2001, 2001/2002 y 2002/2003».

6 Además, el artículo 1, punto 11, del Reglamento nº 864/2004 modificó el artículo 44, apartado 2, del Reglamento nº 1782/2003, al considerar como «hectáreas admisibles para el disfrute de la ayuda disociada» a las superficies que hayan sido plantadas con olivos antes del 1 de mayo de 1998, salvo para Chipre y Malta, o con nuevos olivos en sustitución de los existentes, o con olivos al amparo de los programas de plantación autorizados, y registrados en el sistema de información geográfica.

Hechos que originaron el litigio y procedimiento ante el Tribunal de Primera Instancia

7 Mediante demandas presentadas en la Secretaría del Tribunal de Primera Instancia el 22 de julio de 2004, los recurrentes interpusieron sendos recursos que tienen por objeto la anulación de la disposición impugnada. Dichas demandas se registraron con los números T-295/04 a T-297/04.

8 Uno de los recurrentes, Centro Provincial de Jóvenes Agricultores de Jaén (en lo sucesivo, «ASAJA»), es una organización profesional agrícola constituida, según sus estatutos, para la representación, gestión y defensa de los intereses profesionales de sus miembros en la provincia de Jaén.

9 Los demás recurrentes son productores de aceite de oliva beneficiarios de ayudas en este sector por las campañas de comercialización 1999/2000, 2000/2001 y 2001/2002.

10 Tanto ASAJA como los demás recurrentes impugnaron que la disposición impugnada añadiese la campaña 1999/2000 al período de referencia para el cálculo de la ayuda disociada, dado que los recurrentes plantaron sus olivos en 1998, por lo que no produjeron aceitunas en 1999.

11 Ante el Tribunal de Primera Instancia, el Consejo propuso excepciones de inadmisibilidad con arreglo al artículo 114, apartado 1, del Reglamento de Procedimiento del Tribunal de Primera Instancia, y solicitó que se declarase la inadmisibilidad de los recursos, basándose en que los recurrentes no resultaban individualmente afectados, en el sentido del artículo 230 CE, párrafo cuarto, por la disposición impugnada.

12 La Comisión de las Comunidades Europeas solicitó intervenir en cada uno de los asuntos de que se trata.

13 Mediante auto de 6 de junio de 2005, y de conformidad con el artículo 50 del Reglamento de Procedimiento, tras oír a las partes, los asuntos T-295/04 a T-297/04 se acumularon a efectos de la fase oral y de la sentencia, por razón de su conexión y de su identidad de objeto.

El auto recurrido

14 Mediante el auto recurrido, el Tribunal de Primera Instancia, por considerar que la disposición impugnada es un acto de alcance general y que los recurrentes no resultan afectados ni directa ni individualmente por dicho acto, declaró la inadmisibilidad de los recursos y que no procedía pronunciarse sobre la demanda de intervención presentada por la Comisión. A tal efecto, el Tribunal de Primera Instancia se basó en los motivos siguientes:

«52. […] ASAJA no reivindica ningún derecho de naturaleza procedimental que le reconozca el

Derecho comunitario en materia de organización común de los mercados del aceite de oliva.

53. […] una asociación constituida para promover los intereses colectivos de una categoría de justiciables no puede considerarse individualmente afectada, cuando éstos no lo están con carácter individual […]

54. […] [ASAJA] no ha aportado ninguna prueba que permita concluir que sus miembros están afectados por la disposición impugnada debido a determinadas cualidades que les son propias o de una situación de hecho que les caracteriza en relación con cualquier otra persona.

55. […] ningún dato de los que figura en los autos permite concluir que ASAJA esté individualizada en relación con la disposición impugnada debido a que la disposición cuya anulación se solicita afecta a su posición negociadora.

56. De ello se deriva que ASAJA no puede ser considerada individualmente afectada en el sentido de la jurisprudencia recordada en el apartado 50 anterior.

57. En lo referente, en segundo lugar, a la admisibilidad de los recursos interpuestos en los asuntos T-296/04 y T-297/04 por productores de aceite de oliva, el Tribunal de Primera Instancia considera que éstos tampoco pueden considerarse individualmente afectados por la disposición impugnada.

58. En efecto, los demandantes en los asuntos T-296/04 y T-297/04 no están afectados por la disposición impugnada por razón de su condición objetiva de productores de aceite de oliva, en el período de referencia, y de beneficiarios de regímenes de ayudas previstos por la legislación anterior, y ello de igual modo que cualquier otro productor de aceite de oliva afectado por la disposición impugnada. Ninguna cualidad particular o situación de hecho caracteriza, por tanto, a los demandantes en relación con los demás operadores económicos que pertenecen a la categoría de sujetos afectados por la disposición impugnada.

59. A este respecto, hay que recordar que, como alega el Consejo en sus excepciones de inadmisibilidad, la disposición impugnada, que establece los criterios de cálculo de la ayuda en el sector del aceite de oliva, se aplica indistintamente a todos los productores de que se trata independientemente de la cantidad efectivamente producida por éstos, incluso de cualquier producción, en el período de referencia.

60. […] En el presente caso, aun cuando la disposición impugnada puede producir efectos que difieren según el productor de aceite de oliva de que se trata, esta circunstancia no basta para demostrar que los demandantes tienen cualidades particulares o se encuentran en una situación de hecho que les caracteriza en relación con los demás productores.

61. Por añadidura, aun suponiendo que, en virtud de la aplicación de la disposición impugnada, los demandantes ya no tengan derecho a la ayuda de que se trata en el sector del aceite de oliva, éstos no estarían individualmente afectados por la citada disposición. En efecto, no basta que un acto tenga sobre determinados operadores mayores repercusiones económicas que sobre los operadores del mismo sector para que se les considere individualmente afectados por ese acto (autos [del Tribunal de Primera Instancia] de 15 de septiembre de 1999, Van Parys y otros/Comisión, T-11/99, Rec. p. II-2653, apartados 50 y 51, y [de 2 de abril de 2004,] Gonnelli y AIFO/Comisión, [T-231/02, Rec. p. II-1051], apartado 45).

62. Además, aunque se acreditara que ya no tienen derecho a la ayuda, ha de tenerse en cuenta que de tales medidas se derivaban consecuencias similares para los demás productores de aceite de

oliva afectados por la disposición impugnada (véase, en este sentido, la sentencia del Tribunal de Justicia de 10 de abril de 2003, Comisión/Nederlandse Antillen, C-142/00 P, Rec. p. I-3483, apartado 77).

63. De las consideraciones que preceden resulta que los demandantes en los asuntos T-296/04 y T-297/04 no están individualmente afectados por la disposición impugnada.»

Pretensiones de las partes

15 Los recurrentes solicitan al Tribunal de Justicia que:

– Anule el auto recurrido por infracción del artículo 230 CE.

– Estime las pretensiones aducidas en primera instancia sobre el fondo del asunto.

– Condene en costas al Consejo.

16 El Consejo solicita al Tribunal de Justicia que:

– Desestime el recurso de casación mediante auto motivado con arreglo al artículo 119 del Reglamento de Procedimiento del Tribunal de Justicia.

– Condene en costas a los recurrentes.

17 La Comisión, admitida a intervenir en apoyo de las pretensiones del Consejo mediante auto del Presidente del Tribunal de Justicia de 4 de mayo de 2006, solicita al Tribunal de Justicia que:

– Desestime el recurso de casación por ser manifiestamente infundado.

– Condene en costas a los recurrentes.

Sobre la admisibilidad del recurso de casación

18 En apoyo de su recurso de casación, los recurrentes afirman que la disposición impugnada les afecta directa e individualmente por ser propietarios de olivos plantados en 1998, circunstancia que los distingue del resto de los olivareros del sector. Consideran que la inclusión de la campaña 1999/2000 carente de toda motivación para el cómputo de la ayuda comunitaria les afecta directa e individualmente, en la medida en que su producción de aceituna en el año 1999 fue de 0 kg, dado que sus olivos fueron plantados en el año 1998.

19 Tanto el Consejo como la Comisión solicitan que se declare la inadmisibilidad del recurso de casación, basándose en que los recurrentes se limitan a repetir los hechos y los argumentos ya expuestos en el recurso ante el Tribunal de Primera Instancia. Estiman que no hacen mención a ningún punto o elemento del auto recurrido que consideren erróneo.

20 Con carácter preliminar, procede recordar que, en virtud del artículo 119 de su Reglamento de Procedimiento, cuando el recurso de casación sea manifiestamente inadmisible o manifiestamente infundado, el Tribunal de Justicia podrá, en todo momento, oído el Abogado General, desestimarlo mediante auto motivado.

21 Con arreglo al artículo 225 CE y al artículo 58, párrafo primero, del Estatuto del Tribunal de Justicia, el recurso de casación se limita a las cuestiones de Derecho y debe fundarse en motivos derivados de la incompetencia del Tribunal de Primera Instancia, de irregularidades de procedimiento ante el mismo que lesionen los intereses de la parte recurrente o de la violación del Derecho comunitario por parte del Tribunal de Primera Instancia (véanse, en particular, los autos de 17 de septiembre de 1996, San Marco/Comisión, C-19/95 P, Rec. p. I-4435, apartado 36, y de 10 de mayo de 2001, FNAB y otros/Consejo, C-345/00 P, Rec. p. I-3811, apartado 28).

22 Además, de los citados artículos así como del artículo 112, apartado 1, párrafo primero, letra c), del Reglamento de Procedimiento del Tribunal de Justicia se desprende que un recurso de casación debe indicar de manera precisa los elementos impugnados de la sentencia cuya anulación se solicita, así como los fundamentos jurídicos que apoyan de manera específica esta pretensión (véanse, en particular, las sentencias de 4 de julio de 2000, Bergaderm y Goupil/Comisión, C-352/98 P, Rec. p. I-5291, apartado 34; de 30 de septiembre de 2003, Eurocoton y otros/Consejo, C-76/01 P, Rec. p. I-10091, apartado 46, y de 12 de septiembre de 2006, Reynolds Tobacco y otros/Comisión, C-131/03 P, Rec. p. I-0000, apartado 49).

23 No cumple este requisito el recurso de casación que se limita a repetir o a reproducir textualmente los motivos y las alegaciones ya formulados ante el Tribunal de Primera Instancia, incluidos los basados en hechos rechazados expresamente por este órgano jurisdiccional. En efecto, tal recurso de casación es, en realidad, un recurso destinado a obtener un mero reexamen del presentado ante el Tribunal de Primera Instancia, lo cual excede de la competencia del Tribunal de Justicia (véase el auto San Marco/Comisión, antes citado, apartado 38; sentencias de 17 de diciembre de 1998, Baustahlgewebe/Comisión, C-185/95 P, Rec. p. I-8417, apartado 113, y Eurocoton y otros/Consejo, antes citada, apartado 47).

24 Pues bien, es preciso señalar que en el caso de autos los recurrentes, por una parte, no formularon alegaciones que acreditasen que el Tribunal de Primera Instancia había incurrido en un error de Derecho en su apreciación y, por otra parte, no precisaron los elementos impugnados del auto de que se trata.

25 En efecto, los recurrentes se limitan a indicar que su recurso de casación tiene por objeto obtener la anulación del auto recurrido y a afirmar su legitimación activa puesto que la disposición impugnada les afecta directa e individualmente, a diferencia de los demás olivareros. Sin embargo, se circunscriben a hacer referencia a circunstancias puramente fácticas, repitiendo la argumentación ya expuesta en su recurso ante el Tribunal de Primera Instancia, sin formular la menor crítica al razonamiento jurídico en que se basa el auto recurrido.

26 El recurso de casación, que tiene así por objeto en realidad obtener un mero reexamen por parte del Tribunal de Justicia de las alegaciones formuladas ante el Tribunal de Primera Instancia y una nueva apreciación de los hechos, excede de la competencia del Tribunal de Justicia.

27 En estas circunstancias, debe desestimarse el recurso de casación en su totalidad por ser manifiestamente inadmisible.

Costas

28 A tenor del artículo 69, apartado 2, del Reglamento de Procedimiento, aplicable al procedimiento de recurso de casación en virtud del artículo 118 del mismo Reglamento, la parte que pierda el proceso

será condenada en costas, si así lo hubiera solicitado la otra parte. Por haber solicitado el Consejo que se condene en costas a los recurrentes y haber sido desestimados los motivos formulados por éstos, procede condenarlos en costas. Con arreglo al artículo 69, aparado 4, del mismo Reglamento, también aplicable al procedimiento de casación en virtud del artículo 118, las instituciones que intervengan como coadyuvantes en el litigio soportarán sus propias costas.

En virtud de todo lo expuesto, el Tribunal de Justicia (Sala Sexta) resuelve:

1) **Desestimar el recurso de casación.**

2) **Condenar en costas a los recurrentes.**

3) **La Comisión de las Comunidades Europeas cargará con sus propias costas.**

Firmas

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* Lengua de procedimiento: español.

JUDGMENT OF THE COURT (Second Chamber)

26 October 2006 *

In Case C-239/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 8 June 2004,

Commission of the European Communities, represented by M. van Beek and A. Caeiros, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, acting as Agent, and J.F. Ganderez and R. Gomes da Silva, advogados, with an address for service in Luxembourg,

defendant,

* Language of the case: Portuguese.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, J. Klučka, R. Silva de Lapuerta (Rapporteur), and L. Bay Larsen, Judges,

Advocate General: J. Kokott,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 April 2006,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by implementing a project for a motorway, whose route crosses the Castro Verde special protection area (SPA), notwithstanding the negative environmental impact assessment and the existence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the

conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Directive 97/62/EC of 27 October 1997 (OJ 1997 L 305, p. 42) ('the Habitats Directive').

Legal context

Directive 79/409/EEC

2 Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) require member States to classify as SPAs areas fulfilling the criteria laid down by those provisions.

3 Article 4(4) of that directive provides:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

The Habitats Directive

4 Article 6(2) to (4) of the Habitats Directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

...'

5 Pursuant to Article 7 of the Habitats Directive:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

Facts of the dispute and the pre-litigation procedure

6 The construction project for the A 2 motorway, linking the city of Lisbon with the Algarve region, was awarded in 1997 to the company BRISA Auto-Estradas de Portugal.

7 For the part of that motorway running between the settlements of Aljustrel and Castro Verde, the company drew up a planned route bypassing to the east the settlements of Messejana, Alcarias, Conceiçao, Aivados and Estação de Ourique and crossing the western side of the Castro Verde SPA.

8 In September 1999, an environmental impact assessment relating to the planned route ('the environmental impact study') was submitted to the Portuguese Ministry of the Environment.

9 In the same month, the Castro Verde area was classified as a SPA by the Portuguese authorities pursuant to Article 4 of Directive 79/409.

10 In January 2000, the Secretary of State for the Environment approved the environmental impact study and authorised the implementation of the project.

11 The section of the A 2 motorway between Aljustrel and Castro Verde was opened to traffic in July 2001.

12 On the basis of a complaint which informed it that, despite the negative assessment of impact of that section of motorway on the Castro Verde SPA, the Portuguese authorities had implemented a motorway construction project whose route crossed that area, the Commission, by letter of 20 October 2000, gave the Portuguese Republic formal notice to submit its observations within two months.

13 The Portuguese authorities submitted their observations to the Commission by letters of 4 December 2000 and 12 January 2001.

14 Having found that the Portuguese authorities had not explained why alternative routes situated outside both the Castro Verde SPA and the residential zones of Alcarias, Conceição, Aivados and Estação de Ourique had not been considered and taking the view that the Portuguese Republic had failed to fulfil its obligations under Article 6(4) of the Habitats Directive, on 11 April 2001 the Commission issued a reasoned opinion calling on that Member State to take the measures necessary in order to comply with the opinion within two months of the date of its notification.

15 Since the Commission was not satisfied by the reply given by the Portuguese authorities, it decided to bring the present action.

The action

16 The Commission asserts that the environmental impact study clearly shows that the route chosen by the Portuguese authorities for the construction of the section of the A 2 motorway between Aljustrel and Castro Verde has a very significant negative impact on 17 species of wild birds listed in Annex I to Directive 79/409 and on the habitat of those birds.

17 The Portuguese Republic submits that the Commission merely makes general observations drawn from the environmental impact study, without demonstrating how the implementation of the route has had a very significant negative impact. In its view, it is necessary to weigh the potential adverse effect on the Castro Verde SPA against that which has actually been caused.

18 Pursuant to Article 6(3) of the Habitats Directive, the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the area but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of the plan or project for the site, that it will not adversely affect the integrity of the site and, if appropriate, after having obtained the opinion of the general public.

19 That provision thus establishes a procedure intended to ensure, by means of a prior examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is

authorised only to the extent that it will not adversely affect the integrity of that site (Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraph 34).

20 In that regard, the Court has already held that a plan or project such as the one in question may be granted authorisation only on the condition that the competent national authorities are certain that it will not have adverse effects on the integrity of the site concerned. That is so where no reasonable scientific doubt remains as to the absence of such effects (*Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 56 and 59).

21 In the present case, the environmental impact study mentions the presence, in the Castro Verde SPA, of 17 species of bird listed in Annex I to Directive 79/409 and the high sensitivity of certain of them to the disturbance and/or the fragmentation of their habitat resulting from the planned route of the section of the A 2 motorway between the settlements of Aljustrel and Castro Verde.

22 It is also apparent from that study that the project in question has a 'significantly high' overall impact and a 'high negative impact' on the avifauna present in the Castro Verde SPA.

23 The inevitable conclusion is that, when authorising the planned route of the A 2 motorway, the Portuguese authorities were not entitled to take the view that it would have no adverse effects on the SPA's integrity.

24 The fact that, after its completion, the project may not have produced such effects is immaterial to that assessment. It is at the time of adoption of the decision authorising implementation of the project that there must be no reasonable

scientific doubt remaining as to the absence of adverse effects on the integrity of the site in question (see, to that effect, Case C-209/02 *Commission* v *Austria* [2004] ECR I-1211, paragraphs 26 and 27, and *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 56 and 59).

25 In those circumstances, the Portuguese authorities had the choice of either refusing authorisation for the project or of authorising it under Article 6(4) of the Habitats Directive, provided that the conditions laid down therein were satisfied (see, to that effect, *Waddenvereniging and Vogelbeschermingsvereniging*, paragraphs 57 and 60).

26 In the present case, therefore, it must be considered whether it was possible to authorise the planned route of the A 2 motorway between the settlements of Aljustrel and Castro Verde on the basis of Article 6(4) of the Habitats Directive.

27 The Commission submits that the Portuguese Republic did not comply with that provision since, in the present case, the Portuguese authorities failed to study certain alternative routes which would not have adverse effects on the Castro Verde SPA or on the population of that area.

28 In particular, it takes the view that those authorities did not take into consideration the alternative routes falling outside the Castro Verde SPA and the residential zone comprising the settlements of Alcarias, Conceição, Aivados and Estação de Ourique.

29 The Commission is of the opinion that such alternative routes should have been examined, in particular those which took the A 2 motorway along a corridor to the west of the Castro Verde SPA, between its boundary and the road IC 1, in an area of

plains with a very low demographic density, so that the Portuguese authorities could have chosen, without significant technical difficulties or unreasonable additional financial costs, an alternative route which did not have adverse effects on the SPA and affected neither the abovementioned nor other settlements.

30 According to the Portuguese Republic, it is for the Commission not only to propose such a route, but also to define it and give details of it, demonstrating the existence and viability of an alternative solution less harmful to the environment which the Portuguese authorities had not envisaged. The Commission has not supplied any evidence in that regard.

31 In any event, the Portuguese Republic submits that the solution proposed by the Commission cannot be considered to be an 'alternative solution' within the meaning of Article 6(4) of the Habitats Directive. In its view, that notion does not simply refer to an alternative solution whose theoretical feasibility is defensible, but also implies that the adverse effects of such a solution are taken into account.

32 In the submission of the Portuguese Republic, the implementation of the route proposed by the Commission would cause serious social, economic and environmental harm since it would affect the populations of Conceição, Aivados and Estação de Ourique as well as the reservoir at the Monte da Rocha dam.

33 Accordingly, that Member State takes the view that the marginal and incidental harm to the integrity of the Castro Verde SPA resulting from the route chosen by the Portuguese authorities is less significant than that which would be caused by implementation of the solution proposed by the Commission.

34 Article 6(4) of the Habitats Directive provides that, if, in spite of a negative assessment carried out pursuant to the first sentence of Article 6(3) and in the absence of alternative solutions, a plan or project must nevertheless be carried out

for imperative reasons of overriding public interest, the Member State is to take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

35 That provision, which permits a plan or project which has given rise to a negative assessment under the first sentence of Article 6(3) of the Habitats Directive to be implemented on certain conditions, must, as a derogation from the criterion for authorisation laid down in the second sentence of Article 6(3), be interpreted strictly.

36 Thus, the implementation of a plan or project under Article 6(4) of the Habitats Directive is, inter alia, subject to the condition that the absence of alternative solutions be demonstrated.

37 In the present case, it is common ground that the Portuguese authorities examined and rejected a number of solutions whose routes bypassed the settlements of Alcarias, Conceição, Aivados and Estação de Ourique but crossed the western side of the Castro Verde SPA.

38 On the other hand, it is not apparent from the file that those authorities examined solutions falling outside that SPA and to the west of the settlements referred to above, although, on the basis of information supplied by the Commission, it cannot be ruled out immediately that such solutions were capable of amounting to alternative solutions within the meaning of Article 6(4) of the Habitats Directive, even if they were, as asserted by the Portuguese Republic, liable to present certain difficulties.

39 Accordingly, by failing to examine that type of solution, the Portuguese authorities did not demonstrate the absence of alternative solutions within the meaning of that provision.

40 In those circumstances, it must be held that, by implementing a project for a motorway whose route crosses the Castro Verde SPA, notwithstanding the negative environmental impact assessment and without having demonstrated the absence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of the Habitats Directive.

Costs

41 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for the Portuguese Republic to be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by implementing a project for a motorway whose route crosses the Castro Verde special protection area, notwithstanding the negative environmental impact assessment and without having demonstrated the absence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 97/62/EC of 27 October 1997;**

2. **Orders the Portuguese Republic to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

14 September 2006 *

In Case C-244/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Bayerischer Verwaltungsgerichtshof (Germany), made by decision of 19 April 2005, received at the Court on 7 June 2005, in the proceedings

Bund Naturschutz in Bayern eV,

Johann Märkl and Others,

Angelika Graubner-Riedelsheimer and Others,

Friederike Nischwitz and Others,

v

Freistaat Bayern,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), P. Kūris, G. Arestis and J. Klučka, Judges,

Advocate General: L.A. Geelhoed,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 6 April 2006,

after considering the observations submitted on behalf of:

— Bund Naturschutz in Bayern eV, by U. Kaltenegger and P. Rottner, Rechtsanwälte,

— J. Märkl and Others, by C. Deißler and A. Schwemer, Rechtsanwälte,

— F. Nischwitz and Others, by A. Lehners and E. Schönefelder, Rechtsanwälte,

— Freistaat Bayern, by Professors A. Brigola and M. Dauses, and by G. Schlapp and M. Wiget, acting as Agents,

— the Commission of the European Communities, by M. Van Beek and M. Heller, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 May 2006,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 3 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Directive').

2 This reference was made in the course of proceedings between Bund Naturschutz in Bayern eV and 23 other persons ('the applicants') and Freistaat Bayern regarding a decision to approve a motorway project.

The Directive

3 Under the sixth recital in the preamble to the Directive, 'in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable'.

4 Article 3 of the Directive provides:

'1. A coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to Directive 79/409/EEC.

2. Each Member State shall contribute to the creation of Natura 2000 in proportion to the representation within its territory of the natural habitat types and the habitats of species referred to in paragraph 1. To that effect each Member State shall designate, in accordance with Article 4, sites as special areas of conservation taking account of the objectives set out in paragraph 1. ... .'

5 Article 4 of the Directive is worded as follows:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host ...

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. ...

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which lost one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible ... .

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

6 In accordance with Article 6(1) of the Directive, Member States are to establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

7 Article 6(2), (3) and (4) of the Directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

8 Article 7 of the Directive provides that obligations arising under Article 6(2), (3) and (4) of the Directive shall replace any obligations arising under the first sentence of Article 4(4) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.

9 In accordance with Article 11 of the Directive, Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.

National legislation

10 The law on federal roads (Bundesfernstraßengesetz) lays down, inter alia, the conditions necessary for the construction of that category of roads.

11 Paragraph 17 of that law provides:

'1. The construction or modification of federal roads is subject to the prior approval of a plan. In that context, all the public and private interests concerned by the project must be taken into consideration, including the impact of the project on the environment.

...'

12 Article 10(1)(5) of the Federal Law on Nature protection and countryside conservation (Gesetz über Naturschutz und Landschaftspflege) is worded as follows:

'Within the meaning of the present law, sites of Community importance means sites placed on the list prescribed in the third subparagraph of Article 4(2) of Directive 92/43/EEC, even if they have not yet been declared as protected sites within the meaning of the present law.'

13 That law provides in Articles 32 to 38 measures intended to protect the European ecological network 'Natura 2000'.

14 To that end, Article 33 of the same law establishes the selection procedure for sites which can then be accepted by the Commission. The first sentence of subparagraph 5(1) of that Article states:

'If a site has been published ...

1. all the projects, measures, amendments or disturbances which can adversely affect that site in its essential elements which are necessary for the conservation objectives shall be prohibited on a site of Community importance until the implementation of protective measures.'

15 The first sentence of Paragraph 13(b)(1) of the Bavarian law on the protection of nature, countryside conservation and outdoor leisure (Gesetz über den Schutz der Natur, die Pflege der Landschaft und die Erholung in der freien Natur) is worded as follows:

'Sites of Community importance shall be protected as special areas of conservation under Article 4(4) of Directive 92/43/EEC ... .'

16 Paragraph 13c of that law provides:

'1. Changes or disturbances which may, appreciably or in the long term, adversely affect the integrity of areas which are part of sites of Community importance or European ornithological reserves which have a determining importance with regard to the conservation objectives pursued by those sites or reserves shall be prohibited. The actions referred to in the previous sentence shall be forbidden on sites which are the subject of consultation since they risk adversely affecting, appreciably or in the long term, the biotypes or priority species which they host.

2. Plans shall be prohibited which, individually or in combination with other plans or projects, risk adversely affecting, appreciably or in the long term, the integrity of areas which are part of sites of Community importance or European ornithological reserves which have a determining importance with regard to the objectives of protection or conservation pursued by the latter.

3. Plans which may, individually or in combination with other plans or projects, affect sites of Community importance or European ornithological reserves must take into account the objectives of protection and conservation of those sites and reserves.

...'

17 Paragraph 48 of the same law provides:

'1. The officials or agents of authorities entrusted with nature conservation, of the Bavarian office for the protection of the environment and of municipalities shall be authorised to enter any plot of land in order to carry out the investigations necessary to perform the duties imposed by the present law; that authorisation shall also extend to the members of consultative committees for the protection of the environment in the preparation and holding of meetings. The present provision shall apply in particular to the preparation of measures prescribed by this law and the carrying out of land surveying, soil sampling and similar operations. ...

2. Until implementing regulations shall have been adopted ... the bodies or authorities responsible for nature conservation ... may, by general or individual

order, prohibit changes ... for a period of up to two years, in order to guarantee the provisional protection of the areas and objects to be protected, when there are grounds for fearing that those changes may jeopardise the aim of the protective measures envisaged; if special circumstances so require, that period may be extended for a maximum of a year. That measure may not be adopted unless the authorities responsible for nature conservation or the competent bodies apply the definitive protection procedure at the same time or immediately afterwards.

3. From the notification of the zone to be protected ... until the entry into force of the protective regulation, any alteration shall be prohibited for a maximum of one year in the prescribed natural conservation areas, subject to contrary provisions pursuant to paragraph 2 in the general or individual order. The legal use to which the land is put shall remain as it was at the time of notification. That consequence must be mentioned in the notification.'

The facts which gave rise to the dispute and the questions referred for a preliminary ruling

18 The applicants in the main proceedings object to the construction of the Forstinning-Pastetten section of the new Munich-Mühldorf-Simbach-Pocking A 94 motorway. In the development plans for national trunk roads, that link was classified as an 'absolute priority'.

19 In the planning of that work, the route to be taken, from the Forstinning area, is controversial. The existing national B 12 trunk road, in the corridor of which it is planned to construct the main part of the new A 94 motorway, passes through the village of Haag ('the Haag route').

20 By decision of 7 March 2002 the Upper Bavarian government approved the plan for the construction of the Forstinning-Pastetten section of the A 94 motorway, 6.2 kilometres long, and turned down the Haag route in favour of a route passing further to the north through the village of Dorfen ('the Dorfen route'). The choice of the Dorfen route means that the A 94 would cross, in particular, the Hammerbach and Isen rivers and their tributaries, the Lappach, Goldach and Rimbach.

21 These are parts of areas which have been identified by the German authorities, on 29 September 1994, as sites eligible to be considered sites of Community importance. Those sites are designated as follows:

— Strogn, Hammerbach, Kollinger Bach (DE 7637-371),

— The valley of the Isen and its tributaries (DE 7739-371)

— Colonies of long-eared bats in the Lower Bavarian hill country (DE 7839-371).

22 According to ecological data relating to those zones, in both site DE 7637-371 and site DE 7739-371 there is a priority natural habitat type which appears in Annex I to the Directive and is listed under the name 'alluvial forests with Alnus glutinosa and Fraxinus excelsior'.

23 In addition, in the vicinity of the Haag route, the German authorities have designated the following additional protection zone:

— Ebersberger and Großhaager forest (DE 7837-371).

24 The applicants in the main proceedings having brought an action before it, the referring court points out that it would be possible to set aside the decision of approval of 7 March 2002 in accordance with the applicants' application only if there were irreparable errors of examination or breaches of Community law, in particular if the view were to be taken that the disputed planning significantly affected the designated protection zones with a view to their recognition as sites of Community importance.

25 In those circumstances, the Bayerischer Verwaltungsgerichtshof (Administrative Court, Bavaria) (Germany) firstly ruled that the claims should have suspensory effect and, secondly, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) What protection regime is required under Article 3(1) of Directive 92/43 in conjunction with the sixth recital in the preamble to that Directive in the light of the prohibition of any measure that might jeopardise the attainment of the objectives of the Treaty laid down in the second paragraph of Article 10 EC, as a result of the judgment of the Court of 13 January 2005 in Case C-117/03 in respect of sites which could be designated sites of Community importance, particularly those with priority natural habitat types or priority species, before

they appear in the list of sites of Community importance adopted by the Commission of the European Communities under the procedure provided for in Article 21 of the Directive?

(2) What is the effect on that protection regime if those sites already appear in the national list submitted to the Commission under Article 4(1) of Directive 92/43?

(3) Is a national protection scheme for those sites under Article 48(2) ... (the Bavarian Law on the protection of nature and countryside conservation) sufficient to satisfy the requirements of Community law under Article 3(1) of Directive 92/43 in conjunction with the sixth recital in the preamble to that Directive in the light of the prohibition of any measure that might jeopardise the attainment of the Treaty laid down in the second paragraph of Article 10 EC?'

26 In its assessments relating to the proceedings before it, the Verwaltungsgerichtshof wonders whether the protection scheme which must be determined is a protection scheme under Community law or whether the Member States must ensure the protection of the designated sites by means of measures within the scope of a national protection scheme alone. The response to that question will determine the legislation, criteria and also factual circumstances on the basis of which foreseeable damage linked to the planning at issue is to be assessed.

27 The Verwaltungsgerichtshof points out that it is not inconceivable that the planning might have significantly prejudicial consequences for the priority natural habitat type 'alluvial forests'. It finds that, in this case, the planned route crosses and, as it were,'criss-crosses' an integrated alluvial system (the Isen and its tributaries) several times. Consideration should also be given to the adverse effects on the area caused by noise, exhaust emissions, shadows cast by the bridges, land drying out under the bridges, harmful chemicals coming from the carriageway and also the emergence of atypical plant species during the construction period.

28 The Verwaltungsgerichtshof finally points out that a determination of the seriousness of the foreseeable damage to a designated zone with a view to its inclusion on the list of sites of Community importance depends also on whether the Directive requires the protection of such a zone to be strengthened before it is placed on that list.

Concerning the questions referred for a preliminary ruling

The first and second questions

29 By those questions which may appropriately be dealt with together, the referring court raises the question of the protection scheme applicable to sites which have been designated by the national competent authorities with a view to their recognition as sites of Community importance, but whose inclusion on the list awaits a decision by the Commission.

30 More specifically, the referring court puts forward firstly the question of the legal nature of that protection scheme and, secondly, the question of its material characteristics.

31 It must first be remembered that the process of designating sites with a view to their inclusion on the list of sites of Community importance is governed by the provisions listed in Articles 3 and 4 of the Directive.

32 As is clear from Article 3(2) of the Directive, the decision of the national competent authorities relating to the designation of a site eligible to be considered as the element forming the European ecological network of special areas of conservation constitutes the first step of a process leading to the creation of the 'Natura 2000' network.

33 In that context, when scientific assessments and decisions identifying natural habitats and species are made, in particular those of a priority nature, account must be taken of the selection criteria established in Annex III of the Directive.

34 Following that process, it is the Commission's duty, on the basis of those criteria, to establish, in agreement with each of the Member States, a draft list of the sites of Community importance, showing in particular the sites which host one or more priority natural habitat types or one or more priority species.

35 As regards the level of protection applicable to the sites which appear on the national list transmitted to the Commission, it must be remembered that, in accordance with Article 4(5) of the Directive, the protection scheme for special areas of conservation laid down in Article 6(2), (3) and (4) thereof applies to a site once the latter is placed, in accordance with the third subparagraph of Article 4(2) of the Directive, on the list of sites selected as sites of Community importance, adopted by the Commission.

36 It follows, as the Court ruled in Case C-117/03 *Dragaggi and Others* [2005] ECR I-167, paragraph 25, that the protective measures prescribed in Article 6(2) to (4) of the Directive are required only as regards sites which are placed on the list of sites selected as sites of Community importance.

37 However, the Court pointed out at paragraph 26 of that judgment that that did not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission.

38 At paragraph 29 of that judgment, the Court held that, in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures 'appropriate' for the purpose of safeguarding that ecological interest.

39 As the national court raises the question of the interpretation to be given to the obligation to take such 'appropriate' protective measures, more precisely, the criteria

for the application of the protection scheme for sites designated by the national competent authorities, it must be remembered that, as the Court pointed out in Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraphs 22 and 23, to produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of special sites of conservation, the Commission must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Directive's objective of conservation of natural habitats and wild fauna and flora. Only in that way is it possible to realise the objective, in Article 3(1) of the Directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, in the entire European territory of the Member States.

40 The Court also pointed out, at paragraph 23 of that judgment, that, having regard to the fact that, when a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States, it cannot, of its own accord, exclude sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level.

41 Consequently, the Commission must be sure of having available an exhaustive list of sites eligible as special areas of conservation, the drawing up of which is aimed at a coherent European ecological network. It also follows from this that, at the time of the decision which the Commission is called upon to take, the sites identified by the Member States must reflect the situation on the basis of which the scientific evaluations of potential sites of Community importance have been carried out.

42 If that were not the case, the Community decision-making process which is not only based on the integrity of the sites as notified by the Member States, but is also characterised by the ecological comparisons between the different sites proposed by the Member States, would run the risk of being distorted and the Commission would no longer be in a position to fulfil its duties in the area concerned.

43 It must be added that, in accordance with Annexe III, Stage 2, paragraph 1 of the Directive, 'all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance'. It is therefore correct that those sites appear on the list which the Commission must draw up.

44 Having regard to the foregoing considerations, the Member States must, as regards the sites identified with a view to their inclusion on the Community list, take appropriate protective measures in order to maintain the ecological characteristics of those sites.

45 In that regard, it must be remembered that, in accordance with the first part of Annexe III to the Directive, the ecological characteristics of a site identified by the competent national authorities must reflect the assessment criteria which are listed there, namely, the degree of representativity of the habitat type, its area, its structure and functions, the size and density of the population of the species present on the site, the features of the habitat which are important for the species concerned, the degree of isolation of the population present on the site and the value of the site for conservation of the habitat type and species concerned.

46 Member States cannot therefore authorise interventions which may pose the risk of seriously compromising the ecological characteristics of a site, as defined by those

criteria. This is particularly the case when an intervention poses the risk either of significantly reducing the area of a site, or of leading to the disappearance of priority species present on the site, or, finally, of having as an outcome the destruction of the site or the destruction of its representative characteristics.

47 The answer to the first and second questions must therefore be that the appropriate protection scheme applicable to the sites which appear on a national list transmitted to the Commission under Article 4(1) of the Directive requires Member States not to authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites.

The third question

48 By this question, the national court seeks an interpretation of Community law as regards the methods of implementation of the abovementioned protection scheme.

49 As regards the implementation of the protection scheme applicable to the sites concerned, it is for the Member States to take all the measures which are necessary.

50 In that regard, the detailed procedural rules applicable fall within the ambit of the domestic legal order of each Member State, provided that such rules are not less favourable than those governing similar domestic situations of an internal nature

and do not render impossible in practice or excessively difficult the exercise of rights conferred by Community law (see, to that effect, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31).

51 Consequently, the answer to the third question must be that Member States must, in accordance with the provisions of national law, take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission. It is for the national court to assess whether that is the case.

Costs

52 Since these proceedings are, for the parties in the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **The appropriate protection regime applicable to sites which appear on a national list transmitted to the Commission, under Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, requires Member States not to**

authorise interventions which incur the risk of seriously compromising the ecological characteristics of those sites.

2. **Member States must, in accordance with the provisions of national law, take all the measures necessary to avoid interventions which incur the risk of seriously compromising the ecological characteristics of the sites which appear on the national list transmitted to the Commission. It is for the national court to assess whether that is the case.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

13 July 2006 *

In Case C-191/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 28 April 2005,

Commission of the European Communities, represented by M. van Beek and A. Caeiros, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Portuguese Republic, represented by L. Fernandes, acting as Agent,

defendant,

* Language of the case: Portuguese.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta, P. Kūris (Rapporteur), J. Klučka and L. Bay Larsen, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 23 February 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court to declare that, by altering the demarcation of the 'Moura, Mourão, Barrancos' Special Protection Area ('the SPA concerned'), thereby excluding from it areas providing a habitat for species of wild birds for whose protection that SPA was designated, the Portuguese Republic has failed to fulfil its obligations under Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, 'the Directive').

2 Article 4(1) of the Directive provides:

'The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this directive applies.'

3 Following a complaint stating that the SPA concerned had been altered without any scientific basis, on 17 October 2003, the Commission sent the Portuguese Government a letter of formal notice, to which the Portuguese authorities responded by letter of 19 December 2003.

4 On 9 July 2004, the Commission issued a reasoned opinion to the Portuguese Government, stating that, by altering the demarcation of the SPA concerned, thereby excluding from it areas providing a habitat for species of wild birds for whose protection that SPA was designated, the Portuguese Republic had failed to fulfil its obligations under Article 4(1) of the Directive, and calling on that Member State to take the measures necessary to comply with the opinion within two months of receipt thereof. After examining the Portuguese authorities' response of 24 February 2005 and taking the view that the situation remained unsatisfactory, the Commission brought the present proceedings.

5 In its application, the Commission maintains that, in reducing, by Decree-Law No 141/2002 of 20 May 2002 (Diário da República I, Series A, No 116, of 20 May 2002), the extent of the SPA concerned as defined when it was created by Decree-Law No 384-B/99 of 23 September 1999 (Diário da República I, Series A, No 223, of 29 September 1999), the Portuguese Government excluded from protection several species of wild birds listed on the Natura 2000 Standard Data Form, which was used as a basis for creating that SPA, although those species were to be protected under the Directive.

6 The Commission further maintains that the alteration of the boundaries of the SPA concerned has no scientific basis, which is contrary to the requirements laid down in the Court's case-law.

7 The Portuguese Government, for its part, recognises that, irrespective of the discretion enjoyed by the Member States, the boundaries for SPAs must be defined in accordance with the criteria laid down in the Directive, as emphasised in the case-law of the Court.

8 That government states that new, adequate boundaries are currently being drawn up for the SPA concerned. They will take into account, on the one hand, the requirements for adequate protection of the species on account of which that area was designated as an SPA, such as the crane (Grus grus), the eagle owl (Bubo bubo), the black vulture (Aegypius monachus), the booted eagle (Hieraaetus pennatus) and the griffon vulture (Gyps fulvus), and, on the other hand, the protection necessary for steppe-land birds in suitable areas.

Findings of the Court

9 It must be borne in mind that Article 4 of the Directive lays down a protection regime which is specifically targeted and reinforced both for the species listed in Annex I and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the Community (see to that effect, Case C-169/89 *Van den Burg* [1990] ECR I-2143, paragraph 11, and Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraphs 23 and 26).

10 It is the ornithological criteria laid down in paragraphs (1) and (2) of Article 4 which are to guide the Member States in designating and defining the boundaries of SPAs (see, to that effect, *Royal Society for the Protection of Birds*, paragraph 26).

11 It follows from the provisions of Decree-Law No 141/2002 that the boundaries of the SPA concerned were altered on the ground that that SPA included areas which were not important habitats for steppe-land birds.

12 However, as rightly pointed out by the Commission, although the areas excluded from the SPA concerned by that Decree-Law do not provide a habitat for steppe-land birds, they did provide a habitat for other species of wild birds listed in Annex I to the Directive for whose protection that SPA had been designated, namely the crane (Grus grus), the eagle owl (Bubo bubo), the black vulture (Aegypius monachus), the booted eagle (Hieraaetus pennatus) and the griffon vulture (Gyps fulvus).

13 In those circumstances a Member State may not reduce the surface area of an SPA or alter its boundaries unless the areas excluded from the SPA are no longer the most suitable territories for the conservation of species of wild birds within the meaning of Article 4(1) of the Directive.

14 The Portuguese Government has not even sought to establish the existence of such a situation in this case.

15 The Commission's action must therefore be held to be well founded.

16 In the light of the foregoing considerations, it must be held that, by altering the demarcation of the SPA concerned, thereby excluding from it areas providing a habitat for species of wild birds for whose protection that SPA was designated, the Portuguese Republic has failed to fulfil its obligations under Article 4(1) of the Directive.

Costs

17 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission asked that the Portuguese Republic be ordered to pay the costs and the latter has been unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by altering the demarcation of the 'Moura, Mourão, Barrancos' Special Protection Area, thereby excluding from it areas providing a habitat for species of wild birds for whose protection that area was designated, the Portuguese Republic has failed to fulfil its obligations under Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;**

2. **Orders the Portuguese Republic to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

18 May 2006 *

In Case C-221/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 27 May 2004,

Commission of the European Communities, represented by G. Valero Jordana and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, R. Schintgen, P. Kūris (Rapporteur) and G. Arestis, Judges,

Advocate General: J. Kokott,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 December 2005,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court for a declaration that, owing to the authorisation by the authorities in Castilla y Léon of the setting of stopped snares in several private hunting areas, the Kingdom of Spain has failed to fulfil its obligations under Article 12(1) of and Annex VI to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the directive').

Legal context

2 The aim of the directive, according to Article 2(1) thereof, is 'to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies'.

3 Article 12(1) of the directive provides that:

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

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

...'

4 Annex IV to the directive, entitled 'Animal and plant species of Community interest in need of strict protection', cites *Lutra lutra* ('the otter') under (a), 'Animals'.

5 Annex VI to the directive, entitled 'Prohibited methods and means of capture and killing and modes of transport', mentions, as regards mammals, '[t]raps which are non-selective according to their principle or their conditions of use' under (a), 'Non-selective means'.

6 Article 15 of the directive provides that:

'In respect of the capture or killing of species of wild fauna listed in Annex V(a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV(a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI(a);

...'

7 Article 16 of the directive provides that:

'1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a

favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

...

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

...'

Facts and pre-litigation procedure

8 On 19 April 2001, following a complaint registered in 2000, the Commission sent the Kingdom of Spain a letter of formal notice in which it maintained that that Member State had failed to fulfil its obligations under Article 12(1) of and Annex VI to the directive by authorising the setting of stopped snares in a hunting area in which some of the animal species referred to in Annexes II and IV to that directive are to be found. The Spanish authorities replied by means of a detailed letter of 29 June 2001.

9 Having received two new complaints concerning permits for setting stopped snares in the course of 2001, the Commission, on 21 December 2001, sent a supplementary letter of formal notice to the Spanish authorities, who replied by letter of 25 February 2002.

10 As it considered that the infringements of the directive were persisting, the Commission sent the Kingdom of Spain a reasoned opinion on 3 April 2003 concerning the grant by the Spanish authorities of permits to set stopped snares, which do not constitute a selective hunting method, on various hunting grounds. It requested that that Member State take the measures necessary to comply with that opinion within two months of its notification.

11 In its letter of reply of 15 July 2003, the Spanish Government stated that the Commission had contravened the provisions of Article 226 EC by mentioning in the reasoned opinion a permit of 13 December 2002 which had not been cited either in the initial letter of formal notice or in the supplementary letter of formal notice. Moreover, that government again contested the grounds of complaint put forward by the Commission.

12 As it took the view that the Kingdom of Spain was still failing to fulfil some of the obligations stemming from the directive, the Commission brought this action.

13 The action relates to three permits for the use of stopped snares for fox hunting issued by the authorities of Castilla y Léon on 10 January 2000, 24 May 2001 and 13 December 2002 ('the contested permits'). The contested permits relate to two hunting areas ('the areas concerned'), namely the AV-10.198 area situated in the territory of the municipality of Mediana de la Voltoya in the province of Ávila which is referred to in the permit of 24 May 2001 and the SA-10.328 area situated in the territory of the municipality of Aldeanueva de la Sierra in the province of Salamanca which is referred to in the permits of 10 January 2000 and 13 December 2002.

Admissibility of the action

14 The Spanish Government raises two pleas of inadmissibility. The first concerns alteration of the subject-matter of the application and in the alternative its lack of precision and the second relates to the insufficient statement of grounds in the application.

The plea of inadmissibility concerning alteration of the subject-matter of the application

15 The Spanish Government submits principally that the Commission altered the subject-matter of the application following its submission by alleging that the directive was incorrectly transposed although in earlier correspondence it had restricted itself to alleging that the Kingdom of Spain had infringed the directive by issuing the contested permits.

16 According to the Commission that claim is incorrect as the action for failure to fulfil obligations has the sole aim of challenging the permits.

17 It is clear from the documents in the file that the debate regarding the incorrect transposition of the directive has its origin in the position taken by the Spanish Government in its defence which consisted of justifying the contested permits with regard to the derogations provided for in the directive.

18 The subject-matter of this action is clearly not the possible incorrect transposition into Spanish law of that directive, but the alleged infringement thereof by the grant of the contested permits. Accordingly, that plea of inadmissibility, as set out in the principal argument, must be rejected.

19 In the alternative, the Spanish Government submits that the Commission did not define the subject-matter of the action sufficiently. In that regard, the Spanish Government puts forward five arguments.

20 By its first argument, the Spanish Government objects to the expansion of the subject-matter of the application to include the permits of 24 May 2001 and 13 December 2002. On the one hand, the permit of 24 May 2001 was revoked by the competent authorities on 29 May 2001 and consequently has no legal force or status. On the other hand, the permit of 13 December 2002 was mentioned for the first time in the reasoned opinion so that that government did not have an opportunity to make observations.

21 The Commission contends first of all that the Spanish Government has not proved that the permit of 24 May 2001 was revoked. According to the Commission that permit shows the continuing existence of the administrative practice of issuing permits for hunting using stopped snares in hunting areas in which otters are to be found and should, on that basis, be taken into account in spite of the fact that it was granted only for a very brief period. As regards the permit of 13 December 2002, it was applied for and granted as an extension to the permit of 10 January 2000.

22 It must be borne in mind that it follows from the express terms of the second paragraph of Article 226 EC that the Commission may bring an action for failure to fulfil obligations before the Court only if the Member State concerned has failed to comply with the reasoned opinion within the period laid down by the Commission for that purpose (see, inter alia, Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 9, and Case C-525/03 *Commission* v *Italy* [2005] ECR I-9405, paragraph 13).

23 It is, furthermore, settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned

opinion (see, inter alia, Case C-362/90 *Commission* v *Italy*, paragraph 10; Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7; Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9; and Case C-525/03 *Commission* v *Italy*, paragraph 14).

24 In the present case, it appears that the permit of 24 May 2001 was granted for a limited period ending on 15 June 2001, that is to say well before the reasoned opinion was sent.

25 It has not been shown that that permit continued to produce legal effects after the expiry of the period laid down in the reasoned opinion.

26 It follows that the action is inadmissible in so far as it relates to the permit issued on 24 May 2001.

27 As regards the permit of 13 December 2002, it must be noted that it was granted as an extension to the permit of 10 January 2000.

28 In that regard, it must be borne in mind that, according to the settled case-law of the Court, the subject-matter of a dispute may be extended to events which took place after the reasoned opinion was delivered in so far as they are of the same kind and constitute the same conduct as the events to which the opinion referred (see to that effect Case 42/82 *Commission* v *France* [1983] ECR 1013, paragraph 20, and Case 113/86 *Commission* v *Italy* [1988] ECR 607, paragraph 11).

29 In the present case, it must be noted that the permit of 13 December 2002 is of the same kind as the permit of 10 January 2000, as it states the conditions applicable under the latter for using and setting stopped snares without altering the meaning and scope thereof, and that the grant of those two permits constitutes the same conduct. Consequently, the fact that the permit of 13 December 2002 was cited as an example by the Commission in the reasoned opinion and is referred to again in this application did not deprive the Kingdom of Spain of the rights conferred by Article 226 EC. Therefore, that permit can be incorporated lawfully into the subject-matter of the action.

30 By its second argument, the Spanish Government submits that the Commission did not specify the obligations which the Kingdom of Spain failed to fulfil.

31 However, it is absolutely clear from the Commission's application that it alleges that the Kingdom of Spain failed to fulfil specific obligations stemming from Article 12(1)(a) of and Annex VI to the directive, namely the obligation to establish a system of strict protection for the animal species listed in Annex IV(a) to the directive (among which is to be found the otter) prohibiting all forms of deliberate capture or killing and the obligation to prohibit means of capture and killing which are non-selective according to their principle or their conditions of use. Accordingly, the Kingdom of Spain was aware of the obligations which it is alleged that it failed to fulfil.

32 By its third and fourth arguments, the Spanish Government alleges that the Commission restricted the subject-matter of the application for failure to fulfil obligations. During the pre-litigation procedure the Commission referred, on the one hand, to the protection of five other animal species apart from the otter and, on the other hand, to a variety of hunting methods and not only the use of stopped snares.

33 It must be borne in mind that, as the Commission rightly observes, the Court has already found that it is possible to limit the subject-matter of the proceedings at the stage of the proceedings before the Court (see to that effect Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraphs 24 and 25; Case C-52/00 *Commission* v *France* [2002] ECR I-3827, paragraph 44; Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraphs 18 and 19; and Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 28). Accordingly, the Commission could limit the subject-matter of the failure to fulfil obligations alleged in its application to one of the species and one of the hunting methods mentioned during the pre-litigation procedure.

34 By its fifth argument, the Spanish Government submits that the Commission used the pre-litigation procedure as a means of progressively establishing the grounds for the failure to fulfil obligations. The consequence of such conduct is a breach of the principles of legal certainty and of respect for the fundamental rights of the defence.

35 The Commission considers that that argument alleges, on the one hand, the limitation of the subject-matter of the action, and, on the other hand, the absence, in the letter of formal notice, of sufficient evidence to warrant the initiation of infringement proceedings.

36 In this connection, such factors do not however appear capable of affecting the admissibility of the action. First, the Commission was permitted to limit the subject-matter of the proceedings at the stage of the proceedings before the Court, as observed in paragraph 33 of this judgment. Secondly, according to the case-law of the Court the purpose of the pre-litigation procedure is to give the State concerned the opportunity, on the one hand, to comply with its obligations under Community law and, on the other hand, to avail itself of its right to defend itself against the complaints formulated by the Commission (Case C-117/02 *Commission* v *Portugal*

[2004] ECR I-5517, paragraph 53). Furthermore, the formal notice cannot be subject to such strict requirements of precision as is the reasoned opinion, since the formal notice cannot, of necessity, contain anything more than an initial brief summary of the complaints (see to that effect Case C-279/94 *Commission* v *Italy*, paragraph 15).

37 As the Advocate General observed at point 24 of her Opinion, whilst it is true that the aim of the letter of formal notice is to delimit the subject-matter of the dispute, the Commission is obliged to specify precisely in the reasoned opinion the grounds of complaint which it has already raised more generally in the letter of formal notice. However, that does not prevent it from restricting the subject-matter of the dispute or expanding it to cover subsequent measures that are essentially the same as the measures challenged in the formal notice.

The plea of inadmissibility alleging an insufficient statement of grounds in the application

38 The second plea of inadmissibility raised by the Spanish Government alleges infringement of Article 38(1)(c) of the Rules of Procedure of the Court of Justice on the one hand and on the other hand an insufficient statement of grounds in the application and failure to prove the alleged failures to fulfil obligations.

39 As regards the first point, it must be stated that the application meets the requirements set out in Article 38(1)(c) of the Rules of Procedure of the Court of Justice as regards the subject-matter of the proceedings and a summary of the pleas in law.

40 With regard to the second point, it must be noted that, as the Commission states, the ground of complaint set out therein falls to be examined in the context of the substance of the case. Therefore, that plea of inadmissibility cannot be upheld.

41 In the light of the foregoing, it must be held that the action is inadmissible to the extent that it is founded on the permit of 24 May 2001 concerning the AV-10.198 hunting area situated in the territory of the municipality of Mediana de la Voltoya in the province of Ávila and is admissible as to the remainder.

The merits of the action

42 It must therefore be considered whether the permit of 13 December 2002 ('the contested permit') which relates to the SA-10.328 hunting area situated in the territory of the municipality of Aldeanueva de la Sierra in the province of Salamanca ('the area concerned') was issued by the Spanish authorities in breach of the directive.

43 The Commission puts forward two complaints in support of its action. First, the permit to use stopped snares in the area concerned entails the deliberate capture or killing of otters, in breach of Article 12(1)(a) of the directive. Secondly, the Commission submits that the Kingdom of Spain also infringed the provisions in Annex VI(a) to the directive as that permit relates to a means of hunting which is non-selective according to its principle and its conditions of use.

The complaint concerning infringement of Annex VI(a) to the directive

44 By its second complaint, which it is appropriate to examine first, the Commission submits that the permit to use stopped snares infringes Annex VI(a) to the directive since it involves a means of hunting which is non-selective according to its principle and its conditions of use.

45 Under the directive the methods and means of capture and killing listed in Annex VI(a) are prohibited only as regards the cases referred to in Article 15 of the directive, which is the only article referring to that annex.

46 It is clear from that provision that it is prohibited to use non-selective means, in particular those listed in Annex VI(a) to the directive, to capture or kill species of wild fauna listed in Annex V(a) to the directive and, where in accordance with Article 16, derogations are applied, to take, capture or kill species listed in Annex IV(a) to the directive.

47 It must be borne in mind that the contested permit was issued for fox hunting and that the fox is an animal species which is not referred to in either Annex IV(a) or Annex V(a) to the directive. It follows that the prohibition with regard to non-selective means of hunting is not binding on the Spanish authorities in the present case. Therefore, the complaint concerning infringement of Annex VI(a) to the directive must be rejected.

The complaint concerning infringement of Article 12(1)(a) of the directive

48 It must be borne in mind that under Article 12(1)(a) of the directive Member States are required to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to the directive in their natural range. That system must, according to that provision, prohibit all forms of deliberate capture or killing of the species referred to.

49 In order to assess the validity of the complaint put forward by the Commission, the presence of the otter in the area concerned must be ascertained, and the circumstances under which the capture or killing of that species is deliberate must be established.

The presence of the otter in the area concerned

— Arguments of the parties

50 First, the Commission submits that, in its reply to the reasoned opinion, the Spanish Government acknowledged the presence of the otter in the area concerned as in that response it stated that the otter may be found throughout virtually the whole of the territory of Castilla y Léon.

51 Secondly, the presence of the otter is borne out by the scientific information sheets 'Natura 2000' which the Kingdom of Spain submitted to the Commission concerning the sites of Quilamas (Salamanca) and Encinares de los ríos Adaja y Voltoya (Ávila), the site of Quilamas being adjacent to the area concerned.

52 Thirdly, waterways, which are a necessary component of the habitat of otters, cross that area.

53 Lastly, monographs on the position of otters in Spain also confirm that that species is to be found in the area concerned.

54 In view of all those factors, the Commission submits that if the Spanish Government considers that the otter is not to be found in that area, it must prove it by submitting a technical study carried out on site.

55 The Spanish Government submits that there are no otters in the area concerned. In reply to the first argument put forward by the Commission, it observes that acknowledging that a particular animal species is present in a territory does not imply that that species occupies all the habitats in that territory.

56 The Spanish Government also states that waterways are a necessary component of the habitat of otters whereas the area concerned is neither a coastal area nor an area adjoining a river. It adds that the rivers and streams which cross that area are of a seasonal nature as they dry up during the summer months.

57 Furthermore, monographs produced by the Commission prove that there are no otters in the area concerned.

58 Lastly, the Spanish Government considers that there is in that area merely a likelihood that otters are to be found and that the Commission has not established their presence in so far as it does not have either direct evidence, such as the capture of specimens of that species, or indirect evidence, such as the existence of otter tracks.

— Findings of the Court

59 It must be borne in mind that, according to the settled case-law of the Court, in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove that the obligation has not been fulfilled without being able to rely on any presumption (see to that effect, inter alia, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-194/01 *Commission* v *Austria* [2004] ECR I-4579, paragraph 34; and Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 75).

60 As regards the scientific information sheets 'Natura 2000', it must be stated that, as the Advocate General observed in point 71 of her Opinion, they cover the Quilamas site, which has a surface area of over 10 000 hectares. Admittedly, the area concerned is situated in the immediate vicinity of that site, to the north-west. However, it is common ground that the largest waterways on that site, including the Arroyo de las Quilamas, flow to the south-east and are separated from the area concerned by a range of hills with a height of several hundred metres. Therefore, it is unlikely that otters from the populations living in the network of waterways on the Quilamas site would move into the area concerned.

61 Furthermore, as the Spanish Government, which has not been contradicted on that point by the Commission, has stated, although waterways are a necessary component of the habitat of otters those which cross the area concerned or flow near it are of a seasonal nature.

62 Lastly, as regards the monographs produced by the Commission, it must be stated that they contain contradictory information so that no certainty regarding the presence of the otter in the area concerned is apparent from them.

63 It is clear from the foregoing that the Commission has not furnished evidence to the requisite legal standard as to the presence of otters in the area concerned as the evidence produced proves at the very most that there is a possibility that they are to be found in that area.

Whether the capture of otters is deliberate

— Arguments of the parties

64 The Commission submits that the capture of otters cannot be regarded as accidental and therefore that the condition as to intention which is provided for in Article 12(1)(a) of the directive is met if the Spanish authorities, although they know that otters are present in an area, nevertheless authorise for the purposes of fox hunting the use of a non-selective method of capture there which may adversely affect otters.

65 Thus, by issuing the contested permit, the Kingdom of Spain failed to fulfil the obligation arising out of Article 12(1)(a) of the directive to forestall adverse consequences for otters and created a risk of specimens of that species being deliberately captured.

66 The Spanish Government contends that the contested permit was issued for fox hunting, not otter hunting. It acknowledges the possibility of an indirect effect on otters provided that that animal species is to be found in the area concerned — a circumstance which has not, however, been established.

67 Furthermore, the Spanish Government considers that the stopped snare is a selective means of hunting both according to its principle, as the stop serves to prevent the captured animal's death, and as regards the conditions of use imposed by the contested permit such as the daily inspection of snares, the requirement that any animal which is not covered by that permit be immediately freed or the specific manner in which those snares are set.

— Findings of the Court

68 Under Article 12(1)(a) of the directive, Member States are to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range, prohibiting all forms of deliberate capture or killing.

69 With respect to the condition as to 'deliberate' action provided for in that provision, it is clear from a reading of the different language versions thereof that 'deliberate' refers to both the capture and the killing of protected animal species.

70 It must also be borne in mind that the Court has categorised as deliberate disturbance within the meaning of Article 12(1)(b) of the directive matters such as the use of mopeds on a beach notwithstanding warnings as to the presence of protected sea turtles' nests and the presence of pedalos and small boats in the sea area of the beaches concerned, and has held that a Member State fails to fulfil its obligations under Article 12(1)(b) and (d) of the directive where it does not take all the requisite specific measures to prevent the deliberate disturbance of the animal species concerned during its breeding period or the deterioration or destruction of

its breeding sites (see Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraphs 36 and 39, and the Opinion of Advocate General Léger in that case, at point 57).

71 For the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.

72 It is common ground, however, that the contested permit related to fox hunting. Accordingly, the permit in itself is not intended to allow the capture of otters.

73 Furthermore, it must be borne in mind that the presence of otters in the area concerned has not been formally proven, so that it has also not been established that by issuing the contested permit for fox hunting the Spanish authorities knew that they risked endangering otters.

74 It must therefore be held that the requisite criteria, as set out in paragraph 71 of this judgment, for fulfilling the condition relating that the capture or killing of a specimen belonging to a protected animal species is deliberate have not been met in the present case.

75 The Commission's action must therefore be dismissed.

Costs

76 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. Dismisses the action;

2. Orders the Commission of the European Communities to pay the costs.

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

23 March 2006 *

In Case C-209/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 12 May 2004,

Commission of the European Communities, represented by M. van Beek and B. Schima, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Austria, represented by E. Riedl, J. Müller and K. Humer, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, P. Kūris (Rapporteur), G. Arestis and J. Klučka, Judges,

Advocate General: J. Kokott,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 6 October 2005,

after hearing the Opinion of the Advocate General at the sitting on 27 October 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court for a declaration that:

— by failing to include in the area of the Lauteracher Ried national nature reserve ('the Lauteracher Ried') that is classified as a special protection area ('SPA') the Soren and Gleggen-Köblern sites which, according to scientific criteria, are,

together with that SPA, among the most suitable territories in number and size for the purposes of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended by Commission Directive 97/49/EC of 29 July 1997 (OJ 1997 L 223, p. 9) ('the Birds Directive'), and

— by failing, when authorising the planned construction of the federal S 18 Lake Constance dual carriageway ('the S 18 carriageway'), to comply properly and fully with the requirements laid down in Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive') in the case of execution of a project despite a negative assessment of the environmental implications for the site,

the Federal Republic of Austria has failed to fulfil its obligations under Article 4(1) and (2) of the Birds Directive and Article 6(4), in conjunction with Article 7, of the Habitats Directive.

Legal framework

The Act of Accession of the Republic of Austria to the European Union

2 The Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('the Act of Accession') was signed on 24 June 1994 and entered into force on 1 January 1995.

3 According to Article 2 of the Act of Accession, 'from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act'.

4 Article 168 of the Act of Accession provides:

'The new Member States shall put into effect the measures necessary for them to comply, from the date of accession, with the provisions of directives and decisions within the meaning of Article 189 of the EC Treaty and of Article 161 of the Euratom Treaty, and with recommendations and decisions within the meaning of Article 14 of the ECSC Treaty, unless a time-limit is provided for in the list of Annex XIX or in any other provisions of this Act.'

The Birds Directive

5 According to Article 1(1), the Birds Directive 'relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation'.

6 The corncrake (*Crex crex*) is a species added to Annex I to the Birds Directive ('Annex I') by Commission Directive 85/411/EEC of 25 July 1985 amending Directive 79/409 (OJ 1985 L 233, p. 33).

7 Article 4 of the Birds Directive provides:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. ...

...

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

The Habitats Directive

8 Article 6(3) and the first paragraph of Article 6(4) of the Habitats Directive provide:

'3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in

combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.'

9 Article 7 of the directive provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

Background to the dispute

10 The Lauteracher Ried is situated in the Province of Vorarlberg. After the Republic of Austria acceded to the European Union, the Austrian Government notified the

Commission for the first time of the classification of that nature reserve as an SPA on 7 June 1995 and it subsequently submitted certain additional documents. The Soren and Gleggen-Köblern sites are not included within the boundaries of that SPA.

11 As regards the construction project for the S 18 carriageway, the procedure for determining the road line was commenced in 1992. Following a discussion held on 29 April 1992 with the administration of the district of Dornbirn, the project was completely revised in order to take account of the report drawn up by the Province of Vorarlberg's official expert for the protection of nature and landscapes. The procedure for presenting the project and hearing the parties concerned with a view to determining the road line began on 8 March 1994 pursuant to the 1971 Law on federal roads. It ended with the determination of the road line by order of 8 April 1997 of the Federal Minister for Economic Affairs. At that stage of the project, the Austrian authorities reached the conclusion that there were no alternative routes for the S 18 carriageway.

12 On 27 January 1999, the procedure for authorisation of the construction of the carriageway began. By decision of 6 July 2001, the project for construction of the carriageway was authorised by the administrations of the districts of Bregenz and Dornbirn, pursuant to the legislation of the Province of Vorarlberg. Given the abovementioned order of the Federal Minister for Economic Affairs, that decision could not adopt a road line other than the one which had been chosen.

13 That decision was the subject of an appeal to the government of the Province of Vorarlberg. On 21 February 2003, the government adopted a decision confirming the decision, but the execution of the government's decision was suspended on 29 August 2003 by the Verwaltungsgerichtshof (Administrative Court). The project for the construction of the S 18 carriageway is currently blocked and cannot proceed.

Pre-litigation procedure

14 Following a complaint, on 12 November 2001 the Commission sent a letter to the Austrian authorities concerning the insufficient classification, from an ornithological point of view, of the Lauteracher Ried SPA, the feared negative implications of the S 18 carriageway construction project for the corncrake and the other bird populations to be safeguarded within that area, and also other issues relating to the protection of that area.

15 After examining the Austrian Government's response, sent to the Commission on 1 February 2002, on 27 June 2002 the Commission sent the Republic of Austria a letter of formal notice. Not satisfied with the explanations provided by the Austrian Government, on 11 July 2003 the Commission issued a reasoned opinion calling upon the Republic of Austria to take the measures necessary to comply therewith within two months of its notification.

16 Taking the view that the arguments relied on by the Republic of Austria in its response of 26 September 2003 to the reasoned opinion were not convincing and considering that the infringement alleged was continuing, the Commission decided to bring the present action.

The action

17 The Commission puts forward two complaints in support of its action. First, it criticises the Republic of Austria for not having complied with the provisions of Article 4(1) and (2) of the Birds Directive concerning the procedure for selection and classification of an SPA. Second, it pleads that the requirements laid down in Article 6(4) of the Habitats Directive were not complied with when the project for the construction of the S 18 carriageway was authorised.

The first complaint: failure to comply with Article 4(1) and (2) of the Birds Directive

Arguments of the parties

18 By its first complaint, the Commission maintains that the current classification, and definition of the boundaries, of the Lauteracher Ried SPA do not comply with the requirements of protection and sustainable conservation of the bird species present in that area, particularly the corncrake and other migratory grassland-nesting species. According to the Commission, in order to meet the requirements of Article 4(1) and (2) of the Birds Directive, the surface area of that SPA must be expanded to include the Soren and Gleggen-Köblern sites.

19 In support of that complaint, the Commission submits, first, that the decisive factor for defining the boundaries of the SPA is the presence of bird species to be protected. According to the scientific information and the results of monitoring carried out between 2000 and 2002, those sites are not only habitats but also form part of the principal breeding ground for the corncrake and other migratory grassland-nesting species. The Commission also states that the meadows situated inside and around the Lauteracher Ried site offer, in terms of bird protection, a uniform natural habitat that is particularly appropriate structurally and they are used by the same bird populations. It adds that the corncrakes present in the Rhine Valley, in the territory of the Province of Vorarlberg, are a closely-knit group of birds.

20 Next, the Commission maintains that the obligation to designate as an SPA all areas which seem most suitable on the basis of ornithological criteria does not come to an end with the first declaration made. The objective of conservation of endangered

species requires re-examination of a declaration in the light of more recent scientific knowledge and a possible re-definition of the boundaries of an existing SPA.

21 Lastly, the fact that the Republic of Austria classified as protection areas the sites of Bangs and Matschels, which are also situated in the Province of Vorarlberg, as part of a conservation effort for the corncrake, in no way affects that Member State's obligation to do likewise for the Soren and Gleggen-Köblern sites, which are adjacent to the declared SPA.

22 The Republic of Austria states that the currently-defined boundaries of the Lauteracher Ried SPA constitute the best possible means of complying with the requirements of the Birds Directive for the protection and conservation of the corncrake and regularly-occurring migratory bird species in the Rhine Valley in the Province of Vorarlberg.

23 It submits that it has fulfilled its obligations under the Birds Directive by defining the boundaries for that SPA together with the Bangs and Matschels protection area for fauna, flora, habitats and birds, having thereby classified as an SPA and recognised as such the territories of the Rhine Valley situated in the Province of Vorarlberg which are the most suitable in number and size for the conservation of the corncrake referred to in Annex I and of regularly-occurring migratory species.

24 The Republic of Austria states that the boundaries of the SPA were defined on the basis of scientific evidence available at the time of the choice and classification of that area; that evidence is recognised as being reliable in the case-law of the Court of Justice and it led to the classification of that area alone as being the most important breeding ground for meadow birds in the Province of Vorarlberg.

25 It adds that, in classifying that area, it relied solely on the ornithological or ecological aspects which may be inferred from Article 4(1) and (2) of the Birds Directive. In that context, it maintains that an untouched natural setting essential for the development of the corncrake is concentrated only in the Lauteracher Ried SPA, and that that setting does not include the litter meadows situated in the Soren and Gleggen-Köblern sites.

26 According to the Republic of Austria, several criteria must be considered in order to determine the most suitable territories, in particular the fact that two species of birds occur in a given area or part of that area. However, that criterion alone is not decisive for compliance with the requirements of the Birds Directive. To be included in the most suitable territories within the meaning of that directive, the area must also satisfy each of a number of other ornithological or ecological criteria. It is also necessary to consider and assess whether the area is suitable in size and from a quantitative point of view, and whether the condition it is in and its environment are suitable. This aspect includes existing harm to the area due to recreational activities, management of the area or other factors, and the deterioration of the habitat resulting therefrom. According to the Republic of Austria, because of the existing pollution and constraints and the current quality of the two sites of Soren and Gleggen-Köblern, they do not meet the relevant criteria to be classified as an SPA under the Birds Directive.

27 In that context, the Republic of Austria states that the taking into account, if only indirectly, of socio-economic interests may play a role in the assessment of whether an area is suitable in size and adds that this is the case for interference with the legal rights of individuals.

28 According to the Republic of Austria, the complaint that it was obliged to amend subsequently and make constant adaptations to the Lauteracher Ried SPA has no legal basis. Such an obligation could be difficult to reconcile with the principle of legality of administrative actions and contrary to the Court of Justice's case-law.

29 The Republic of Austria adds that although the Soren and Gleggen-Köblern sites are not among the most suitable territories within the meaning of the fourth subparagraph of Article 4(1) of the Birds Directive, they are not entirely unprotected. In fact, during the appeal procedure relating to the project for the construction of the S 18 carriageway, they were subject to the protection scheme provided for in the second sentence of Article 4(4).

Findings of the Court

30 In order to decide the present dispute, it is appropriate to begin by recalling the principles governing the Member States' obligations concerning the choice and classification of SPAs as imposed by the Birds Directive.

31 It follows from the fourth subparagraph of Article 4(1) of that directive that the Member States must classify as SPAs the most suitable territories in number and size for the conservation of the protected species listed in Annex I. In doing so, they must take into account those species' protection requirements in the geographical sea and land area where that directive applies. Under Article 4(2), Member States must take similar measures for regularly-occurring migratory species not listed in Annex I as regards their breeding, moulting and wintering areas and staging posts along their migration routes.

32 According to the settled case-law of the Court, Article 4(1) and (2) of the Birds Directive requires the Member States to provide SPAs with a legal status protecting them that is capable, in particular, of ensuring both the survival and reproduction of the bird species listed in Annex I and the breeding, moulting and wintering of regularly-occurring migratory species not listed in Annex I (see Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 21, and case-law cited).

33 The Court has also held that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs concerns not the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I (see, inter alia, Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraph 61).

34 It should also be borne in mind that, according to the results of scientific studies and a monitoring exercise which were submitted by the Commission during the procedure and have not been contested by the Austrian Government, in the years 2000 to 2002, respectively four or five, four and three singing male corncrakes were observed within the 580-hectare Lauteracher Ried SPA. The sightings concerning the Soren and Gleggen-Köblern sites, covering 64 and 352 hectares, were only slightly lower, the birds observed numbering four, two and three, respectively.

35 Moreover, as the Commission has maintained, without being contradicted on this point either, in 2001 there were likewise large numbers of migratory common snipe (*Gallinago gallinago*), Northern lapwings (*Vanellus vanellus*) and Eurasian curlews (*Numenius arquata*) breeding in the two sites not designated as SPAs by the Austrian authorities. Within the Lauteracher Ried SPA there were three to five pairs of common snipe nesting, 11 or 12 pairs of Northern lapwings and three pairs of Eurasian curlews. In the Soren and Gleggen-Köblern sites, respectively, there were three and three or four pairs of common snipe, six and nine pairs of Northern lapwings and one (probably) and eight pairs of Eurasian curlews.

36 It follows, as observed by the Advocate General in point 32 of her Opinion, that the Soren and Gleggen-Köblern sites are of at least comparable importance to the Lauteracher Ried SPA for both the corncrake and migratory bird species not listed in Annex I, such as the common snipe, Northern lapwing and Eurasian curlew. Moreover, the figures provided by the Austrian Government in the standard data

form relating to those last three species are reached only if account is taken also of the land situated outside that SPA.

37 As regards the Austrian Government's argument that the Soren and Gleggen-Köblern sites are not the most suitable ones for protecting the abovementioned bird species due to the existing pollution and constraints, as well as the condition and current quality of those sites, it should be borne in mind that, as just mentioned in paragraphs 34 and 35 of this judgment, those sites host, in a smaller area than the Lauteracher Ried SPA, a similar number of nesting birds to that observed in the SPA.

38 Accordingly, the Court finds that, on the basis of ornithological criteria, the Soren and Gleggen-Köblern sites, in the same way as the Lauteracher Ried SPA, are among the most suitable territories in number and size for classification as SPAs for the purposes of Article 4(1) and (2) of the Birds Directive.

39 This finding cannot be affected by the argument relied on by the Austrian Government to the effect that it is appropriate to take account, if only indirectly, of economic and social criteria in the necessary assessment of the characteristics of the area to be classified as an SPA.

40 According to the settled case-law of the Court, a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of the Birds Directive or as constituting imperative reasons of overriding public interest of the kind referred to in the first subparagraph of Article 6(4) of the Habitats Directive (see, in particular, Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraphs 31 and 42).

41 Regarding the Austrian Government's argument that the results of the on-site monitoring do not lead to the conclusion that the Soren and Gleggen-Köblern sites are suitable for the conservation of the bird species to be protected, the Court finds that that argument is not such as to provide scientific justification for excluding those sites from the SPA. On the contrary, the classification of those sites as SPAs should safeguard the conservation status of the corncrake, a species listed in Annex I, and other regularly-occurring migratory bird species, in accordance with the objectives of the Birds Directive.

42 Nor does the Court accept the Austrian Government's argument that the Commission is incorrect in maintaining that the Lauteracher Ried SPA must continually be amended and adapted, since such a requirement has no legal basis.

43 Although it is common ground that the obligation to classify the most suitable territories for establishing an SPA entered fully into force with respect to the Republic of Austria on 1 January 1995, the date of its accession to the European Union, such an obligation does not end on that date. Neither the Birds Directive nor the wording of Article 4 thereof contains the slightest indication that the effects of the obligation to transpose that directive were exhausted on that date. Moreover, as noted by the Advocate General in point 39 of her Opinion, it would hardly be compatible with the objective of effective protection of birds if outstanding areas for the conservation of the species to be protected were not brought under protection merely because the outstanding nature of a site came to light only after transposition of the Birds Directive.

44 As to the Austrian Government's argument that it relied on the study carried out in 1995 by the Federal Environment Agency in collaboration with BirdLife, entitled *Important Bird Areas in Österreich*, because it was the only reliable inventory and scientific assessment existing at the time the Lauteracher Ried site was selected and

classified as an SPA, it need merely be stated that, as rightly pointed out by the Commission, the obligation to classify is not limited by the state of scientific knowledge at any given time.

45 The case-file shows that other scientific ornithological studies and expert reports, as well as the results of monitoring more recent than that on which the classification of the Lauteracher Ried SPA was based, are available. Accordingly, it is on the basis of that evidence, the accuracy of which is not disputed by the Republic of Austria, that the classification of the SPA had to be reconsidered.

46 Nor can the Republic of Austria maintain that, having classified the Bangs and Matschels sites, where the corncrake is also present, as protection areas, it no longer has to classify the Soren and Gleggen-Köblern sites as SPAs.

47 As the Court has already held, Member States are obliged to classify as SPAs all the sites which, applying ornithological criteria, appear to be the most suitable for conservation of the species in question (see, inter alia, *Commission* v *Netherlands*, paragraph 62).

48 Lastly, regarding the Austrian Government's argument that the Soren and Gleggen-Köblern are not left entirely unprotected, suffice it to recall that Article 4(1) of the Directive requires Member States to classify as SPAs the most suitable territories in number and size for the conservation of the species mentioned in Annex I, an obligation which it is not possible to avoid by adopting other special conservation methods (*Commission* v *Netherlands*, paragraph 55).

49 In the light of the foregoing, the Court finds that first complaint put forward by the Commission is well founded.

The second complaint: failure to comply with the requirements of Article 6(4) of the Habitats Directive

50 By its second complaint, the Commission maintains that the Republic of Austria did not comply with its obligations under Article 6(4), in conjunction with Article 7, of the Habitats Directive when the project for the construction of the S 18 carriageway was authorised, having regard to the requirements for biotope and habitat protection set for the Lauteracher Ried SPA.

51 The Commission states, first, that no specific and detailed assessment in accordance with the objectives of the Birds Directive was carried out before May 2000. It maintains that, when the environmental study led to a negative opinion from the Province of Vorarlberg's official expert in May 2000, due to the implications of the project for the construction of the S 18 carriageway on the SPA, no study was undertaken to ascertain whether alternative solutions could be envisaged for the road line. Next, the Commission states that, after the decision authorising construction, taken on 6 July 2001, it was not directly informed of the compensatory measures taken to counter the adverse impact of construction. Lastly, the Commission states that it has not been established that all necessary compensatory measures have actually been taken to ensure that the overall coherence of Natura 2000 is protected.

52 The Republic of Austria contests all of the submissions put forward by the Commission in support of the second complaint.

The temporal applicability of the Habitats Directive

53 Since it follows from paragraph 11 of this judgment that certain events pertaining to the project for the construction of the S 18 carriageway occurred before the date on which the Republic of Austria acceded to the European Union, it is appropriate, before ruling on the alleged infringement of the Habitats Directive, to consider whether it is applicable to the facts of the dispute which gave rise to the Commission's action.

54 It is common ground that the project for the construction of the S 18 carriageway began in 1992. The procedure was suspended and then resumed on 8 March 1994, the date on which it was formally presented and made subject to an assessment procedure pursuant to the 1971 Law on federal roads.

55 The case-file also shows that the overall federal expert report was made public in the same year, that is, prior to 1 January 1995, when the Republic of Austria acceded to the European Union.

56 According to the Court's settled case-law, the principle that projects likely to have significant effects on the environment must be subjected to an environmental assessment does not apply where the application for authorisation for a project was formally lodged before the expiry of the time-limit for transposition of a directive (see, with respect to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraphs 29 and 32, and Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923, paragraph 23).

57 The Court has held that that formal criterion is the only one which accords with the principle of legal certainty and preserves a directive's effectiveness. The reason for that is that a directive such as the Habitats Directive is primarily designed to cover large-scale projects which will most often require a long time to complete. It would therefore not be appropriate for the relevant procedures, which are already complex at national level and which were formally initiated prior to the date of the expiry of the period for transposing the directive, to be made more cumbersome and time-consuming by the specific requirements imposed by the directive and for situations already established to be affected by it (see, by analogy, *Gedeputeerde Staten van Noord-Holland*, paragraphs 23 and 24).

58 Both Directive 85/337 and the Habitats Directive pertain to the assessment of the effects of certain public and private projects on the environment. In both cases, the assessment procedure takes place before the project is finally decided upon. The results of that assessment must be taken into consideration when the decision on the project is made, and the decision may be amended depending on the results. The various phases of examination of a project are so closely connected that they represent a complex operation. The fact that the content of some requirements differs does not affect this assessment. It follows that this complaint must be considered as at the date on which the project was formally presented, namely the date referred to in paragraph 54 of this judgment.

59 Next, it should be borne in mind that, in accordance with the provisions of acts of accession, the rights and obligations resulting from Community law are, save where otherwise provided, immediately applicable in the new Member States (see, to that effect, Case C-179/00 *Weidacher* [2002] ECR I-501, paragraph 18).

60 It follows from the Act of Accession that the obligations under the Birds Directive and the Habitats Directive entered into force with respect to the Republic of Austria on 1 January 1995 and that no derogation or transitional period was granted to it.

61 Accordingly, the procedure for authorisation of the project for the construction of the S 18 carriageway was formally initiated prior to the date of accession of the Republic of Austria to the European Union.

62 It follows that, in the present case, in accordance with the case-law referred to in paragraph 56 of this judgment, the obligations under the Habitats Directive did not bind the Republic of Austria and that the project for the construction of the S 18 carriageway was not subject to the requirements laid down in that directive.

63 In the light of the foregoing, the Commission's second complaint is not well founded.

64 Consequently, the Court finds that, by failing to include in the Lauteracher Ried SPA the Soren and Gleggen-Köblern sites which, according to scientific criteria, are, together with that SPA, among the most suitable territories in number and size for the purposes of Article 4(1) and (2) of the Birds Directive, the Republic of Austria has failed to fulfil its obligations under those provisions of that directive.

Costs

65 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under the first subparagraph of Article 69(3) of the same rules, the Court may nevertheless order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads, or where the

circumstances are exceptional. Since the Commission and the Republic of Austria have each been partially unsuccessful in this case, they should bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by failing to include in the special protection area at the Lauteracher Ried national nature reserve the Soren and Gleggen-Köblern sites which, according to scientific criteria, are, together with that special protection area, among the most suitable territories in number and size for the purposes of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, as amended by Commission Directive 97/49/EC of 29 July 1997, the Republic of Austria has failed to fulfil its obligations under those provisions of that directive;**

2. **Dismisses the remainder of the action;**

3. **Orders the Commission of the European Communities and the Republic of Austria to bear their own costs.**

[Signatures]

ARRÊT DE LA COUR (cinquième chambre)

16 mars 2006 (*)

«Manquement d'État – Directive 92/43/CEE – Conservation des habitats naturels ainsi que de la faune et de la flore sauvages – Protection des espèces»

Dans l'affaire C-518/04,

ayant pour objet un recours en manquement au titre de l'article 226 CE, introduit le 21 décembre 2004,

Commission des Communautés européennes, représentée par MM. M. van Beek et M. Konstantinidis, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République hellénique, représentée par Mme E. Skandalou, en qualité d'agent, ayant élu domicile à Luxembourg,

partie défenderesse,

LA COUR (cinquième chambre),

composée de M. J. Makarczyk, président de chambre, MM. R. Schintgen et J. Klučka (rapporteur), juges,

avocat général: M. A. Tizzano,

greffier: Mme C. Strömholm, administrateur,

vu la procédure écrite et à la suite de l'audience du 26 janvier 2006,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1 Par sa requête, la Commission des Communautés européennes demande à la Cour de constater que, en ne prenant pas les mesures nécessaires pour instaurer et mettre en œuvre un système efficace de protection stricte de la vipère Vipera schweizeri sur l'île de Milos afin d'éviter toute perturbation intentionnelle de cette espèce, notamment durant la période de reproduction, de dépendance et d'hibernation, ainsi que toute détérioration ou destruction des sites de reproduction ou des aires de repos, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 12, paragraphe 1, sous b) et d), de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la

conservation des habitats naturels ainsi que de la faune et de la flore sauvages (JO L 206, p. 7, ci-après la «directive»).

Le cadre juridique

2 L'article 12, paragraphe 1, de la directive dispose:

«Les États membres prennent les mesures nécessaires pour instaurer un système de protection stricte des espèces animales figurant à l'annexe IV point a), dans leur aire de répartition naturelle, interdisant:

[...]

b) la perturbation intentionnelle de ces espèces notamment durant la période de reproduction, de dépendance, d'hibernation et de migration;

[...]

d) la détérioration ou la destruction des sites de reproduction ou des aires de repos.»

3 La vipère Vipera schweizeri figure à l'annexe IV, sous a), de ladite directive en tant qu'espèce animale d'intérêt communautaire qui nécessite une protection stricte.

La procédure précontentieuse

4 Estimant que la République hellénique avait manqué aux obligations qui lui incombent en vertu de l'article 12, paragraphe 1, sous b) et d), de la directive, la Commission a engagé la procédure en manquement prévue à l'article 226 CE.

5 Après avoir mis la République hellénique en demeure de présenter ses observations, la Commission a, le 19 décembre 2003, émis un avis motivé invitant cet État membre à prendre les mesures nécessaires pour s'y conformer dans un délai de deux mois à compter de la notification de cet avis.

6 N'ayant reçu aucun élément d'information lui permettant de conclure que la République hellénique s'était conformée à ses obligations résultant de la directive, la Commission a décidé d'introduire le présent recours.

Sur le recours

Argumentation des parties

7 La Commission considère que la réglementation grecque n'assure pas une protection stricte de la vipère Vipera schweizeri en ce qu'elle se limiterait à introduire des principes généraux et des orientations ainsi qu'à fixer des règles isolées, sans instaurer un régime spécifique, préventif et juridiquement contraignant. À cet égard, elle invoque l'arrêt du 30 janvier 2002, Commission/Grèce (C-103/00, Rec. p. I-1147, points 29 et 30) ainsi que les conclusions de l'avocat général Léger (point 43) rendues dans la même affaire.

8 Le gouvernement hellénique ne conteste pas la nécessité de prendre des mesures aux fins de protéger l'espèce en question mais estime que le cadre législatif en vigueur, les différents programmes et activités

de gestion en cours ainsi qu'un projet d'arrêté interministériel sont suffisants pour assurer cette protection, notamment en prévoyant, préalablement à l'autorisation de certains projets, travaux et activités, l'évaluation de leur incidence sur l'environnement ainsi qu'en envisageant des actions spécifiques de protection.

9 Ledit gouvernement fait également valoir que le bon état de l'environnement et, en particulier, la stabilité dans le temps de la population des vipères concernées attestent de la qualité des mesures qui ont été adoptées.

10 La Commission rétorque que ces circonstances ne sauraient dispenser la République hellénique d'adopter un cadre juridique propre à instaurer une protection stricte de l'espèce Vipera schweizeri. La Commission se réfère, à cet égard, aux points 30 et 31 de l'arrêt Commission/Grèce, précité.

11 À l'audience, elle a fait également valoir que les mesures adoptées de manière isolée par la République hellénique ne permettent pas de garantir la protection de ladite espèce, dans la mesure où des mines seraient exploitées dans la zone regroupant les sites de reproduction et les aires de repos de cette même espèce et seraient à l'origine de perturbations intentionnelles de celle-ci. De même, des caprins et des bovins seraient laissés en pâture de manière excessive dans ladite zone, ce qui serait susceptible de nuire à la protection de l'espèce Vipera schweizeri.

Appréciation de la Cour

12 À titre liminaire, il convient de rappeler que, selon une jurisprudence constante, l'existence d'un manquement doit être appréciée en fonction de la situation de l'État membre telle qu'elle se présentait au terme du délai imparti dans l'avis motivé et que les changements intervenus par la suite ne sauraient être pris en compte par la Cour (voir, notamment, arrêts Commission/Grèce, précité, point 23, et du 19 juin 2003, Commission/France, C-161/02, Rec. p. I-6567, point 6).

13 Dès lors, il n'y a pas lieu d'examiner si le projet d'arrêté interministériel, dont le gouvernement hellénique a fait mention au cours de la procédure écrite et orale et qui, selon lui, a pour objet de codifier ou compléter des mesures de protection déjà en vigueur, satisfait, en ce qui concerne la vipère Vipera schweizeri, aux exigences de protection énoncées à l'article 12, paragraphe 1, sous b) et d), de la directive.

14 S'agissant des autres mesures visant, selon le gouvernement hellénique, à protéger cette espèce, il importe de rappeler que l'article 12, paragraphe 1, sous b) et d), de la directive impose l'adoption des mesures nécessaires pour instaurer un système de protection stricte des espèces animales figurant à l'annexe IV, sous a), de la directive dans leur aire de répartition naturelle, interdisant, d'une part, la perturbation intentionnelle desdites espèces, notamment durant la période de reproduction, et, d'autre part, la détérioration ou la destruction des sites de reproduction ou des aires de repos.

15 À cet égard, il convient de relever, en premier lieu, que l'île de Milos est une région essentielle pour la reproduction et la survie de l'espèce protégée Vipera schweizeri figurant à ladite annexe IV, sous a). En effet, d'une part, il est constant que la partie occidentale de Milos regroupe, à elle seule, plus de la moitié de la population mondiale de cette espèce. D'autre part, un des trois sites proposés par les autorités helléniques comme sites d'importance communautaire pour le réseau Natura 2000 aux fins de la protection de la vipère Vipera schweizeri est situé à Milos.

16 En deuxième lieu, un système de protection stricte, au sens de l'article 12, paragraphe 1, sous b) et d), de la directive, suppose l'adoption de mesures cohérentes et coordonnées, à caractère préventif, ainsi

que l'a relevé l'avocat général Léger dans ses conclusions dans l'affaire Commission/Grèce, précitée (points 43 et 44).

17 En troisième lieu, la loi-cadre grecque n° 1650/1986, relative à la protection de l'environnement, exige elle-même, d'une part, l'élaboration d'un plan de gestion, ou «étude environnementale spéciale», en vue de l'adoption ultérieure d'un décret présidentiel relatif à la protection efficace des espèces ainsi que de leurs habitats qui fixera les conditions, restrictions et interdictions nécessaires à cette protection, et, d'autre part, la création d'un organisme de gestion. À titre transitoire, cette loi-cadre prévoit que, jusqu'à l'adoption de ce décret, lesdites conditions, restrictions et interdictions peuvent être fixées par arrêté ministériel. Or, il est constant que, à l'expiration du délai fixé par l'avis motivé, toutes les mesures nécessaires n'avaient pas été prises en ce sens.

18 À cet égard, le gouvernement hellénique a reconnu, au cours de la procédure écrite, que les lignes directrices fixées par le cadre juridique actuellement en vigueur méritent, pour certaines, d'être précisées et a ajouté, à l'audience, que le projet d'arrêté interministériel ayant pour objet de codifier mais également de compléter les mesures prises en application de la loi-cadre n° 1650/1986 et d'assurer ainsi une protection plus spécifique et plus stricte de la partie occidentale de Milos était encore en cours d'adoption.

19 En quatrième lieu, s'agissant des autres éléments dudit cadre juridique, le gouvernement hellénique s'est contenté, lors de la procédure écrite et orale, d'énumérer une série d'actes législatifs, réglementaires et administratifs, sans indiquer ni reproduire aucune disposition spécifique en vigueur au moment de l'expiration du délai fixé par l'avis motivé susceptible de remplir les exigences imposées par l'article 12, paragraphe 1, sous b) et d), de la directive.

20 En conséquence, il y a lieu de constater que la République hellénique n'a pas adopté, dans le délai prescrit, un cadre juridique de nature à assurer, sur l'île de Milos, une protection stricte de la vipère Vipera schweizeri contre toute perturbation intentionnelle, notamment durant la période de reproduction, de dépendance et d'hibernation, ainsi que contre toute détérioration ou destruction de ses sites de reproduction ou aires de repos (voir, en ce sens, arrêt Commission/Grèce, précité, points 27 à 30).

21 Des circonstances telles que le bon état de l'environnement ou la stabilité de la population de l'espèce Vipera schweizeri, sur l'île de Milos, ne sauraient, par elles-mêmes, remettre en cause cette constatation (voir, en ce sens, arrêt Commission/Grèce, précité, point 31). Le recours de la Commission doit donc être accueilli.

22 Au vu de ce qui précède, il convient de constater que, en ne prenant pas, dans le délai prescrit, les mesures nécessaires pour instaurer et mettre en œuvre un système efficace de protection stricte de la vipère Vipera schweizeri sur l'île de Milos interdisant la perturbation intentionnelle de cette espèce, notamment durant la période de reproduction, de dépendance et d'hibernation, ainsi que toute détérioration ou destruction des sites de reproduction ou des aires de repos de ladite espèce, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 12, paragraphe 1, sous b) et d), de la directive.

Sur les dépens

23 Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de

la République hellénique et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs, la Cour (cinquième chambre) déclare et arrête:

1) **En ne prenant pas, dans le délai prescrit, les mesures nécessaires pour instaurer et mettre en œuvre un système efficace de protection stricte de la vipère Vipera schweizeri sur l'île de Milos interdisant la perturbation intentionnelle de cette espèce, notamment durant la période de reproduction, de dépendance et d'hibernation, ainsi que toute détérioration ou destruction des sites de reproduction ou des aires de repos de ladite espèce, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 12, paragraphe 1, sous b) et d), de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages.**

2) **La République hellénique est condamnée aux dépens.**

Signatures

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* Langue de procédure: le grec.

JUDGMENT OF THE COURT (Second Chamber)

10 January 2006 *

In Case C-98/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 28 February 2003,

Commission of the European Communities, represented by U. Wölker, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by M. Lumma and C. Schulze-Bahr, acting as Agents,

defendant,

* Language of the case: German.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Silva de Lapuerta, P. Kūris and G. Arestis, Judges,

Advocate General: A. Tizzano,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 July 2005,

after hearing the Opinion of the Advocate General at the sitting on 24 November 2005,

gives the following

Judgment

1 By its application the Commission of the European Communities has brought an action for a declaration that:

— by failing, in respect of certain projects carried out outside special areas of conservation ('SACs') within the meaning of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild

fauna and flora (OJ 1992 L 206, p. 7; 'the Directive'), to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) of that directive, whether or not such projects are capable of significantly affecting an SAC;

— by authorising emissions in an SAC, irrespective of whether they are likely to have a significant effect on that area;

— by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;

— by failing to ensure compliance with the criteria for derogation set out in Article 16 of the directive in the case of certain activities compatible with the conservation of the area;

— by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;

— by failing to notify fishery catch legislation and/or to ensure that such legislation contains adequate bans on fishing,

the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and (4) and Articles 12, 13 and 16 of the Directive.

Legal background

Community law

2 The aim of the Directive, in accordance with Article 2(1), is 'to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies'.

3 Article 4 of the Directive lays down a procedure for designating sites as SACs, where species and habitats protected by the Directive are present.

4 As provided in the 10th recital in the preamble to the Directive, 'an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future.' That recital is expressed in Article 6(3) of the Directive which refers to subparagraph 4. Those subparagraphs provide:

'3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in

combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

5 According to Article 12(1) of the Directive:

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

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

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

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

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

6 Article 13 of the Directive provides that:

'1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV(b), prohibiting:

(a) the deliberate picking, collecting, cutting, uprooting or destruction of such plants in their natural range in the wild;

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this Directive is implemented.

2. The prohibitions referred to in paragraph 1(a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.'

7 Article 16(1) of the Directive is worded as follows:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

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

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

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

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

National law

8 The Federal Republic of Germany has, inter alia, transposed the Directive by the Federal Law on Nature protection of 21 September 1998 (Gesetz über Naturschutz und Landschaftspflege, BGBl. 1998 I, p. 2995) ('the BNatSchG 1998').

9 That law was subsequently repealed and replaced by the Federal Law on nature protection and countryside conservation of 25 March 2002 (Gestz über Naturschutz und der Landschaftspflege, BGBl. 2002 I, p. 1193) ('the BNatSchG 2002').

10 Paragraph 34(1) of the BNatSchG 2002 transposed into German law the duty laid down in the first sentence of Article 6(3) of the Directive to subject projects to an assessment of their implications for protected sites, for the purposes of the Directive.

11 Paragraph 10(1)(11) of the BNatSchG 2002 defines the concept of 'projects within the meaning of the law' as follows:

'(a) projects and measures planned within a site of Community importance or a European site for the protection of birds, in so far as they are subject to a decision by an authority or to notification to an authority or that they are carried out by an authority, and

(b) acts affecting nature and the countryside, within the meaning of Paragraph 18, in so far as they are subject to a decision by an authority or to notification to an authority or are carried out by an authority, and

(c) installations subject to an authorisation under the Federal law on protection against pollution and the use of water, which are subject to an authorisation or to approval under the Law on water use,

in so far as, separately or in conjunction with other projects or plans, they are likely to have a significant effect on a site of importance to the Community or a European site for the protection of birds ...'

12 Paragraph 18 of the BNatSchG 2002 provides:

'1. Acts affecting nature and the countryside, within the meaning of this Law, are changes of form or use of surface areas or changes to the level of the water table connected to the surface soil stratum which may alter to a considerable extent the capacity and functioning of the ecosystem or the countryside.

2. The use of soil for the purpose of agriculture, forestry and fishing shall not constitute an intervention where it takes account of the objectives and the principles of nature protection and countryside conservation. The use of soil for the purposes of agriculture, forestry and fishing does not, in principle, undermine the objectives and principles set out above, provided that it complies with the conditions in Paragraph 5(4) to (6) and the rules of professional practice under the Law on agriculture forestry and fishing and Paragraph 17(2) of the Federal Law on soil protection.'

13 Paragraph 36 of BNatSchG 2002 entitled 'Material nuisances' provides:

'If it is foreseeable that installations, subject to an authorisation under the Federal Law on protection against pollution, will cause emissions which, together with other installations or measures, will significantly affect, in the area of impact of that installation, the elements fundamentally necessary for the conservation of a site of Community importance or a European site for the protection of birds, and if the damage cannot be made good in accordance with Paragraph 19(2), the authorisation shall not be issued unless the conditions in the combined provisions of Paragraph 34 (3) and (4) are fulfilled. Paragraph 34(1) and (5) are applicable *mutatis mutandis.* Decisions shall be taken with the agreement of the authorities responsible for nature protection and conservation areas.'

14 The first sentence of Paragraph 39(2) of the BNatSchG 2002, entitled 'Relationship with other legislative provisions', provides:

'The laws on the protection of plants, the protection of animals, protection against epizootic diseases and the laws on forests, hunting and fishing shall not be affected either by the provisions of this section or by the laws adopted pursuant thereto.'

15 Paragraph 42(1) and (2) of the BNatSchG 2002 are designed to transpose the prohibitions in Articles 12 and 13 of the Directive.

16 Paragraph 43 of the BNatSchG 2002, entitled 'Derogations', provides, in subparagraph 4, that 'the prohibitions laid down in Paragraph 42(1) and (2) shall not apply to acts intending to use land for the purposes of agriculture, forestry or fishing and carried out in accordance with good professional practice and the requirements laid down in Paragraph 5(4) to (6); acts intending to process the products obtained in the course of those activities; acts designed to implement an act authorised under Paragraph 19, or an assessment of the effect on the environment within the framework of the Law on the assessment of environmental impact; acts to implement a measure authorised under Paragraph 30; provided that animals and their nesting and incubation sites, habitats and resting places, and plant species which are specifically protected, are not intentionally damaged as a result.'

17 The Directive was also transposed in the Federal Republic of Germany by way of a number of sectoral laws, including the Law on plant protection of 14 May 1998 (Planzenschutzgesetz, BGBl. 1998 I, p. 971, 'the PflSchG'), which provides in Paragraph 6(1):

'Pesticides must be used in accordance with good professional practice. Use shall be prohibited if it is foreseeable that it will produce harmful effects on humans or animals or the water table, or that it will produce other serious harmful effects, in particular, on the balance of nature. The competent authority shall order the measures necessary in order to satisfy the requirements mentioned in the first two sentences of this subparagraph.'

Pre-litigation procedure

18 On 10 April 2000, the Commission sent a letter of formal notice to the Federal Republic of Germany inviting on it to submit its observations on the implementation of Article 6(3) and (4) and Articles 12, 13 and 16 of the Directive.

19 After examining the reply sent to it by the Federal Republic of Germany on 11 August 2000, the Commission issued a reasoned opinion on 25 July 2001, calling on that Member State to take the measures necessary to comply with that opinion within two months of the date of its notification.

20 In that reasoned opinion the Commission found, referring in particular to the BNatSchG 1998, that the Federal Republic of Germany had failed to take the measures necessary in order to transpose the abovementioned provisions of the Directive.

21 After the expiry of the period prescribed in the reasoned opinion, the Federal Republic of Germany, by letter of 21 November 2001, challenged the complaints raised by the Commission.

22 Subsequently the BNatSchG 2002 entered into force.

23 In those circumstances, the Commission decided to bring the present proceedings.

Admissibility of the action

24 The German Government argues, as a preliminary issue, that the Commission's action is inadmissible for failing to take sufficient account of the new provisions introduced by the BNatSchG 2002 or other specific national provisions. The latter ensure that the contested provisions are applied in accordance with the Directive.

25 In that connection, it must be observed that the issue of whether or not the Commission has taken account of certain legislative changes in the assessment of the compatibility of German law with the Directive relates to the substance of the proceedings and, therefore, to the merits of the case and not to its admissibility.

26 The fact that, in its originating application the Commission bases its pleas on certain provisions of the BNatSchG 2002, mentioning the earlier provisions of the BNatSchG 1998 between brackets, while the reasoned opinion referred only to those earlier provisions, is not capable of rendering the action inadmissible.

27 Although it is true that the subject-matter of an action brought under Article 226 EC is delimited by the pre-litigation procedure and that, accordingly, the originating application cannot be based on provisions other than those stated in that procedure, that requirement cannot, however, go so far as to make it necessary for the national provisions mentioned in the reasoned opinion and those in the application to be completely identical. Where a change in the legislation occurred between those two procedural stages, it is sufficient that the system established by the legislation contested in the pre-litigation procedure has, on the whole, been maintained by the

new measures which were adopted by the Member State after the issue of the reasoned opinion and have been challenged in the application (Case C-221/03 *Commission* v *Belgium* [2005] ECR I-8307, paragraphs 38 and 39).

28 In this case, the provisions of the BNatSchG 2002 to which the Commission refers in its originating application are almost identical to the provisions in the BNatSchG 1998 that it criticises in its reasoned opinion.

29 It follows that the action is admissible.

The merits

30 In support of its application the Commission raises six complaints.

The first complaint

Arguments of the parties

31 The Commission complains that the Federal Republic of Germany has failed to fully transpose Article 6(3) and (4) of the Directive into its national law in so far as the definition of 'project', in Paragraph 10(1)(11)(b) and (c) of the BNatSchG 2002, which applies to projects undertaken outside the SACs, is too restrictive and

excludes the duty to carry out an assessment of the implications of certain acts and other activities which are potentially harmful to protected sites.

32 As regards projects within the meaning of Paragraph 10(1)(11)(b) of the BNatSchG 2002, the Commission submits that since they include only acts affecting nature and the countryside, within the meaning of Paragraph 18, certain projects likely to have a significant effect on protected sites are not subject to a prior assessment of the implications for the site in accordance with Article 6(3) and (4) of the Directive. Paragraph 18(1) covers only changes of form or use of surface areas, but fails to take account of any other activities or measures which do not concern the surface area of a protected site or those which do not result in any change, even where they are likely to have a significant effect on such a site. In fact, the term 'project', within the meaning of Paragraph 10(1)(11)(b) of the BNatSchG 2002, which refers to acts carried out outside the SACs, is narrower than that in Paragraph 10(1)(11)(a), which concerns projects carried out within an SAC. In its definition of measures to be subject to an assessment of the implications, the Directive does not distinguish between measures taken outside or inside a protected site.

33 Moreover, Paragraph 18(2) of BNatSchG 2002 excludes from the term 'project' within the meaning of Paragraph 10(1)(11)(b) the use of soil for the purposes of agriculture, forestry and fishing, where that project takes account of the objectives and principles of nature protection and countryside conservation.

34 Furthermore, as regards Paragraph 10(1)(11)(c) of the BNatSchG 2002, the Commission criticises the fact that the definition of 'project' is limited, on one hand, to installations subject to authorisation under the Federal Law on protection against pollution (Bundes-Immissionsschutzgestez, 'the BImSchG') and, on the other hand, to the use of water which is subject to authorisation or approval under the Law on water use (Wasserhaushaltsgesetz, 'the WHG'). Therefore, the installations

and uses of water not subject to authorisation or approval are excluded from the duty to carry out an assessment of the implications for the site laid down in Article 6 (3) of the Directive, regardless of whether or not they may have a significant impact on the protected sites.

35 The German Government submits, first of all, that the Commission interprets the term 'project' too widely, since it does not permit any limit on the duty to carry out an assessment of the implications that the activities referred to by German law may have on the sites. That term should be interpreted in the light of the specific definition in Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

36 Next, the German Government contends that the term 'act', within the meaning of Paragraph 18(1) of the BNatSchG 2002, requires a case by case assessment in the light of the objectives of the Directive. Therefore, in practice, Paragraph 18(1) does not limit the term 'project' with the meaning of the Directive. Paragraph 18(1) does not require a change of form or use of the surface area, but that there be an act where an activity has an effect on the surface area which impacts on the protected site.

37 As regards the derogation laid down in Paragraph 18(2) of the BNatSchG 2002, the German Government submits that it is a mandatory requirement of that provision that the objectives and principles of nature protection and countryside conservation have been taken into consideration, so that the use of soil for the purposes of agriculture, forestry and fishing does not constitute a project which must be subject to an assessment of its implications.

38 Finally, as regards Paragraph 10(1)(11)(c) of the BNatSchG 2002, the German Government states that the installations which are not subject to authorisation or approval under the BImSchG must themselves comply with requirements which take account of the Directive. The BImSchG requires, inter alia, verification that serious environmental damage which is preventable by the state of current technology is in fact prevented, and that the damage that cannot be avoided by current technology is reduced to the minimum. As regards the use of water which does not require an authorisation under the WHG, the German Government contends, in particular, that such use concerns very small quantities of water, which is compatible with Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1). If uses which do not have any significant impact on the status of a body of water are not taken into consideration under Directive 2000/60 they cannot have any significant impact on neighbouring SACs.

Findings of the Court

39 According to the first sentence of Article 6(3) of the Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

40 The Court has already held that the requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (see Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 54).

41 Therefore, the condition, to which the assessment of the implications of a plan or a project on a particular site is subject, which requires such an assessment to be carried out where there are doubts as to the existence of significant effects, does not permit that assessment to be avoided, as do Paragraph 10(1)(11)(b) of the BNatSchG 2002, read in conjunction with Paragraph 18, and Paragraph 10(1)(11)(c), in respect of certain categories of projects, on the basis of criteria which do not adequately ensure that those projects will not have a significant effect on the protected sites.

42 It should be noted, in particular, that Article 10(1)(11)(b) and (c) of the BNatSchG 2002 exclude from the assessment obligation (i) projects consisting of acts affecting nature and the countryside other than changes of form or use of surface areas or changes to the level of the water table connected to the surface soil stratum, and (ii) projects relating to installations or to use of water, on account of the fact that they are not subject to authorisation. It does not appear that those criteria excluding the duty to carry out an assessment are capable of ensuring that those projects are never likely have a significant effect on the protected sites.

43 As regards, in particular, installations not subject to authorisation under the BImSchG, the fact that that text requires verification, that serious environmental damage which may be prevented by current technology is in fact prevented, and that damage which cannot be prevented by current technology is reduced to the minimum, cannot be sufficient to ensure compliance with the duty laid down in Article 6(3) of the Directive. The duty of verification laid down by the BImSchG is not, in any event, capable of ensuring that a project relating to such an installation does not adversely affect the integrity of the protected site. In particular, the duty to verify whether serious environmental damage, which cannot be prevented by current technology, is reduced to the minimum, does not ensure that such a project will not give rise to such damage.

44 As regards the use of water not requiring an authorisation under the WHG, the fact that it concerns the use of small quantities of water does not in itself preclude the possibility that some of those uses are likely to have a significant effect on a protected site. Even assuming that such uses of water are not likely to have a significant effect on the status of a body of water, it does not follow that they are not likely to have a significant effect on neighbouring protected sites.

45 In the light of the foregoing, it must be held that the Federal Republic of Germany has failed to correctly transpose into its national law Article 6(3) of the Directive as regards certain projects undertaken outside the SACs.

The second complaint

Arguments of the parties

46 The Commission submits that Paragraph 36 of the BNatSchG 2002 does not correctly transpose Article 6(3) and (4) of the Directive, in so far as the authorisation for installations causing emissions is refused only where it is foreseeable that they directly affect an SAC situated in an area where those installations are operated.

47 It follows that material nuisances caused outside such an area are, however, not taken into account, contrary to those provisions of the Directive.

48 The German Government states that monitoring of material nuisance caused by air pollutants or noise from the area affected by the installation must be carried out on an individual basis taking account of local data and the various pollutants emitted by the installation. Further, in practice, an authorisation for a project involving material nuisance is issued only if it does not have any harmful effects on the areas protected by the Directive.

Findings of the Court

49 Since, under Paragraph 36 of the BNatSchG 2002, the authorisation of installations causing emissions is refused only where they appear likely to affect a protected site situated in the area of impact particularly of those installations, installations whose emissions affect a protected site situated outside such an area may be authorised without taking account of the effects of those emissions on such a site.

50 In that connection, it must be held that the system established by German law, so far as it covers emissions within an area of impact, as defined in technical circulars in accordance with general criteria on installations, do not appear to be capable of ensuring compliance with Article 6(3) and (4) of the Directive.

51 In the absence of established scientific criteria, which have not been mentioned by the German Government, which would a priori rule out emissions affecting a protected site situated outside the area of impact of the installation concerned having a significant effect on that site, the system put in place by national law in the field in question is not, in any event, capable of ensuring that the projects or plans relating to installations causing emissions which affect protected sites situated outside their area of impact do not adversely affect the integrity of those sites, within the meaning of Article 6(3) of the Directive.

52 Accordingly, it must be held that Article 6(3) of the Directive has not been properly transposed.

The third complaint

53 The Commission complains that the Federal Republic of Germany has failed to properly transpose the obligation in Article 12(1)(d) of the Directive to take the requisite measures to establish a system of strict protection for certain animals by prohibiting the deterioration or destruction of breeding sites or resting places. The Commission argues that that provision requires Member States to prohibit not only deliberate acts but also non-deliberate ones. It submits that Paragraph 43(4) of the BNatSchG 2002 fails to comply with Article 12(1)(d) of the Directive, in so far as it authorises a number of derogations from the rules protecting the sites 'provided that animals, including their nesting or incubation sites, habitat or resting places ... are not intentionally affected'.

54 The German Government observes that the transposition of Article 12(1)(d) of the Directive is limited over the whole territory of the Federal Republic of Germany to deliberate acts, which, it argues, is in accordance with that provision since it does not require inclusion of non-deliberate destruction or deterioration of those sites in the system of protection that it establishes. An interpretation which also prohibits non-deliberate acts is, in any event, contrary to the principle of proportionality.

55 The Court has already held that the acts referred to in Article 12(1)(d) of the Directive include non-deliberate acts (see *Commission* v *United Kingdom*, paragraphs 73 to 79). By not limiting the prohibition laid down in Article 12(1)(d) of the Directive to deliberate acts, which it has done in respect of acts referred to in

Article 12(1)(a) to (c), the Community legislature has demonstrated its intention to give breeding grounds or resting places increased protection against acts causing their deterioration or destruction. Given the importance of the objectives of protecting biodiversity which the Directive aims to achieve, it is by no means disproportionate that the prohibition laid down in Article 12(1)(d) is not limited to deliberate acts.

56 In those circumstances the complaint alleging that Article 12(1)(d) of the Directive has not been properly transposed must be accepted.

The fourth complaint

57 The Commission complains that the Federal Republic of Germany inserted in Paragraph 43(4) of the BNatSchG 2002 two derogations to the prohibitions laid down in Paragraph 42(1), which do not sufficiently take account of the conditions to which the derogations authorised by Article 16 of the Directive are subject. More specifically, the Commission refers to derogations in German law to the systems for the protection of species to which implementing measures for an act authorised in accordance with Paragraph 19 of the BNatSchG 2002 and implementing measures authorised under Paragraph 30 of that law are entitled.

58 The German Government replies that the acts and measures which are the subject of the two derogations laid down in Paragraph 43(4) of the BNatSchG 2002 are subject to administrative decisions and that in order to adopt such decisions the competent authorities are, in any event, bound to observe the conditions laid down in Article 16 of the Directive.

59 It is clear from the 4th and 11th recitals in the preamble to the Directive that the threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Accordingly, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see *Commission* v *United Kingdom*, paragraph 25)

60 It follows that, in the context of the Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise (see *Commission* v *United Kingdom*, paragraph 26).

61 Accordingly, even assuming that the two derogations at issue in this case must be the subject of administrative decisions, on the issuing of which the competent authorities do in fact comply with the conditions to which Article 16 of the Directive subjects the authorisation of derogations, the fact remains that Paragraph 43(4) of the BNatSchG 2002 does not provide a legal framework consistent with the derogatory regime established by Article 16. That provision of national law does not submit the grant of the two derogations in question to all of the conditions laid down in Article 16 of the Directive. In that connection, it is sufficient to state that Paragraph 43(4) of the BNatSchG 2002 provides as the sole condition for authorisation for those derogations that animals, including their nesting or incubation sites, habitat or resting places and plant species which are particularly protected must not be subject to deliberate harm.

62 Therefore, the complaint alleging that Article 16 of the Directive has not been properly transposed into German law must be accepted.

The fifth complaint

63 The Commission refers to Paragraph 6(1) of the PflSchG, which prohibits the use of pesticides if it is foreseeable that they will produce effects harmful to human or animal health or the water table, or has other seriously harmful effects, in particular, on the balance of nature, the latter also covering plant and animal species within the meaning of Paragraph 2(6) of the PflSchG. The Commission argues that, by that prohibition, the Federal Republic of Germany has failed to transpose Articles 12, 13 and 16 of the Directive in a sufficiently clear and precise manner.

64 The German Government contests the merits of that complaint, arguing that the provision referred to by the Commission contains a general prohibition which facilitates compliance with the prohibitions laid down in Articles 12 and 13 of the Directive. It also refers to the fact that, according to Paragraph 6(1) of the PflSchG, pesticides must be used in accordance with good professional practice, and that the competent authority may order the measures necessary to fulfil the requirements also mentioned in that provision.

65 In that connection, as was pointed out in paragraph 60 of this judgment, the Member States are, in the context of the Directive, under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise.

66 According to settled case-law, Articles 12, 13 and 16 of the Directive form a coherent body of provisions (see, *Commission* v *United Kingdom*, paragraph 112). Articles 12 and 13 require Member States to establish a system of strict protection for animal and plant species.

67 Paragraph 6(1) of the PflSchG, by listing the situations in which the use of pesticides is prohibited, does not express in a clear, specific and strict manner the measures laid down in Articles 12 and 13 of the Directive which prohibit protected species from being adversely affected.

68 In particular, it does not appear that the prohibition on using pesticides, where it is foreseeable that it will produce seriously harmful effects on the balance of nature, is as clear, precise and strict as the prohibition on the deterioration of breeding sites or resting places of protected animals laid down in Article 12(1)(d) of the Directive or the prohibition of the deliberate destruction in the wild of protected plants laid down in Article 13(1)(a) of the Directive.

69 Accordingly, the fifth complaint must be accepted in so far as it concerns Articles 12 and 13 of the Directive.

The sixth complaint

Arguments of the parties

70 The Commission complains that the Federal Republic of Germany has infringed Articles 12 and 16 of the Directive by failing to notify it of the fishery catch legislation or by failing to ensure that those provisions contain adequate bans on fishing.

71 The Commission argues that the legislation in three Länder is not in accordance with the Directive. Thus, in Bavaria, the fish known by the scientific name *coregonus oxyrhynchus* does not feature among the species protected all year round. In Brandenberg, that species and the mollusc *unio crassus* are not protected. In Bremen, the legislation does not include in the list of fishing bans the three species which must be protected in that Land, namely, the two species previously mentioned and the fish *acipenser sturio*. Furthermore, that legislation expressly authorises fishing of specimens of *acipenser sturio* which are at least 100 cm long and specimens of the species *coregonus oxyrhynchus* which are at least 30 cm long. Moreover, no information is available on any fishing bans in the Länder of Berlin, Hamburg, Mecklenburg-West Pomerania, Lower Saxony, North Rhine-Westphalia, Saarland, Saxony and Saxe-Anhalt. It cannot, therefore, be held that the legislation in those Länder contains the fishing bans necessary to satisfy the provisions of Articles 12 and 16 of the Directive.

72 The German Government contends that, although Federal law authorises the Länder to lay down more specific provisions on the right to fish, those provisions

must nevertheless be interpreted in accordance with the Directive. Where the provisions of the Länder on fishing contravene the protection of the species of fish and shellfish legally required by Community law, they are void on account of an infringement of Federal law. To that effect, the BNatSchG 2002 is a law which overrides the legislation of the Länder. The fishing ban laid down in Paragraph 42 (1)(1) of the BNatSchG 2002, which also concerns the species mentioned in Annex IV of the Directive is therefore applicable. Therefore, it is not necessary to notify the provisions of the Länder on that matter.

73 The German Government states that it will ensure that the provisions of the Länder on fishing will be amended forthwith, in so far as they do not comply with the conditions of the Directive and Federal law, as is the case, for example, of the legislation of the Land Bremen, which is complained of by the Commission.

Findings of the Court

74 It is common ground in this case that *coregonus oxyrhynchus*, *unio crassus* and *acipenser sturio*, which feature in Annex IV(a) to the Directive, are species found in Germany.

75 Those species must therefore be subject, in accordance with Article 12(1)(a) of the Directive, to a system of strict protection prohibiting all forms of deliberate capture or killing of members of those species in the wild.

76 It is clear from the file that, when the period set down in the reasoned opinion expired, Bremen's legislation authorised, inter alia, the capture of fish all year round so long as no fishing bans were issued. *Coregonus oxyrhynchus* is not the subject of a fishing ban. In Brandenburg neither that species nor *unio crassus* are the subject of a fishing ban. As to Bremen's legislation, the German Government has acknowledged that it is not in accordance with the Directive.

77 Although it is true, as the German Government observes, that Paragraph 42(1) of the BNatSchG 2002 prohibits, inter alia, the capture and killing of the animal species covered by a system of strict protection, such as those mentioned in paragraph 74 of this judgment, the fact remains that, under the first sentence of Paragraph 39(2) of that law on the protection of animals, hunting and fishing are not affected by the provisions of that section. That section includes Paragraph 42 of the BNatSchG 2002.

78 In those circumstances, it must be stated that the legislative framework existing in Germany, in which regional provisions which infringe Community law coexist with a Federal law which complies with it, does not ensure effectively, and in a clear and precise manner, in respect of the three animal species at issue in this case, the strict protection required by Article 12(1)(a) of the Directive, with respect to the prohibition of all forms of deliberate capture and killing of specimens of those species in the wild.

79 In this case, it is established that German law is not in accordance with Article 12(1)(a) of the Directive and does not fulfil the conditions for derogation laid down in Article 16 of the Directive.

80 As regards the rules on fishing in the other Länder, which have not been communicated to the Commission, it cannot be held that they do not satisfy the provisions of Articles 12 and 16 of the Directive, since no information is available on any fishing bans in those Länder, particularly since, as was stated in Paragraph 77 of this judgment, Paragraph 42(1)(1) of the BNatSchG 2002 prohibits the capture and killing of specimens of the species *coregonus oxyrhynchus*, *union crassus* and *acipenser sturio*.

81 In that connection, it must be observed that Article 23(3) of the Directive provides that Member States are to communicate to the Commission the main provisions of national law which they adopt in the field covered by this Directive. However, the Commission has not based its action on that provision.

82 It follows that the sixth complaint must be accepted within the limits set out in the preceding paragraphs of this judgment.

83 Accordingly, the Court finds that:

— by failing, in respect of certain projects carried out outside the SAC within the meaning of Article 4(1) of the Directive, to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) of the Directive whether or not such projects are capable of significantly affecting such an SAC;

— by authorising emissions in an SAC, irrespective of whether they are likely to have a significant effect on that area;

— by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;

— by failing to ensure compliance with the criteria for derogation set out in Article 16 of the Directive in the case of certain activities compatible with the conservation of the area;

— by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;

— by failing to ensure that legislation on fishing contains adequate bans on catches,

the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and Articles 12, 13 and 16 of the Directive.

Costs

84 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby rules:

1. — **By failing, in respect of certain projects carried out outside special areas of conservation within the meaning of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, to require compulsory assessment of the impact on the site, in accordance with Article 6(3) and (4) of that directive, whether or not such projects are capable of significantly affecting a special area of conservation;**

— **by authorising emissions in a special area of conservation, irrespective of whether they are likely to have a significant effect on that area;**

— **by derogating from the scope of the provisions concerning the protection of species in the case of certain non-deliberate effects on protected animals;**

— **by failing to ensure compliance with the criteria for derogation set out in Article 16 of Directive 92/43 in the case of certain activities compatible with the conservation of the area;**

— **by retaining provisions on the application of pesticides which do not take sufficient account of the protection of species;**

— **by failing to ensure that legislation on fishing contains adequate bans on catches,**

the Federal Republic of Germany has failed to fulfil its obligations under Article 6(3) and Articles 12, 13 and 16 of Directive 92/43.

2. **Orders the Federal Republic of Germany to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

20 October 2005 *

In Case C-6/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 9 January 2004,

Commission of the European Communities, represented by M. van Beek and L. Flynn, acting as Agents, with an address for service in Luxembourg,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by C. Jackson, acting as Agent, and K. Smith, Barrister,

defendant,

* Language of the case: English.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Schintgen, R. Silva de Lapuerta, G. Arestis and J. Klučka (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 26 May 2005,

after hearing the Opinion of the Advocate General at the sitting on 9 June 2005,

gives the following

Judgment

1 By its action, the Commission of the European Communities requests the Court to declare that, by failing to transpose correctly the requirements of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive'), the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive.

Legal context

Community legislation

2 According to Article 2(1) of the Habitats Directive, the aim of the directive is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies.

3 In accordance with Article 3(1) of the Habitats Directive, the Member States designate special areas of conservation ('SACs') with a view to maintaining or restoring, at a favourable conservation status, natural habitat types and habitats of species of Community interest. Those areas are to form part of a European ecological network under the title Natura 2000.

4 Article 6 of the Habitats Directive relates to the measures necessary in order to protect SACs. Surveillance of the conservation status of natural habitats and species of Community interest is governed by Article 11 of the directive. Articles 12 and 13 concern measures for protecting animal and plant species. Article 14 relates to the taking of specimens of species of wild fauna and flora. Article 15 prohibits certain indiscriminate means of capture or killing of some species of wild fauna. Article 16 sets out the circumstances in which the Member States may derogate, for specified purposes, from certain provisions of the directive.

5 Under Article 23(1) of the Habitats Directive, the Member States were to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification and were forthwith to inform the Commission thereof. The directive was notified to the Member States on 10 June 1992.

National legislation

6 The principal instruments transposing the Habitats Directive in the United Kingdom that are relevant in the present case are the following:

— the Conservation (Natural Habitats, &c.) Regulations 1994 ('the 1994 Regulations'), which apply in England, Wales and Scotland;

— the Conservation (Natural Habitats, etc.) Regulations (Northern Ireland) 1995 ('the 1995 Regulations'), which apply in Northern Ireland;

— the Nature Protection Ordinance 1991 as amended by the Nature Protection Ordinance (Amendment) Regulations 1995 ('the 1991 Ordinance'), which applies in Gibraltar;

— the Conservation of Seals Act 1970 ('the Conservation of Seals Act').

7 Regulation 3(2) of the 1994 Regulations provides that the Secretary of State, the Minister of Agriculture, Fisheries and Food and the nature conservation bodies are to exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive.

8 Regulation 3(4) of the 1994 Regulations provides that, without prejudice to the provision referred to in the preceding paragraph, every competent authority in the exercise of any of its functions is to have regard to the requirements of the Habitats Directive so far as they may be affected by the exercise of those functions.

Pre-litigation procedure

9 On 6 November 2000, the Commission sent to the United Kingdom a letter of formal notice in which it contended that certain provisions of the Habitats Directive had not been correctly transposed into that Member State's domestic law.

10 The United Kingdom authorities replied to the letter of formal notice by letter of 27 February 2001. They accepted that on two points, relating to offshore oil and gas activities and to the extension of the application of the Habitats Directive beyond territorial waters, the letter of formal notice was well founded, but contested most of the other complaints raised in it.

11 Since it was not persuaded by the explanations provided by the United Kingdom, on 18 July 2001 the Commission issued a reasoned opinion in which it repeated its complaints and called on the United Kingdom to take the necessary measures to comply with the reasoned opinion within two months of its receipt.

12 By letter of 27 November 2001 ('the letter of 27 November 2001') the United Kingdom informed the Commission, in response to the reasoned opinion, of its intention to amend its legislation in order to establish greater legal certainty and clarity on a number of points at issue in the reasoned opinion, while maintaining that in general the measures in force complied with the Habitats Directive.

13 Finally, by letter of 2 December 2003, the United Kingdom authorities informed the Commission of progress made in the process of implementing changes in national legislation to transpose the Habitats Directive better.

14 It was in those circumstances that the Commission decided to bring the present action.

The action

The method of transposing the Habitats Directive

Arguments of the parties

15 The Commission alleges that the United Kingdom has not transposed the Habitats Directive appropriately into its legal order. In particular, the Commission submits that the United Kingdom has wrongly adopted a general clause for the purpose of filling any gaps in the specific provisions designed to transpose it.

16 The United Kingdom maintains that it has correctly transposed the Habitats Directive by adopting, for its transposition, legislation which contains not only specific requirements but also general duties and administrative procedures. Those general duties must be read together with the specific requirements of that legislation, which they supplement, thereby ensuring that the directive is in fact implemented appropriately.

17 The United Kingdom authorities rely in particular on regulation 3(2) and (4) of the 1994 Regulations, the equivalent provisions of which are, for Northern Ireland, regulation 3(2) and (4) of the 1995 Regulations and, for Gibraltar, section 17A of the 1991 Ordinance. Those provisions require ministers, nature conservation bodies and all competent public authorities to exercise their functions so as to secure compliance with the requirements of the Habitats Directive.

18 The Commission submits, on the other hand, that the general clauses pleaded by the United Kingdom are not sufficiently precise to ensure transposition into national law of the specific obligations imposed by the directive.

19 In order to determine the scope of their rights and obligations, individuals must refer to the Habitats Directive each time, a situation which does not meet the requirements of legal certainty or the conditions with regard to specificity, precision and clarity required under the settled case-law of the Court.

20 The Commission adds that if the Court were to follow the logic of the United Kingdom's reasoning, the whole directive could presumably have been transposed by such a general clause. This would be at odds with the requirement of specificity repeatedly noted in the case-law on the transposition of directives.

Findings of the Court

21 Under the third paragraph of Article 249 EC, a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of form and methods for implementing the directive in question in domestic law. However, in accordance with settled case-law, while the transposition of a directive into domestic law does not necessarily require that the content of the directive be incorporated formally and verbatim in express, specific legislation and, depending on its content, a general legal context may be adequate for the purpose, that is on condition that that context does indeed guarantee the full application of the directive in a sufficiently clear and precise manner (see, inter alia, Case 363/85 *Commission* v *Italy* [1987] ECR 1733, paragraph 7, Case C-361/88 *Commission* v *Germany* [1991] ECR I-2567, paragraph 15, and Case C-58/02 *Commission* v *Spain* [2004] ECR I-621, paragraph 26).

22 In that regard, it is important in each individual case to determine the nature of the provision, laid down in a directive, to which the action for infringement relates, in order to gauge the extent of the obligation to transpose imposed on the Member States (see Case C-233/00 *Commission* v *France* [2003] ECR I-6625, paragraph 77).

23 The United Kingdom's argument that the most appropriate way of implementing the Habitats Directive is to confer specific powers on nature conservation bodies and to impose on them the general duty to exercise their functions so as to secure compliance with the requirements of that directive cannot be upheld.

24 First, it is to be remembered that the existence of national rules may render transposition by specific legislative or regulatory measures superfluous only if those rules actually ensure the full application of the directive in question by the national authorities.

25 Second, it is apparent from the 4th and 11th recitals in the preamble to the Habitats Directive that threatened habitats and species form part of the European Community's natural heritage and that the threats to them are often of a transboundary nature, so that the adoption of conservation measures is a common responsibility of all Member States. Consequently, as the Advocate General has observed in point 11 of her Opinion, faithful transposition becomes particularly important in an instance such as the present one, where management of the common heritage is entrusted to the Member States in their respective territories (see by analogy, in respect of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), Case 262/85 *Commission* v *Italy* [1987] ECR 3073, paragraph 39, and Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53).

26 It follows that, in the context of the Habitats Directive, which lays down complex and technical rules in the field of environmental law, the Member States are under a particular duty to ensure that their legislation intended to transpose that directive is clear and precise, including with regard to the fundamental surveillance and monitoring obligations, such as those imposed on national authorities by Articles 11, 12(4) and 14(2) of the directive.

27 However, it is apparent on examination of the legislation relied upon by the United Kingdom that it is so general that it does not give effect to the Habitats Directive with sufficient precision and clarity to satisfy fully the demands of legal certainty (see, by analogy, Case 291/84 *Commission* v *Netherlands* [1987] ECR 3483, paragraph 15) and that it also does not establish a precise legal framework in the area concerned, such as to ensure the full and complete application of the directive and allow harmonised and effective implementation of the rules which it lays down (see, by analogy, the judgment of 10 March 2005 in Case C-531/03 *Commission* v *Germany*, not published in the ECR, paragraph 19).

28 It follows that the general duties laid down by the United Kingdom legislation cannot ensure that the provisions of the Habitats Directive referred to in the Commission's application are transposed satisfactorily and are not capable of filling any gaps in the specific provisions intended to achieve such transposition. Consequently, there remains no need to consider the United Kingdom's arguments based on the general duties contained in that legislation when analysing the specific complaints relied upon by the Commission.

The complaints raised by the Commission

The complaint alleging incomplete transposition of Article 6(2) of the Habitats Directive

29 In the light of information that the United Kingdom provided, the Commission, in its reply and at the hearing, abandoned its complaint alleging breach of Article 6(2) of the Habitats Directive with regard to England, Wales, Scotland and Northern Ireland, while maintaining it with regard to Gibraltar.

30 The Commission submits that, by merely protecting designated sites from any operation with potential to cause disturbance without also ensuring that deterioration due to neglect or inactivity is avoided, the United Kingdom has failed to implement Article 6(2) of the directive fully in Gibraltar.

31 The United Kingdom, without genuinely contesting the Commission's line of argument, contends that only non-natural deterioration is to be avoided.

32 In addition, it argues that the 1991 Ordinance set in place a complete and stringent enforcement regime. That regime adequately implements the Habitats Directive, particularly when it is read in conjunction with the general rule laid down in section 17A of the ordinance.

33 As to those submissions, it should first be noted that Article 6(2) of the Habitats Directive obliges the Member States to avoid the deterioration of natural habitats and the habitats of species.

34 As the Advocate General has observed in point 19 of her Opinion, it is clear that, in implementing Article 6(2) of the Habitats Directive, it may be necessary to adopt both measures intended to avoid external man-caused impairment and disturbance and measures to prevent natural developments that may cause the conservation status of species and habitats in SACs to deteriorate.

35 Second, at the end of the period laid down in the reasoned opinion, Article 6(2) of the Habitats Directive had not been formally reproduced in the legislation applicable in Gibraltar. Section 17G of the 1991 Ordinance, allowing the competent authorities to enter into site management agreements with the owners or occupiers of sites, appears to be the only provision applicable in Gibraltar for avoiding any deterioration.

36 It is clear that this provision confers only a non-mandatory power on those authorities and that it is not such as to avoid deterioration, contrary to the requirements of Article 6(2) of the Habitats Directive.

37 Accordingly, inasmuch as domestic law contains no express provision obliging the competent authorities to avoid the deterioration of natural habitats and the habitats of species, it involves an element of legal uncertainty as to the obligations with which those authorities must comply.

38 It follows from the foregoing that, in any event, Article 6(2) of the Habitats Directive has not been transposed clearly, precisely and completely in Gibraltar.

39 In those circumstances, the complaint alleging incomplete transposition of Article 6 (2) of the Habitats Directive must be held to be well founded as regards Gibraltar.

The complaint alleging incomplete transposition of Article 6(3) and (4) of the Habitats Directive

40 The Commission submits that United Kingdom legislation does not properly transpose these provisions in three specific areas: water abstraction plans and projects, land use plans and, in respect of Gibraltar, the review of existing planning rights.

— Water abstraction plans and projects

41 In the Commission's submission, no provision of domestic law requires water abstraction licences granted under Chapter II of Part II of the Water Resources Act

1991 to comply with the obligation, imposed by Article 6(3) of the Habitats Directive, to take account of the significant effects which water abstraction may have on sites forming part of a SAC. No such provisions exist in Northern Ireland or Gibraltar either. Thus, water abstraction activities, which may have a significant adverse effect on a SAC, are not fully covered or correctly controlled by the United Kingdom's implementing legislation.

42 The Commission adds that in its letter of 27 November 2001 the United Kingdom had indicated that the relevant provisions of the 1994 Regulations would be amended in order to clarify the rules relating to water abstraction activities.

43 The United Kingdom contends, on the other hand, that it has set up, in conjunction with the general clauses, a system which enables potentially damaging operations to be determined in advance for each site.

44 As to those submissions, Article 6(3) of the Habitats Directive provides that any plan or project not directly connected with or necessary to the management of a site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, must be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

45 In the present case, it is not disputed that, at the end of the period laid down in the reasoned opinion, no legal provision expressly required water abstraction plans and projects to be subject to such an assessment.

46 Furthermore, the system established by the United Kingdom legislation, inasmuch as it essentially provides that all water abstraction plans and projects which fall within the conditions laid down in Article 6(3) of the Habitats Directive are deemed in advance to be potentially damaging for the site concerned, does not appear to be capable of ensuring compliance with the requirements of that provision.

47 As the Advocate General has observed in point 33 of her Opinion, while this kind of advance assessment of potential risks can be based on concrete facts with regard to the site, that is not the case with regard to the projects themselves, contrary to the requirements of Article 6(3) of the Habitats Directive, under which an appropriate assessment of the project's implications for the site in question should be carried out. Consequently, in merely defining potentially damaging operations for each site concerned, the risk is run that certain projects which on the basis of their specific characteristics are likely to have an effect on the site are not covered.

48 Nor is it possible to uphold the United Kingdom's argument that, as regards Scotland, the Water Environment and Water Services Act 2003 has laid down, as part of the transposition of Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (OJ 2000 L 327, p. 1), a framework for a comprehensive new system of water abstraction which introduces controls consistent with Article 6(2) and (3) of the Habitats Directive.

49 It is settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and that the Court cannot take account of any subsequent changes (see, inter alia, Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraph 23, and Case C-323/01 *Commission* v *Italy* [2002] ECR I-4711, paragraph 8).

50 Having regard to the foregoing, it must be found that the United Kingdom has not transposed Article 6(3) and (4) of the Habitats Directive correctly as regards water abstraction plans and projects.

— Land use plans

51 The Commission submits that United Kingdom legislation does not clearly require land use plans to be subject to appropriate assessment of their implications for SACs in accordance with Article 6(3) and (4) of the Habitats Directive.

52 According to the Commission, although land use plans do not as such authorise development and planning permission must be obtained for development projects in the normal manner, they have great influence on development decisions. Therefore land use plans must also be subject to appropriate assessment of their implications for the site concerned.

53 The United Kingdom accepts that land use plans can be considered to be 'plans and projects' for the purposes of Article 6(3) of the Habitats Directive, but it disputes that they can have a significant effect on sites protected pursuant to the directive. It submits that they do not in themselves authorise a particular programme to be carried out and that, consequently, only a subsequent consent can adversely affect such sites. It is therefore sufficient to make just that consent subject to the procedure governing plans and projects.

54 As to those submissions, the Court has already held that Article 6(3) of the Habitats Directive makes the requirement for an appropriate assessment of the implications of a plan or project conditional on there being a probability or a risk that it will have a significant effect on the site concerned. In the light, in particular, of the precautionary principle, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have a significant effect on the site concerned (see, to this effect, Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, paragraphs 43 and 44).

55 As the Commission has rightly pointed out, section 54A of the Town and Country Planning Act 1990, which requires applications for planning permission to be determined in the light of the relevant land use plans, necessarily means that those plans may have considerable influence on development decisions and, as a result, on the sites concerned.

56 It thus follows from the foregoing that, as a result of the failure to make land use plans subject to appropriate assessment of their implications for SACs, Article 6(3) and (4) of the Habitats Directive has not been transposed sufficiently clearly and precisely into United Kingdom law and, therefore, the action brought by the Commission must be held well founded in this regard.

— Review of existing planning rights in Gibraltar

57 The Commission submits that, so far as concerns Gibraltar, the competent authorities do not comply with the requirements of Article 6(3) of the Habitats Directive in that they are not obliged to review whether existing planning permits affect sites protected under the directive.

58 As the Advocate General rightly observes in point 55 of her Opinion, while it is true that such an obligation to carry out a subsequent review may be based on Article 6 (2) of the Habitats Directive, the fact remains that Article 6(3) of the directive contains no provision obliging the Member States to carry out a review of that kind.

59 On the contrary, it follows from the very wording of the latter provision that the procedure laid down must be applied before a Member State agrees to the carrying out of plans or projects likely to affect the site concerned.

60 It follows that this part of the complaint alleging incomplete transposition of Article 6(3) and (4) of the Habitats Directive cannot be upheld.

The complaint alleging failure to transpose Articles 11 and 14(2) of the Habitats Directive

61 The Commission alleges that the United Kingdom has failed to transpose into domestic law the surveillance obligations set out in these provisions. It maintains that, until those obligations have been clearly assigned to the competent authorities, it will be unable to establish whether the required surveillance is actually being carried out.

62 In support of this complaint, the Commission relies on the letter of 27 November 2001, in which the United Kingdom stated, first, that a surveillance obligation was implicitly imposed on the competent authorities and, secondly, that the 1994 Regulations, the 1995 Regulations and the 1991 Ordinance would be amended to provide greater legal certainty through provisions more specific than those of that legislation.

63 In the United Kingdom's submission, Articles 11 and 14(2) of the Habitats Directive simply provide that the Member States are to undertake surveillance, without imposing any specific requirement as to how it is to take place, or as to how such surveillance is to be provided for in national law. It further contends that the list of surveillance activities carried out in accordance with domestic legislation demonstrates that surveillance is being carried out effectively in the United Kingdom in accordance with Articles 11 and 14(2) of the directive.

64 The Commission replies that it never asserted that no surveillance of the conservation status of natural habitats and species was undertaken in the United Kingdom. It contends, on the other hand, that the surveillance obligation is neither clearly implemented in that Member State nor clearly assigned to a particular authority of the latter.

65 With regard to those submissions, first, as has already been stated in paragraph 26 of this judgment, the surveillance obligation is fundamental to the effectiveness of the Habitats Directive and it must be transposed in a detailed, clear and precise manner.

66 However, at the end of the period laid down in the reasoned opinion, no provision of domestic law imposed an obligation on the national authorities requiring the surveillance of natural habitats and species.

67 Second, the United Kingdom's argument that the list of surveillance activities carried out proves that surveillance is undertaken effectively cannot be upheld. As the Court has already held, the fact, should it be established, that a practice is in conformity with the requirements of a directive which concern protection cannot constitute a reason for not transposing that directive into the domestic law of the Member State concerned (see, to this effect, Case C-361/88 *Commission* v *Germany*, cited above, paragraph 24).

68 Accordingly, inasmuch as it is common ground that United Kingdom domestic law does not contain any statutory duty requiring the national authorities to undertake surveillance of the conservation status of natural habitats and species, that domestic law involves an element of legal uncertainty. Hence, it is not guaranteed that surveillance of their conservation status is undertaken systematically and on a permanent basis.

69 It follows that Articles 11 and 14(2) of the Habitats Directive have not been transposed completely, clearly and precisely in the United Kingdom.

70 Consequently, the complaint alleging failure to transpose Articles 11 and 14(2) of the Habitats Directive must be held to be well founded.

The complaint alleging incorrect transposition of Article 12(1)(d) of the Habitats Directive

71 The Commission submits that the United Kingdom has not transposed correctly the obligation to take the requisite measures to establish a system of strict protection for certain animal species by prohibiting deterioration or destruction of their breeding sites or resting places. National legislation uses the verb 'to damage' instead of the word 'deterioration' used in Article 12(1)(d) of the Habitats Directive.

72 First, in the Commission's submission the use of the verb 'to damage' means that the effects of deterioration resulting from neglect or inactivity on the part of the competent authorities are not covered. However, in its reply, the Commission went back on this argument, accepting that the provision does not require breeding sites

and resting places of the species concerned to be protected from deterioration due to neglect or inactivity on the part of the competent authorities. Accordingly, there is no longer any need to rule on this point.

73 Second, the Commission contends that by creating offences only for acts having the effect of harming or damaging the breeding sites or resting places of the species in question, without prohibiting their deterioration, the measures transposing the Habitats Directive introduce a condition, not provided for in Article 12(1)(d) thereof, linked to whether the harmful act is intentional.

74 The United Kingdom does not dispute that Article 12(1)(d) of the Habitats Directive requires activities which would lead to the deterioration or destruction of the sites concerned to be prohibited. On the other hand, it contests the Commission's interpretation of the national legislation, according to which transposition of the directive in the United Kingdom, with the exception of Gibraltar, is limited to deliberate or intentional acts.

75 As to those submissions, it is settled case-law that in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove the allegation that the obligation has not been fulfilled and it may not rely on any presumption (see, inter alia, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6, and Case C-194/01 *Commission* v *Austria* [2004] ECR I-4579, paragraph 34).

76 Accordingly, inasmuch as the United Kingdom contends that its domestic law in force is consistent with Article 12(1)(d) of the Habitats Directive, it is for the Commission, in order to prove that that provision has not been transposed completely, to put before the Court the evidence or arguments necessary in order for it to determine that there has been such a failure to fulfil obligations.

77 However, it does not appear from the documents before the Court that the Commission has put forward evidence or arguments capable of proving that the transposition of that provision is limited to deliberate or intentional acts. On the contrary, it appears that the criminal offence provided for by United Kingdom domestic law, which punishes acts consisting in damaging or destroying a site, is a strict liability offence not in any way requiring the damage or destruction to be deliberate or intentional.

78 In those circumstances, since the Commission has not proved that the United Kingdom, other than in respect of Gibraltar, has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive, this part of the complaint cannot be upheld.

79 As regards Gibraltar, suffice it to state that the United Kingdom acknowledges that, by prohibiting only the deliberate damaging or destruction of breeding sites or resting places of the species concerned, the legislation applicable in Gibraltar does not satisfy the requirements of Article 12(1)(d). Accordingly this part of the complaint must be held to be well founded.

80 Third, the Commission states that the United Kingdom legislation as currently drafted would protect breeding sites and resting places only against activities having a direct effect on them, and does not take account of indirect impairment in accordance with the requirements of Article 12(1)(d) of the Habitats Directive.

81 This argument cannot be upheld. The Commission has adduced no evidence capable of proving that the United Kingdom has failed to fulfil its obligations in this regard.

82 It follows from the foregoing that the complaint alleging that Article 12(1)(d) of the Habitats Directive has been transposed incorrectly must be partially upheld.

The complaint alleging incomplete transposition of Articles 12(2) and 13(1) of the Habitats Directive

83 The Commission submits that the national measures intended to transpose the prohibition on the keeping, transport, sale or exchange of specimens of animal and plant species fail to comply with the temporal limitation laid down in those articles.

84 It need only be stated that the United Kingdom acknowledged, during the written procedure and at the hearing, that the derogations in force in its domestic law are broader than those envisaged by the Habitats Directive and that, consequently, the provisions in question have not been correctly transposed in that Member State.

85 Accordingly, the complaint alleging incomplete transposition of Articles 12(2) and 13(1) of the Habitats Directive must be held to be well founded.

The complaint alleging incorrect transposition of Article 12(4) of the Habitats Directive

86 The Commission submits that the United Kingdom's implementing measures contain no provision requiring the establishment of a monitoring system such as

that required in Article 12(4), in respect of the incidental capture and killing of certain animal species. In the absence of further information the Commission is unable to establish whether such monitoring is in fact carried out.

87 It need only be stated that the United Kingdom, first, has acknowledged that national legislation contains no provision designed to establish such a monitoring system and, second, accepted in its letter of 27 November 2001 that national legislation had to be amended so that such monitoring is expressly established.

88 In any event, it does not appear that such a measure was adopted within the period laid down in the reasoned opinion.

89 Accordingly, the complaint alleging that Article 12(4) of the Habitats Directive has been transposed incorrectly must be held to be well founded.

The complaint alleging incorrect transposition of Article 15 of the Habitats Directive

90 The Commission complains that the United Kingdom has failed to comply with its obligations under Article 15 of the Habitats Directive. First, it criticises that Member State for having prohibited only the methods expressly listed in Annex VI(a) and (b) to the directive, without imposing a general prohibition on the use of indiscriminate means. Second, the Commission submits that sections 1 and 10 of the Conservation of Seals Act prohibit the use of only two methods of killing seals, whilst providing for exemptions, in the form of licences granted by the Secretary of State, which appear to go beyond the derogations allowed by the directive.

— No general prohibition on all indiscriminate means

91 The Commission pleads that United Kingdom legislation contains no general prohibition on the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the relevant species of wild fauna. The national legislation does not therefore preclude the emergence of as yet unknown means of indiscriminate capture and killing.

92 The United Kingdom contends that Article 15 of the directive has been transposed by regulation 41 of the 1994 Regulations, regulation 36(2) of the 1995 regulations and section 17V(2) of the 1991 Ordinance. It states that those provisions establish lists of every indiscriminate means of capture and killing of the protected species that is currently recorded in that Member State and that the lists are kept under review in order to be updated if necessary.

93 As to those submissions, Article 15 of the Habitats Directive provides that, in respect of the capture or killing of species of wild fauna listed in Annex V(a) thereto and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV(a), Member States are to prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species.

94 That provision, as is apparent from its very wording, imposes a general obligation designed to prohibit the use of all indiscriminate means of capture or killing of the species of wild fauna concerned.

95 In the present case, it is not in dispute that, at the end of the period laid down in the reasoned opinion, domestic law did not impose a general prohibition of that kind.

96 Furthermore, as the Advocate General has observed in point 89 of her Opinion, the possibility of updating a list of prohibited methods is less effective than a general prohibition. Delay in updating the aforementioned lists would necessarily lead to lacunae in protection which are specifically intended to be prevented by means of the general prohibition in Article 15 of the Habitats Directive. This interpretation is all the more justified because domestic law contains no statutory duty to review the lists.

97 In those circumstances, it is not in any way guaranteed that all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of the protected species are prohibited in the United Kingdom.

98 Therefore, it must be held that the United Kingdom has not transposed Article 15 of the Habitats Directive correctly as regards the prohibition on all indiscriminate means of capture or killing of the species of wild fauna concerned.

— Conservation of Seals Act

99 A preliminary point to note is that in its reply the Commission withdrew its complaint relating to the Conservation of Seals Act, on the basis of the fact that the United Kingdom had undertaken in its defence to adopt amending legislation in that regard. However, in its rejoinder the United Kingdom considered it necessary to alert the Commission that it would await the outcome of the present proceedings before amending its legislation. It was in those circumstances that at the hearing the Commission wished to maintain this complaint, and the United Kingdom did not contest this.

100 The Commission submits that, by prohibiting only two methods of killing seals and allowing licences to be granted on conditions which go beyond the derogations provided for by the Habitats Directive, the Conservation of Seals Act does not comply with Article 15 of the directive.

101 According to the United Kingdom, such an interpretation of the Conservation of Seals Act is incorrect. The Act simply supplements regulation 41 of the 1994 Regulations, which transposes Article 15 of the Habitats Directive, and it therefore provides additional protection for the various seal species.

102 As to those submissions, first, as has been held in paragraph 98 of this judgment, regulation 41 of the 1994 Regulations does not transpose Article 15 of the Habitats Directive correctly. Therefore, the United Kingdom's argument that the Conservation of Seals Act supplements regulation 41 of the 1994 Regulations cannot be upheld.

103 Second, even if the Conservation of Seals Act were to supplement the 1994 Regulations, it could be interpreted as meaning that only the two methods expressly mentioned by it are prohibited.

104 In those circumstances, the Conservation of Seals Act involves an element of legal uncertainty as to the methods of killing seals which are prohibited in the United Kingdom and it therefore does not ensure that Article 15 of the Habitats Directive is transposed correctly.

105 It follows from the foregoing that the complaint relating to incorrect transposition of Article 15 of the Habitats Directive must be upheld.

The complaint alleging incorrect transposition of Article 16 of the Habitats Directive

106 First, the Commission submits that the body of national provisions establishing derogations from Articles 12, 13, 14 and 15(a) and (b) of the Habitats Directive, which are set out in particular in regulation 40 of the 1994 Regulations, regulation 35 of the 1995 Regulations and section 17U of the 1991 Ordinance, does not comply with the two conditions specified in Article 16 of the directive. The Commission observes that, as provided in Article 16, a derogation may be granted only if there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.

107 It need only be stated (i) that the United Kingdom has accepted that any derogation granted pursuant to Article 16 of the directive must necessarily fulfil the two aforementioned conditions and (ii) that although that Member State has admitted that those conditions are not reproduced in the national legislation, no amendment designed to remedy that breach of obligations had been made at the end of the period laid down in the reasoned opinion.

108 This part of the complaint must therefore be upheld.

109 Second, the Commission submits that the specific derogations set out in regulations 40(3)(c) and 43(4) of the 1994 Regulations and in the equivalent provisions of the 1995 Regulations and the 1991 Ordinance go beyond the scope of Article 16 of the Habitats Directive. It states that the prohibitions laid down in order to transpose Articles 12, 13 and 16 of the directive are not applicable where the act in question is the result of a lawful operation.

110 The United Kingdom contends that since it transposed the requirements of Articles 12 and 13 of the Habitats Directive by making their infringement a criminal offence, it is necessary to exclude the application of such an offence in cases where persons act without criminal intent.

111 As to those submissions, Article 16 of the Habitats Directive defines in a precise manner the circumstances in which Member States may derogate from Articles 12, 13, 14 and 15(a) and (b) thereof, so that Article 16 must be interpreted restrictively.

112 Furthermore, as the Advocate General has observed in point 113 of her Opinion, Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16.

113 The derogation at issue in the present case authorises acts which lead to the killing of protected species and to the deterioration or destruction of their breeding and resting places, where those acts are as such lawful. Therefore such a derogation, founded on the legality of the act, is contrary both to the spirit and purpose of the Habitats Directive and to the wording of Article 16 thereof.

114 Having regard to the foregoing, the action must be held well founded in this regard.

Failure to apply the Habitats Directive beyond the territorial waters of the United Kingdom

115 The Commission alleges that the United Kingdom has limited the application of the provisions which transpose the Habitats Directive into national law to just national territory and United Kingdom territorial waters. It contends that within their exclusive economic zones the Member States have an obligation to comply with Community law in the fields where they exercise sovereign powers and that the directive therefore applies beyond territorial waters. In particular, the Commission complains that the United Kingdom has not complied in its exclusive economic zone with its obligation to designate SACs under Article 4 of the directive or the obligation to provide species protection laid down in Article 12 of the directive.

116 The United Kingdom, without contesting the validity of this complaint, states, first, that in 2001 it adopted appropriate legislation so far as concerns the petroleum industry, namely the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001, and second, that it has prepared suitable legislation to extend the application of the Habitats Directive's requirements to the marine area beyond its territorial waters.

117 As the Advocate General has rightly observed in points 132 and 133 of her Opinion, it is common ground between the parties that the United Kingdom exercises sovereign rights in its exclusive economic zone and on the continental shelf and that the Habitats Directive is to that extent applicable beyond the Member States' territorial waters. It follows that the directive must be implemented in that exclusive economic zone.

118 Furthermore, it is common ground that the legislation to which the United Kingdom refers in its letter of 27 November 2001, which extends the application of the measures designed to transpose the requirements of the Habitats Directive beyond United Kingdom territorial waters, had not yet been adopted at the end of the period laid down in the reasoned opinion.

119 Consequently, the only national legislation in force at the end of that period was the Offshore Petroleum Activities (Conservation of Habitats) Regulations 2001. It is clear that those regulations concern only the petroleum industry and are therefore not capable by themselves of transposing the Habitats Directive beyond United Kingdom territorial waters.

120 The Commission's action must accordingly be held well founded in this regard.

121 In light of all the foregoing considerations, it must be held that, by failing to adopt, within the prescribed period, all the measures necessary in order to implement completely and correctly the requirements of the Habitats Directive, and in particular of:

— Article 6(2), as regards Gibraltar,

— Article 6(3) and (4), as regards water abstraction plans and projects and land use plans,

— Article 11,

— Article 12(1)(d), as regards Gibraltar,

— Article 12(2),

— Article 12(4),

— Article 13(1),

— Article 14(2),

— Article 15,

— Article 16,

— the whole of the Habitats Directive beyond its territorial waters,

the United Kingdom has failed to fulfil its obligations under that directive.

Costs

122 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the United Kingdom has been essentially unsuccessful, the United Kingdom must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by failing to adopt, within the prescribed period, all the measures necessary in order to implement completely and correctly the requirements of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, and in particular of:**

   — **Article 6(2), as regards Gibraltar,**

   — **Article 6(3) and (4), as regards water abstraction plans and projects and land use plans,**

   — **Article 11,**

   — **Article 12(1)(d), as regards Gibraltar,**

   — **Article 12(2),**

   — **Article 12(4),**

   — **Article 13(1),**

— **Article 14(2),**

— **Article 15,**

— **Article 16,**

— **the whole of Directive 92/43 beyond its territorial waters,**

the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;

2. **Dismisses the action as to the remainder;**

3. **Orders the United Kingdom of Great Britain and Northern Ireland to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

14 April 2005 *

In Case C-441/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 16 October 2003,

Commission of the European Communities, represented by M. van Beek, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by H.G. Sevenster and N.A.J. Bel, acting as Agents,

defendant,

* Language of the case: Dutch.

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, R. Silva de Lapuerta (Rapporteur), R. Schintgen, P. Kūris and G. Arestis, Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 3 February 2005,

gives the following

Judgment

1 By its application the Commission of the European Communities seeks from the Court a declaration that, by failing to bring into force within the prescribed periods the laws, regulations and administrative provisions necessary to comply with the requirements of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) and of Article 6(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), in conjunction with Articles 2(2), 1

(a), (e) and (i), 6(2) to (4), 7, 11, 14 and 15 thereof, or, at the very least, by failing to notify those national provisions to it and by maintaining in force Article 13(4) of the Nature Conservancy Law (Natuurbeschermingswet), which is incompatible with Article 6(4) of Directive 92/43, the Kingdom of the Netherlands has failed to fulfil its obligations under those directives.

2 As a result of information communicated by the Netherlands Government in its defence the Commission has however found that Article 14 of Directive 92/43 had been properly transposed into domestic law, so that it withdrew, in its reply, the complaint relating to the incorrect transposition of that article.

Legal background

Community legislation

3 Directive 79/409 relates, as provided in Article 1(1) thereof, to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States. It covers the protection, management and control of these species and lays down rules for their exploitation.

4 In accordance with Article 4(1) and (2) of Directive 79/409, the species mentioned in Annex I thereto are to be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution, taking account of the particular situation of a certain number of species. As regards the conservation of those species, Member States are to classify

in particular the most suitable territories in number and size as special protection areas. Member States are also obliged to take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection as regards their breeding, moulting and wintering areas and the staging posts along their migration routes. To this end, Member States are to pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

5 Under Article 2(1) thereof, the aim of Directive 92/43 is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the EC Treaty applies. According to Article 2(2), measures taken pursuant to the Directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

6 Article 6(2) to (4) of Directive 92/43 provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

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

integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

7 Article 11 of Directive 92/43 is worded as follows:

'Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.'

8 Article 15 of Directive 92/43 provides:

'In respect of the capture or killing of species of wild fauna listed in Annex V(a) and in cases where, in accordance with Article 16, derogations are applied to the taking,

capture or killing of species listed in Annex IV(a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

...'.

National legislation

9 As the Commission stated in its application, the Kingdom of the Netherlands has adopted the following measures in order to transpose Directive 92/43:

— Nature Conservancy Law (Natuurbeschermingswet);

— Decree providing for exceptions to and derogations from the Nature Conservancy Law (Besluit ontheffingen en vrijstellingen Natuurbeschermingswet);

— Action Plan for Nature (Natuurbeleidsplan) including the European Network of protected areas (ecologische hoofdstructuur EHS);

— Structural Plan for Green Spaces (Structuurschema Groene Ruimte);

— Town and Country Planning Law (Wet op de ruimtelijke ordening);

— Decree on protected native animal species (Besluit beschermde inheemse diersoorten);

— Regulation of the Minister for Agriculture, Nature Management and Fisheries (Regeling van de Minister van Landbouw, Natuurbeheer en Visserij) of 12 April 1995;

— list of endangered and vulnerable species within the meaning of Articles 1 and 3 of the Berne Convention on the Conservation of wildlife and natural habitats, drawn up by the Regulation of the Minister for Agriculture, Nature Management and Fisheries (Regeling van de Minister van Landbouw, Natuurbeheer en Visserij) of 27 January 1995;

— Law on endangered exotic animal and plant species (Wet bedreigde uitheemse dier- en plantensoorten);

— Regulation on management contracts and nature development (Regeling beheersovereenkomsten en natuurontwikkeling);

— Regulation to stimulate forest development of farm land (Regeling stimulering bosuitbreiding op landbouwgronden);

— Regulation providing for derogations from the Law on endangered exotic animal and plant species (Regeling ontheffingen Wet bedreigde uitheemse dier- en plantensoorten);

— Regulation designating endangered exotic animal and plant species (Regeling aanwijzing bedreigde uitheemse dier- en plantensoorten);

— Environment Management Law (Wet milieubeheer), and

— Flora and Fauna Law (Flora- en faunawet).

Pre-litigation procedure

10 By letter of formal notice of 24 October 2000 the Commission called on the Kingdom of the Netherlands to submit its observations concerning the transposition of Directives 79/409 and 92/43 into its national law. The Kingdom of the Netherlands replied by letter of 8 March 2001.

11 On 26 July 2001 the Commission sent a reasoned opinion to the Kingdom of the Netherlands in which it complained that the latter had incorrectly transposed a certain number of provisions of Directives 79/409 and 92/43, and invited the Kingdom of the Netherlands to comply with the reasoned opinion within two months from the date of its notification.

12 By letter of 11 October 2001, the Kingdom of the Netherlands sent to the Commission a draft law amending the Nature Conservancy Law. On 28 January 2002 a more detailed reply on that matter was sent to the Commission by the Netherlands authorities.

13 Taking the view that the Kingdom of the Netherlands had not fully transposed, within the prescribed periods, Directives 79/409 and 92/43, the Commission decided to bring the present proceedings.

The action

Arguments of the parties

14 The Commission puts forward the following seven complaints against the Kingdom of the Netherlands:

— the national legislation does not fully transpose Article 6(1) of Directive 92/43, in conjunction with Articles 1(a), (e) and (i) and 2(2) thereof;

— the national legislation has only partially transposed the requirements of Article 6(2) of Directive 92/43, in conjunction with Articles 1(a), (e) and (i) and 2(2) thereof;

— neither Articles 12 and 21(3) of the Nature Conservancy Law or the Environment Management Law, nor any other law, regulation or administrative provision in force in the Netherlands are in accordance with the requirements of Article 6(3) of Directive 92/43;

— neither Articles 12 and 21(3) of the Nature Conservancy Law or the Environment Management Law, nor any other law, regulation or administrative provision in force in the Netherlands adequately transpose Article 6(4) of Directive 92/43, in the situations covered by that provision; Article 13(4) of the Nature Conservancy Law is also incompatible with that provision;

— contrary to the requirements of Article 11 of Directive 92/43 a complete system for surveillance of sites has not been set up in the Netherlands;

— the prohibition of indiscriminate means set out in Article 15 of Directive 92/43 is not fully implemented in the provisions of the Decree providing for exceptions to and derogations from the Nature Conservancy Law;

— the measures necessary to fulfil the obligation to protect the habitat of the species of birds referred to in Article 4(1) and (2) of Directive 79/409 have not been adopted in the Netherlands.

15 As regards the third complaint, relating to the failure to transpose Article 6(3) of Directive 92/43 into Netherlands law, the Commission submits that the assessment which must be carried out on the basis of that provision must also cover the elements set out in Article 6(4). For the purposes of such an assessment there should

be an examination not only of whether a plan or project is likely adversely to affect the integrity of the site concerned, but also of whether alternative solutions exist, whether imperative reasons of overriding public interest require the operation to be carried out or whether compensatory measures must be taken. Furthermore, it is necessary to take account of the fact that a particular site may host a priority natural habitat type and/or a priority species.

16 In that connection, the Netherlands Government, while acknowledging that Article 6(3) of Directive 92/43 has not been fully transposed, rejects the Commission's interpretation of the definition of 'appropriate assessment' contained in that provision. It takes the view that, given the characteristics of the assessment process for plans or projects set out in that article, Article 6(4) and the elements in it are applicable only if it is clear from the assessment carried out under Article 6(3) that the plan or project may in fact adversely affect the integrity of the site. The Netherlands Government argues that it is only in such cases that it is necessary to go on to examine the elements mentioned in Article 6(4). If the assessment carried out under Article 6(3) showed that a plan or project does not affect the integrity of the site, there would then be no reason to add to the assessment obligation under that provision a further examination concerning the existence of the elements mentioned in Article 6(4).

17 As to the first, second, fourth and seventh complaints made by the Commission, the Kingdom of the Netherlands acknowledges that the provisions of Directives 79/409 and 92/43 which are the subject of the action have not been fully transposed into Netherlands law. In that connection, it states that on 19 December 2001 a draft law amending the Nature Conservancy Law was submitted to Parliament. That draft law is intended to ensure that those directives are fully transposed, particularly as regards the provisions on the basis of which the first, second, fourth and seventh complaints have been raised.

18 As to the fifth and sixth complaints the Netherlands Government contends that measures are planned in order to eliminate the legal lacunas pointed out by the Commission in its action.

Findings of the Court

19 Since the Kingdom of the Netherlands accepts that the first, second, fourth, fifth, sixth and seventh complaints are well founded, the application must be upheld in that regard.

20 As regards the third complaint, although the Kingdom of the Netherlands admits that it has not completely transposed Article 6(3) of Directive 92/43 into its domestic law, nevertheless it contests the Commission's complaint in so far as, according to the Commission, the appropriate assessment referred to in Article 6(3) must also cover the elements referred to in Article 6(4).

21 In that connection, in order to determine the scope of the obligation to carry out an appropriate assessment of a plan or project likely to affect a site which falls within the scope of Article 6(3) of Directive 92/43, it must be stated, as a preliminary point, that the protection scheme established by that article consists of several aspects designed to permit examination of the effects of such a plan or project, and various stages of assessment where the plan or project is likely to have serious repercussions on a protected site.

22 As the Advocate General stated in points 12 and 13 of her Opinion, this 'appropriate assessment' is not a merely formal process of examination, but must allow a detailed analysis which satisfies the conservation objectives of the site in question, as set out in Article 6, particularly as regards the protection of natural habitats and priority species.

23 As the Court stated in paragraphs 33 and 34 of its judgment in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* [2004] ECR I-7405, it is clear from Article 6(3) of Directive 92/43 that in every case of a plan or project not directly connected with or necessary to the management of the site, but likely to have a significant effect thereon, either individually or in combination with other plans and projects, the competent authorities are required to carry out an appropriate assessment in that respect. That assessment must relate to the implications of the plan or project for the site in view of the site's conservation objectives.

24 In accordance with Article 6(3), it is only in the second stage, that is on completion of the appropriate assessment and in the light of the conclusions on the implications for the site in question of the plan or project, that the competent authorities adopt a decision on it.

25 It should be added that, in accordance with that provision, the competent authorities, when taking their decision, agree to the plan or project only after having ascertained that the planned operation does not adversely affect the integrity of the site concerned. Furthermore, those authorities must, if appropriate, obtain the opinion of the general public on that subject.

26 Within the procedural context thus outlined, it is only where the assessment required under Article 6(3) of Directive 92/43 is negative and in the absence of alternative solutions that, where the plan or project must nevertheless be carried out for imperative reasons of overriding public interest, the examination laid down in Article 6(4) must be undertaken. It is stated in Article 6(3) that the decision is to be adopted by the competent authorities 'subject to the provisions of paragraph 4'.

27 As to the examination which must be carried out within the framework of Article 6 (4), it should be noted that the complex factors to which it relates, such as the absence of alternative solutions and the existence of imperative reasons of overriding public interest, are intended to enable a Member State to take all compensatory measures to ensure that the overall coherence of Natura 2000 is preserved. Furthermore, where the site concerned hosts a priority natural habitat type and/or a priority species, only a limited number of such imperative reasons may be relied on in order to justify a plan or project nevertheless being carried out.

28 In those circumstances, having regard to the particular characteristics of each of the stages referred to in Article 6 of Directive 92/43, it must be held that the various requirements set out in Article 6(4) cannot constitute elements that the competent national authorities are obliged to take account of where they carry out an appropriate assessment provided for in Article 6(3).

29 Therefore, the complaint alleging that the Netherlands national legislation does not provide that the assessment referred to in Article 6(3) of Directive 92/43 must also be carried out with regard to the elements mentioned in Article 6(4) must be dismissed.

30 In the light of the foregoing, it must be held that, by failing to bring into force within the prescribed periods all the laws, regulations and administrative provisions necessary to comply with the requirements of Article 4(1) and (2) of Directive 79/409 and of Article 6(1) of Directive 92/43, in conjunction with Articles 2(2), 1(a), (e) and (i), 6(2) to (4), 7, 11 and 15 thereof and by maintaining in force Article 13(4) of the Nature Conservancy Law, which is incompatible with Article 6(4) of Directive 92/43, the Kingdom of the Netherlands has failed to fulfil its obligations under those directives.

Costs

31 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of the Netherlands has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds the Court (Second Chamber) hereby:

1. **Declares that, by failing to bring into force within the prescribed periods all the laws, regulations and administrative provisions necessary to comply with the requirements of Article 4(1) and (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds and of Article 6(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, in conjunction with Articles 2 (2), 1(a), (e) and (i), 6(2) to (4), 7, 11 and 15 thereof and by maintaining in force Article 13(4) of the Nature Conservancy Law (Natuurbeschermingswet), which is incompatible with Article 6(4) of Directive 92/43, the Kingdom of the Netherlands has failed to fulfil its obligations under those directives;**

2. **Dismisses the remainder of the application;**

3. **Orders the Kingdom of the Netherlands to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

13 January 2005 *

In Case C-117/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by order of 17 December 2002, received at the Court on 18 March 2003, in the proceedings

Società Italiana Dragaggi SpA and Others

v

Ministero delle Infrastrutture e dei Trasporti,

Regione Autonoma del Friuli-Venezia Giulia,

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), J.-P. Puissochet, N. Colneric and J.N. Cunha Rodrigues, Judges,

* Language of the case: Italian.

Advocate General: J. Kokott,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 June 2004,

after considering the observations submitted on behalf of:

— Società Italiana Dragaggi SpA, acting in its own name and as agent of Associazione Temporanea di Imprese Mantovani SpA and HAM BV, by R. Titomanlio, avvocato,

— Regione Autonoma del Friuli-Venezia Giulia, by G. Marzi, avvocato,

— the French Republic, by C. Mercier, acting as Agent,

— the Kingdom of Sweden, by A. Kruse, acting as Agent,

— the Commission of the European Communities, by M. van Beek and L. Cimaglia, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2004,

gives the following

Judgment

1 The reference for a preliminary ruling relates to the interpretation of Articles 4(5), 6(3) and 21 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the Directive').

2 The reference was submitted in proceedings between, first, Società Italiana Dragaggi SpA ('Dragaggi') amongst others and, second, the Ministero delle Infrastrutture e dei Trasporti (Ministry for Infrastructure and Transport) and the Regione Autonoma Friuli-Venezia Giulia (Autonomous Region of Friuli-Venezia Giulia) concerning the annulment, by the contracting authority, of a tender procedure relating to dredging works and the dumping of sediment on reclaimed land in the port of Monfalcone.

Legal context

Community law

3 The sixth recital in the preamble to the Directive states that, 'in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable'.

4 According to Article 3(1) of the Directive, 'a coherent European ecological network of special areas of conservation shall be set up under the title Natura 2000. This network, composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.'

5 Article 4 of the Directive is worded as follows:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. ...

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. ...

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most ...

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

6 Under paragraph 1 of Annex III (Stage 2) to the Directive, 'all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance'.

7 Article 6 of the Directive states:

'...

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

8 Article 21 of the Directive provides that measures envisaged are to be adopted in accordance with a committee procedure.

9 Under Article 23, the Member States had to transpose the Directive into national law within two years of notification thereof. Notification took place on 10 June 1992.

National legislation

10 The Directive was transposed into Italian law by Decree No 357 of the President of the Republic of 8 September 1997 entitled 'Regulation implementing Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora' (GURI No 248, 'supplemento ordinario No 219/L', of 23 October 1997; 'Decree No 357/97').

11 Article 4 of Decree No 357/97 ties conservation measures for sites to establishment by the Commission of the list of sites of Community importance.

The main proceedings and the question referred for a preliminary ruling

12 On 14 May 2001 Dragaggi was awarded a contract relating to dredging works and the dumping of the sediment on reclaimed land in the port of Monfalcone.

13 Four months later the contracting authority annulled the entire tender procedure on the ground that the reclaimed land on which the sediment resulting from the works was intended to be deposited was classified as a site of Community interest, requiring an impact assessment under the relevant national legislation. According to the authority, such an assessment could not have a positive outcome.

14 Dragaggi challenged the legality of the decision annulling the tender procedure before the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia (Regional Administrative Court of Friuli-Venezia Giulia, Italy). It contended in particular that the procedure for classifying as a site of Community importance the 'mouth of the Timavo' site where the reclaimed land in question was situated had not yet been completed. Although the Italian authorities had proposed a list of sites, including the site at the mouth of the Timavo, to the Commission, the latter had not yet adopted

the Community list under the third subparagraph of Article 4(2) of the Directive. Therefore, the obligation to carry out a prior assessment of projects that had significant implications for the site was not yet applicable.

15 In its judgment, the court rejected the argument alleging that the impact assessment procedure was not applicable to the project. According to the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia, where a Member State has, as in the present instance, identified a site hosting a priority species and has included it in the list proposed to the Commission, that site must, under paragraph 1 of Schedule III (Stage 2) to the Directive, be considered to be of Community importance. Accordingly it is subject, pursuant to Article 4(5) of the Directive, to the protective measures referred to in Article 6(2), (3) and (4) thereof, and in particular to the impact assessment which is provided for in Article 6(3).

16 According to that court, this approach is the only one capable of giving logical meaning to the Directive which, inasmuch as it seeks to protect habitats or species in danger of disappearance and extinction, must be capable of applying directly, if only in order to provide a safeguard. Furthermore, the measures proposing the classification of the mouth of the Timavo as a priority site, in particular the decree of the Minister for the Environment of 3 April 2000, were not challenged.

17 Holding that an impact assessment was necessary, the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia upheld Dragaggi's other complaints alleging that the persons concerned by the carrying out of the project had not been consulted, that alternative solutions to those defined in the project had not been considered before the tender procedure was annulled and that the competent authority had not considered the possibility of giving a positive assessment accompanied by conditions.

18 Dragaggi brought an appeal against the judgment of the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia before the Consiglio di Stato (Council of State). In particular, it repeated before the Consiglio di Stato the argument that Article 4(5) of the Directive requires the protective measures envisaged in Article 6 of the Directive to be applied only once the Community list has been established. In its submission, this view is confirmed by Article 4 of Decree No 357/97 which provides that the protective measures must be adopted within three months following the inclusion of the site on the list established by the Commission.

19 The Consiglio di Stato observed that, inasmuch as the listing of sites of Community importance hosting priority habitats appeared to be a purely declaratory act that did not require the exercise of any discretion by the Community authority, the interpretation placed on Article 4(5) of the Directive by the Tribunale Amministrativo Regionale del Friuli-Venezia Giulia could not be considered to be manifestly unfounded.

20 In those circumstances the Consiglio di Stato decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 4(5) of Directive 92/43 of 21 May 1992 to be interpreted as meaning that the measures under Article 6 and, in particular, under Article 6(3) of that directive are mandatory for the Member States only after final approval at Community level of the list of sites under Article 21 or, alternatively, in addition to determination of the ordinary commencement date of conservation measures, must a distinction be drawn between declaratory listing and determinative listing (including in the first category the listing of priority sites) with the result that, in order to ensure the

effectiveness of the directive, where a Member State identifies a site of Community importance sustaining priority natural habitat types or species, there must be considered to be an obligation to carry out an assessment of plans and projects with a significant effect on the site even before the Commission draws up the draft list of sites or the adoption of the final version of that list pursuant to Article 21 of the directive and, in fact, with effect from the drawing up of the national list?'

Consideration of the question referred

21 Pursuant to Article 4(5) of the Directive, the regime for the protection of special areas of conservation that is laid down in Article 6(2), (3) and (4) thereof applies to a site once it is placed, in accordance with the third subparagraph of Article 4(2), on the list of sites selected as sites of Community importance as adopted by the Commission under the procedure laid down in Article 21.

22 The fact that, according to paragraph 1 of Annex III (Stage 2) to the Directive, all the sites identified by the Member States in Stage 1 which contain priority natural habitat types and/or species will be considered as sites of Community importance cannot render the protection regime prescribed in Article 6(2), (3) and (4) of the Directive applicable to them before they appear, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission.

23 The contrary proposition referred to by the Consiglio di Stato, that where a Member State has, as in the main proceedings, identified a site as hosting a priority habitat and has included it in the list proposed to the Commission pursuant to Article 4(1) of the Directive, that site must, in view of paragraph 1 of Annex III (Stage 2) to the Directive, be considered to be of Community importance and is therefore subject, pursuant to Article 4(5), to the protective measures referred to in Article 6(2), (3) and (4), cannot succeed.

24 First, this proposition clashes with the wording of Article 4(5) of the Directive, which expressly links application of those protective measures to the fact that the site concerned has been placed, in accordance with the third subparagraph of Article 4(2), on the list of sites of Community importance adopted by the Commission. Second, the proposition presupposes that, where a site has been identified by a Member State as hosting priority natural habitat types or priority species and has been referred to on the list proposed to the Commission pursuant to Article 4(1) of the Directive, the Commission is required to place it on the list of sites of Community importance which it adopts in accordance with the procedure laid down in Article 21 of the Directive and is mentioned in the third subparagraph of Article 4(2). If that were the case, the Commission would be precluded, when establishing, in agreement with each Member State, a draft list of sites of Community importance within the meaning of the first subparagraph of Article 4(2), from contemplating not including on the draft list any site proposed by a Member State as hosting priority natural habitat types or priority species, even if it were to consider, notwithstanding the contrary opinion of the Member State concerned, that a given site did not host priority natural habitat types and/or species as referred to in paragraph 1 of Annex III (Stage 2) to the Directive. Such a situation would be contrary, in particular, to the first subparagraph of Article 4(2) of the Directive, read in conjunction with paragraph 1 of Annex III (Stage 2).

25 It thus follows from the foregoing that, on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive.

26 This does not mean that the Member States are not to protect sites as soon as they propose them, under Article 4(1) of the Directive, as sites eligible for identification as sites of Community importance on the national list transmitted to the Commission.

27 If those sites are not appropriately protected from that moment, achievement of the objectives seeking the conservation of natural habitats and wild fauna and flora, as set out in particular in the sixth recital in the preamble to the Directive and Article 3(1) thereof, could well be jeopardised. Such a situation would be particularly serious as priority natural habitat types or priority species would be affected, for which, because of the threats to them, early implementation of conservation measures would be appropriate, as recommended in the fifth recital in the preamble to the Directive.

28 In the present instance, it should be remembered that the national lists of sites eligible for identification as sites of Community importance must contain sites which, at national level, have an ecological interest that is relevant from the point of view of the Directive's objective of conservation of natural habitats and wild fauna and flora (see Case C-371/98 *First Corporate Shipping* [2000] ECR I-9235, paragraph 22).

29 It is apparent, therefore, that in the case of sites eligible for identification as sites of Community importance that are mentioned on the national lists transmitted to the Commission and may include in particular sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures appropriate for the purpose of safeguarding that ecological interest.

30 The answer to the question referred must therefore be that:

— on a proper construction of Article 4(5) of the Directive, the protective measures prescribed in Article 6(2), (3) and (4) of the Directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the Directive, are on the list of sites selected as sites of Community importance adopted by the Commission in accordance with the procedure laid down in Article 21 of the Directive;

— in the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of the Directive, required to take protective measures that are appropriate, from the point of view of the Directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.

Costs

31 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) rules as follows:

On a proper construction of Article 4(5) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the protective measures prescribed in Article 6(2), (3) and (4) of that directive are required only as regards sites which, in accordance with the third subparagraph of Article 4(2) of the directive, are on the list of sites selected as sites of Community importance adopted by the Commission of the European Communities in accordance with the procedure laid down in Article 21 of the directive.

In the case of sites eligible for identification as sites of Community importance which are included in the national lists transmitted to the Commission and, in particular, sites hosting priority natural habitat types or priority species, the Member States are, by virtue of Directive 92/43, required to take protective measures that are appropriate, from the point of view of the directive's conservation objective, for the purpose of safeguarding the relevant ecological interest which those sites have at national level.

Signatures.

JUDGMENT OF THE COURT (Grand Chamber)

7 September 2004 *

In Case C-127/02,

REFERENCE for a preliminary ruling under Article 234 EC

from the Raad van State (Netherlands), made by decision of 27 March 2002, registered at the Court on 8 April 2002, in the proceedings brought by

Landelijke Vereniging tot Behoud van de Waddenzee,

Nederlandse Vereniging tot Bescherming van Vogels

against

Staatssecretaris van Landbouw, Natuurbeheer en Visserij,

* Language of the case: Dutch.

intervener:

Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA,

THE COURT (Grand Chamber),

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann (Rapporteur), J.-P. Puissochet and J.N. Cunha Rodrigues, Presidents of Chambers, R. Schintgen, S. von Bahr and R. Silva de Lapuerta, Judges,

Advocate General: J. Kokott,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 November 2003,

after considering the observations submitted on behalf of:

— Landelijke Vereniging tot Behoud van de Waddenzee, by C.A.M. Rombouts, advocaat,

— Nederlandse Vereniging tot Bescherming van Vogels, by A.J. Durville, advocaat,

— Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA, by G. van der Wal, advocaat,

— the Netherlands Government, by H.G. Sevenster and N.A.J. Bel, acting as Agents,

— the Commission of the European Communities, by G. Valero Jordana, acting as Agent, and J. Stuyck, avocat,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2004,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, 'the Habitats Directive').

2 The reference was made in proceedings between the Landelijke Vereniging tot Behoud van de Waddenzee (National association for conservation of the Waddenzee, 'the Waddenvereniging') and the Nederlandse Vereniging tot Bescherming van Vogels (Netherlands association for the protection of birds, 'the Vogelbeschermingsvereniging') on the one hand and the Staatssecretaris van Landbouw, Natuurbeheer en Visserij (Secretary of State for agriculture, nature conservation and fisheries, 'the Secretary of State') on the other in respect of licences which the latter issued to the Coöperatieve Producentenorganisatie van de Nederlandse Kokkelvisserij UA (Cooperative producers' association of Netherlands cockle fisheries, 'the PO Kokkelvisserij') for the mechanical fishing of cockles in the special protection area (SPA) of the Waddenzee, classified within the meaning of Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) ('the Birds Directive').

Legal framework

The Birds Directive

3 Article 4(1) and (2) of the Birds Directive requires Member States to classify as SPAs the territories satisfying the ornithological criteria established by those provisions.

4 Article 4(4) of the Birds Directive provides:

'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or

any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

The Habitats Directive

Article 6 of the Habitats Directive states :

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment

of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

6 Article 7 of the Habitats Directive states that 'obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of [the Birds Directive] in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under [the Birds Directive], where the latter date is later'.

National legislation

7 Under Article 12(1) of the Natuurbeschermingswet (Nature Conservation Law), it is prohibited to carry out, to have carried out or to allow actions which are harmful to the natural integrity or the scientific importance of a protected natural site or disfigure it, without authorisation by the Minister van Landbouw, Natuurbeheer en Visserij (Minister for Agriculture, nature conservation and fisheries, 'the Minister') or in breach of the conditions accompanying that authorisation. Under Article 12(2), activities harmful to the essential characteristics of a protected natural site, as set out in the designation decision, are always to be considered harmful to the natural integrity of such a site or its interest in natural science terms.

8 It is clear from the order of 17 November 1993 designating the Waddenzee as a national natural site and from the explanatory memorandum for that order, which is an integral part of it, that the policy of authorisations and revocations under the Natuurbeschermingswet is linked to that followed under the Planologische Kernbeslissing Waddenzee (Key planning decision for the Waddenzee, hereinafter 'the PKB Waddenzee'). According to that explanatory memorandum, applying the procedures of the Natuurbeschermingswet creates an adequate framework for controlling activities which might harm the main objective of the PKB Waddenzee, namely, sustainable protection and development of that sea as a natural site and, in particular, of feeding, nesting and resting areas for birds frequenting that site. Human activities for economic purposes are allowed subject to an adequate assessment in the light of the main objective. Activities envisaged in the Waddenzee must therefore be examined in the light of the abovementioned objective and policy guidelines and assessed in terms thereof.

9 The section in the PKB Waddenzee devoted to coastal fisheries management is implemented in the Government decision of 21 January 1993, namely, the Structuurnota Zee- en kustvisserij 'Vissen naar evenwicht' (Structure Document on Marine and Inshore Fisheries 'Fishing for equilibrium'). This establishes the policy for shellfish fishing, inter alia in the Waddenzee, for the years 1993 to 2003 and includes a number of restrictions as regards cockle fishing. Certain areas in the national natural site are permanently closed to cockle fishing and in years in which food is scarce, 60% of the average food requirement of birds in the form of cockles and mussels is reserved for them. While 100% of their average food requirement is not thus reserved, that is because they can also turn to alternative food sources (Baltic clams, surf clams and shore crabs).

10 Under the PKB Waddenzee, it follows from the precautionary principle that where the most reliable information available leaves obvious doubt as to the absence of possible significant adverse effects on the ecosystem, the benefit of the doubt will favour conservation of the Waddenzee. The order for reference makes clear that most of the available scientific studies consulted do not unequivocally indicate the existence of significant adverse effects on the ecosystem of the Waddenzee linked to mechanical cockle fishing.

The main action and the questions referred

11 By decisions of 1 July 1999 and 7 July 2000 ('the decisions at issue in the main action'), the Secretary of State issued licences to PO Kokkelvisserij, subject to certain conditions, to engage in mechanical cockle fishing in the Waddenzee SPA during the periods from 16 August to 25 November 1999 and 14 August to 30 November 2000 respectively.

12 The Waddenvereniging and the Vogelbeschermingsvereniging challenged those decisions before the Secretary of State, who, by decisions of 23 December 1999 and 19 February 2001, held that the complaints made against the decisions at issue in the main action were not founded and rejected the applications against them.

13 Those nature protection associations brought an action against those rejections before the Raad van State (Council of State). They claimed in essence that cockle fishing, as authorised by the decisions at issue in the main action, causes permanent damage to the geomorphology, flora and fauna of the Waddenzee's seabed. They also submitted that such fishing reduces the food stocks of birds which feed on shellfish, causing a decline in their populations, in particular for oystercatchers and eider ducks. The Waddenvereniging and the Vogelbeschermingsvereniging also claimed that those decisions were contrary to the Habitats and Birds Directives.

14 As regards the correct transposition of Article 6(2) to 6(4) of the Habitats Directive into Netherlands law, the Raad van State states that Article 12 of the Natuurbeschermingswet, although not expressly intended to implement the obligations laid down in Article 6(2) of the Habitats Directive, may be interpreted in a manner consistent with that provision. Similarly, the Natuurbeschermingswet does not contain rules which implement Article 6(3) and (4) of that directive. Nor are there generally binding rules intended to implement the provisions of those two paragraphs which are otherwise applicable to the Waddenzee.

15 The national court also states that according to the Waddenvereniging and the Vogelbeschermingsvereniging, in view of the expansion of cockle fishing in the Waddenzee SPA, there is a 'plan or project' which should be subject to 'appropriate assessment' in accordance with Article 6(3) of the Habitats Directive whereas the Secretary of State contends that the activity in question, inasmuch as it has been

carried on for many years without any intensification, falls within Article 6(2) of that directive.

16 As regards the relationship between Article 6(2) and 6(3) of the Habitats Directive, the Waddenvereniging and the Vogelbeschermingsvereniging submit that although the activity for which licences were granted must be described as a 'plan' or 'project' within the meaning of Article 6(3), it must nevertheless be examined in the light of Article 6(2). It is therefore appropriate to consider whether Article 6(3) must be regarded as a specific application of the rules in Article 6(2), so that those two paragraphs must be applied cumulatively, or as a provision with a separate, independent purpose, so that Article 6(2) relates to existing use while Article 6(3) applies to new plans or projects.

17 The Raad van State asks under what conditions an 'appropriate assessment' of the effect of the plan or project on the site concerned must be carried out. In addition, it asks what the criteria are on the basis of which it must be determined whether 'appropriate steps' or an 'appropriate assessment' are concerned, also in the light of the requirement laid down in Article 6(3) of the Habitats Directive for the competent authorities to agree to a plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned.

18 Finally, the national court considers it relevant to know whether Article 6(2) and (3) of the Habitats Directive has direct effect.

19 In those circumstances, the Raad van State decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. (a) Are the words "plan or project" in Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora to be interpreted as also covering an activity which has already been carried on for many years but for which an authorisation is in principle granted each year for a limited period, with a fresh assessment being carried out on each occasion as to whether, and if so in which sections of the area, the activity may be carried on?

(b) If the answer to Question 1(a) is in the negative, must the relevant activity be regarded as a "plan or project" if the intensity of this activity has increased over the years or an increase in it is made possible by the authorisations?

2. (a) If it follows from the answer to Question 1 that there is a "plan or project" within the meaning of Article 6(3) of the Habitats Directive, is Article 6(3) of the Habitats Directive to be regarded as a special application of the rules in Article 6(2) or as a provision with a separate, independent purpose in the sense that, for example:

(i) Article 6(2) relates to existing use and Article 6(3) to new plans or projects, or

(ii) Article 6(2) relates to management measures and Article 6(3) to other decisions, or

(iii) Article 6(3) relates to plans or projects and Article 6(2) to other activities?

(b) If Article 6(3) of the Habitats Directive is to be regarded as a special application of the rules in Article 6(2), can the two subparagraphs be applicable cumulatively?

3. (a) Is Article 6(3) of the Habitats Directive to be interpreted as meaning that there is a "plan or project" once a particular activity is likely to have an effect on the site concerned (and an "appropriate assessment" must then be carried out to ascertain whether or not the effect is "significant") or does this provision mean that an "appropriate assessment" has to be carried out only where there is a (sufficient) likelihood that a "plan or project" will have a significant effect?

(b) On the basis of which criteria must it be determined whether or not a plan or project within the meaning of Article 6(3) of the Habitats Directive not directly connected with or necessary to the management of the site is likely to have a significant effect thereon, either individually or in combination with other plans or projects?

4. (a) When Article 6(3) of the Habitats Directive is applied, on the basis of which criteria must it be determined whether or not there are "appropriate steps" within the meaning of Article 6(2) or an "appropriate assessment", within the meaning of Article 6(3), in connection with the certainty required before agreeing to a plan or project?

(b) Do the terms "appropriate steps" or "appropriate assessment" have independent meaning or, in assessing these terms, is account also to be taken of Article 174(2) EC and in particular the precautionary principle referred to therein?

(c) If account must be taken of the precautionary principle referred to in Article 174(2) EC, does that mean that a particular activity, such as the cockle fishing in question, can be authorised where there is no obvious doubt as to the absence of a possible significant effect or is that permissible only where there is no doubt as to the absence of such an effect or where the absence can be ascertained?

5. Do Article 6(2) or Article 6(3) of the Habitats Directive have direct effect in the sense that individuals may rely on them in national courts and those courts must provide the protection afforded to individuals by the direct effect of Community law, as was held inter alia in Case C-312/93 *Peterbroeck* [1995] ECR I-4599?'

20 By order of 28 April 2004, the application by PO Kokkelvisserij to be allowed to submit written observations in response to the Advocate General's Opinion or otherwise to be given an opportunity to respond to that Opinion was rejected.

The questions referred

First question

Question 1(a)

21 By Question 1(a), the national court in essence asks whether mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may take place, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of the Habitats Directive.

22 The 10th recital in the preamble to the Habitats Directive states that 'an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'. That recital finds expression in Article 6(3) of the Directive, which provides inter alia that a plan or project likely to have a significant effect on the site concerned cannot be authorised without a prior assessment of its effects.

23 The Habitats Directive does not define the terms 'plan' and 'project'.

24 By contrast, Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), the sixth recital in the preamble to which states that development consent for projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out, defines 'project' as follows in Article 1(2):

'— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.'

25 An activity such as mechanical cockle fishing is within the concept of 'project' as defined in the second indent of Article 1(2) of Directive 85/337.

26 Such a definition of 'project' is relevant to defining the concept of plan or project as provided for in the Habitats Directive, which, as is clear from the foregoing, seeks, as does Directive 85/337, to prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment.

27 Therefore, an activity such as mechanical cockle fishing is covered by the concept of plan or project set out in Article 6(3) of the Habitats Directive.

28 The fact that the activity has been carried on periodically for several years on the site concerned and that a licence has to be obtained for it every year, each new issuance of which requires an assessment both of the possibility of carrying on that activity and of the site where it may be carried on, does not in itself constitute an obstacle to considering it, at the time of each application, as a distinct plan or project within the meaning of the Habitats Directive.

29 The answer to Question 1(a) must therefore be that mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of the Habitats Directive.

Question 1(b)

30 In the light of the reply to Question 1(a), there is no need to reply to Question 1(b).

Second question

31 By its second question, the national court in essence asks what the relationship is between Article 6(2) and Article 6(3) of the Habitats Directive.

32 It should be recalled that Article 6(2) of the Habitats Directive, in conjunction with Article 7 thereof, requires Member States to take appropriate steps to avoid, in SPAs, the deterioration of habitats and significant disturbance of the species for which the areas have been designated.

33 Article 6(3) of the Habitats Directive provides that the competent national authorities are to authorise a plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon only after having ascertained, by means of an appropriate assessment of the implications of that plan or project for the site, that it will not adversely affect the integrity of the site.

34 That provision thus establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site.

35 The fact that a plan or project has been authorised according to the procedure laid down in Article 6(3) of the Habitats Directive renders superfluous, as regards the

action to be taken on the protected site under the plan or project, a concomitant application of the rule of general protection laid down in Article 6(2).

36 Authorisation of a plan or project granted in accordance with Article 6(3) of the Habitats Directive necessarily assumes that it is considered not likely adversely to affect the integrity of the site concerned and, consequently, not likely to give rise to deterioration or significant disturbances within the meaning of Article 6(2).

37 Nevertheless, it cannot be precluded that such a plan or project subsequently proves likely to give rise to such deterioration or disturbance, even where the competent national authorities cannot be held responsible for any error. Under those conditions, application of Article 6(2) of the Habitats Directive makes it possible to satisfy the essential objective of the preservation and protection of the quality of the environment, including the conservation of natural habitats and of wild fauna and flora, as stated in the first recital in the preamble to that directive.

38 The answer to the second question must therefore be that Article 6(3) of the Habitats Directive establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of the Habitats Directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).

Third question

Question 3(a)

39 According to the first sentence of Article 6(3) of the Habitats Directive, any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, is to be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

40 The requirement for an appropriate assessment of the implications of a plan or project is thus conditional on its being likely to have a significant effect on the site.

41 Therefore, the triggering of the environmental protection mechanism provided for in Article 6(3) of the Habitats Directive does not presume — as is, moreover, clear from the guidelines for interpreting that article drawn up by the Commission, entitled 'Managing Natura 2000 Sites: The provisions of Article 6 of the "Habitats" Directive (92/43/EEC)' — that the plan or project considered definitely has significant effects on the site concerned but follows from the mere probability that such an effect attaches to that plan or project.

42 As regards Article 2(1) of Directive 85/337, the text of which, essentially similar to Article 6(3) of the Habitats Directive, provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment ... are made subject to an assessment with regard to their effects', the Court has held that these are projects which are likely to

have significant effects on the environment (see to that effect Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, paragraph 85).

43 It follows that the first sentence of Article 6(3) of the Habitats Directive subordinates the requirement for an appropriate assessment of the implications of a plan or project to the condition that there be a probability or a risk that the latter will have significant effects on the site concerned.

44 In the light, in particular, of the precautionary principle, which is one of the foundations of the high level of protection pursued by Community policy on the environment, in accordance with the first subparagraph of Article 174(2) EC, and by reference to which the Habitats Directive must be interpreted, such a risk exists if it cannot be excluded on the basis of objective information that the plan or project will have significant effects on the site concerned (see, by analogy, inter alia Case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265, paragraphs 50, 105 and 107). Such an interpretation of the condition to which the assessment of the implications of a plan or project for a specific site is subject, which implies that in case of doubt as to the absence of significant effects such an assessment must be carried out, makes it possible to ensure effectively that plans or projects which adversely affect the integrity of the site concerned are not authorised, and thereby contributes to achieving, in accordance with the third recital in the preamble to the Habitats Directive and Article 2(1) thereof, its main aim, namely, ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora.

45 In the light of the foregoing, the answer to Question 3(a) must be that the first sentence of Article 6(3) of the Habitats Directive must be interpreted as meaning that any plan or project not directly connected with or necessary to the management

of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.

Question 3(b)

46 As is clear from the first sentence of Article 6(3) of the Habitats Directive in conjunction with the 10th recital in its preamble, the significant nature of the effect on a site of a plan or project not directly connected with or necessary to the management of the site is linked to the site's conservation objectives.

47 So, where such a plan or project has an effect on that site but is not likely to undermine its conservation objectives, it cannot be considered likely to have a significant effect on the site concerned.

48 Conversely, where such a plan or project is likely to undermine the conservation objectives of the site concerned, it must necessarily be considered likely to have a significant effect on the site. As the Commission in essence maintains, in assessing the potential effects of a plan or project, their significance must be established in the light, inter alia, of the characteristics and specific environmental conditions of the site concerned by that plan or project.

49 The answer to Question 3(b) must therefore be that, pursuant to the first sentence of Article 6(3) of the Habitats Directive, where a plan or project not directly connected with or necessary to the management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.

Fourth question

50 By Questions 4(a) to 4(c), the national court in essence asks the Court to clarify the concepts of 'appropriate steps' within the meaning of Article 6(2) of the Habitats Directive and 'appropriate assessment' within the meaning of Article 6(3) thereof and the conditions under which an activity such as mechanical cockle fishing may be authorised.

51 In the light of the context of the main action, as well as the foregoing observations, and in particular the answers to the first two questions, there is no need, as stated in point 116 of the Advocate General's Opinion, to answer the fourth question as regards Article 6(2) of the Habitats Directive.

52 As regards the concept of 'appropriate assessment' within the meaning of Article 6(3) of the Habitats Directive, it must be pointed out that the provision does not define any particular method for carrying out such an assessment.

53 None the less, according to the wording of that provision, an appropriate assessment of the implications for the site concerned of the plan or project must precede its approval and take into account the cumulative effects which result from the combination of that plan or project with other plans or projects in view of the site's conservation objectives.

54 Such an assessment therefore implies that all the aspects of the plan or project which can, either individually or in combination with other plans or projects, affect those objectives must be identified in the light of the best scientific knowledge in the field. Those objectives may, as is clear from Articles 3 and 4 of the Habitats Directive, in particular Article 4(4), be established on the basis, inter alia, of the importance of the sites for the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I to that directive or a species in Annex II thereto and for the coherence of Natura 2000, and of the threats of degradation or destruction to which they are exposed.

55 As regards the conditions under which an activity such as mechanical cockle fishing may be authorised, given Article 6(3) of the Habitats Directive and the answer to the first question, it lies with the competent national authorities, in the light of the conclusions of the assessment of the implications of a plan or project for the site concerned, to approve the plan or project only after having made sure that it will not adversely affect the integrity of that site.

56 It is therefore apparent that the plan or project in question may be granted authorisation only on the condition that the competent national authorities are convinced that it will not adversely affect the integrity of the site concerned.

57 So, where doubt remains as to the absence of adverse effects on the integrity of the site linked to the plan or project being considered, the competent authority will have to refuse authorisation.

58 In this respect, it is clear that the authorisation criterion laid down in the second sentence of Article 6(3) of the Habitats Directive integrates the precautionary principle (see Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 63) and makes it possible effectively to prevent adverse effects on the integrity of protected sites as the result of the plans or projects being considered. A less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection intended under that provision.

59 Therefore, pursuant to Article 6(3) of the Habitats Directive, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned, in the light of the site's conservation objectives, are to authorise such activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, by analogy, Case C-236/01 *Monsanto Agricoltura Italia and Others* [2003] ECR I-8105, paragraphs 106 and 113).

60 Otherwise, mechanical cockle fishing could, where appropriate, be authorised under Article 6(4) of the Habitats Directive, provided that the conditions set out therein are satisfied.

61 In view of the foregoing, the answer to the fourth question must be that, under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the

aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.

Fifth question

62 In the light of the finding in paragraph 51 above, it is not necessary to consider the fifth question in so far as it relates to Article 6(2) of the Habitats Directive.

63 It is therefore appropriate to consider that question only in so far as it concerns Article 6(3) of the Habitats Directive.

64 By its fifth question, the national court asks in essence whether, when a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of the Habitats Directive, it may examine whether the limits of discretion of the competent national authorities laid down by that provision have been complied with even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.

65 It should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 249 EC and by the directive itself. That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 55).

66 As regards the right of an individual to rely on a directive and of the national court to take it into consideration, it would be incompatible with the binding effect attributed to a directive by Article 249 EC to exclude, in principle, the possibility that the obligation which it imposes may be relied on by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set by the directive (see *Kraaijeveld and Others*, paragraph 56). That also applies to ascertaining whether, failing transposition into national law of the relevant provision of the directive concerned, the national authority which has adopted the contested measure has kept within the limits of its discretion set by that provision.

67 More particularly, as regards the limits of discretion set by Article 6(3) of the Habitats Directive, it follows from that provision that in a case such as that in the main action, the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise

such an activity only if they have made certain that it will not adversely affect the integrity of that site, that being the case if there remains no reasonable scientific doubt as to the absence of such effects (see paragraph 59 above).

68 Such a condition would therefore not be observed were the national authorities to authorise that activity in the face of uncertainty as to the absence of adverse effects for the site concerned.

69 It follows that Article 6(3) of the Habitats Directive may be taken into account by the national court in determining whether a national authority which has granted an authorisation relating to a plan or project has kept within the limits of the discretion set by the provision in question.

70 Consequently, the answer to the fifth question must be that where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of the Habitats Directive, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) rules as follows:

1. **Mechanical cockle fishing which has been carried on for many years but for which a licence is granted annually for a limited period, with each licence entailing a new assessment both of the possibility of carrying on that activity and of the site where it may be carried on, falls within the concept of 'plan' or 'project' within the meaning of Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.**

2. **Article 6(3) of Directive 92/43 establishes a procedure intended to ensure, by means of a preliminary examination, that a plan or project which is not directly connected with or necessary to the management of the site concerned but likely to have a significant effect on it is authorised only to the extent that it will not adversely affect the integrity of that site, while Article 6(2) of that directive establishes an obligation of general protection consisting in avoiding deterioration and disturbances which could have significant effects in the light of the Directive's objectives, and cannot be applicable concomitantly with Article 6(3).**

3. (a) **The first sentence of Article 6(3) of Directive 92/43 must be interpreted as meaning that any plan or project not directly connected with or necessary to the management of the site is to be subject to an appropriate assessment of its implications for the site in view of the site's conservation objectives if it cannot be excluded, on the basis of objective information, that it will have a significant effect on that site, either individually or in combination with other plans or projects.**

   (b) **Pursuant to the first sentence of Article 6(3) of Directive 92/43, where a plan or project not directly connected with or necessary to the**

management of a site is likely to undermine the site's conservation objectives, it must be considered likely to have a significant effect on that site. The assessment of that risk must be made in the light inter alia of the characteristics and specific environmental conditions of the site concerned by such a plan or project.

4. **Under Article 6(3) of Directive 92/43, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects.**

5. **Where a national court is called on to ascertain the lawfulness of an authorisation for a plan or project within the meaning of Article 6(3) of Directive 92/43, it can determine whether the limits on the discretion of the competent national authorities set by that provision have been complied with, even though it has not been transposed into the legal order of the Member State concerned despite the expiry of the time-limit laid down for that purpose.**

Signatures.

ARRÊT DE LA COUR (cinquième chambre)
15 juillet 2004 (1)

«Manquement d'État – Conservation des habitats naturels – Faune et flore sauvages»

Dans l'affaire C-407/03,

Commission des Communautés européennes, représentée par MM. M. van Beek et M. Huttunen, en qualité d'agents, ayant élu domicile à Luxembourg,

partie requérante,

contre

République de Finlande, représentée par Mme A. Guimaraes-Purokoski, en qualité d'agent,

partie défenderesse,

ayant pour objet de faire constater que, en ne prévoyant pas dans sa législation une sécurité juridique suffisante encadrant l'obligation d'effectuer pour tout projet, y compris ceux faisant l'objet d'une évaluation des incidences sur l'environnement, l'évaluation appropriée, visée à l'article 6, paragraphe 3, de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages (JO L 206, p. 7), la république de Finlande a manqué aux obligations qui lui incombent en vertu de ladite directive,

LA COUR (cinquième chambre),

composée de M. C. Gulmann, président de chambre, M. S. von Bahr et Mme R. Silva de Lapuerta (rapporteur), juges,

avocat général: Mme J. Kokott,
greffier: M. R. Grass,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1
Par requête déposée au greffe de la Cour le 29 septembre 2003, la Commission des Communautés européennes a introduit, en vertu de l'article 226 CE, un recours visant à faire constater que, en ne prévoyant pas dans sa législation une sécurité juridique suffisante encadrant l'obligation d'effectuer pour tout projet, y compris ceux faisant l'objet d'une évaluation des incidences sur l'environnement, l'évaluation appropriée, visée à l'article 6, paragraphe 3, de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages (JO L 206, p. 7, ci-après la «directive»), la république de Finlande a manqué aux obligations qui lui incombent en vertu de ladite directive.

2
La directive a pour objet de favoriser le maintien de la biodiversité par la conservation des habitats naturels ainsi que de la faune et de la flore sauvages dans les États membres. Conformément aux dispositions de la directive, ces mêmes États désignent des zones spéciales de conservation en vue du maintien ou du rétablissement, dans un état de conservation favorable, des habitats naturels d'intérêt communautaire.

3
L'article 6 de la directive impose un certain nombre d'obligations aux autorités nationales si celles-ci approuvent des projets ou des programmes qui sont susceptibles d'affecter une zone spéciale de conservation. Le paragraphe 3 de cet article prévoit que tout plan ou projet non directement lié ou nécessaire à la gestion du site mais susceptible d'affecter ce site de manière significative, individuellement ou en conjugaison avec d'autres plans et projets, fait l'objet d'une évaluation appropriée de ses incidences sur le site eu égard aux objectifs de conservation de ce site et que, compte tenu des conclusions de l'évaluation des incidences sur le site et sous réserve des dispositions du paragraphe 4, les autorités nationales compétentes ne marquent leur accord sur ce plan ou projet qu'après s'être assurées qu'il ne portera pas atteinte à l'intégrité du site concerné et après avoir pris, le cas échéant, l'avis du public.

4
La mise en œuvre de l'article 6 de la directive est régie en Finlande par l'article 65 de la loi n° 1096/1996 sur la protection de la nature (ci-après la «loi sur la protection de la nature»). Par ailleurs, la loi nº 468/1994 concernant l'évaluation des incidences sur l'environnement prévoit des dispositions relatives à la planification et à la prise de décision de projets susceptibles d'avoir des répercussions sur l'environnement.

5
Après avoir reçu une plainte concernant l'impact d'un projet de ligne à haute tension sur des sites proposés par la république de Finlande comme sites d'importance communautaire au sens de la directive et désignés par cet État membre comme zones spéciales de conservation, la Commission a adressé à celui-ci, par lettre du 16 février 2000, une demande de renseignements concernant les incidences du projet en cause sur ces sites.

6
N'ayant pas jugé satisfaisantes les réponses fournies par la république de Finlande, la Commission lui a adressé une lettre de mise en demeure en date du 10 avril 2001. Ultérieurement, elle a adressé à ce même État membre une lettre de mise en demeure complémentaire, datée du 24 octobre 2001, dans laquelle elle relevait que l'article 65 de la loi sur la protection de la nature exemptait des obligations prévues à l'article 6, paragraphe 3, de la directive tous les projets auxquels la procédure d'évaluation des incidences sur l'environnement est applicable.

7

Par lettre datée du 26 juin 2002, la Commission a adressé à la république de Finlande un avis motivé. Par lettres des 27 août 2002 et 2 juillet 2003, cet État membre lui a répondu qu'il avait l'intention de modifier l'article 65, premier alinéa, de la loi sur la protection de la nature et a précisé les initiatives qu'il entendait prendre à cette fin. Estimant que le gouvernement finlandais ne lui avait pas fourni d'éléments démontrant qu'il avait mis sa législation en conformité avec l'article 6, paragraphe 3, de la directive, la Commission a décidé d'introduire le présent recours.

8
Le gouvernement finlandais admet le bien-fondé du recours. Selon lui, il est vrai que la loi sur la protection de la nature n'indique pas avec suffisamment de clarté que les projets qui font l'objet des procédures d'évaluation de l'incidence sur l'environnement en général doivent aussi être soumis à une évaluation au sens de la directive.

9
Dans ces conditions, il y a lieu de considérer comme fondé le recours introduit par la Commission.

10
En conséquence, il convient de constater que, en ne prévoyant pas dans sa législation une sécurité juridique suffisante encadrant l'obligation d'effectuer une évaluation appropriée pour tout projet, y compris ceux faisant l'objet d'une évaluation des incidences sur l'environnement, la république de Finlande a manqué aux obligations qui lui incombent en vertu de l'article 6, paragraphe 3, de la directive.

Sur les dépens

11
Aux termes de l'article 69, paragraphe 2, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens. La Commission ayant conclu à la condamnation de la république de Finlande et celle-ci ayant succombé en ses moyens, il y a lieu de la condamner aux dépens.

Par ces motifs,

LA COUR (cinquième chambre)

déclare et arrête:

1)

En ne prévoyant pas dans sa législation une sécurité juridique suffisante encadrant l'obligation d'effectuer une évaluation appropriée pour tout projet, y compris ceux faisant l'objet d'une évaluation des incidences sur l'environnement, la république de Finlande a manqué aux obligations qui lui incombent en vertu de l'article 6, paragraphe 3, de la directive 92/43/CEE du Conseil, du 21 mai 1992, concernant la conservation des habitats naturels ainsi que de la faune et de la flore sauvages.

2)

La république de Finlande est condamnée aux dépens.

Gulmann von Bahr Silva de Lapuerta

Ainsi prononcé en audience publique à Luxembourg, le 15 juillet 2004.

Le greffier — Le président de la cinquième chambre

R. Grass — C. Gulmann

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1 – Langue de procédure: le finnois.

JUDGMENT OF THE COURT (Third Chamber)
20 March 2003 *

In Case C-143/02,

Commission of the European Communities, represented by G. Valero Jordana and R. Amorosi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by U. Leanza, acting as Agent, and M. Fiorilli, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

* Language of the case: Italian.

APPLICATION for a declaration that, in adopting legislation transposing Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of Directive 92/43,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive,

THE COURT (Third Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann (Rapporteur) and F. Macken, Judges,

Advocate General: P. Léger,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 9 January 2003,

gives the following

Judgment

1 By application lodged at the Court Registry on 17 April 2002, the Commission of the European Communities brought an action under Article 226 EC in which it sought a declaration that, in adopting legislation transposing Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the habitats directive'), which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of the habitats directive,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive.

The law

2 Article 5 of the habitats directive provides:

'1. In exceptional cases where the Commission finds that a national list as referred to in Article 4(1) fails to mention a site hosting a priority natural habitat

type or priority species which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

2. If, on expiry of a consultation period not exceeding six months, the dispute remains unresolved, the Commission shall forward to the Council a proposal relating to the selection of the site as a site of Community importance.

3. The Council, acting unanimously, shall take a decision within three months of the date of referral.

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6(2).'

3 Article 6(2) to (4) of the habitats directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

4 Article 7 of the habitats directive provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly

recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

Pre-litigation procedure

5 Considering that Decree No 357 of the President of the Republic of 8 September 1997 (GURI No 248, Ordinary Supplement No 219/L of 23 October 1997, 'the presidential decree'), notified to it by the Italian authorities, did not bring about a correct implementation of the habitats directive, the Commission sent a letter of formal notice to the Italian Republic on 4 April 2000 requesting it to submit its observations in that regard.

6 By letter of 27 June 2000, the Italian Government forwarded to the Commission a note from the Ministry of the Environment stating that it was already aware of the shortcomings pointed out by the Commission and that it had identified other issues likely to give rise to serious problems when it came to applying the presidential decree, and submitting that, for a year, it had been in consultations with the regional authorities with a view to amending the text of that decree.

7 On 8 September 2000, the Italian Government sent to the Commission a further note from the Ministry of the Environment dated 29 August 2000 stating that the draft legislation amending the presidential decree had been approved and that any subsequent amendment made during the revision and adoption process would be notified to the Commission.

8 Since it received no further information concerning the adoption of the legislation amending the presidential decree, the Commission issued a reasoned opinion to the Italian Republic on 25 July 2001 repeating the complaints set out in the letter of formal notice and requesting that Member State to adopt the measures necessary to comply with that opinion within a period of two months from the date of its notification.

9 As the Commission received no reply from the Italian authorities, it decided to bring the present action.

The action

10 The Italian Republic does not deny the complaints alleged against it. Indeed, it intended, in line with the Commission's proposals, to amend Articles 5 and 6 of the presidential decree in particular, concerning respectively the assessment of the implications for the environment of certain projects and the protection of areas other than special protection areas, and to insert into that decree an Article 4b transposing Article 5 of the habitats directive. However, the question of the competent authority to act in the matter gives rise to conflict between the regions and the Italian State.

11 It suffices to point out, in that regard, that according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, *inter alia*, Case C-148/00 *Commission* v *Italy* [2001] ECR I-9823, paragraph 7) and that a Member State

cannot rely on provisions, practices or circumstances in its own legal order to justify failure to implement a directive within the prescribed period (see, to that effect, Case C-276/98 *Commission* v *Portugal* [2001] ECR I-1699, paragraph 20 and Case C-392/01 *Commission* v *Spain* [2002] ECR I-11111, paragraph 9).

12 Article 6(3) of the habitats directive does not allow projects not directly connected with or necessary to the management of sites to be excluded from the scope of the directive where they are likely to have a significant effect on those sites. Article 7 of that directive provides, in particular, that Article 6(2) applies to special protection areas designated under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). As for Article 5 of the habitats directive, this provides that during the period of bilateral consultation between the Member State and the Commission, and pending a Council decision, the site concerned is to be subject to the scheme of protection laid down by Article 6(2) of that directive.

13 Since Articles 5, 6 and 7 of the habitats directive were not fully implemented within the period prescribed by the reasoned opinion, the action brought by the Commission must be regarded as well founded.

14 Therefore, in adopting a measure transposing the habitats directive which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of the habitats directive,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive.

Costs

15 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against the Italian Republic and the latter has been unsuccessful, the Italian Republic must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Declares that, in adopting a measure transposing Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, which:

— excludes from the scope of the rules on the assessment of the implications for the environment projects other than those listed in the Italian legislation implementing directives on environmental impact assessment that are likely to have a significant effect on sites of Community importance,

— fails to impose upon the competent authorities of the Member State any obligation to take appropriate steps in respect of special protection areas to avoid the deterioration of natural habitats and of the habitats of species or disturbance of the species for which the areas were designated, in so far as such disturbance could be significant in relation to the objectives of Directive 92/43,

— fails to provide that the conservation measures referred to in Article 6(2) of that directive apply to the sites referred to in Article 5(1) of that directive,

the Italian Republic has failed to fulfil its obligations under Articles 5, 6 and 7 of that directive;

2. Orders the Italian Republic to pay the costs.

Puissochet Gulmann Macken

Delivered in open court in Luxembourg on 20 March 2003.

R. Grass — Registrar

J.-P. Puissochet — President of the Third Chamber

JUDGMENT OF THE COURT (Sixth Chamber)

13 February 2003 *

In Case C-75/01,

Commission of the European Communities, represented by R.B. Wainwright and J. Adda, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Grand Duchy of Luxembourg, represented by J. Faltz, acting as Agent,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b) and 13(2), 14, 15, 16(1), 22(b) and (c), and 23(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) in conjunction with Annexes I, II, IV, V and VI to that directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the directive and under the third paragraph of Article 249 EC,

THE COURT (Sixth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, C. Gulmann (Rapporteur), V. Skouris, F. Macken and N. Colneric, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2002,

gives the following

Judgment

1 By application lodged at the Court Registry on 14 February 2001, the Commission of the European Communities brought an action pursuant to Article 226 EC for a declaration that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b) and 13(2), 14, 15, 16(1), 22(b) and (c), and 23(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the Directive') in conjunction with Annexes I, II, IV, V and VI to that directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the Directive and under the third paragraph of Article 249 EC.

The Directive

2 Article 1 of the Directive defines the principal terms used. In particular, Article 1(m) defines specimen as 'any animal or plant, whether alive or dead, of the species listed in Annex IV and Annex V, any part or derivative thereof, as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts or derivatives of animals or plants of those species'.

3 Article 4 of the Directive establishes a procedure in several stages for designating as special areas of conservation ('SACs') sites which host the species and habitats protected by the Directive. Under Article 4(1), each Member State must propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. The list must be sent to the Commission, together with information on each site, within three years of notification of the Directive.

4 Under Article 4(5) of the Directive, once a site is placed on the list of sites of Community importance drawn up by the Commission it falls subject to the provisions of Article 6(2), (3) and (4).

5 Article 5(1) and (4) of the Directive provides:

'1. In exceptional cases where the Commission finds that a national list as referred to in Article 4(1) fails to mention a site hosting a priority natural habitat type or priority species which, on the basis of relevant and reliable scientific information, it considers to be essential for the maintenance of that priority natural habitat type or for the survival of that priority species, a bilateral consultation procedure shall be initiated between that Member State and the Commission for the purpose of comparing the scientific data used by each.

...

4. During the consultation period and pending a Council decision, the site concerned shall be subject to Article 6(2).'

6 Article 6 of the Directive provides:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

7 Under Article 7 of the Directive, '[o]bligations arising under Article 6(2), (3) and (4) of this directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later'.

8 Under Article 11 of the Directive, 'Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species'.

9 Article 12(1)(b) and (c), (2) and (4) of the Directive reads as follows:

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

...

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

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

...

2. For these species, Member States shall prohibit the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild, except for those taken legally before this directive is implemented.

...

4. Member States shall establish a system to monitor the incidental capture and killing of the animal species listed in Annex IV (a). In the light of the information gathered, Member States shall take further research or conservation measures as required to ensure that incidental capture and killing does not have a significant negative impact on the species concerned.'

10 Article 13(1)(b) and (2) provides:

'1. Member States shall take the requisite measures to establish a system of strict protection for the plant species listed in Annex IV (b), prohibiting:

...

(b) the keeping, transport and sale or exchange and offering for sale or exchange of specimens of such species taken in the wild, except for those taken legally before this directive is implemented.

2. The prohibitions referred to in paragraph 1(a) and (b) shall apply to all stages of the biological cycle of the plants to which this Article applies.'

11 Article 14 of the Directive provides:

'1. If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status.

2. Where such measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11. Such measures may also include in particular:

— regulations regarding access to certain property,

— temporary or local prohibition of the taking of specimens in the wild and exploitation of certain populations,

— regulation of the periods and/or methods of taking specimens,

— application, when specimens are taken, of hunting and fishing rules which take account of the conservation of such populations,

— establishment of a system of licences for taking specimens or of quotas,

— regulation of the purchase, sale, offering for sale, keeping for sale or transport for sale of specimens,

— breeding in captivity of animal species as well as artificial propagation of plant species, under strictly controlled conditions, with a view to reducing the taking of specimens [in] the wild,

— assessment of the effect of the measures adopted.'

12 Article 15 of the Directive reads as follows:

'In respect of the capture or killing of species of wild fauna listed in Annex V (a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV (a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI (a);

(b) any form of capture and killing from the modes of transport referred to in Annex VI (b).'

13 Article 16(1) of the Directive provides:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

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

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

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

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

14 Article 22(b) and (c) of the Directive provides:

'In implementing the provisions of this directive, Member States shall:

...

(b) ensure that the deliberate introduction into the wild of any species which is not native to their territory is regulated so as not to prejudice natural habitats within their natural range or the wild native fauna and flora and, if they consider it necessary, prohibit such introduction. The results of the assessment undertaken shall be forwarded to the committee for information;

(c) promote education and general information on the need to protect species of wild fauna and flora and to conserve their habitats and natural habitats.'

15 Under Article 23(2) of the Directive, the laws, regulations and administrative provisions which the Member States must adopt in order to comply with the Directive must contain a reference to the Directive or be accompanied by such reference on the occasion of their official publication.

The pre-litigation procedure

16 On 29 April 1999, having concluded that the various measures transposing the Directive into Luxembourg law communicated to it failed to conform to Articles 1, 4, 5, 6, 7, 8, 12, 13, 14, 15, 16, 18, 22 and 23 of the Directive, the Commission gave the Grand Duchy of Luxembourg formal notice to submit its observations.

17 In his letter of reply of 13 July 1999, addressed to the Commission ('the letter of reply') the Minister for the Environment of the Grand Duchy of Luxembourg stated that various national laws and regulations could help to attain certain of the Directive's objectives and that the Law of 21 May 1999 on regional planning (*Mémorial* A 1999, p. 1402, hereinafter 'the Regional Planning Law'), the draft Grand-Ducal regulation on biodiversity and the Law of 11 August 1982 on the protection of nature and natural resources (*Mémorial* A 1999, p. 1486, hereinafter 'the Nature Protection Law') would shortly ensure that the Directive's objectives were fully met. The letter also expressly disputed certain of the Commission's complaints.

18 The Commission was not satisfied by the observations submitted to it by the Grand Duchy of Luxembourg in its letter of reply and on 21 January 2000 issued a reasoned opinion in which it observed that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b) and 13(2), 14, 15, 16(1), 22(b) and (c), and 23(2) of the Directive in conjunction with Annexes I, II, IV, V and VI to the Directive, the Grand Duchy of Luxembourg had failed to fulfil its obligations under the Directive and under the third paragraph of Article 249 EC. The Commission therefore called upon the Grand Duchy to adopted the measures required to comply with the reasoned opinion within two months of its notification.

19 By letter of 6 April 2000, the Luxembourg authorities acknowledged that, in order to transpose the Directive into national law, it would be necessary to supplement or amend its existing legislation.

20 Finding that the Grand Duchy of Luxembourg had failed to adopt the necessary measures to comply with the reasoned opinion within the time specified therein, the Commission brought the present action.

The action

21 In its defence the Luxembourg Government merely indicates that a draft law transposing the Directive was approved by the government in council on 23 February 2001 and asks the Court to dismiss the action.

Incomplete transposition of Article 1 of the Directive

22 The Commission points out that, in its letter of formal notice, it observed that there were no provisions of Luxembourg law that had as their object or effect the correct, complete and precise transposition of the definitions set out in Article 1 of the Directive and that the Luxembourg authorities did not dispute that complaint in the letter of reply.

23 On this point, it should be borne in mind that the letter of reply stated that the Article 1 definitions were to be included in a sectoral plan provided for by the Regional Planning Law.

24 However, it appears that no such measure was adopted within the period of time specified in the reasoned opinion.

25 The complaint of incomplete transposition of Article 1 of the Directive must therefore be regarded as well founded.

Failure to transpose Article 4(5) of the Directive

26 According to the Commission, the transposing provisions notified by the Luxembourg authorities do not have the object or effect of transposing Article 4(5) of the Directive. Thus, sites of Community importance are not

automatically brought within the protection regime provided for in Article 6(2), (3) and (4) of the Directive. The letter of reply disputes this complaint but only to the extent that the Commission charged the Grand Duchy of Luxembourg with having failed to put in place a system for applying the protection regime provided for in Article 6(2) to sites of Community importance.

27 It is important to bear in mind that, according to the letter of reply, the administrative practice in Luxembourg of refusing the necessary authorisation for certain projects falling within the scope of the Nature Protection Law is an appropriate means of ensuring that the nuisances mentioned in Article 6(2) of the Directive do not occur on the sites referred to in Article 4(5). The Luxembourg Government has, however, acknowledged its failure as regards application of Article 6(3) and (4) of the Directive to sites of Community importance.

28 Now, according to the settled case-law of the Court of Justice relating to the obligations incumbent upon Member States in the transposition of Community directives, mere administrative practices, which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations arising under the EC Treaty (see, in particular, Case C-159/99 *Commission* v *Italy* [2001] ECR I-4007, paragraph 32, and Case C-394/00 *Commission* v *Ireland* [2002] ECR I-581, paragraph 11).

29 Given the foregoing, the Commission's complaint of failure to transpose Article 4(5) of the Directive must be upheld.

Failure to transpose Article 5(4) of the Directive

30 The Commission argues that no laws in Luxembourg make the sites referred to in Article 5(4) of the Directive subject to the protection regime provided for by Article 6(2). The Luxembourg authorities dispute this complaint in the letter of reply.

31 As is clear from the letter of reply, the Luxembourg Government maintains, in essence, that the administrative practice of refusing the necessary authorisation for certain projects falling within the scope of the Nature Protection Law is an appropriate means of ensuring that the nuisances mentioned in Article 6(2) of the Directive do not occur on the sites referred to in Article 5(4).

32 However, having regard to the case-law of the Court mentioned in paragraph 28 of the present judgment, that argument must be rejected.

33 It is also submitted in the letter of reply that the Grand Duchy of Luxembourg has, in any event, probably already included in the list sent to the Commission pursuant to Article 4(1) of the Directive all the sites within its territory which are essential to maintaining certain types of habitat present in its territory and that, consequently, there would be no need to have recourse to the procedure laid down in Article 5(4) of the Directive.

34 That submission cannot be upheld either because, in any event, it cannot be ruled out that the Commission might find, pursuant to Article 5(1) of the Directive, that the list sent by the Grand Duchy of Luxembourg omits a site which it regards as essential to the preservation of a given priority natural habitat type or the survival of a given priority species and that the bilateral consultation procedure will therefore have to be initiated, during the currency of which the site in question will, in accordance with Article 5(4), have to be made subject to the protection regime laid down in Article 6(2).

35 Consequently, the complaint of failure to transpose Article 5(4) of the Directive must be regarded as well founded.

Failure to transpose Article 6 of the Directive

Article 6(1) of the Directive

36 The Commission complains that the Grand Duchy of Luxembourg has failed to transpose this provision.

37 In the letter of reply, the Luxembourg Government acknowledged that failure.

38 The complaint of non-transposition of Article 6(1) of the Directive must therefore be upheld.

Article 6(2) of the Directive

39 The Commission observes that, subject to exceptional ministerial derogation based on public interest, Article 14 of the Nature Protection Law prohibits the reduction, destruction or modification of certain types of biotope. A provision such as that, however, does not appear adequate to ensure that all habitats falling within SACs benefit from the protection provided for. The Commission also emphasises that the provisions of the Nature Protection Law envisage only certain types of disturbance. In particular, under Article 12 it is possible to prevent only certain types of disturbance in forests. There is therefore a lack of any general measure, binding upon third parties, making it possible to prevent, in SACs, disturbance of species which could have a significant effect on those species, in relation to the objectives of the Directive. The Commission also points out that, in the letter of reply, infringement of this aspect of the Directive is expressly disputed.

40 It is submitted in the letter of reply that Article 14 of the Nature Protection Law protects all biotopes, including those forming part of an SAC and that it is incorrect to say that this law contemplates only certain types of disturbance: Article 23, which has a general scope, prohibits disturbance of fauna and Articles 21 and 22 prohibit any kind of unjustified exploitation, use, mutilation or destruction of wild plants and animals that are not protected by means of a more stringent set of national rules. Moreover, the Nature Protection Law is backed by a ministerial circular, whose very purpose is to transpose the Directive, and this states that any degradation of habitats and disturbance of protected species must be avoided by means of rigorous application of the Nature Protection Law.

41 It should be borne in mind that, subject to exceptional ministerial derogation based on public interest, Article 14 of the Nature Protection Law prohibits the reduction, destruction or modification of biotopes such as ponds, fens, marshlands, land covered in reeds and rushes, hedgerows, scrub and groves.

42 A provision such as that, which makes express reference to certain types of biotope only does not appear to be capable of ensuring, as is required by Article 6(2) of the Directive, that all natural habitats and habitats of species found within SACs are protected against acts liable to deteriorate them.

43 In so far as concerns protection against deterioration, as provided for by Article 6(2) of the Directive, it is plain that, whilst certain provisions of the Nature Protection Law pleaded in the present case, and in particular Articles 12 and 23, may contribute to the prevention of certain types of disturbance, the fact remains that they are incapable of completely transposing Article 6(2) of the Directive because they do not cover all types of disturbance that are significant in relation to the objectives of the Directive of the species for which the SACs are designated.

44 As regards the ministerial circular to which the Luxembourg Government refers, it must be held that, in light of the case-law mentioned in paragraph 28 of the present judgment, it is not capable of ensuring proper transposition of Article 6(2).

45 It follows that the complaint of incomplete transposition of Article 6(2) of the Directive must be regarded as well founded.

Article 6(3) and (4) of the Directive

46 The Commission maintains that the Luxembourg legislation sent to it contains no provision for an assessment to be carried out of the effects on protected sites in all the cases mentioned in Article 6(3) of the Directive. Furthermore, Luxembourg law fails to ensure that projects and plans are approved by the competent authority only after the authority has satisfied itself that the project or plan will not compromise the integrity of the site in question. As far as Article 6(4) of the Directive is concerned, the Commission argues that no provision of national law requires that alternative solutions be pursued before approval is given to projects regarded as having an adverse effect on protected sites. Luxembourg law also fails to provide for the adoption of compensatory measures where such projects are authorised.

47 It is appropriate to observe that these complaints were already formulated in the same terms in the letter of formal notice and that, in the letter of reply, the Luxembourg Government acknowledged that the existing provisions of national law were inadequate as regards Article 6(3) and (4) of the Directive.

48 That being so, the Court must also uphold this aspect of the Commission's action.

Failure to transpose Article 7 of the Directive

49 The Commission submits that no provision of Luxembourg law provides for the application of Article 6(2), (3) and (4) of the Directive to special protection areas designated under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as is required by Article 7 of the Directive. The arguments put forward in the letter of reply also fail to persuade that Article 7 has been transposed.

50 It should be borne in mind that the letter of reply states that the sectoral plan which it anticipated drawing up would provide a precise legal framework, in particular as regards special protection areas classified under Directive 79/409.

51 Given that, and taking particular account of what is stated in paragraph 24 of the present judgment, it must be held that the complaint of failure to transpose Article 7 of the Directive is well founded.

Inadequate transposition of Article 12(1)(b) and (c), (2) and (4) of the Directive

52 The Commission maintains, first of all, that Article 12(1)(b) of the Directive has been incompletely transposed into Luxembourg law because none of the national

transposing provisions communicated to it prohibits the deliberate disturbance of the species concerned during the migration period. Secondly, none of the provisions has as its object or effect the complete transposition of Article 12(1)(c) of the Directive. Thirdly, the national provisions communicated to the Commission fail to prohibit the exchange and the offering for exchange of specimens of the species concerned, as is required by Article 12(2) of the Directive. Fourthly, no provision of Luxembourg law ensures that the definition of 'animal' in national law is as broad as that of 'specimen' within the meaning of the Directive. Lastly, none of the provisions communicated has as its object or effect the transposition of Article 12(4) of the Directive. According to the Commission, the arguments to the contrary set out in the letter of reply cannot be accepted.

Article 12(1)(b) of the Directive

53 As the Commission rightly observes, Article 23 of the Nature Protection Law, which the Luxembourg Government regards as conforming to Article 12(1)(b) of the Directive, is incapable of transposing the latter provision fully because, whilst prohibiting the disturbance of fauna during the periods of breeding, rearing and hibernation, the prohibition fails expressly to mention the migration period.

54 Consequently, the complaint of inadequate transposition of Article 12(1)(b) of the Directive must be regarded as well founded.

Article 12(1)(c) of the Directive

55 The letter of reply maintains that Article 12(1)(c) of the Directive has been transposed into national law by Article 17 of the Nature Protection Law and Article 6 of the Convention on the Conservation of European Wildlife and Natural Habitats, signed in Bern on 19 September 1979 and approved by the Law of 26 November 1981 (*Mémorial* A 1981, p. 2130), to which the Community became a party by Council Decision 82/72/EEC of 3 December 1981 (OJ 1982 L 38, p. 1) (hereinafter 'the Bern Convention'). Article 17 of the Nature Protection Law provides that animals which are the subject of complete protection may not be disturbed, killed, hunted, captured, kept in captivity or tamed, at any stage of their development. As regards Article 6 of the Bern Convention, that provision prohibits the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty.

56 In this connection, it should be pointed out that Article 17 of the Nature Protection Law does not expressly mention the collection of eggs in the wild. The prohibition in Article 17 on keeping in captivity animals which are the subject of complete protection at any stage of their development does not appear to include with sufficient certainty the collection of eggs in the wild, particularly as, under Article 144 et seq. of the Nature Protection Law, this prohibition is one that is backed by criminal sanction.

57 As regards Article 6(d) of the Bern Convention, which prohibits the deliberate destruction or taking of eggs from the wild or keeping such eggs, it is appropriate to point out that that provision applies only to the species listed in Annex II to the convention, which does not include certain of the species listed in Annex IV (a) to the Directive, to which Article 12 of the Directive refers.

58 It follows that Article 12(1)(c) of the Directive has not been correctly transposed into Luxembourg law.

Article 12(2) of the Directive

59 The letter of reply states that, in so far as it prohibits the keeping of animals which receive complete protection, Article 17 of the Nature Protection Law also precludes the exchange of such animals. Indeed, to exchange something which may not be held is impossible. Moreover, Article 15 of the Nature Protection Law, read together with the Grand-Ducal Regulation of 8 April 1986 on the Complete and Partial Protection of Certain Species of Wild Animal (*Mémorial* A 1986, p. 1174), provides for the classification of rare wild animals for the purposes of their conservation, without restriction to indigenous species. In addition, Article 20 of the Nature Protection Law extends the definition of animal beyond the meaning conferred by national law.

60 The Luxembourg Government's argument cannot be accepted.

61 Indeed, the prohibition, laid down in Article 17 of the Nature Protection Law, on keeping animals which receive complete protection would not seem to include the exchange or the offering for exchange of such animals, the concept of keeping being distinct from that of exchanging or offering for exchange, particularly from the viewpoint of a system of criminal sanctions, such as that mentioned in paragraph 56 of the present judgment.

62 As regards the meaning of the term animal in Luxembourg law, it must be held that, in any event, the law on which the Luxembourg Government relies in the letter of reply does not include within the definition of animal 'any... derivative [of any animal]... as well as any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other

circumstances, to be... derivatives of animals... of those species', as is provided for in Article 1(m) of the Directive, which defines the meaning of specimen as it appears, in particular, in Article 12(2) of the Directive.

63 Article 12(2) of the Directive has not, therefore, been correctly transposed into Luxembourg law.

Article 12(4) of the Directive

64 It is appropriate to recall that the Luxembourg Government acknowledged in the letter of reply that there had yet to be established in Luxembourg law a monitoring system such as that provided for by Article 12(4) of the Directive.

65 It also appears that no such monitoring system was adopted within the period of time laid down in the reasoned opinion.

66 It thus appears that Article 12(4) of the Directive has not been transposed into the internal legal system of the defendant Member State.

67 In light of the foregoing, it must be held that the complaint of inadequate transposition of Article 12(1)(b) and (c), (2) and (4) of the Directive is well founded.

Inadequate transposition of Article 13(1)(b) and (2) of the Directive

Article 13(1)(b) of the Directive

68 The Commission submits that, despite the arguments advanced by the Luxembourg authorities in the letter of reply, Article 13(1)(b) of the Directive has not been completely transposed into Luxembourg law, which neither prohibits the keeping, exchange or offering for sale or exchange of specimens of the plant species protected under that provision nor ensures that the prohibitions laid down in the provision apply also to the non-indigenous species protected under it.

69 The letter of reply states that the sale of plants which receive complete protection is prohibited by Article 16 of the Nature Protection Law and that, in so far as is necessary, keeping such plants is prohibited by Article 5 of the Bern Convention. Moreover, Article 15 of the Nature Protection Law does not exclude the protection of non-indigenous species. In this connection it would be sufficient to incorporate the species concerned into the Grand-Ducal Regulation of 19 August 1989 on the Complete and Partial Protection of Certain Species of Wild Flower (*Mémorial* A 1989, p. 1102, hereinafter 'the Wild Flower Regulation'). Article 20 of the Nature Protection Law extends the definition of plant beyond the meaning conferred by national law.

70 It should be observed that whilst Article 16 of the Nature Protection Law prohibits the sale of plants that receive complete protection, it does not prohibit the possession, exchange or offering for sale or exchange of such plants. Article 5 of the Bern Convention provides that each contracting party must, as appropriate, prohibit the possession of protected species. However, it does not appear that

the Luxembourg authorities have adopted any supplementary measure further defining application of the Bern Convention as regards this point. As far as this aspect is concerned, therefore, Article 13(1)(b) of the Directive has not been properly transposed into Luxembourg law.

71 As regards the complaint that Luxembourg law fails to ensure that the prohibitions laid down in Article 13(1)(b) of the Directive apply to the non-indigenous plant species protected by the Directive, it is important to recall that the Luxembourg Government itself has acknowledged that the non-indigenous plant species covered by Article 13(1)(b) are not protected by Article 15 of the Nature Protection Law, read together with the Wild Flower Regulation. Also, Article 20 of the law provides that the plants and animals protected under approved and published international conventions may be purchased, imported, offered for sale, exported or held only pursuant to the relevant provisions of such conventions. However, Article 20 is, in any event, incapable of ensuring as such the protection of non-indigenous species provided for by Article 13(1)(b) of the Directive. Moreover, the Luxembourg Government has provided no further information as to which international conventions are relevant in the matter.

72 It follows that Article 13(1)(b) of the Directive has not been properly transposed into Luxembourg law.

Article 13(2) of the Directive

73 According to the Commission, the Luxembourg Government's assertion that Article 13(2) of the Directive has been transposed by Article 16 of the Nature

Protection Law, which extends the prohibitions laid down in that provision to parts of the plants concerned, fails to establish that the definition of plant in national law is as broad as that of specimen given in Article 1(m) of the Directive, particularly in so far as concerns the inclusion of any part of or derivative obtained from a plant and any other goods which appear, from an accompanying document, the packaging or a mark or label, or from any other circumstances, to be parts of derivatives of plants of those species.

74 It is important to bear in mind that, under Article 13(2) of the Directive, the prohibitions referred to in Article 13(1)(a) and (b) apply to all stages of the biological cycle of the plants to which Article 13 applies.

75 Even if the definition of plant in national law is narrower than that of specimen in Article 1(m), the Court finds that the Commission has failed to demonstrate why that should be inconsistent with Article 13(2) of the Directive, which makes no direct reference to specimens but instead refers to Article 13(1)(b) which does refer to specimens and lays down precise prohibitions in relation to specimens of protected specimens.

76 Consequently, the complaint of incomplete transposition of Article 13(2) of the Directive, as formulated by the Commission, must be rejected.

77 In view of the foregoing, the complaint of incomplete transposition of Article 13(1)(b) of the Directive must be upheld.

Non-transposition of Article 14 of the Directive

78 The Commission maintains that Article 14 of the Directive is not optional but contains an unconditional obligation of surveillance of the species listed in Annex V together with an obligation to take appropriate measures to ensure that those species are maintained at a favourable conservation status where the competent authorities deem it necessary, that is to say where surveillance reveals that, without such measures, the conservation status of the species would be endangered.

79 In the letter of reply, the Luxembourg authorities acknowledged that national law fails to provide for the surveillance obligation relating to completely and partially protected species or the associated obligation to adopt appropriate measures to ensure that those species are maintained at a favourable conservation status. They have acknowledged the need to modify the law on this point.

80 It therefore appears that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V to the Directive as well as their exploitation is not coupled in Luxembourg law with an obligation to adopt, where their conservation status so warrants, appropriate measures to ensure that those species are maintained at a favourable conservation status.

81 The complaint of non-transposition of Article 14 of the Directive must therefore be regarded as well founded.

Incorrect transposition of Article 15 of the Directive

82 The Commission maintains that the transposition measures communicated to it by the Grand Duchy of Luxembourg fail to ensure the correct transposition of Article 15 of the Directive. It refutes the reasoning put forward in the letter of reply in support of the contrary view.

83 Indeed, the letter of reply states that, since the Grand Duchy of Luxembourg intended to avail itself of the derogation provided for by Article 16 of the Directive, it was necessary for it to transpose Article 15 of the Directive. The means of capture and killing mentioned in Article 15(a) and (b) of the Directive are exactly the same as those provided for in and prohibited by the Bern Convention. They are also prohibited, without exception, by the rules on hunting and fishing. Moreover, the Luxembourg Government has stated that the arrêté grand-ducal du 10 mars 1959 ayant pour objet la destruction des animaux malfaisants et nuisibles (Grand-Ducal Decree of 10 March 1959 on the elimination of harmful animals and vermin, hereinafter 'the Grand-Ducal Decree'), which imposes no restriction on the means of destruction used, is to be repealed by a new Grand-Ducal regulation of which a draft already exists.

84 It is important to bear in mind that Annex VI (a) to the Directive, to which Article 15 refers, includes amongst the prohibited methods and means of capture and killing traps which are non-selective according to their principle or their conditions of use and smoking out. However, in so far as it authorises the destruction of animals of the species listed in Annex V (a) to the Directive such as the marten and polecat, by means of smoking out with terriers or with the aid of traps, which, moreover, are not expressly required to be selective, the Grand-Ducal Decree is inconsistent with Article 15 of the Directive. Furthermore, it is not apparent from the file that the Grand-Ducal Decree was repealed within the period laid down in the reasoned opinion.

85 It follows that, in any event, the complaint of incorrect transposition of Article 15 of the Directive must be regarded as well founded.

Unsatisfactory transposition of Article 16(1) of the Directive

86 According to the Commission, the transposition measures mentioned in the letter of reply are unsatisfactory as regards Article 16(1) of the Directive.

87 As far as concerns Article 26 of the Nature Protection Law, which provides that the competent minister may grant derogations from Articles 13 to 18 of that law for scientific purposes or in the public interest, it should be observed that the grant of such derogations has not been made conditional upon there being no other satisfactory solution, as is required by Article 16(1) of the Directive.

88 As regards Article 9 of the Bern Convention, even if that provision makes the grant of derogations from the protection rules laid down in the convention subject to the same conditions as those specified in Article 16(1) of the Directive, and in particular the condition that there be no other satisfactory solution, the fact that that system of derogations and that implemented by Article 26 of the Nature Protection Law coexist in Luxembourg's national law is, in any event, contrary to Article 16(1) of the Directive because that situation in fact creates in this case an ambiguity liable to render compliance with Article 16(1) less than certain.

89 The complaint of unsatisfactory transposition of Article 16(1) of the Directive must therefore be upheld.

Incorrect transposition of Article 22(b) and (c) of the Directive

Article 22(b) of the Directive

90 In reply to the complaint of incorrect transposition of Article 22(b) of the Directive, as formulated in the letter of formal notice, the Luxembourg authorities state that that provision was transposed by Article 25 of the Nature Protection Law, which prohibits the introduction of non-indigenous species into the wild except with the authorisation of the competent minister, to which appropriate conditions may be attached.

91 In this connection it should be observed that Article 25 of the Nature Protection Law does not make the grant of the ministerial authorisation referred to in that provision conditional upon satisfaction of the requirements of Article 22(b) of the Directive, particularly the requirement that authorisation should be granted only where no harm would be caused to natural habitats.

92 Consequently, Article 25 of the Nature Protection Law does not correctly transpose Article 22(b) of the Directive. The Commission's complaint in this regard must therefore be regarded as well founded.

Article 22(c) of the Directive

93 The letter of reply maintains that Article 22(c) of the Directive, which is designed to promote education and general information on the need to protect species of wild fauna and flora and to conserve natural habitats, is transposed by Article 3(3) of the Bern Convention, by Article 13 of the Convention on Biological Diversity concluded in Rio de Janeiro on 5 June 1992 and approved by the Law of 4 March 1994 (*Mémorial* A 1994, p. 429), to which the European Community became a party by Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity (OJ 1993 L 309, p. 1), and by the Law of 10 August 1992 on freedom of access to environmental information and rights of action of associations for the protection of nature and the environment (*Mémorial* A 1992, p. 2204).

94 Whilst it maintains that the Law of 10 August 1992 just mentioned contains no provision for actively supplying the public with information, the Commission acknowledges that Article 3(3) of the Bern Convention and Article 13 of the Convention on Biological Diversity are in principle capable of transposing Article 22(c) of the Directive satisfactorily. Nevertheless, the institution objects that the Grand Duchy of Luxembourg has failed to show that its legal system includes the principle of direct effect of the so-called self-executing provisions of international conventions that are properly approved and published.

95 Since it is not disputed that the provisions of the Bern Convention and of the Convention on Biological Diversity just mentioned are capable of satisfactorily transposing Article 22(c) of the Directive, the Court must confine itself to considering whether those provisions have in fact been incorporated into Luxembourg law.

96 There is no doubt that the provisions have been incorporated in the present case. Indeed the conventions in question were approved by laws of the Grand Duchy of Luxembourg and require no further measures to be taken in order for them to achieve their full effect in the internal legal system of that Member State.

97 That being so, the complaint of incorrect transposition of Article 22(c) of the Directive must be rejected.

98 In view of the foregoing, the Court must uphold the complaint of inappropriate transposition of Article 22(b) of the Directive.

Infringement of Article 23(2) of the Directive

99 The Commission maintains that the Grand Duchy of Luxembourg has infringed Article 23(2) of the Directive in that the transposition measures which that Member State adopted after the Directive's entry into force and communicated to the Commission contain no reference to the Directive or were not accompanied by any such reference when officially published.

100 The letter of reply states that the essential purpose of the proposed sectoral plan provided for by the Regional Planning Law is the implementation of Directives 79/409 and 92/43 and that a list of all national measures transposing the Directive is to be published in the *Mémorial*.

101 However, it is apparent that no such list has been published within the period laid down in the reasoned opinion.

102 It follows that the complaint of infringement of Article 23(2) of the Directive is well founded.

103 In light of the foregoing, it must be held that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b), 14, 15, 16(1), 22(b) and 23(2) of the Directive in conjunction with Annexes I, II, IV, V and VI to the Directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under the Directive.

Costs

104 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if there has been an application to that effect. Since the Commission has applied for costs and the Grand Duchy of Luxembourg has been unsuccessful in the majority of its pleas, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber),

hereby:

1. **Declares that, by failing to take all the necessary measures to implement fully and correctly Articles 1, 4(5), 5(4), 6, 7, 12(1)(b) and (c), 12(2), 12(4), 13(1)(b), 14, 15, 16(1), 22(b) and 23(2) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora in conjunction with Annexes I, II, IV, V and VI to that directive, the Grand Duchy of Luxembourg has failed to fulfil its obligations under that directive;**

2. **Orders the Grand Duchy of Luxembourg to pay the costs.**

Puissochet Gulmann Skouris

Macken Colneric

Delivered in open court in Luxembourg on 13 February 2003.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber

JUDGMENT OF THE COURT (Sixth Chamber)

30 January 2002 *

In Case C-103/00,

Commission of the European Communities, represented by R. Wainwright and P. Panayotopoulos, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by A. Samoni-Rantou and P. Skandalou, acting as Agents, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, by failing to adopt or, in the alternative, to notify to the Commission, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakinthos (Greece) so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed

* Language of the case: Greek.

to fulfil its obligations under the EC Treaty and under Article 12(1)(b) and (d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann (Rapporteur), J.-P. Puissochet, R. Schintgen and J.N. Cunha Rodrigues, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 July 2001,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2001,

gives the following

Judgment

1 By application lodged at the Court Registry on 17 March 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt or, in the alternative, to notify to the Commission, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakinthos (Greece) so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under the EC Treaty and Article 12(1)(b) and (d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, the 'Directive').

The relevant provisions

2 Article 2(1) of the Directive states that the aim of the Directive is to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

3 Article 2(2) states that measures taken pursuant to the Directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

4 Article 12(1) provides:

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

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

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

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

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

5 The sea turtle *Caretta caretta* is one of the species listed in Annex IV(a) of the Directive.

6 Under Article 23(1), Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of its notification, and to forthwith inform the Commission thereof. Since notification of the Directive took place in June 1992, the relevant time-limit expired in June 1994.

Pre-litigation procedure

7 The deterioration in the conservation conditions for the sea turtle *Caretta caretta* on the island of Zakinthos was criticised by non-governmental organisations. In addition, by a letter of 3 July 1998, the Commission requested information from the Greek authorities on measures for the protection of that species on the island.

8 On 16 and 17 July 1998, Commission officials went on a mission to Zakinthos to verify whether any measures for the protection of the sea turtle *Caretta caretta* had in fact been implemented. In the course of the mission, they visited the beaches at Laganas, Kalamaki, Sekania, Dafni and Gerakas, the places where that species lays its eggs. They found that the protective measures at all of the places visited were inadequate, in particular:

— there was no supervision and there were no notices on the beaches;

— there were pedalos and boats in the sea area where their use is prohibited;

— there were a significant number of beach umbrellas and deck-chairs on various beaches (Kalamaki, Gerakas, Dafni);

— there were illegal buildings and recent works on the beach at Dafni.

9 In response to the Commission's letter of 3 July 1998, the Greek authorities, by letter of 22 July 1998, referred *inter alia* to port regulations adopted during the first half of the 1990s, to the implementation of programmes for monitoring sea turtles and to public information and awareness campaigns.

10 The Commission took the view that the Hellenic Republic had not taken the requisite measures to introduce an effective system of protection for the sea turtle *Caretta caretta* at Zakinthos and, consequently, had failed to fulfil its obligations under Article 12(1)(b) and (d) of the Directive. By letter of 2 December 1998, it therefore gave the Greek Government formal notice to submit its observations on the matter.

11 The Greek authorities replied in a letter of 17 March 1999, stating that a draft presidential decree on the creation of a marine park of Zakinthos had been submitted to the Greek Council of State for finalisation. They also informed the Commission that they had established a committee charged with drafting a special presidential decree, of general nature, containing financial provisions applicable to all the protected natural regions in Greece. In addition, they notified

the Commission of their intention to draft a third presidential decree on compensatory measures for the marine park of Zakinthos. In the same letter, the Greek authorities also announced a series of measures such as, in particular, the demolition of all illegal buildings on the beaches, the establishment of a national land register, the prohibition of vehicle access to the beaches, the replacement of the current lighting which disturbs the sea turtles, and the removal of deck-chairs and beach umbrellas. They also stated that a contract had been signed on the construction of a high-speed patrol boat for the use of the Zakinthos port police for the purpose of ensuring compliance with the planned measures.

12 The Commission concluded that the Greek authorities had still not adopted the measures needed to introduce an effective system of protection for the sea turtle *Caretta caretta* on Zakinthos by creating the appropriate institutional framework or taking measures at the sites to protect that species. By letter of 15 June 1999, the Commission therefore delivered a reasoned opinion to the Hellenic Republic in which it reiterated the complaints contained in its letter of formal notice and requested that Member State to comply with the reasoned opinion within two months from the date of its notification.

13 On 24 and 25 August 1999, Commission officials carried out another mission to Zakinthos, in which they once again inspected the principal beaches used for breeding by the sea turtle *Caretta caretta*. They noted, in particular, a certain amount of progress in comparison with the situation prevailing at the time of their earlier mission, including *inter alia* the presence of supervisors and notices on the beaches, the publication and distribution of information pamphlets and the fact that a high-speed patrol boat had been put into service. However, they also found that:

— there were pedalos and small boats in Sea Area A at Gerakas and Dafni;

— pedalos and small boats were moored in Sea Area B at Kalamaki;

— there were beach umbrellas and deck-chairs on various beaches (Gerakas, Dafni, Kalamaki, Laganas) in numbers clearly exceeding the number permitted by the draft presidential decree on the creation of the marine park of Zakinthos;

— the number of illegal buildings on the beach at Dafni had increased;

— mopeds were being driven on the sand beach to the east of Laganas;

— supervisory measures on certain beaches were inadequate.

14 On 29 October 1999, the Greek authorities replied to the reasoned opinion by informing the Commission that a budget of GRD 30 million for a public information programme and for the supervision, cleaning and protection of the sand beaches on the biotope of the bay of Laganas on Zakinthos had been approved for the summer of 1999. The Greek authorities also stated that the beach umbrellas had been removed from the beach at Dafni and that the number of beach umbrellas on the beach at Gerakas had been considerably reduced so as not to exceed the limit fixed for that beach by the draft presidential decree on the creation of the marine park of Zakinthos.

15 Since the Commission did not receive any other information to lead it to conclude that the Hellenic Republic had complied with its obligations under the Directive, it decided to bring the present action.

Substance

16 The Commission states that the sea turtle *Caretta caretta* only lays eggs every two or three years. In Greece, the laying season starts at the end of May and finishes at the end of August. The turtle leaves the sea at night and moves towards the driest area of the beach, where it digs a hole of 40 to 60 centimetres in which it lays an average of 120 eggs. The Commission explains that two months later the eggs hatch and the baby turtles then crawl onto the sand and head towards the sea. The baby turtles are very vulnerable and a large number of them die.

17 The Commission emphasises the fact that the bay of Laganas on Zakinthos is a vital breeding region, perhaps even the most important in the Mediterranean, for the sea turtle *Caretta caretta*. Given the significance of the bay of Laganas, the Greek authorities have proposed that the region be classified as one of the sites of Community importance for the Natura 2000 network.

18 The Commission's principal complaint is that the Hellenic Republic has infringed its obligations under the Treaty and Article 12(1)(b) and (d) of the Directive, first, by failing to adopt a legislative framework which would ensure the strict protection of the sea turtle *Caretta caretta* against any deliberate disturbance during its breeding period and against any deterioration or destruction of its breeding sites and, second, by failing to take specific measures to prevent such nuisances.

Legislative provisions for the protection of the Caretta caretta species

19 According to the Commission, the Greek Government has not adopted an institutional framework within the prescribed time-limit capable of ensuring the effective long-term protection of the sea turtle *Caretta caretta*.

20 The Greek Government claims that by issuing a presidential decree on 22 December 1999 which classifies the land and sea regions of the bay of Laganas and the Strofada islands as a national marine park and the costal areas of the communes of Zakinthos and Laganas as a regional park (FEK D'906/22.12.1999, the 'Decree of 1999'), it has instituted a system of strict protection for the sea turtle *Caretta caretta*.

21 The Greek Government submits that, over the last 20 years, measures have been progressively taken to ensure the protection of that species on the island of Zakinthos. It refers to various laws, regulations and administrative measures adopted to that end from 1980 onwards. The Decree of 1999 constitutes only the most recent measure in a process of progressive implementation of a system of strict protection for that species.

22 According to the Greek Government, the lack of grounds for the Commission's action is also demonstrated by the nesting figures available for the sea turtle *Caretta caretta* on the bay of Laganas over the last 15 years. These figures do not show that the number of nests has decreased.

23 It should be observed in this regard that the Court has consistently held that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see, *inter alia*, Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 18, and Case C-220/99 *Commission* v *France* [2001] ECR I-5831, paragraph 33).

24 The Decree of 1999, on which the Greek Government has based a significant part of its pleadings, was adopted after the expiry of the two-month time-limit laid down in the reasoned opinion.

25 Consequently, it is not necessary to examine whether the system of protection for the sea turtle *Caretta caretta* provided for by that decree meets the protection requirements set out in Article 12(1)(b) and (d) of the Directive.

26 As regards the other measures which, according to the Greek Government, are intended to implement an effective system of protection for that species, it must be remembered that Article 12(1)(b) and (d) of the Directive require that the requisite measures be taken to establish a system of strict protection for the animal species listed in Annex IV(a) of that Directive in their natural habitats, prohibiting the deliberate disturbance of those species, particularly during the period of breeding, rearing, hibernation and migration, and the deterioration or destruction of breeding sites or resting places.

27 First, it is undisputed that the bay of Laganas is a vital breeding region for the protected species *Caretta caretta*.

28 Second, according to the findings of the Greek Council of State in a report in 1999 annexed to the draft presidential decree establishing the marine park of Zakinthos, the provisions in force at that time did not ensure, to the extent necessary, the effective protection of the sea and land areas of the bay of Laganas. In particular, given the pressure and the erosion caused to the breeding beaches at Dafni, Gerakas and Kalamaki by the construction of access routes to those beaches and given the noise resulting from human activity, the Council of State recommended the prohibition not only of the opening of new access routes to those beaches, but also of the creation of infrastructure such as kiosks, tents or parking facilities. The Greek Government does not contest those matters.

29 Third, it should be observed that during the pre-litigation period, the Greek Government particularly stressed that the adoption of a decree creating a marine park at Zakinthos would introduce a system of strict protection for the sea turtle *Caretta caretta*. In its defence, the Greek Government claimed that, in respect of that species, the Decree of 1999 met the protection objectives set out in Article 12 of the Directive. In its rejoinder, the Greek Government submitted, for the first time, that the requisite measures to establish a system of strict protection for that species pursuant to Article 12(1)(b) and (d) of the Directive had been taken prior to 14 August 1999, the date on which the time-limit set by the Commission expired. However, in the oral hearing, the Greek Government admitted that the Decree of 1999 had established a system creating stricter protection than had been afforded by the system of protection previously in force. It should also be observed that, when asked by the Court to identify, and submit the wording of, the specific provisions in force in their legal system on 14 August 1999 which it

believed met the requirements laid down by Article 12(1)(b) and (d) of the Directive, the Greek Government merely listed a series of laws, regulations and administrative measures without referring to any specific provisions capable of meeting those requirements.

30 In the light of the foregoing, it must be held that the Greek Government did not adopt a legal framework within the prescribed time-limit which was capable of ensuring strict protection for the sea turtle *Caretta caretta* against any deliberate disturbance during the breeding period and against any deterioration or destruction of its breeding sites. Consequently, the Commission's application must be granted on this point.

31 The fact that it does not appear that the number of nests of that species has decreased over the last 15 years does not, of itself, call this finding into question.

Specific measures for the protection of the Caretta caretta species

32 The Commission points out that, during a visit to the breeding beaches of the sea turtle *Caretta caretta* on the island of Zakinthos at the end of August 1999, its officials reported *inter alia* the use of mopeds on the sand beach to the east of Laganas, the presence of pedalos and small boats in the sea around Gerakas and Dafni and the presence of illegal buildings on the beach at Dafni.

33 The Greek Government does not dispute the accuracy of those findings.

34 It is undisputed that the use of mopeds on a beach used for breeding by the *Caretta caretta* turtle is, particularly owing to the noise pollution, liable to disturb that species during the laying period, the incubation period and the hatching of the eggs, as well as during the baby turtles' migration to the sea. It is also established that the presence of small boats near the breeding beaches constitutes a source of danger to the life and physical well-being of the turtles.

35It is apparent from the documents before the Court that at the time the facts were ascertained by the Commission's officials, the use of mopeds on the breeding beaches was prohibited and notices indicating the presence of turtle nests on the beaches had been erected. As regards the sea area around Gerakas and Dafni, it had been classified as an absolute protection area and special notices had been erected there.

36 It follows that the use of mopeds on the sand beach to the east of Laganas and the presence of pedalos and small boats in the sea area around Gerakas and Dafni constitute the deliberate disturbance of the species in question during its breeding period for the purposes of Article 12(1)(b) of the Directive.

37 Moreover, the acts were not isolated occurrences. As regards the use of mopeds on the breeding beaches, this is clear from the Greek Government's assertion that nocturnal supervision of the eastern part of beach at Laganas was, at the material time, particularly difficult to ensure owing to the length of the beach, the high number of access points and the low number of supervisors. As far as the presence of small boats in the relevant sea area is concerned, it should be noted that these were observed on two visits to Zakinthos by Commission officials, as stated at paragraphs 8 and 13 of this judgment.

38 Finally, there is no doubt that the presence of buildings on a breeding beach such as the one at Dafni is liable to lead to the deterioration or destruction of the breeding site within the meaning of Article 12(1)(d) of the Directive.

39 It must, therefore, be held that the Hellenic Republic did not take, within the prescribed time-limit, all the requisite specific measures to prevent the deliberate disturbance of the sea turtle *Caretta caretta* during its breeding period and the deterioration or destruction of its breeding sites. Consequently, the Commission's application must also be granted on this point.

40 In the light of the foregoing, the Court finds that by failing to take, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakinthos so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under Article 12(1)(b) and (d) of the Directive.

Costs

41 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Hellenic Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that by failing to take, within the prescribed time-limit, the requisite measures to establish and implement an effective system of strict protection for the sea turtle *Caretta caretta* on Zakinthos so as to avoid any disturbance of the species during its breeding period and any activity which might bring about deterioration or destruction of its breeding sites, the Hellenic Republic has failed to fulfil its obligations under Article 12(1)(b) and (d) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora;**

2. **Orders the Hellenic Republic to pay the costs.**

Macken Gulmann Puissochet

Schintgen Cunha Rodrigues

Delivered in open court in Luxembourg on 30 January 2002.

R. Grass F. Macken

Registrar President of the Sixth Chamber

JUDGMENT OF THE COURT (Sixth Chamber)

7 December 2000 *

In Case C-374/98,

Commission of the European Communities, represented by P. Stancanelli, of its Legal Service, and O. Couvert-Castéra, a national civil servant on secondment to that Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Nadal, Assistant Foreign Affairs Secretary in that Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

* Language of the case: French.

APPLICATION for a declaration, first, that, by failing to classify the Basses Corbières site, France, as a special protection area for the conservation of certain species of birds listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) and of certain migratory species not listed in that Annex, and by also failing to adopt special conservation measures concerning their habitat, contrary to Article 4(1) and (2) of that directive, and, second, that, by failing to take appropriate steps in relation to the Basses Corbières to avoid disturbance of the species protected on that site and deterioration of their habitat likely to have a significant effect, as a result of the opening and working of limestone quarries in the municipalities of Tautavel and Vingrau, France, contrary to Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), the French Republic has failed to fulfil its obligations under the EC Treaty,

THE COURT (Sixth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Sixth Chamber, V. Skouris and R. Schintgen, Judges,

Advocate General: S. Alber,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 December 1999, during which the Commission was represented by O. Couvert-Castéra and

the French Republic by A. Maitrepierre, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 15 February 2000,

gives the following

Judgment

1 By application lodged at the Court Registry on 16 October 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration, first, that, by failing to classify the Basses Corbières site, France, as a special protection area ('SPA') for the conservation of certain species of birds listed in Annex I to Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1; 'the birds directive') and of certain migratory species not listed in that Annex, and by also failing to adopt special conservation measures concerning their habitat, contrary to Article 4(1) and (2) of that directive, and, second, that, by failing to take appropriate steps in relation to the Basses Corbières to avoid disturbance of the species protected on that site and deterioration of their habitat likely to have a significant effect, as a result of the opening and working of limestone quarries within the municipalities of Tautavel and Vingrau, France, contrary to Article 6(2) to (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; 'the habitats directive'), the French Republic has failed to fulfil its obligations under the EC Treaty.

Legislative background

2 Article 4 of the birds directive provides:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

3. [...]

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

3 Article 7 of the habitats directive provides that obligations arising under Article 6(2), (3) and (4) of that directive are to 'replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of

classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later'.

4 Article 6(2) to (4) of the habitats directive provide:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

5 Article 23(1) of the habitats directive provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with that directive within two years of its notification. The directive having been notified in June 1992, that period expired in June 1994.

The pre-litigation procedure

6 On 2 July 1996, the Commission sent the French Government a letter of formal notice in respect of failure to comply with Article 4 of the birds directive, as amended by the habitats directive, in relation to the Basses Corbières site which straddles the Aude and Pyrénées-Orientales départements. In that letter, the Commission maintained, first, that, having regard to its importance for the conservation of wild birds, particularly the Bonelli's eagle, the Basses Corbières site should have been classified as an SPA, and, second, that the opening and working of limestone quarries on that site had caused its deterioration without the required conditions being met.

7 In its reply of 28 November 1996, the French Government argued that the French authorities had recognised the interest of the site in question by passing a special conservation measure designed to protect the Bonelli eagle, namely a prefectoral decree on the conservation of the biotope of that species within the Vingrau and Tautavel municipalities. The Government, moreover, referred to the fact that a classification of those territories as an SPA was envisaged. It also stated that the

OMYA company had been working a limestone deposit in the Tautavel municipality for many years. The exhaustion of the deposit in that municipality had led the company to submit a request for authorisation to extend the working of the deposit into the neighbouring municipality of Vingrau. In that respect, the French Government argued that a judgment of the Administrative Court of Appeal of Bordeaux, which had annulled the prefectoral decree granting OMYA permission to build the quarrying installation in the Vingrau municipality, was capable of meeting the requirements of the birds directive.

8 By letter of 19 December 1997, the Commission delivered a reasoned opinion in which it held, first, that, by failing to classify the Basses Corbières site as an SPA for the conservation of certain species of birds listed in Annex I to the birds directive and of certain migratory species not listed in that Annex, and by also failing to adopt special conservation measures concerning their habitat, contrary to Article 4(1) and (2) of that directive, and, secondly, that, by failing to take appropriate steps in relation to the Basses Corbières to avoid disturbance of the species protected on that site and deterioration of their habitat, likely to have a significant effect, as a result of the opening and working of limestone quarries in the municipalities of Tautavel and Vingrau, contrary to Article 6(2) to (4) of the habitats directive, the French Republic had failed to fulfil its obligations under the EC Treaty. The Commission called upon the French Republic to take the necessary measures to comply with that reasoned opinion within two months from its notification.

9 By letter of 22 July 1998, the French authorities sent their reply to the reasoned opinion. They indicated in particular that a very full impact study had enabled the effects of the quarries in question on the attainment of the Community objectives to be assessed. In the light of that study, compensatory measures for reducing the effects of the project on habitats, species and landscape had been put into operation. In their letter, the French authorities also referred to the fact that a decision of the Conseil d'État, France, of 18 December 1996 and a decision of the Tribunal Administratif (Administrative Court) of Montpellier, France, of January 1998 confirmed the authorisations granted to the OMYA company to operate

and to set up a classified installation. The authorities also stated that a mediation mission was in progress between opponents and supporters of the operation of the Vingrau quarry and that, at the end of that mission, they would open a procedure for classifying the site as an SPA.

Substance

10 The Commission charges the French Republic with:

— first, not having classified the Basses Corbières site as an SPA;

— second, not having taken sufficient special conservation measures concerning the habitat of the species referred to in Annex I to the birds directive and of migratory species which frequent that site;

— third, not having taken appropriate steps to avoid disturbances in that site affecting those species and a deterioration of their habitat.

The classification as an SPA

11 The Commission states that the ornithological richness of the Basses Corbières site, which is situated in a migration corridor of European importance, caused the

French authorities to enter it as an important area for the conservation of wild birds (zone importante pour la conservation des oiseaux sauvages; 'ZICO'), and that the area thus designated as a ZICO amounts to 47 400 hectares. The Basses Corbières site both shelters several species listed in Annex I to the birds directive, particularly a pair of Bonelli's eagles, of which there are about 20 pairs in France, and constitutes an important area for the migration of birds of prey.

12 The French Government acknowledges that the classification of the Basses Corbières as an SPA has been delayed on account of fierce local controversy. Nevertheless, thanks to the work of a mediator sent by the French Government, it had been possible to classify a major part of the Basses Corbières site as an SPA. The French Government further argues that, under Article 4 of the birds directive, as interpreted by the Court of Justice, it is for the Government to classify as SPAs the territories which appear to it to be the most suitable in number and size for the conservation of birds. The French authorities were therefore not required to classify the whole of the area listed in the national inventory of ZICOs as SPAs. The Government also maintains that Bonelli's eagle is the most remarkable species of the area in terms of ornithological interest. As for migratory species, it claims that the area is more one of passage than of stopping or feeding. Certain species might, it is true, be observed on a migratory halt in that area for a resting or feeding period. However, the Basses Corbières region does not contain large gathering areas as is the case on coastal lakes.

13 In this connection, it should first be noted that, according to the settled case-law of the Court, a Member State may not plead provisions, practices or circumstances existing in its internal legal system in order to justify a failure to comply with the obligations and time-limits laid down in a directive (see, *inter alia*, Case C-166/97 *Commission* v *France* [1999] ECR I-1719, paragraph 13).

14 Second, it is well settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation

prevailing in that State at the end of the period laid down in the reasoned opinion (*Commission* v *France*, cited above, paragraph 18). On that point, it is undisputed that no part of the Basses Corbières site had been classified as an SPA before the expiry of the period laid down by the reasoned opinion.

15 Third, it is undisputed that the Basses Corbières site contains natural areas of particular ornithological interest, at least because of the presence of Bonelli's eagle, which is a species listed in Annex I to the birds directive. In that respect it should be noted that, in January 1999, the French authorities classified two nesting areas of Bonelli's eagle, representing a total area of around 360 hectares and already referred to by two prefectoral decrees for conserving the biotope of that species, as SPAs. One of those areas extends over the municipalities of Tautavel and Vingrau, the other over the municipalities of Maury, Planèzes and Raziguières.

16 However, it has not been shown that there are migratory species justifying the classification of the Basses Corbières site as an SPA by virtue of Article 4(2) of the birds directive. All the species mentioned for that purpose by the Commission as migratory species, such as the honey buzzard, the black kite, the kite, the Egyptian vulture, the short-toed eagle, the marsh harrier, the hen harrier and Montagu's harrier are listed in Annex I to the birds directive, whereas Article 4(2) of that directive applies only to migratory species not listed in Annex I.

17 Therefore, without there being any need in this case to consider what area the SPA in the Basses Corbières should cover for the obligations arising under the birds directive to be met, it must be concluded that the French Republic has not, within the prescribed period, classified any territory in the Basses Corbières site as an SPA within the meaning of Article 4(1) of the birds directive. The Commission's application must therefore be upheld on that point, within the limits stated above.

The special conservation measures

18 As regards the special conservation measures required by Article 4(1) of the birds directive, the Commission maintains that the measures adopted by the French authorities for the Basses Corbières site are insufficient. In particular, the three prefectoral decrees for conserving the biotope of Bonelli's eagle on that site, although they mention wild bird species other than Bonelli's eagle in their annexes, refer only to that latter species in their provisions and provide for specific measures only in respect of the latter. Those decrees do not, the Commission submits, ensure sufficient and complete protection of all the bird species required to be protected in that site by the birds directive, either in relation to the protection regime established or in relation to its geographical extent.

19 According to the French Government, those three decrees for the protection of the biotope ensure complete protection of the bird species present in the areas concerned. In that respect, it states in particular that the protection measures laid down by those decrees for the whole of those areas consist essentially of a prohibition on all forms of rock climbing from 15 January to 30 June and more generally a prohibition on all works which might adversely affect the integrity of the biotope. It maintains that such measures meet the objectives of conserving not only the most remarkable species of the Basses Corbières, namely Bonelli's eagle, but also the other species characteristic of that biotope. It also maintains that the areas defined by the decrees protecting the biotope correspond to biotopes generally favourable to rock species sharing their territory with Bonelli's eagle.

20 As regards the alleged insufficiency of the protection regime arising from the special conservation measures adopted by the French authorities, it should be noted in any event that, even though the three decrees for protecting the biotope are all aimed primarily at ensuring the conservation of the biotope of Bonelli's

eagle, and thus the protection of that species, their provisions nevertheless benefit all wild birds frequenting the areas covered by that legislation, by laying down in some detail the prohibition of activities capable of adversely affecting the integrity of the biotopes in question.

21 Moreover, there is nothing in the documents before the Court to show that the regime established by the three decrees for protecting the biotope is insufficient in relation to the conservation requirements of any of the bird species present in the areas covered by those decrees.

22 The complaint that the protection regime arising from the special conservation measures adopted by the French authorities is insufficient must therefore be rejected.

23 As regards the complaint that the geographical extent of those special conservation measures is insufficient, it should be noted that the Groupe Ornithologique du Roussillon ('GOR') filed a proposal in March 1999 that sectors situated in the Basses Corbières ZICO should be classified as an SPA. That file shows that the area extending over 950 hectares from the Serre de Vingrau-Tautavel to the Trou de Cavall was regarded as being suitable for classification as an SPA. That area falls entirely within the ZICO LR 07 which corresponds to the Basse Corbières site as referred to by the Commission in this case and was delimited in 1991, at the request of the Ministry of the Environment, by the GOR and the Groupe de Recherche et d'Information sur les Vertébrés et leur Environnement.

24 According to the GOR, which the French Government recognises as a naturalist association independent of the administration that has shown scientific seriousness and objectivity for many years, that area, which has already suffered deterioration around 1990, must be regarded as classifiable as an SPA

particularly on account of the presence of large birds of prey such as Bonelli's eagle, the golden eagle, the peregrine and the eagle owl, and of a corvid such as the red-billed chough. The presence of those species in the area in question is of fairly long standing, as the various documents submitted to the Court in this case show. The golden eagle, which has been living in this area since January 1998, appears to be the most recently-arrived species.

25 It should also be noted that the inventory of areas which are of great importance for the conservation of wild birds, more commonly known under the acronym IBA (Inventory of Important Bird Areas in the European Community) includes the area in question. The Court of Justice has held that that inventory, although not legally binding on the Member States concerned, contains scientific evidence making it possible to assess whether a Member State has complied with its obligation to classify as SPAs the most suitable territories in number and size for conservation of the protected species (Case C-3/96 *Commission* v *Netherlands* [1998] ECR I-3031, paragraphs 69 and 70).

26 It follows from the general scheme of Article 4 of the birds directive that, where a given area fulfils the criteria for classification as an SPA, it must be made the subject of special conservation measures capable of ensuring, in particular, the survival and reproduction of the bird species mentioned in Annex I to that directive.

27 In this case, the maps with the Court's file show that, of the three decrees for protecting the biotope issued in relation to the Basses Corbières area, only one refers to the area indicated by the GOR as requiring classification as an SPA, and that the decree in question covers only part of that area. Moreover, the 231 hectares protected by that decree are not entirely included in that area.

28 Furthermore, it does not appear that the part of the area indicated by the GOR which lies outside the scope of the decree in question is subject to any special conservation measures whatsoever.

29 In those circumstances, in the absence of any evidence capable of reopening the question whether the GOR's proposal that the 950-hectare area extending from the Serre de Vingrau-Tautavel to the Trou de Cavall should be classified as an SPA is well founded, it must be held that, since a considerable part of that area does not benefit from a special conservation regime, the special conservation measures taken by the French authorities are insufficient in their geographical extent.

30 Therefore, without there being any need in this case to consider whether other parts of the Basses Corbières area are suitable for classification as SPAs, it appears that the French Republic has failed to fulfil its obligations under Article 4(1) of the birds directive by not taking sufficient special conservation measures as to their geographical extent. It follows that the Commission's application must also be upheld on this point, within the limits specified above.

The disturbance and deterioration caused by the limestone quarries of Vingrau and Tautavel

31 According to the Commission — given that, as from the implementation date of the habitats directive, namely 10 June 1994, the obligations under Article 6(2) to (4) of that directive were substituted, pursuant to Article 7 thereof, for the obligations under the first sentence of Article 4(4) of the birds directive — those

obligations under the habitats directive have had to be complied with since that date in the case of the Basses Corbières site, even if the latter has not yet been classified as an SPA under Article 4(1) and (2) of the birds directive.

32 In reply to the Court's question on that point, the Commission maintains that, since Article 7 of the habitats directive does not in any way amend Article 4(1) and (2) of the birds directive, the grounds which led the Court to extend the protection regime under the first sentence of Article 4(4) of the birds directive to areas not classified as SPAs are equally relevant in relation to the protection regime under Article 6(2) to (4) of the habitats directive, which replaced it. The Commission further argues that, if the provisions of Article 7 of the habitats directive had to be interpreted as being intended to make the obligations under Article 6(2) to (4) applicable only to SPAs actually classified as such by the national authorities pursuant to Article 4(1) and (2) of the birds directive, the result would be a duality in the protection schemes that would be hard to justify. The protection regime laid down in the birds directive is, the Commission submits, stricter than that under the habitats directive, and it would be paradoxical to place areas of ornithological interest that have not been the subject of a national classification measure such as an SPA under a stricter protection scheme than that applicable to areas which have actually been classified as SPAs by Member States.

33 The Commission states that the realisation of the project to open and work limestone quarries in the territory of the Vingrau and Tautavel municipalities within the Basses Corbières site is likely to cause disturbance to the species present in that site and a deterioration of their habitat. It argues that, for Bonelli's eagle in particular, the opening of the quarries involves the disappearance of part of its hunting territory and risks disturbing its reproduction on account of the visual and noise pollution connected with the quarries' activity.

34 The Commission also argues that in this case, even if, for determining the areas due to benefit from the special protection regime, one were to take only those

classified as SPAs by the French authorities and which correspond to the territories covered by the two decrees for protecting the biotope referred to in paragraph 15 of this judgment, it appears that the quarrying project of the OMYA company is likely significantly to affect those areas, which are of undisputed ornithological interest.

35 The Commission maintains that, in those circumstances, an appropriate assessment of the impact of the project on the conservation of the site concerned should have been carried out. The impact study prior to the authorisation to operate quarries, dated 1994, did not meet that requirement.

36 The French Republic also infringed the obligation to adopt appropriate compensatory measures. The Commission submits that the cultivation of prey for Bonelli's eagle, the scientific monitoring of that species, the construction of a merlon and a plan for managing the natural environment, besides the fact that they do not concern the other bird species requiring protection, cannot compensate for the disturbance and deterioration caused, since the latter have not been assessed.

37 Since there had been no appropriate assessment of the impact of the quarries project on the site to be classified as an SPA in the municipality of Vingrau and, moreover, a negative impact was far from being excluded, the Commission claims that the French authorities should have refused to give their agreement to that project without demonstrating that there was no alternative solution and that a major public interest was capable of justifying the project. In that respect, the Commission states that several reports emanating from qualified universities conclude that solutions do exist which are equivalent to that of the Vingrau deposit. In any event, neither the OMYA company nor the French authorities had seriously studied those other solutions.

38 The French Government maintains that the Commission does not present any scientific or other evidence to demonstrate that the quarries create significant

disturbance for the pair of Bonelli's eagles or for the other species. In any event, the Government denies that the opening and operation of the quarries are capable of entailing serious consequences for the species present in the site. In that respect, it argues, first, that none of the scientific studies carried out concluded that operation of the quarries might involve such consequences for the wild birds and in particular Bonelli's eagle; second, that such operation was preceded by a detailed impact study which concluded that the project had no significant effect on the environment; and, finally, that important precautionary measures designed to avoid potential negative effects of the project on the environment have been put into operation.

39 The French Government states that Bonelli's eagle was present before the Tautavel quarry began operating in 1968, and that it has since maintained itself on the site without the working of the limestone noticeably causing a disturbance of the species. Nothing in the monitoring of that species, carried out by local bird protection associations independent of the administration, supports the conclusion that moving the Tautavel workings to Vingrau might have negative effects, the nesting area of Bonelli's eagle being in any event unaffected by either of the working sites.

40 Concerning the hunting area of Bonelli's eagle, the French Government points out that, in the impact study referred to above, it is stated, first, that the area needed for working the quarries should not unduly disturb the habits of that species, which has a hunting territory of several square kilometres, and, secondly, that precautionary measures to encourage proliferation of the small prey upon which that eagle feeds have been taken.

41 As regards possible alternative solutions to the deposit currently being worked by the OMYA company in the Vingrau and Tautavel municipalities, the French

Government claims that they have been seriously studied by that company but are not equivalent to that deposit.

42 In reply to the question put by the Court as to the applicability of Article 6(2) to (4) of the habitats directive to areas not yet classified as SPAs, the French Government, which acknowledges that it has not pleaded the inapplicability of those provisions to the Basses Corbières area, maintains that the substitution of the obligations contained therein for those in the first sentence of Article 4(4) of the birds directive, as provided for in Article 7 of the habitats directive, concerns only areas already classified as SPAs under the birds directive.

43 It first needs to be considered whether Article 6(2) to (4) of the habitats directive apply to areas which have not been classified as SPAs but should have been so classified.

44 In that respect, it is important to note that the text of Article 7 of the habitats directive expressly states that Article 6(2) to (4) of the directive apply, in substitution for the first sentence of Article 4(4) of the birds directive, to the areas classified under Article 4(1) or (2) of the latter directive.

45 It follows that, on a literal interpretation of that passage of Article 7 of the habitats directive, only areas classified as SPAs fall under the influence of Article 6(2) to (4) of that directive.

46 Moreover, the text of Article 7 of the habitats directive states that Article 6(2) to (4) of that directive replace the first sentence of Article 4(4) of the birds directive

as from the date of implementation of the habitats directive or the date of classification by a Member State under the birds directive, where the latter date is later. That passage of Article 7 appears to support the interpretation to the effect that the application of Article 6(2) to (4) presupposes the classification of the area concerned as an SPA.

47 It is clear, therefore, that areas which have not been classified as SPAs but should have been so classified continue to fall under the regime governed by the first sentence of Article 4(4) of the birds directive.

48 The Commission's arguments to the contrary cannot be accepted.

49 Thus, the fact that, as the case law of the Court of Justice shows (see, in particular, Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 22), the protection regime under the first sentence of Article 4(4) of the birds directive applies to areas that have not been classified as SPAs but should have been so classified does not in itself imply that the protection regime referred to in Article 6(2) to (4) of the habitats directive replaces the first regime referred to in relation to those areas.

50 Moreover, as regards the Commission's argument concerning a duality of applicable regimes, it should be noted that the fact that the areas referred to in the previous paragraph of this judgment are, under the first sentence of Article 4(4) of the birds directive, made subject to a regime that is stricter than that laid down by Article 6(2) to (4) of the habitats directive in relation to areas classified as SPAs does not appear to be without justification.

51 As the Advocate General points out in paragraph 99 of his Opinion, a Member State cannot derive an advantage from its failure to comply with its Community obligations.

52 In that respect, if it were lawful for a Member State, which, in breach of the birds directive, has failed to classify as an SPA a site which should have been so classified, to rely on Article 6(3) and (4) of the habitats directive, that State might enjoy such an advantage.

53 Since no formal measure for classifying such a site as an SPA exists, it is particularly difficult for the Commission, in accordance with Article 155 of the EC Treaty (now Article 211 EC), to carry out effective monitoring of the application by Member States of the procedure laid down by Article 6(3) and (4) of the habitats directive and to establish, in appropriate cases, the existence of possible failures to fulfil the obligations arising thereunder. In particular, the risk is significantly increased that plans or projects not directly connected with or necessary to the management of the site, and affecting its integrity, may be accepted by the national authorities in breach of that procedure, escape the Commission's monitoring and cause serious, or irreparable ecological damage, contrary to the conservation requirements of that site.

54 Natural or legal persons entitled to assert before the national courts interests connected with the protection of nature, and especially wild bird life, which in this case means primarily environmental protection organisations, would face comparable difficulties.

55 A situation of this kind would be likely to endanger the attainment of the objective of special protection for wild bird life set forth in Article 4 of the birds

directive, as interpreted by the case-law of the Court (see, in particular, Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraphs 23 and 25).

56 As the Advocate General has, essentially argued in paragraph 102 of his Opinion, the duality of the regimes applicable, respectively, to areas classified as SPAs and those which should have been so classified gives Member States an incentive to carry out classifications, in so far as they thereby acquire the possibility of using a procedure which allows them, for imperative reasons of overriding public interest, including those of a social or economic nature, and subject to certain conditions, to adopt a plan or project adversely affecting an SPA.

57 It follows from the above that Article 6(2) to (4) of the habitats directive do not apply to areas which have not been classified as SPAs but should have been so classified.

58 The complaint alleging infringement of Article 6(2) to (4) of the habitats directive must therefore be rejected.

59 It must therefore be held that, by not classifying any part of the Basses Corbières site as an SPA and by not adopting special conservation measures for that site sufficient in their geographical extent, the French Republic has failed to fulfil its obligations under Article 4(1) of the birds directive.

60 The remainder of the application must be dismissed.

Costs

61 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, under the first paragraph of Article 69(3), the Court may order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads. Since the Commission has been only partially unsuccessful, the parties must be ordered to bear their own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Declares that, by not classifying any part of the Basses Corbières site as a special protection area and by not adopting special conservation measures for that site sufficient in their geographical extent, the French Republic has failed to fulfil its obligations under Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds;

2. Dismisses the remainder of the application;

3. Orders the parties to bear their own costs.

Gulmann Skouris Schintgen

Delivered in open court in Luxembourg on 7 December 2000.

R. Grass

Registrar

C. Gulmann

President of the Sixth Chamber

JUDGMENT OF THE COURT

7 November 2000 *

In Case C-371/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales for a preliminary ruling in the proceedings pending before that court between

The Queen

and

Secretary of State for the Environment, Transport and the Regions,

ex parte First Corporate Shipping Ltd,

interveners:

World Wide Fund for Nature UK (WWF)

and

Avon Wildlife Trust,

* Language of the case: English.

on the interpretation of Articles 2(3) and 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), M. Wathelet, V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet, P. Jann, L. Sevón and R. Schintgen, Judges,

Advocate General: P. Léger,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— First Corporate Shipping Ltd, by G. Barling QC, M. Shaw and M. Hoskins, Barristers, instructed by Arnheim Tite & Lewis, Solicitors,

— World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust, by P. Sands and J.H. Marks, Barristers, instructed by Leigh Day & Co., Solicitors,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and Richard Drabble QC,

— the Finnish Government, by H. Rotkirch and T. Pynnä, Valtionasiamiehet, acting as Agents,

— the Commission of the European Communities, by R.B. Wainwright, Principal Legal Adviser, and P. Stancanelli, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of First Corporate Shipping Ltd, World Wide Fund for Nature UK (WWF) and Avon Wildlife Trust, the United Kingdom Government, the Finnish Government and the Commission at the hearing on 7 December 1999,

after hearing the Opinion of the Advocate General at the sitting on 7 March 2000,

gives the following

Judgment

1 By order of 21 July 1998, received at the Court on 16 October 1998, the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 2(3) and

4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the Habitats Directive').

2 The question arose in proceedings brought by First Corporate Shipping Ltd (hereinafter 'FCS') for judicial review of the act by which the Secretary of State for the Environment, Transport and the Regions indicated that he was minded to propose the Severn Estuary to the Commission of the European Communities as a site eligible for designation as a special area of conservation (SAC) under Article 4(1) of the Habitats Directive.

The Community legislation

3 According to Article 2 of the Habitats Directive:

'1. The aim of this Directive shall be to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.'

4 Article 4 of the Habitats Directive states:

'1. On the basis of the criteria set out in Annex III (Stage 1) and relevant scientific information, each Member State shall propose a list of sites indicating which natural habitat types in Annex I and which species in Annex II that are native to its territory the sites host. For animal species ranging over wide areas these sites shall correspond to the places within the natural range of such species which present the physical or biological factors essential to their life and reproduction. For aquatic species which range over wide areas, such sites will be proposed only where there is a clearly identifiable area representing the physical and biological factors essential to their life and reproduction. Where appropriate, Member States shall propose adaptation of the list in the light of the results of the surveillance referred to in Article 11.

The list shall be transmitted to the Commission, within three years of the notification of this Directive, together with information on each site. That information shall include a map of the site, its name, location, extent and the data resulting from application of the criteria specified in Annex III (Stage 1) provided in a format established by the Commission in accordance with the procedure laid down in Article 21.

2. On the basis of the criteria set out in Annex III (Stage 2) and in the framework both of each of the five biogeographical regions referred to in Article 1(c)(iii) and of the whole of the territory referred to in Article 2(1), the Commission shall establish, in agreement with each Member State, a draft list of sites of

Community importance drawn from the Member States' lists identifying those which host one or more priority natural habitat types or priority species.

Member States whose sites hosting one or more priority natural habitat types and priority species represent more than 5% of their national territory may, in agreement with the Commission, request that the criteria listed in Annex III (Stage 2) be applied more flexibly in selecting all the sites of Community importance in their territory.

The list of sites selected as sites of Community importance, identifying those which host one or more priority natural habitat types or priority species, shall be adopted by the Commission in accordance with the procedure laid down in Article 21.

3. The list referred to in paragraph 2 shall be established within six years of the notification of this Directive.

4. Once a site of Community importance has been adopted in accordance with the procedure laid down in paragraph 2, the Member State concerned shall designate that site as a special area of conservation as soon as possible and within six years at most, establishing priorities in the light of the importance of the sites for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which those sites are exposed.

5. As soon as a site is placed on the list referred to in the third subparagraph of paragraph 2 it shall be subject to Article 6(2), (3) and (4).'

5 Annex III to the Habitats Directive reads as follows:

'Criteria for selecting sites eligible for identification as sites of Community importance and designation as special areas of conservation

Stage 1: Assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II (including priority natural habitat types and priority species)

A. *Site assessment criteria for a given natural habitat type in Annex 1*

(a) Degree of representativity of the natural habitat type on the site.

(b) Area of the site covered by the natural habitat type in relation to the total area covered by that natural habitat type within national territory.

(c) Degree of conservation of the structure and functions of the natural habitat type concerned and restoration possibilities.

(d) Global assessment of the value of the site for conservation of the natural habitat type concerned.

B. *Site assessment criteria for a given species in Annex II*

(a) Size and density of the population of the species present on the site in relation to the populations present within national territory.

(b) Degree of conservation of the features of the habitat which are important for the species concerned and restoration possibilities.

(c) Degree of isolation of the population present on the site in relation to the natural range of the species.

(d) Global assessment of the value of the site for conservation of the species concerned.

C. On the basis of these criteria, Member States will classify the sites which they propose on the national list as sites eligible for identification as sites of Community importance according to their relative value for the conservation of each natural habitat type in Annex I or each species in Annex II.

D. That list will show the sites containing the priority natural habitat types and priority species selected by the Member States on the basis of the criteria in A and B above.

...'

6 Article 6(2), (3) and (4) of the Habitats Directive provides:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or

economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

The main proceedings and the question referred for a preliminary ruling

7 FCS is the statutory port authority for the port of Bristol, on the Severn Estuary, and owns considerable land in the neighbourhood of the port. Since acquiring the port, FCS has invested, in partnership with other undertakings, nearly GBP 220 million in capital in developing its facilities. It employs 495 permanent full-time employees. The number of workers employed at the port, including FCS's own employees, is between 3 000 and 5 000.

8 The Secretary of State indicated that he was minded to propose the Severn Estuary to the Commission as a site eligible for designation as an SAC under Article 4(1) of the Habitats Directive, most of the intertidal part of the estuary having already been classified as a special protection area under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). FCS thereupon applied to the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales for leave to apply for judicial review.

9 FCS submitted before that court that Article 2(3) of the Habitats Directive obliged the Secretary of State to take account of economic, social and cultural requirements when deciding which sites should be proposed to the Commission pursuant to Article 4(1) of that directive.

10 The Secretary of State contended that, in the light of the Court's reasoning in Case C-44/95 *R* v *Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1996] ECR I-3805, he could not take economic, social and cultural requirements into account when deciding which sites should be proposed to the Commission pursuant to Article 4(1) of the Habitats Directive.

11 In those circumstances, the High Court of Justice stayed proceedings and referred the following question to the Court for a preliminary ruling:

'Is a Member State entitled or obliged to take account of the considerations laid down in Article 2(3) of Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), namely, economic, social and cultural requirements and regional and local characteristics, when deciding which sites to propose to the Commission pursuant to Article 4(1) of that Directive and/or in defining the boundaries of such sites?'

The question referred for a preliminary ruling

12 It should be noted that the question of interpretation referred for a preliminary ruling relates only to Stage 1 of the procedure for classifying natural sites as SACs laid down by Article 4(1) of the Habitats Directive.

13 Under that provision, on the basis of the criteria set out in Annex III (Stage 1) together with relevant scientific information, each Member State is to propose and transmit to the Commission a list of sites, indicating which natural habitat types in Annex I and native species in Annex II are to be found there.

14 Annex III to the Habitats Directive, which deals with the criteria for selecting sites eligible for identification as sites of Community importance and designation as SACs, sets out, as regards Stage 1, criteria for the assessment at national level of the relative importance of sites for each natural habitat type in Annex I and each species in Annex II.

15 Those assessment criteria are defined exclusively in relation to the objective of conserving the natural habitats or the wild fauna and flora listed in Annexes I and II respectively.

16 It follows that Article 4(1) of the Habitats Directive does not as such provide for requirements other than those relating to the conservation of natural habitats and of wild fauna and flora to be taken into account when choosing, and defining the boundaries of, the sites to be proposed to the Commission as eligible for identification as sites of Community importance.

17 FCS submits that identifying and defining the boundaries of the sites to be notified to the Commission with a view to designation as SACs, as required by Article 4(1) of the Habitats Directive, constitute a measure taken pursuant to the directive within the meaning of Article 2(3). It follows that Article 2(3) imposes an obligation on a Member State to take account of economic, social and cultural requirements and regional and local characteristics when it applies the criteria in Annex III to the directive when drawing up the list of sites to be transmitted to the Commission.

18 According to the Finnish Government, it is open to a Member State, when proposing its list of sites to the Commission, to take account of economic, social and cultural requirements and regional and local characteristics, provided that it does not compromise realisation of the Habitats Directive's nature protection objectives. The Government observes that there may, for example, be such a large number of sites eligible to be considered of Community importance within the territory of a Member State that that State is entitled to exclude some of them from its list of proposed sites without jeopardising realisation of those objectives.

19 It should be noted that the first subparagraph of Article 3(1) of the Habitats Directive provides for the setting up of a coherent European ecological network of SACs to be known as 'Natura 2000', composed of sites hosting the natural habitat types listed in Annex I and habitats of the species listed in Annex II, to enable them to be maintained or, where appropriate, restored at a favourable conservation status in their natural range.

20 Moreover, Article 4 of the Habitats Directive sets out the procedure for classifying natural sites as SACs, divided into several stages with corresponding legal effects, which is intended in particular to enable the Natura 2000 network to be realised, as provided for by Article 3(2) of the directive.

21 In particular, the first subparagraph of Article 4(2) prescribes that the Commission is to establish, on the basis of the lists drawn up by the Member States and in agreement with each Member State, a draft list of sites of Community importance.

22 To produce a draft list of sites of Community importance, capable of leading to the creation of a coherent European ecological network of SACs, the Commission

must have available an exhaustive list of the sites which, at national level, have an ecological interest which is relevant from the point of view of the Habitats Directive's objective of conservation of natural habitats and wild fauna and flora. To that end, that list is drawn up on the basis of the criteria laid down in Annex III (Stage 1) to the directive.

23 Only in that way is it possible to realise the objective, in the first subparagraph of Article 3(1) of the Habitats Directive, of maintaining or restoring the natural habitat types and the species' habitats concerned at a favourable conservation status in their natural range, which may lie across one or more frontiers inside the Community. It follows from Article 1(e) and (i), read in conjunction with Article 2(1), of the directive that the favourable conservation status of a natural habitat or a species must be assessed in relation to the entire European territory of the Member States to which the Treaty applies. Having regard to the fact that, when a Member State draws up the national list of sites, it is not in a position to have precise detailed knowledge of the situation of habitats in the other Member States, it cannot of its own accord, whether because of economic, social or cultural requirements or because of regional or local characteristics, delete sites which at national level have an ecological interest relevant from the point of view of the objective of conservation without jeopardising the realisation of that objective at Community level.

24 In particular, if the Member States could take account of economic, social and cultural requirements and regional and local characteristics when selecting and defining the boundaries of the sites to be included in the list which, pursuant to Article 4(1) of the Habitats Directive, they must draw up and transmit to the Commission, the Commission could not be sure of having available an exhaustive list of sites eligible as SACs, with the risk that the objective of bringing them together into a coherent European ecological network might not be achieved.

25 The answer to the national court's question must therefore be that, on a proper construction of Article 4(1) of the Habitats Directive, a Member State may not

take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance.

Costs

26 The costs incurred by the United Kingdom and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the the Queen's Bench Division (Divisional Court) of the High Court of Justice of England and Wales by order of 21 July 1998, hereby rules:

On a proper construction of Article 4(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora,

a Member State may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance.

Rodríguez Iglesias	Gulmann	Wathelet
Skouris	Edward	Puissochet
Jann	Sevón	Schintgen

Delivered in open court in Luxembourg on 7 November 2000.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President

JUDGMENT OF THE COURT (Fifth Chamber)

6 April 2000 *

In Case C-256/98,

Commission of the European Communities, represented by P. Stancanelli, of its Legal Service, and O. Couvert-Castéra, a national civil servant on secondment to that Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, also of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

French Republic, represented by K. Rispal-Bellanger, Head of Subdirectorate in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and R. Nadal, Assistant Foreign Affairs Secretary in that Directorate, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

defendant,

* Language of the case: French.

APPLICATION for a declaration that, by not adopting all the laws, regulations and administrative measures necessary to comply with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), in that it has omitted to take the measures necessary to comply with Article 6 thereof, the French Republic has failed to fulfil its obligations under that Directive and under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC),

THE COURT (Fifth Chamber),

composed of: D.A.O. Edward, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann (Rapporteur), J.-P. Puissochet and P. Jann, Judges,

Advocate General: N. Fennelly,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 June 1999,

after hearing the Opinion of the Advocate General at the sitting on 16 September 1999,

gives the following

Judgment

1 By application lodged at the Court Registry on 15 July 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by not adopting the laws, regulations and administrative measures necessary to comply with Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7; hereinafter 'the Directive'), in that it has omitted to take the measures necessary to comply with Article 6 thereof, the French Republic has failed to fulfil its obligations under that Directive and under the third paragraph of Article 189 of the EC Treaty (now the third paragraph of Article 249 EC).

The applicable legislation

2 Article 2(1) of the Directive states that the aim of that measure is to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

3 Article 2(2) states that measures taken pursuant to the Directive are to be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

4 According to the sixth recital in the preamble to the Directive, it is necessary, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, to designate special areas of conservation in order to create a coherent European ecological network in accordance with a specified timetable.

5 Pursuant to Article 3(1) of the Directive, that network — termed 'Natura 2000' — is to comprise, not only those special areas of conservation, but also areas which the Member States have designated as 'special protection areas' pursuant to Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1; hereinafter 'the Wild Birds Directive').

6 Article 1(l) of the Directive defines a special area of conservation as 'a site of Community importance designated by the Member States through a statutory, administrative and/or contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated'.

7 Article 4 of the Directive lays down a three-stage procedure for the designation of special areas of conservation. Pursuant to Article 4(1), each Member State is to propose a list of sites and to indicate both the natural habitat types and the native species (of those listed, respectively, in Annexes I and II to the Directive) which those sites host. That list, together with information on each site, is to be transmitted to the Commission within three years of notification of the Directive.

8 Pursuant to Article 4(2) of the Directive, the Commission is to establish — on the basis of the criteria set out in Annex III to the Directive, and in agreement with each Member State — a draft list of sites of Community importance. The list of sites selected as sites of Community importance is to be adopted by the Commission in accordance with the procedure laid down in Article 21 of the

Directive. Pursuant to Article 4(3), the list is to be established within six years of notification of the Directive.

9 Article 4(4) provides that once a site has been adopted as a site of Community importance in accordance with the procedure laid down in Article 4(2), the Member State concerned is to designate it as a special area of conservation as soon as possible (within six years at most), establishing priorities in the light of the importance of the site for the maintenance or restoration, at a favourable conservation status, of a natural habitat type in Annex I or a species in Annex II and for the coherence of Natura 2000, and in the light of the threats of degradation or destruction to which such a site is exposed.

10 Article 4(5) provides that as soon as a site is placed on the list of sites of Community importance drawn up by the Commission, it is subject to the provisions of Article 6(2), (3) and (4).

11 Article 6 of the Directive provides:

'1. For special areas of conservation, Member States shall establish the necessary conservation measures involving, if need be, appropriate management plans specifically designed for the sites or integrated into other development plans, and appropriate statutory, administrative or contractual measures which correspond to the ecological requirements of the natural habitat types in Annex I and the species in Annex II present on the sites.

2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so

far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

12 Article 7 provides:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'

13 Article 23(1) provides that Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the Directive within two years of its notification and immediately to inform the Commission thereof. Since the Directive was notified to the French Republic on 5 June 1992, the period prescribed for its implementation in France expired on 5 June 1994.

The pre-litigation procedure

14 Since the French Government failed to communicate by 5 June 1994 the measures adopted to comply with the Directive, the Commission took the view that, in the absence of any other evidence to suggest that the necessary measures had indeed been adopted, the French Republic had failed to fulfil its obligations under the Directive. Accordingly, by letter of 9 August 1994, it sent the French Government formal notice to submit its comments in that regard within two months, in accordance with the procedure laid down in Article 169 of the Treaty.

15 By letter of 16 February 1995, the French Government informed the Commission that the Directive had been transposed into national law by Circular No 38 of 21 January 1993, supplemented by Circular No 24 of 28 January 1994. It also stated that the legal implications of the assessment of projects in accordance with Article 6(3) and (4) were under consideration, as was a draft decree concerning the list of habitats.

16 Under cover of a letter dated 18 April 1995, the French Government sent the Commission a copy of Law No 95-101 of 2 February 1995 concerning more stringent measures for the protection of the environment (*Journal Officiel de la République Française* of 3 February 1995, p. 1840). Appended was a table illustrating the provisions, both of the Directive and of the Wild Birds Directive, which were thereby transposed into national law. In addition, the French Government stated that a decree specifically concerning the Directive was under consideration at departmental level in the ministries responsible.

17 In the light both of the table relating to Law No 95-101 and the other information provided in the various letters from the French authorities, the Commission concluded that the Directive had only partly been transposed into national law and that additional measures were needed to ensure its full implementation, particularly with respect to Article 6.

18 When communication of those transposition measures was not forthcoming, the Commission sent the French Government by letter of 21 September 1995 a reasoned opinion calling upon it to adopt the measures necessary to comply with the Directive within two months of such notification.

19 Under cover of a letter dated 30 October 1995, the French Government sent the Commission a copy of Decree No 95-631 of 5 May 1995 on the conservation of natural habitats and habitats of wild species of Community interest (JORF of 7 May 1995, p. 7612). However, the Commission was unable on that basis to conclude that the Directive had been wholly transposed into French national law. Nevertheless, since the reasoned opinion of 21 September 1995 had neglected to

mention the letter of 18 April 1995 from the French authorities to the Commission, a complementary reasoned opinion was delivered by letter of 31 October 1997.

20 In the complementary reasoned opinion, the Commission expressed the view that, in failing to transpose Article 6 of the Directive into national law, the French Republic was denying future sites of Community importance a suitable regulatory framework which was in conformity with Community law. Pursuant to Article 4(5) of the Directive, such protection must be accorded to a site of that nature as soon as it is placed on the list referred to in the third subparagraph of Article 4(2). Secondly, the Commission maintained that, in neglecting to transpose Article 6(2), (3) and (4) of the Directive, the French Republic was also depriving the special protection areas designated earlier under the Wild Birds Directive of a suitable regulatory framework which is in conformity with Community law, contrary to the requirements of Article 7 of the Directive.

21 The Commission also noted that the information provided by the French Government indicated that the French authorities were contemplating the use of management projects, in accordance with Article 6(1) of the Directive. However, the French Government was silent as to the procedures and measures by which the requirements laid down in that provision would be satisfied. Article 6(1) clearly states that by the deadline set for compliance with the Directive — 5 June 1994 — a regulatory framework must be in place for the establishment of the conservation measures needed to meet the ecological requirements referred to in Annexes I and II to the Directive and which involve management projects and the appropriate statutory, administrative or contractual measures.

22 The Commission adds that, although French law already makes provision for the protection of nature in the form of measures and bodies of rules which were brought to the Commission's knowledge when it was notified of the special protection areas under the Wild Birds Directive, the French authorities have not specified which provisions, in their view, meet the objectives of the Directive and, in particular, of Article 6(1) and (2) thereof.

23 On receiving no communication thereafter regarding the adoption of measures to transpose the Directive into national law, the Commission decided to bring the present proceedings.

24 The Commission bases its application on the same complaints as were raised in the complementary reasoned opinion.

The complaints concerning the transposition into national law of Article 6(1) and (2) of the Directive

25 As regards the transposition into French law of Article 6(1) and (2) of the Directive, the Commission states in its application that the French authorities failed to communicate to it the measures which, in their view, satisfy the objectives of those provisions.

26 In its defence, the French Government refers to a number of French legal provisions which, in its view, constitute an adequate range of legislative, regulatory and contractual measures for ensuring that the objectives of the Directive, particularly of the above provisions, are realised in full.

27 The Commission acknowledges in its reply that French law includes measures designed to enable the obligations created by those provisions to be met. It maintains, however, that nowhere in French law are the French authorities expressly obliged to apply conservation and protection measures to special areas of conservation, in accordance with Article 6(1) and (2) of the Directive. According to the Commission, the very least required under the Directive, if Article 6(1) and (2) thereof are to be correctly transposed into national law, is the incorporation into French law, not only of legal instruments to ensure the

protection of special areas of conservation, but also — especially since the latter instruments were not specifically designed for the implementation of the Directive — of an express provision of general application requiring the French authorities to use those instruments in the situations envisaged and in accordance with the criteria set out in the Directive. Not only would such provision facilitate the transposition of the Directive into French law, it would also offer individuals greater legal certainty by lending more substance to their right to rely before the courts on failure by the competent authorities to comply with the obligation to adopt appropriate measures of protection.

28 It is clear from the foregoing that, both in the reasoned opinion and in the application, the Commission essentially imputes to the French Republic a failure to establish a legal framework to accommodate the measures necessary to ensure the protection of special areas of conservation, such measures being understood in the sense of measures defined by the national legislation and designed to take effect at the same time as the adoption, in accordance with Article 23, of the general measures necessary to ensure compliance with the Directive.

29 In its reply, the Commission amended its grounds of complaint to focus on the question of the existence in Community law of an obligation incumbent on Member States to incorporate in their laws express provisions requiring the competent national authorities to apply the conservation and protection measures provided for in Article 6(1) and (2) of the Directive to special areas of conservation.

30 It should be noted, however, that the amendment goes beyond a mere restatement, albeit in greater detail, of the initial complaints, thereby raising submissions before the Court which were not put forward during the pre-litigation procedure or in the application initiating the proceedings.

31 Those submissions are inadmissible because they are contrary to Article 38(1)(c) of the Rules of Procedure, under which the parties are required to state the subject-matter of the proceedings in the application initiating proceedings. Even though Article 42 of those Rules allows, subject to specific conditions, the introduction of new pleas in law, it is not permissible for a party to alter the very subject-matter of the proceedings. It follows that the merits of an application must be determined solely in the light of the submissions made in the application initiating the proceedings (see Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3).

32 Since the Commission must be deemed to have withdrawn its complaints in relation to Article 6(1) and (2) of the Directive, as initially formulated, the application must to that extent be dismissed as inadmissible.

33 Consequently, there is no need to consider the question — which, moreover, was not addressed during the proceedings — whether Member States were under an obligation to transpose the provisions at issue, particularly Article 6(1) of the Directive, into national law before the Commission adopted the list of sites of Community interest pursuant to the third subparagraph of Article 4(2) of the Directive.

The complaint concerning the transposition into national law of Article 6(3) and (4) of the Directive

34 First, as regards Article 6(3) of the Directive, the French Government admits that under the existing rules of French law relating to the prior assessment of the environmental implications of a development plan or project, the competent authorities are not able in all cases to refuse authorisation on the grounds that the findings of such an assessment were negative. The French Government states that, with a view to complying with the Directive on that point, it is preparing supplementary legislation.

35 However, the French Government disputes the Commission's assertions that its legislation does not enable the competent national authorities to comply fully with the obligation laid down in Article 6(3) of the Directive to carry out a prior assessment of the implications for the environment of any plan or project not directly connected with or necessary to the management of the site but likely nevertheless to have a significant effect thereon, citing in that respect Law No 76-629 of 10 July 1976 on the protection of nature (JORF of 12 and 13 July 1976, p. 4203).

36 It is common ground that there has long been provision in French law, notably in the rules provided for by Law No 76-629, for compulsory environmental impact assessments along the lines indicated by the Directive. Nevertheless, it is for the national authorities responsible for the transposition of the Directive into French law to make sure that those rules do indeed guarantee, with sufficient clarity and precision, the full implementation of Article 6(3).

37 However, as regards two of the three facets of French law as it stands which, in the view of the Commission, precludes full compliance with the obligations imposed by the Directive, the transposition into French law is not sufficiently clear and precise.

38 That does not apply to the first point raised by the Commission. As regards its assertion that the rules in force in France do not guarantee an assessment in the case of 'plans' likely to have a significant effect on sites, the Advocate General has properly pointed out in paragraphs 32 to 34 of his Opinion both that the Directive fails to define the term 'plan' and that French law (Article 2 of Law No 76-629) requires an environmental impact assessment in the case of both 'projets d'aménagement' (development projects) and 'documents d'urbanisme' (town planning). It cannot be regarded as established, therefore, that the French legislation in force does not satisfactorily transpose into national law the term 'plan' referred to in Article 6(3) of the Directive.

39 On the other hand, as regards the Commission's uncontested statement that, contrary to the Directive, the position in France is that the environmental impact assessment may be waived in the case of certain projects because of their low cost or their purpose, it should be noted that such exemptions cannot be justified in terms of the discretion of Member States implied, according to the French Government, by the expression 'likely to have a significant effect [on the site]'. On this point, it is enough to note that, in any event, that provision cannot authorise a Member State to enact national legislation which allows the environmental impact assessment obligation for development plans to be waived because of the low costs entailed or the particular type of work planned.

40 Lastly, as regards the Commission's statement that, contrary to the requirements of Article 6(3) of the Directive, there is no provision in French law which couples the obligation to make an environmental impact assessment with consideration of the 'site's conservation objectives', it should be noted that none of the provisions to which the French Government refers in its pleadings requires the assessment to determine the environmental impact of development plans in the light of the site's particular conservation objectives. It must be concluded, therefore, that those implications of Article 6(3) have not been transposed into French law with sufficient clarity and precision.

41 It follows that, as regards two of the three facets examined in paragraphs 38 to 40 above, Article 6(3) of the Directive has not been transposed into French law in a sufficiently clear and precise manner. Consequently, the action brought by the Commission is well founded in this respect.

42 Secondly, as regards the transposition into French law of Article 6(4) of the Directive, the Commission claims that the French Republic has not implemented the substantive conditions laid down in that provision, concerning the carrying out of a plan or project notwithstanding a negative assessment of the impact on the site, in cases where there are no alternative solutions.

43 On that point, it is enough to note that the French Government acknowledges that it has not adopted the measures necessary to comply with Article 6(4) of the Directive.

44 In the light of the foregoing, it must be held that, by not adopting within the period prescribed all the laws, regulations and administrative provisions necessary to comply with Article 6(3) and (4) of the Directive, the French Republic has failed to fulfil its obligations under that Directive.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. However, under the first paragraph of Article 69(3), the Court may order that the parties each bear their own costs where each party has succeeded on some and failed on other heads. Since both the Commission and the French Republic have been partially unsuccessful in their pleadings, they must be ordered to bear their own costs.

On those grounds,

THE COURT (Fifth Chamber),

hereby:

1. **Declares that, by not adopting within the period prescribed all the laws, regulations and administrative measures necessary to comply with Article 6(3) and (4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the French Republic has failed to fulfil its obligations under that Directive;**

2. **Dismisses the remainder of the action;**

3. **Orders each of the parties to bear its own costs.**

Edward Moitinho de Almeida Gulmann

Puissochet Jann

Delivered in open court in Luxembourg on 6 April 2000.

R. Grass

Registrar

D.A.O. Edward

President of the Fifth Chamber

JUDGMENT OF THE COURT
19 May 1998 *

In Case C-3/96,

Commission of the European Communities, represented by W. Wils, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of the Netherlands, represented by M. A. Fierstra and J. S. van den Oosterkamp, Deputy Legal Advisers in the Ministry of Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue C. M. Spoo,

defendant,

supported by

Federal Republic of Germany, represented by E. Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and S. Maass, Regierungsrätin in that ministry, acting as Agents, D-53107 Bonn,

intervener,

* Language of the case: Dutch.

APPLICATION for a declaration that, by failing sufficiently to designate special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), the Kingdom of the Netherlands has failed to comply with its obligations under that directive and Articles 5 and 189 of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann (Rapporteur), H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents of Chambers), J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, G. Hirsch and P. Jann, Judges,

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 July 1997,

after hearing the Opinion of the Advocate General at the sitting on 9 October 1997,

gives the following

Judgment

1 By application lodged at the Court Registry on 5 January 1996 the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that, by failing sufficiently to designate special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April

1979 on the conservation of wild birds (OJ 1979 L 103, p. 1, hereinafter 'the Directive'), the Kingdom of the Netherlands had failed to fulfil its obligations under that directive and Articles 5 and 189 of the EC Treaty.

2 By order of the President of the Court of 15 July 1996 the Federal Republic of Germany was granted leave to intervene in support of the form of order sought by the defendant State.

3 Article 2 of the Directive provides that Member States are to 'take the requisite measures to maintain the population of [all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies] at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level'.

4 Article 3 of the Directive provides:

'1. In the light of the requirements referred to in Article 2, Member States shall take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of birds referred to in Article 1.

2. The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures:

(a) creation of protected areas;

(b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones;

(c) re-establishment of destroyed biotopes;

(d) creation of biotopes.'

Article 4(1) of the Directive reads as follows:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

In this connection, account shall be taken of:

(a) species in danger of extinction;

(b) species vulnerable to specific changes in their habitat;

(c) species considered rare because of small populations or restricted local distribution;

(d) other species requiring particular attention for reasons of the specific nature of their habitat.

Trends and variations in population levels shall be taken into account as a background for evaluations.

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.'

6 Annex I to the Directive was replaced by the Annex to Commission Directive 85/411/EEC of 25 July 1985 amending Directive 79/409 (OJ 1985 L 233, p. 33).

7 Since it considered in particular that the Kingdom of the Netherlands had not classified a sufficient number of special protection areas (hereinafter 'SPAs') for the species of birds referred to in Annex I to the Directive, the Commission, on 25 September 1989, gave the Netherlands Government formal notice to submit its observations within two months.

8 By letter of 29 December 1989 the Netherlands Government denied the alleged infringement. It submitted essentially that it was not in breach of its obligations under Article 4(1) of the Directive, in that it had classified as SPAs a sufficient number of suitable territories for conservation of the species referred to in Annex I, taking into account the balance between the interests of conservation of protected species and economic and recreational interests, and that it had also introduced other instruments for the protection of birds.

9 Since those explanations did not cause it to alter its position on the alleged failure to fulfil obligations, the Commission sent the Netherlands Government on 14 June 1993 a reasoned opinion requiring the Kingdom of the Netherlands, within two months from notification of the opinion, to take the necessary action on the complaint of not having classified as SPAs sufficient territories to ensure effective protection of the species mentioned in Annex I to the Directive.

10 The Netherlands Government states that it replied to the reasoned opinion by letter of 1 December 1993. The Commission asserts, however, that it never received that reply.

Admissibility

11 The Kingdom of the Netherlands challenges the admissibility of the application on several grounds.

Failure to take account of reply by the Kingdom of the Netherlands to the reasoned opinion

12 The Netherlands Government submits that, by omitting to take account of its reply to the reasoned opinion, the Commission failed to respect its right to a fair hearing, so that the action is inadmissible.

13 The Commission replies that, even supposing it did receive that letter, the fact that its application to the Court does not take account of the Netherlands Government's reply to the reasoned opinion cannot constitute a ground of inadmissibility. The period set in the reasoned opinion serves merely to give the Member State to which it is addressed a last opportunity to conform with the Commission's point of view. Besides, the only new element in the letter, which was brought to its knowledge during the present proceedings, was the statement that three more territories had been classified as SPAs in the meantime. The Commission says that it did in fact take that into account in its application.

14 The Court points out that the procedure laid down in Article 169 of the Treaty comprises two consecutive stages, the pre-litigation or administrative stage and the contentious stage before the Court (see the order in Case C-266/94 *Commission* v *Spain* [1995] ECR I-1975, paragraph 15).

15 Under the first paragraph of Article 169, '[i]f the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations'.

16 The aim of the pre-litigation procedure is thus to give the Member State an opportunity to justify its position or, as the case may be, to comply of its own accord with the requirements of the Treaty. If that attempt to reach a settlement proves unsuccessful, the Member State is requested to comply with its obligations as set out in the reasoned opinion which concludes the pre-litigation procedure provided for in Article 169, within the period prescribed in that opinion (see *inter alia* Case 74/82 *Commission* v *Ireland* [1984] ECR 317, paragraph 13, and Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 11).

17 As the Court has previously held, the proper conduct of the pre-litigation procedure constitutes an essential guarantee intended by the Treaty not only to protect the rights of the Member State concerned but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see the order in *Commission* v *Spain*, cited above, paragraph 17, and the judgment in Case C-159/94 *Commission* v *France* [1997] ECR I-5815, paragraph 15).

18 It should be borne in mind that the subject-matter of an action for failure to fulfil obligations is determined by the Commission's reasoned opinion (see Case 154/85 *Commission* v *Italy* [1987] ECR 2717, paragraph 6).

19 In the present case, it is not disputed that the reasoned opinion and the procedure leading up to it were properly conducted.

20 In those circumstances, even assuming that the contentious procedure was opened by a Commission application which took no account of any new matters of fact or law put forward by the Member State concerned in its reply to the reasoned opinion, that State's right to a fair hearing has not been infringed. It is fully open to the State to raise those matters in the contentious procedure, to begin with in its first pleading in defence. It will be for the Court to examine their relevance for the outcome of the action for failure to fulfil obligations.

21 The first plea of inadmissibility must therefore be rejected.

Nature of the obligation laid down in Article 4(1) of the Directive

22 The Netherlands Government submits, second, that the alleged infringement consists not of a single act or omission but rather of a group of infringements of an obligation to take individual classification decisions. In order to guarantee the right to a fair hearing, it is essential in law to establish infringements of Article 4(1) of the Directive territory by territory. The Government submits essentially that the Commission is complaining that it failed generally to fulfil its obligations under Article 4(1), without first having engaged in an exchange of views with it on the specific complaints on which the action is founded.

23 According to the Commission, the submission that infringements of Article 4(1) of the Directive can only be established territory by territory is incorrect. An infringement may equally well be established if it is apparent that a Member State has clearly classified as SPAs many fewer habitats than required by ornithological criteria.

24 As the Advocate General notes in point 14 of his Opinion, since this plea of inadmissibility concerns the proper interpretation of Article 4(1) of the Directive and goes to the substance of the Commission's complaints, it should be examined in connection with the merits of the present action.

New matters

25 The Netherlands Government submits, third, that it was at the stage of its application to the Court that the Commission raised for the first time the complaint concerning the insufficient total area and quality of the areas classified as SPAs, as well as the specific complaints concerning the failure to classify the Friesian IJsselmeer coast and the Hooge Platen on the Western Scheldt, so preventing the defendant State from reacting at the pre-litigation stage. The same is true as regards the complaint that freshwater lakes and marshes and moorland were classified as SPAs only to a very limited extent. Those complaints are therefore inadmissible.

26 The Netherlands Government further submits that the report listing important areas for birds in the Netherlands (*Review of Areas Important for Birds in the Netherlands*, December 1994, hereinafter 'IBA 94'), published after the reasoned opinion had been sent to it, is not to be taken into consideration in the present proceedings, as the Government was not able to comment on it in the pre-litigation procedure.

27 The Commission replies that the alleged new pleas are in fact merely examples or developments of the single plea which has been consistently relied on since the beginning of the procedure, namely that the Netherlands has not designated sufficient SPAs from the point of view of Article 4(1) of the Directive. In the Commission's contention, Article 4(1), by providing that Member States are to classify as SPAs the most suitable territories in number and size for the conservation of the

species mentioned in Annex I to the Directive, implies an obligation which is not only quantitative but also qualitative, in that the obligation of result under that provision means that each Member State must designate SPAs of sufficient number, area and variety to ensure the survival and reproduction of all the species of birds mentioned in Annex I which are on its territory.

28 The Commission also contends that it substantiated its allegations on the basis of an ornithological study published in 1989 (*Inventory of Important Bird Areas in the European Community*, July 1989, hereinafter 'IBA 89'), its reliance on IBA 94 being altogether redundant.

29 In so far as an application refers to complaints which were not the subject-matter of the pre-litigation procedure, it is inadmissible (see, to that effect, Case 298/86 *Commission* v *Belgium* [1988] ECR 4343, paragraph 10, and Case C-274/93 *Commission* v *Luxembourg* [1996] ECR I-2019, paragraph 11).

30 In the present case the Commission referred expressly, in both the letter of formal notice and the reasoned opinion, to the obligation of the Kingdom of the Netherlands to ensure that the number and size of classified areas in the Member States are in accordance with Article 4(1) of the Directive. The plea of inadmissibility must therefore be rejected, in so far as it concerns the complaint that the Kingdom of the Netherlands did not classify a sufficient total area of SPAs.

31 As to the Commission's complaint that the SPAs classified by the Kingdom of the Netherlands were qualitatively insufficient, and more specifically that freshwater lakes and marshes and moorland have been classified as SPAs only to a limited extent, it must be stated that while, in order to comply with Article 4(1), Member

States must classify as SPAs sufficient territories, in terms of quantity and quality, to ensure conservation of the species listed in Annex I, it does not follow that a complaint that a Member State has not classified sufficient SPAs from the point of view of that provision necessarily covers the qualitative aspect of the obligation in question.

32 It appears that in the course of the pre-litigation stage the Commission based its complaint against the Kingdom of the Netherlands on the alleged insufficient number and size of the territories classified as SPAs by that State, in other words a quantitative insufficiency. By contrast, the alleged qualitative insufficiency of the SPAs classified by that State was raised for the first time in the present case when the contentious procedure was initiated.

33 The action must therefore be declared inadmissible in this respect.

34 As to the references to the Friesian IJsselmeer coast and the Hooge Platen on the Western Scheldt, these do not constitute a separate new complaint inasmuch as they serve merely as examples to illustrate the alleged infringement and are taken from the list, annexed to the letter of formal notice and the reasoned opinion, of areas which the Commission considers suitable for classification as SPAs. Those references are therefore permissible, in that they do not require the Court to rule specifically on the question whether those two areas must be classified as SPAs.

35 As to the reference to IBA 94, it should be noted, first, that that report, which dates from December 1994, draws up a list of areas which must, according to the scientific criteria accepted by the Commission, be classified as SPAs in the Netherlands.

36 Second, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in that State at the end of the period laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see, in particular, Case C-60/96 *Commission* v *France* [1997] ECR I-3827, paragraph 15).

37 There is nothing in the documents before the Court to show that IBA 94 relates to a period prior to the expiry of the time allowed to the defendant State to comply with the reasoned opinion of 14 June 1993. On any view, therefore, the present action is inadmissible in so far as it refers to IBA 94 in order to prove the existence of the alleged infringement of the Directive.

38 In those circumstances, the action must be declared admissible within the limits described above.

Substance

39 The Commission observes, to begin with, that it follows from Article 4(1) of the Directive that each Member State has a specific obligation to designate sufficient SPAs to ensure the survival and reproduction of all the species of birds mentioned in Annex I which are on its territory.

40 It states that, with respect to the Netherlands, IBA 89 identifies, on the basis of the ornithological criteria used and explained in that study, 70 territories with a total area of 797 920 hectares suitable for classification as SPAs.

41 The Commission points out that the Netherlands Ministry of Agriculture and Fisheries has drawn up its own list of potentially classifiable territories, which contains 53 sites with a total area of 398 180 hectares. Those 53 sites correspond in part to 57 sites mentioned in IBA 89. However, the Netherlands Government has given no explanation of the scientific criteria on which its list of territories potentially classifiable as SPAs is based.

42 In any event, the Commission submits that, by designating only 23 territories with a total area of 327 602 hectares as SPAs, the Kingdom of the Netherlands has manifestly exceeded the limits of the discretion conferred on Member States by Article 4 of the Directive.

43 On this point, the Commission maintains, first, that the sites classified by the Netherlands coincide, wholly or partly, with 33 sites mentioned in IBA 89, in other words less than half the total number of sites considered by that scientific report to be suitable for classification as SPAs, and that their number represents only slightly over half the 57 sites listed in IBA 89 which the Netherlands authorities themselves regarded as important areas for birds. Second, the total area of the 23 SPAs in the Netherlands is also quite insufficient: 327 602 hectares as against the 797 920 hectares covered by the 70 sites mentioned in IBA 89. Moreover, as one SPA, the Waddenzee, alone extends to 250 000 hectares, the remaining SPAs cover only 77 602 hectares, which is not sufficient to guarantee adequate protection for a large number of the species of birds listed in Annex I to the Directive.

44 According to the Commission, the obligation to classify is infringed if a Member State manifestly disregards the number and area of the territories listed in IBA 89. That is the case where a Member State designates as SPAs only less than half the sites listed by IBA 89, with respect to both the number of sites and their total area.

45 In the Commission's submission, another indication that the protection given by the Netherlands to the species of birds listed in Annex I to the Directive is insufficient is the fact that the population of nine of those species has declined by over 50%. Of particular significance in this respect is the fall in the population of sedentary species such as *Tetrao tetrix* and *Botaurus stellaris*.

46 The Netherlands Government contends that the designation of SPAs is only one of the measures by which a Member State may perform its obligation under Article 4(1) of the Directive to take special conservation measures. Member States may also have recourse to other conservation measures to comply with that obligation. There can therefore be an infringement of that provision only if a Member State has not taken any special conservation measures at all. The Netherlands Government contends that by taking other measures of relevance in this context, such as the Nature Conservation Law, the sale of sites to nature conservation organisations and bird conservation plans, it has complied with the Directive.

47 The Netherlands Government next observes that the Member States have a margin of discretion in implementing Article 4(1) of the Directive. With respect more particularly to the designation of SPAs, Article 4(1) merely requires designation of the most suitable territories. The scheme of the provision is thus based on an assessment in the specific case of the question whether a particular site is one of the most suitable territories.

48 On this point, the Netherlands Government observes that the previous cases before the Court all related to whether a Member State should have classified a particular site as an SPA. In the present case, however, the Commission has not shown, let alone proved, that in implementing Article 4(1) the Kingdom of the Netherlands exceeded the limits of its discretion in any specific cases.

49 The Netherlands Government further contends that, when adopting the special conservation measures provided for in Article 4(1), Member States must take account not only of the specific factors mentioned in that provision but also of economic and recreational requirements, in accordance with Article 2 of the Directive.

50 The German Government contends, on the basis of the Member States' margin of discretion, that Article 4(1) leaves the choice of SPAs to Member States and that the only decisive factor is that the areas must be suitable in number and area for conservation of the species concerned and capable, together with the areas classified by the other Member States, of constituting a coherent network of protection areas. In its contention, the provision does not require a particular number of areas to be classified, but rather requires Member States to ensure that the SPAs which are created are suitable for the conservation of endangered species of birds.

51 The Netherlands Government adds that it used three criteria, which also form the basis of IBA 89, to draw up its list of sites to be protected. However, because of the general character of those criteria, their application does not produce unequivocal results. That is why differences may appear between the territories which, according to IBA 89, satisfy the criteria of Article 4(1) of the Directive and those which are designated as SPAs by the Member State concerned.

52 The Netherlands Government observes, moreover, that the criterion applied by the Commission, namely that Member States must designate as SPAs at least half in number and area of the territories listed by IBA 89, does not appear in the Directive.

53 The German Government, for its part, states that IBA 89 contains only a list of sites which, according to scientific criteria, could potentially serve for the conservation of endangered species. However, the list is not included in the Directive and

is not legally binding. Moreover, there was no agreement at Community level either on the criteria on which the list is based or on the resulting list. The German Government adds that the fixing of a minimum of 50% of sites classified is arbitrary and has no scientific basis.

54 Finally, the Netherlands Government contends that to find that nine species have declined by over 50%, without taking account of the various factors which may be responsible, is not enough to establish that the Kingdom of the Netherlands has infringed Article 4(1) of the Directive. In particular, the fall in numbers of *Tetrao tetrix* is the consequence of a disastrous hatching season probably caused by an atmospheric deposit originating outside the territories in question. As to *Botaurus stellaris*, the Government observes that despite the fact that 10% of that species are in SPAs, its population is falling, as in all other European territories. That shows that the decline of that species is not due to the inadequacy of the special conservation measures adopted by the Kingdom of the Netherlands.

55 It must first be observed that, contrary to the contention of the Kingdom of the Netherlands, Article 4(1) of the Directive requires Member States to classify as SPAs the most suitable territories in number and size for the conservation of the species mentioned in Annex I, an obligation which it is not possible to avoid by adopting other special conservation methods.

56 It follows from that provision, as interpreted by the Court, that if such species occur on the territory of a Member State, it is obliged to define *inter alia* SPAs for them (see Case C-334/89 *Commission* v *Italy* [1991] ECR I-93, paragraph 10).

57 Such an interpretation of the obligation to classify SPAs is moreover consistent with the system of specifically targeted and reinforced protection laid down by Article 4 of the Directive in respect in particular of the species listed in Annex I (see Case C-44/95 *R* v *Secretary of State for the Environment, ex parte Royal Society for the Protection of Birds* [1996] ECR I-3805, paragraph 23), *a fortiori* since even Article 3 provides, for all the species of birds covered by the Directive, that the preservation, maintenance and re-establishment of biotopes and habitats is to include primarily measures such as the creation of protected areas.

58 Besides, as the Advocate General points out in point 33 of his Opinion, if Member States could escape the obligation to classify SPAs if they considered that other special conservation measures were sufficient to ensure survival and reproduction of the species mentioned in Annex I, the objective of creating a coherent network of SPAs, referred to in Article 4(3) of the Directive, might not be achieved.

59 Second, it must be pointed out that the economic requirements mentioned in Article 2 of the Directive may not be taken into account when selecting an SPA and defining its boundaries (see *Royal Society for the Protection of Birds*, paragraph 27).

60 Moreover, while the Member States have a certain margin of discretion in the choice of SPAs, the classification of those areas is nevertheless subject to certain ornithological criteria determined by the Directive (see Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, paragraph 26).

61 It follows that the Member States' margin of discretion in choosing the most suitable territories for classification as SPAs does not concern the appropriateness of classifying as SPAs the territories which appear the most suitable according to ornithological criteria, but only the application of those criteria for identifying the most suitable territories for conservation of the species listed in Annex I to the Directive.

62 Consequently, Member States are obliged to classify as SPAs all the sites which, applying ornithological criteria, appear to be the most suitable for conservation of the species in question.

63 Thus where it appears that a Member State has classified as SPAs sites the number and total area of which are manifestly less than the number and total area of the sites considered to be the most suitable for conservation of the species in question, it will be possible to find that that Member State has failed to fulfil its obligation under Article 4(1) of the Directive.

64 Consequently, the Netherlands Government's argument that the Commission must establish, territory by territory, specific infringements of that provision cannot be accepted.

65 Third, it should be observed, that the Netherlands Government, while not questioning the scientific reliability of IBA 89, contends that the application of the criteria on which that report is based cannot, in view of their general character, lead to unequivocal results as regards the classification of SPAs. It has maintained that, although it applied the same criteria as those on which IBA 89 is based, it arrived in its inventory of sites potentially classifiable as SPAs at a result which was very different from that indicated by that report. At the hearing, however, it admitted that its criteria differed from those used in IBA 89.

66 In that regard, it is significant that the Kingdom of the Netherlands has to this very day failed to produce a single document from the national procedure for classifying SPAs which indicates the criteria which governed the designation of SPAs in that Member State.

67 Moreover, throughout the pre-litigation procedure and also in its defence and rejoinder, it stressed that when designating SPAs it had, under Article 2 of the Directive, to take account of economic and recreational requirements. That approach is inconsistent with the Netherlands Government's assertion that it applied exclusively ornithological criteria when designating SPAs.

68 In this connection, it must be pointed out that IBA 89 draws up an inventory of areas which are of great importance for the conservation of wild birds in the Community. That inventory was prepared for the competent directorate-general of the Commission by the Eurogroup for the Conservation of Birds and Habitats in conjunction with the International Council of Bird Preservation and in cooperation with Commission experts.

69 In the circumstances, IBA 89 has proved to be the only document containing scientific evidence making it possible to assess whether the defendant State has fulfilled its obligation to classify as SPAs the most suitable territories in number and area for conservation of the protected species. The situation would be different if the Kingdom of the Netherlands had produced scientific evidence in particular to show that the obligation in question could be fulfilled by classifying as SPAs territories whose number and total area were less than those resulting from IBA 89.

70 It follows that that inventory, although not legally binding on the Member States concerned, can, by reason of its acknowledged scientific value in the present case, be used by the Court as a basis of reference for assessing the extent to which the Kingdom of the Netherlands has complied with its obligation to classify SPAs.

71 It should be added that, even supposing that the application of the ornithological criteria in IBA 89 could lead different entities to produce markedly different classifications of SPAs, the mere possibility of this, which has not been shown to have occurred in the present case, cannot as such be taken into consideration in order to undermine the probative value of IBA 89 in this instance.

72 Since it thus appears that the Netherlands has classified as SPAs territories whose number and total area are clearly smaller than the number and total area of the territories suitable, according to IBA 89, for classification as SPAs, the requirements of Article 4(1) of the Directive cannot be regarded as satisfied.

73 Consequently, without there being any need to consider the other arguments which have been put forward, it must be held that by classifying as SPAs territories whose number and total area are clearly smaller than the number and total area of the territories suitable for classification as SPAs within the meaning of Article 4(1) of the Directive, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

Costs

74 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of the Netherlands has been essentially unsuccessful, it must be ordered to pay the costs. Under Article 69(4) of the Rules of Procedure, Member States and institutions which intervene are to bear their own costs.

On those grounds,

THE COURT,

hereby:

1. **Declares that, by classifying as special protection areas territories whose number and total area are clearly smaller than the number and total area of the territories suitable for classification as special protection areas within the meaning of Article 4(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;**

2. **Orders the Kingdom of the Netherlands to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Schintgen Moitinho de Almeida

Kapteyn Murray Edward

Hirsch Jann

Delivered in open court in Luxembourg on 19 May 1998.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President

JUDGMENT OF THE COURT
11 July 1996 *

In Case C-44/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the House of Lords (United Kingdom) for a preliminary ruling in the case, pending before that court, of

Regina

v

Secretary of State for the Environment

ex parte **Royal Society for the Protection of Birds,**

Intervener: **The Port of Sheerness Limited,**

on the interpretation of Articles 2 and 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1),

* Language of the case: English.

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, C. Gulmann (Rapporteur), J. L. Murray, P. Jann and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Royal Society for the Protection of Birds, by R. Gordon QC and R. Buxton, Solicitor;

— the Port of Sheerness Limited, by S. Isaacs QC and C. Lewis, Barrister, instructed by C. Holme, Solicitor;

— the United Kingdom Government, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by S. Richards and A. Lindsay, Barristers;

— the French Government, by C. de Salins, Assistant Director, Directorate for Legal Affairs, Ministry of Foreign Affairs, and J.-L. Falconi, Secretary for Foreign Affairs in the same Directorate, acting as Agents;

— the Commission, by C. O'Reilly and M. van der Woude, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument from the Royal Society for the Protection of Birds, represented by R. Gordon and R. Buxton, the Port of Sheerness Limited, represented by S. Isaacs, the United Kingdom Government, represented by J. E. Collins, S. Richards and A. Lindsay, the French Government, represented by R. Nadal, Deputy Secretary for Foreign Affairs, Directorate for Legal Matters, Ministry of Foreign Affairs, acting as Agent, and the Commission of the European Communities, represented by C. O'Reilly, at the hearing on 7 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 21 March 1996,

gives the following

Judgment

1 By order of 9 February 1995, received at the Court on 24 February 1995, the House of Lords referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 2 and 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103 p. 1, hereinafter 'the Birds Directive').

2 Those questions were raised in proceedings between an association for the protection of birds, the Royal Society for the Protection of Birds (hereinafter 'the RSPB'), and the Secretary of State for the Environment (hereinafter 'the Secretary of State') concerning a decision designating a special protection area for the protection of wild birds.

3 The Birds Directive, which covers all species of birds naturally occurring in the wild in the European territory of the Member States to which the Treaty applies, provides, in Article 2, that the Member States are to take all necessary measures to maintain the population of all those species of birds at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements.

4 According to Article 3 of the Birds Directive, the Member States, having regard to the requirements mentioned in Article 2, are to take all necessary measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the protected species.

5 Pursuant to Article 4(1) of that directive, the species mentioned in Annex I are to be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. In particular, the Member States are to classify the most suitable territories in terms of number and size as special protection areas for the conservation of those species in the geographical sea and land area where the Directive applies.

6 According to Article 4(2), 'Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance'.

7 Finally, according to Article 4(4), '[I] n respect of the areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollu-

tion or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats'.

8 Council Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats of wild fauna and flora (OJ 1992 L 206, p. 7, hereinafter 'the Habitats Directive'), to be implemented in the United Kingdom by June 1994, provides in Article 7 that the obligations under Article 6(2), (3) and (4) are to replace any obligations arising under the first sentence of Article 4(4) of the Birds Directive in respect of areas classified pursuant to Article 4(1) or similarly recognized under Article 4(2) of that directive. Article 6(2), (3) and (4) of the Habitats Directive is worded as follows:

'2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.'

9 The United Kingdom did not transpose the Habitats Directive until October 1994.

10 On 15 December 1993, the Secretary of State decided to designate the Medway Estuary and Marshes as a Special Protection Area (hereinafter 'SPA'). At the same time, he decided to exclude from it an area of about 22 hectares known as Lappel Bank.

11 According to the order for reference, the Medway Estuary and Marshes are an area of wetland of international importance covering 4 681 hectares on the north coast of Kent and listed under the Ramsar Convention. They are used by a number of wildfowl and wader species as a breeding and wintering area and as a staging post during spring and autumn migration. The site also supports breeding populations of the avocet and the little tern, which are listed in Annex I to the Birds Directive.

12 Lappel Bank is an area of inter-tidal mudflat immediately adjoining, at its northern end, the Port of Sheerness and falling geographically within the bounds of the Medway Estuary and Marshes. Lappel Bank shares several of the important ornithological qualities of the area as a whole. Although it does not support any of the species referred to in Article 4(1) of the Birds Directive, some of the bird species of the area are represented in significantly greater numbers than elsewhere in the Medway SPA. Lappel Bank is an important component of the overall estuarine ecosystem and the loss of that inter-tidal area would probably result in a reduction in the wader and wildfowl populations of the Medway Estuary and Marshes.

13 The Port of Sheerness is at present the fifth largest in the United Kingdom for cargo and freight handling. It is a flourishing commercial undertaking, well located for sea traffic and access to its main domestic markets. The Port, which is also a significant employer in an area with a serious unemployment problem, plans extended facilities for car storage and value added activities on vehicles and in the fruit and paper product market, in order better to compete with continental ports offering similar facilities. Lappel Bank is the only area into which the Port of Sheerness can realistically envisage expanding.

14 Accordingly, taking the view that the need not to inhibit the viability of the port and the significant contribution that expansion into the area of Lappel Bank would make to the local and national economy outweighed its nature conservation value, the Secretary of State decided to exclude that area from the Medway SPA.

15 The RSPB applied to the Divisional Court of the Queen's Bench Division to have the Secretary of State's decision quashed on the ground that he was not entitled, by virtue of the Birds Directive, to have regard to economic considerations when classifying an SPA. The Divisional Court found against the RSPB. On appeal by the RSPB, the Court of Appeal upheld that judgment. The RSPB therefore appealed to the House of Lords.

16 Uncertain as to how the directive should be interpreted, the House of Lords stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. Is a Member State entitled to take account of the considerations mentioned in Article 2 of Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds in classification of an area as a Special Protection Area and/or in defining the boundaries of such an area pursuant to Article 4(1) and/or 4(2) of that Directive?

2. If the answer to Question 1 is "no", may a Member State nevertheless take account of Article 2 considerations in the classification process in so far as:

(a) they amount to a general interest which is superior to the general interest which is represented by the ecological objective of the Directive (i. e. the test which the European Court has laid down in, for example, *Commission* v *Germany* ("Leybucht Dykes") Case 57/89, for derogation from the requirements of Article 4(4)); or

(b) they amount to imperative reasons of overriding public interest such as might be taken into account under Article 6(4) of Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora?'

The first question

17 The point of this question is whether Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State is authorized to take account of the economic requirements mentioned in Article 2 thereof when designating an SPA and defining its boundaries.

18 As a preliminary point, it must be borne in mind that, according to the ninth recital in the preamble to the Birds Directive, 'the preservation, maintenance or restoration of a sufficient diversity and area of habitats is essential to the conservation of all species of birds [covered by the directive]', that 'certain species of birds should be the subject of special conservation measures concerning their habitats in order to ensure their survival and reproduction in their area of distribution', and, finally, that 'such measures must also take account of migratory species'.

19 That recital is formally reflected in Articles 3 and 4 of the directive. In paragraph 23 of its judgment in Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221 (hereinafter '*Santoña Marshes*') the Court pointed out that the first of those provisions imposes obligations of a general character, namely the obligation to ensure a sufficient diversity and area of habitats for all the birds referred to in the directive, while the second contains specific obligations with regard to the species of birds listed in Annex I and the migratory species not listed in that annex.

20 According to the United Kingdom Government and the Port of Sheerness Limited, Article 4 cannot be considered in isolation from Article 3. They state that Article 4 provides, in relation to certain species of particular interest, for the specific application of the general obligation imposed by Article 3. Since the latter provision allows account to be taken of economic requirements, the same should apply to Article 4(1) and (2).

21 The French Government reaches the same conclusion, observing that, when an SPA is created, the Member States take account of all the criteria mentioned in Article 2 of the Birds Directive, which is general in scope, and, therefore, *inter alia*, of economic requirements.

22 Those arguments cannot be upheld.

23 It must be noted first that Article 4 of the Birds Directive lays down a protection regime which is specifically targeted and reinforced both for the species listed in Annex I and for migratory species, an approach justified by the fact that they are, respectively, the most endangered species and the species constituting a common heritage of the Community (see Case C-169/89 *Van den Burg* [1990] ECR I-2143, paragraph 11).

24 Whilst Article 3 of the Birds Directive provides for account to be taken of the requirements mentioned in Article 2 for the implementation of general conservation measures, including the creation of protection areas, Article 4 makes no such reference for the implementation of special conservation measures, in particular the creation of SPAs.

25 Consequently, having regard to the aim of special protection pursued by Article 4 and the fact that, according to settled case-law (see in particular Case C-435/92 *APAS* v *Préfets de Maine-et-Loire and de la Loire Atlantique* [1994] ECR I-67, paragraph 20), Article 2 does not constitute an autonomous derogation from the general system of protection established by the directive, it must be held (see paragraphs 17 and 18 of *Santoña Marshes*) — that the ecological requirements laid down by the former provision do not have to be balanced against the interests listed in the latter, in particular economic requirements.

26 It is the criteria laid down in paragraphs (1) and (2) of Article 4 which are to guide the Member States in designating and defining the boundaries of SPAs. It is clear from paragraphs 26 and 27 of *Santoña Marshes* that, notwithstanding the divergences between the various language versions of the last subparagraph of Article 4(1), the criteria in question are ornithological criteria.

27 In view of the foregoing, the answer to the first question must be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State is not authorized to take account of the economic requirements mentioned in Article 2 thereof when designating an SPA and defining its boundaries.

The second question

The first part of the second question

28 By the first part of the second question, the national court seeks to ascertain whether Article 4(1) or (2) of the Birds Directive must be interpreted as allowing a Member State, when designating an SPA and defining its boundaries, to take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive.

29 In its judgment in Case C-57/89 *Commission* v *Germany* [1991] ECR I-883, paragraphs 21 and 22 (hereinafter '*Leybucht Dykes*'), the Court held that the Member States may, in the context of Article 4(4) of the Birds Directive, reduce the extent of a SPA only on exceptional grounds, being grounds corresponding to a general interest superior to the general interest represented by the ecological objective of the directive. It was held that economic requirements cannot be invoked in that context.

30 It is also clear from paragraph 19 of *Santoña Marshes* that, in the context of Article 4 of that directive, considered as a whole, economic requirements cannot on any view correspond to a general interest superior to that represented by the ecological objective of the directive.

31 Accordingly, without its being necessary to rule on the possible relevance of the grounds corresponding to a superior general interest for the purpose of classifying an SPA, the answer to the first part of the second question must be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive.

The second part of the second question

32 By the second part of the second question, the House of Lords asks essentially whether Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may, when designating an SPA and defining its boundaries, take account of economic requirements to the extent that they reflect imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive.

33 The United Kingdom Government considers that that question is relevant only to cases of classification decisions made after the expiry of the period for transposition of the Habitats Directive. Since that is not the case in the main proceedings, it considers that it is unnecessary to answer the question.

34 It is well settled that it is for the national courts alone, before which the proceedings are pending and which will be responsible for the eventual judgment, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is clear that the interpretation of Community law requested bears no relation to the true nature of the case or the subject-matter of the main action (see in particular Case C-129/94 *Ruiz Barnáldez* [1996] ECR I-1829, paragraph 7). That is, however, not the case in the main proceedings.

35 Consequently, it is necessary to examine the second part of the second question submitted by the national court.

36 It is important first to bear in mind that Article 7 of the Habitats Directive provides in particular that the obligations arising under Article 6(4) thereof are to apply, in place of any obligations arising under the first sentence of Article 4(4) of

the Birds Directive, to the areas classified under Article 4(1) or similarly recognized under Article 4(2) of that directive as from the date of implementation of the Habitats Directive or the date of classification or recognition by a Member State under the Birds Directive, whichever is the later.

37 As the Commission submits in its observations, Article 6(4) of the Habitats Directive, as inserted in the Birds Directive, has, following *Leybucht Dykes* where the point in issue was the reduction of an area already classified, widened the range of grounds justifying encroachment upon SPAs by expressly including therein reasons of a social or economic nature.

38 Thus, the imperative reasons of overriding public interest which may, pursuant to Article 6(4) of the Habitats Directive, justify a plan or project which would significantly affect an SPA in any event include grounds relating to a superior general interest of the kind identified in *Leybucht Dykes* and may where appropriate include grounds of a social or economic nature.

39 Next, although Article 6(3) and (4) of the Habitats Directive, in so far as it amended the first sentence of Article 4(4) of the Birds Directive, established a procedure enabling the Member States to adopt, for imperative reasons of overriding public interest and subject to certain conditions, a plan or a project adversely affecting an SPA and so made it possible to go back on a decision classifying such an area by reducing its extent, it nevertheless did not make any amendments regarding the initial stage of classification of an area as an SPA referred to in Article 4(1) and (2) of the Birds Directive.

40 It follows that, even under the Habitats Directive, the classification of sites as SPAs must in all circumstances be carried out in accordance with the criteria permitted under Article 4(1) and (2) of the Birds Directive.

41 Economic requirements, as an imperative reason of overriding public interest allowing a derogation from the obligation to classify a site according to its ecological value, cannot enter into consideration at that stage. But that does not, as the Commission has rightly pointed out, mean that they cannot be taken into account at a later stage under the procedure provided for by Article 6(3) and (4) of the Habitats Directive.

42 The answer to the second part of the second question must therefore be that Article 4(1) or (2) of the Birds Directive is to be interpreted as meaning that a Member State may not, when designating an SPA and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of the Habitats Directive.

Costs

43 The costs incurred by the Governments of the French Republic and the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the House of Lords, by order of 9 February 1995, hereby rules:

1. Article 4(1) or (2) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds is to be interpreted as meaning that a Member

State is not authorized to take account of the economic requirements mentioned in Article 2 thereof when designating a Special Protection Area and defining its boundaries.

2. **Article 4(1) or (2) of Directive 79/409 is to be interpreted as meaning that a Member State may not, when designating a Special Protection Area and defining its boundaries, take account of economic requirements as constituting a general interest superior to that represented by the ecological objective of that directive.**

3. **Article 4(1) or (2) of Directive 79/409 is to be interpreted as meaning that a Member State may not, when designating a Special Protection Area and defining its boundaries, take account of economic requirements which may constitute imperative reasons of overriding public interest of the kind referred to in Article 6(4) of Directive 92/43/EEC of 21 May 1992 on the conservation of the natural habitats of wild fauna and flora.**

Rodríguez Iglesias Edward Puissochet

Hirsch Mancini Moitinho de Almeida

Kapteyn Gulmann Murray

Jann Wathelet

Delivered in open court in Luxembourg on 11 July 1996.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President

JUDGMENT OF THE COURT
28 February 1991 *

In Case C-57/89,

Commission of the European Communities, represented by Ingolf Pernice, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Guido Berardis, also a member of the Commission's Legal Department, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Regierungsdirektor in the Federal Ministry of Economic Affairs, acting as Agent, assisted by G. Leibrock, Regierungsrat in that Ministry, and by Joachim Sedemund, Rechtsanwalt, Cologne, and Albert Bleckmann, Professor of Law in the Westfälische Wilhelms Universität, Münster, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Emile-Reuter,

defendant,

supported by

United Kingdom of Great Britain and Northern Ireland, represented by S. J. Hay, of the Treasury Solicitor's Department, with an address for service in Luxembourg at the British Embassy, 14 Boulevard Roosevelt,

intervener,

APPLICATION for a declaration that by planning or undertaking works detrimental to the habitat of protected birds in special protection areas, contrary to Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of

* Language of the case: German.

wild birds, the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, T. F. O'Higgins, G. C. Rodriguez Iglesias and M. Díez de Velasco (Presidents of Chambers), Sir Gordon Slynn, C. N. Kakouris, R. Joliet, F. A. Schockweiler, F. Grévisse and M. Zuleeg, Judges,

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing the oral argument of the parties at the hearing on 16 October 1990, at which the Federal Republic of Germany was represented by Albert Bleckmann and Mr Montag, and the United Kingdom by G. Barling, Barrister,

after hearing the Opinion of the Advocate General delivered at the sitting on 5 December 1990,

gives the following

Judgment

1 By application lodged at the Court Registry on 28 February 1989, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by planning or undertaking works detrimental to the habitat of protected birds in special protection areas, contrary to Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (Official Journal 1979 L 103, p. 1, hereinafter referred to as 'the directive'), the Federal Republic of Germany has failed to fulfil its obligations under the EEC Treaty.

2 Article 4 of the directive is worded as follows:

'1. The species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution.

(Omissis)

Member States shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.

2. Member States shall take similar measures for regularly occurring migratory species not listed in Annex I, bearing in mind their need for protection in the geographical sea and land area where this Directive applies, as regards their breeding, moulting and wintering areas and staging posts along their migration routes. To this end, Member States shall pay particular attention to the protection of wetlands and particularly to wetlands of international importance.

3. Member States shall send the Commission all relevant information so that it may take appropriate initiatives with a view to the coordination necessary to ensure that the areas provided for in paragraphs 1 and 2 above form a coherent whole which meets the protection requirements of these species in the geographical sea and land area where this Directive applies.

4. In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

3 The application initially comprised two claims, the first concerning dredging and filling operations in the *Rysumer Nacken*, and the second concerning dyke-building operations carried out in the *Leybucht*.

4 With regard to the first claim, the Commission, at the hearing, formally acknowledged that the Rysumer Nacken is not covered by the regulation of the *Land* of Lower Saxony of 13 December 1985 creating the Niedersächisches Wattenmeer National Park and that, consequently, the Rysumer Nacken is not designated as a special protection area. However, the Commission argues that that is a new argument put forward by the defendant in its rejoinder, so that the defendant must bear the costs relating to that point.

5 The German Government replies that the Commission was aware, even before the commencement of proceedings before the Court, of all the information concerning the legal status of the Rysumer Nacken, in particular of maps showing the boundaries of the national park. It is clear from those maps that the Rysumer Nacken is not designated as a special protection area. According to the German Government, the details it provided in its rejoinder do not therefore constitute a new argument.

6 The information regarding the extent of the protected areas in the Wattenmeer was supplied by the German Government in its letter of 6 September 1988 sent pursuant to Article 4(3) of the directive. At the time it lodged its application, the Commission had at its disposal *inter alia* the maps appended to the abovementioned regulation, defining the boundaries of the protected area. It is evident from that information that the Rysumer Nacken is not one of the sites designated as a special protection area. Consequently, since the withdrawal of this part of the application is not the consequence of the conduct of the German Government, the Commission must bear the costs relating thereto.

7 With regard to the dyke-building operations in the Leybucht, the Commission claims that they disturb birds which enjoy special protection under the provisions of Article 4(1) of the directive, in conjunction with Annex I, and damage the

habitat of the birds, which is designated as a special protection area. The Commission emphasizes that the first sentence of Article 4(4) of the directive requires Member States to take positive steps to avoid any deterioration or pollution of habitats as part of the management of special protection areas.

8 The Commission states that coastal defence measures such as the strengthening of a dyke are acceptable in the case of a threat to human life, but only on condition that the necessary measures are restricted to those which cause only the minimum necessary deterioration of the special protection area in question.

9 According to the Commission, those conditions have not been fulfilled in the present case. It is of the opinion that both the construction work in the Leybucht and its results entail deterioration in the living conditions of protected birds and the loss of land areas of considerable ecological importance, thereby leading to lower population densities for some of the species of birds listed in Annex I to the directive, in particular the avocet.

10 The German Government observes that according to the information sent to the Commission pursuant to Article 4(3) of the directive, the new line of the dyke in the Leybucht and the areas located on the landward side of the dyke are excluded from the special protection area. It states that the boundaries of the area in question are defined in the regulation creating the national park in such a way that the protected area extends only to the foot of the dyke, in the form it will have once the construction work in question has been completed.

11 According to the German Government, the sole purpose of the operations is to secure the safety of the dyke. It emphasizes that during the planning stage of the project at issue the competent authorities took account of all bird conservation requirements and balanced them against the requirements of coastal protection.

The German Government states that the new line of the dyke and the temporary disturbances caused by the works constitute the smallest possible interference for bird life in the Leybucht. It adds that the Commission has not furnished any evidence at all that the measures at issue significantly impair the protection of those birds.

12 With regard to the interpretation of Article 4(4) of the directive, the German Government claims that that provision requires a balance to be struck between the various public interests likely to be affected by the management of a special protection area, so that the Member States must have a wide discretionary power in this field.

13 The United Kingdom considers that the Commission has not established that the project at issue has a significant effect within the meaning of the first sentence of Article 4(4) of the directive. It states that that condition must be interpreted as meaning that the deterioration of a special protection area must be such as to threaten the survival or reproduction of protected species within their area of distribution. In the United Kingdom's view, the material supplied by the Commission does not appear sufficient to support the conclusion that the operations in the Leybucht involve such deterioration.

14 The United Kingdom emphasizes the importance of the evidence supplied by the defendant which shows that the works at issue will significantly improve ecological conditions in the Leybucht. It considers that it is legitimate, when assessing whether a particular project will cause deterioration to a special protection area and whether any such deterioration will be significant, to consider whether the works will at the same time bring compensatory ecological improvements.

15 In the submission of the United Kingdom, within the context of Article 4(4) of the directive account can be taken of other important public interest considerations, including those referred to in Article 2 of the directive. It considers that the Member States must be able to take into account the interests of persons living in or around a special protection area.

16 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

17 With regard to the boundaries of the special protection area in question, it must be pointed out that the boundary of the Leybucht is defined by the regulation creating the national park and the maps appended thereto. Although the plan of the area does include a reference to the regional planning scheme, the legal measure designating the special protection area nevertheless sets out its precise territorial delimitation, constituted by the present line of the dyke. The displacement of the dyke towards the sea as part of the coastal defence project thus entails a reduction in the protected area.

18 Consequently, in order to resolve this dispute it is necessary to settle a number of questions of principle concerning the obligations of the Member States under Article 4(4) of the directive in relation to the management of the special protection areas. It must be determined whether — and if so, under what conditions — the Member States are authorized to reduce the size of a special protection area and to what extent other interests may be taken into account.

19 With regard to the powers of the Member States to review in that way a decision to classify an area as a special protection area, it must be stated that a reduction in the geographical extent of a protected area is not expressly envisaged by the terms of the directive.

20 Although the Member States do have a certain discretion with regard to the choice of the territories which are most suitable for classification as special protection areas pursuant to Article 4(1) of the directive, they do not have the same discretion under Article 4(4) of the directive in modifying or reducing the extent of the areas, since they have themselves acknowledged in their declarations that those areas contain the most suitable environments for the species listed in Annex I to the

directive. If that were not so, the Member States could unilaterally escape from the obligations imposed on them by Article 4(4) of the directive with regard to special protection areas.

21 That interpretation of Article 4(4) of the directive is borne out, moreover, by the ninth recital in the preamble, which underlines the special importance which the directive attaches to special conservation measures concerning the habitats of the birds listed in Annex I in order to ensure their survival and reproduction in their area of distribution. It follows that the power of the Member States to reduce the extent of a special protection area can be justified only on exceptional grounds.

22 Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive. In that context the interests referred to in Article 2 of the directive, namely economic and recreational requirements, do not enter into consideration. As the Court pointed out in its judgments in Case 247/85 (*Commission* v *Belgium* [1987] ECR 3029) and Case 262/85 (*Commission* v *Italy* [1987] ECR 3073), that provision does not constitute an autonomous derogation from the general system of protection established by the directive.

23 With regard to the reason put forward in this case, it must be stated that the danger of flooding and the protection of the coast constitute sufficiently serious reasons to justify the dyke works and the strengthening of coastal structures as long as those measures are confined to a strict minimum and involve only the smallest possible reduction of the special protection area.

24 With regard to the part of the project concerning the Leyhörn area, the line of the dyke was influenced by considerations relating not only to coastal protection but also to the concern to ensure that fishing vessels from Greetsiel had access to the harbour. In the light of the principles for the interpretation of Article 4(4) of the directive set out above, to take account of such an interest is in principle incompatible with the requirements of the provision.

25 However, that part of the project has at the same time specific positive consequences for the habitat of birds. Once the works are completed it will be possible to close two navigation channels which cross the Leybucht, with the result that the Leybucht will be left in absolute peace. Moreover, the decision approving the proposed works envisages a strict protection scheme for the Leyhörn area. The dyke which previously protected the Hauener Hooge site will be opened, thus once more exposing an extensive area to tidal movements and allowing the formation of salt meadows of considerable ecological importance.

26 The desire to ensure the survival of the fishing port of Greetsiel could thus be taken into account in order to justify the decision on the line of the new dyke because there were the abovementioned offsetting ecological benefits, and solely for that reason.

27 Finally, the disturbance arising from the construction work itself does not exceed what is necessary to carry it out. The information concerning the number of avocets in that sector of the Wattenmeer shows, moreover, that during the period in question there was no significant change, within the meaning of Article 4(4) of the directive, in population trends for that species. Furthermore, the Commission has not supplied any other evidence relating to population trends for protected species.

28 It follows from the foregoing that the application must be dismissed.

Costs

29 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions, it must be ordered to pay the costs, including the costs of the intervener and those relating to the application for interim measures.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the Commission to pay the costs, including the costs of the intervener and those relating to the application for interim measures.

Due Mancini O'Higgins Rodríguez Iglesias Díez de Velasco

Slynn Kakouris Joliet Schockweiler Grévisse Zuleeg

Delivered in open court in Luxembourg on 28 February 1991.

J.-G. Giraud
Registrar

O. Due
President

JUDGMENT OF THE COURT
9 August 1994 *

In Case C-396/92,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bayerischer Verwaltungsgerichtshof for a preliminary ruling in the proceedings pending before that court between

Bund Naturschutz in Bayern eV,

Richard Stahnsdorf and 40 Others

and

Freistaat Bayern,

and

Stadt Vilsbiburg,

Landkreis Landshut,

interveners,

* Language of the case: German.

on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40),

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho de Almeida, M. Diez de Velasco and D. A. O. Edward (Presidents of Chambers), C. N. Kakouris (Rapporteur), R. Joliet, F. A. Schockweiler, G. C. Rodríguez Iglesias, F. Grévisse, M. Zuleeg, P. J. G. Kapteyn and J. L. Murray, Judges,

Advocate General: C. Gulmann,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Bund Naturschutz in Bayern eV, by U. Kaltenegger, Rechtsanwalt, Landshut,

— plaintiffs 5 to 41 in the main proceedings, J. Birnkammer and Others, by E. Schönefelder, Rechtsanwalt, Munich,

— Freistaat Bayern, by M. A. Dauses, Professor at the University of Bamberg,

— Stadt Vilsbiburg, by P. Barteit, Mayor,

— the Federal Republic of Germany, by E. Röder, Ministerialrat at the Federal Ministry of the Economy, and Claus-Dieter Quassowski, Regierungsdirektor at the same Ministry, acting as Agents,

— the Kingdom of the Netherlands, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom, by S. Cochrane, Treasury Solicitor, acting as Agent, and Derrick Wyatt, Barrister,

— the Commission of the European Communities, by R. Wägenbaur, Principal Legal Adviser, acting as Agent, and A. Böhlke, of the Brussels Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Bund Naturschutz in Bayern eV, J. Birnkammer and Others, Freistaat Bayern, Stadt Vilsbiburg, represented by P. Barteit and G. Nord, Deputy Mayor, the German Government and the United Kingdom, represented by S. L. Hudson, Assistant Treasury Solicitor, and D. Wyatt QC, and the Commission at the hearing on 22 March 1994,

after hearing the Opinion of the Advocate General at the sitting on 3 May 1994,

gives the following

Judgment

1 By order of 5 November 1992, received at the Court Registry on 18 November 1992, the Bayerischer Verwaltungsgerichtshof (Bavarian Higher Regional

Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, hereinafter 'the directive').

2 The questions were raised in the course of proceedings between the Bund Naturschutz in Bayern eV, an ecological organization, with 41 other plaintiffs, mainly farmers, and Freistaat Bayern (Federal State of Bavaria) concerning the conformity with the requirements laid down in the directive of the consent procedure for construction plans for two sections of the new B 15 federal highway in Bavaria.

3 The directive was adopted on the basis of Articles 100 and 235 of the EEC Treaty. According to the first recital in its preamble, action programmes of the European Communities on the environment '... affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes ...' and, according to the eighth recital, '... projects belonging to certain types have significant effects on the environment and ... must as a rule be subject to systematic assessment'.

4 Article 1 of the directive states:

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

2. For the purposes of this Directive: "project" means:

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

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

— ...'

5 Article 2(1) of the directive provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects. Those projects are defined in Article 4.'

6 Under Article 2(2), the 'environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive' and, pursuant to Article 2(3), 'Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive'. In such cases the Member States must, however, under the same article, consider whether another form of assessment would be appropriate and inform the Commission of the reasons justifying the exemption granted.

7 Article 4(1) of the directive provides: 'Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Arti-

cles 5 to 10'. Annex I refers in Point 7 *inter alia* to the construction of motorways and express roads.

8 Articles 5 to 10 concern in particular the necessary measures to be adopted by the Member States to ensure that the developer supplies certain information, that the national authorities and also other Member States likely to be concerned by the project in question are consulted and that the public is kept informed. In that last respect, Article 6(2) provides more particularly that the Member States are to ensure that any request for development consent and the information supplied by the developer are made available to the public, who must be given the possibility of expressing an opinion.

9 In accordance with Article 12(1) of the directive, the Member States are to take the measures necessary to comply therewith within three years of its notification. Since the directive was notified to the Member States on 3 July 1985, that time-limit expired on 3 July 1988.

10 The file shows that in the Federal Republic of Germany the directive was belatedly transposed by a Law of 12 February 1990, which came into force on 1 August 1990 (BGBl 1990 I, p. 205). Article 1 of that transposition law contains the Gesetz über die Umweltverträglichkeitsprüfung (Environmental Impact Assessment Law, the 'UVPG'). Paragraph 22(1) of the UVPG laid down transitional rules under which procedures already initiated were to be completed in accordance with the provisions of the UVPG where the project had not yet been notified to the public when the UVPG came into force.

11 Provision was thus made for exemptions from the requirements laid down in the directive for pending consent procedures for which the relevant project had already been notified to the public when the UVPG came into force on 1 August 1990.

12 The dispute in the main proceedings concerns the construction of two sections of the new B 15 federal highway in Bavaria, a road of some 130 km, the plans and routing for which were decided many years ago. The first section at issue is from Geisenhausen to Haarbach and is 6.9 km in length; the second, known as the 'Vilstal link' and approximately 3 km in length, is to join the new B 15 highway to the B 388 by-passing Vilsbiburg.

13 It appears from the order for reference that the Bavarian Highways Department, the developer of the road construction project, lodged consent applications for the plans of the two sections on 7 September 1988 and 9 November 1989, that is to say after 3 July 1988, the deadline for transposition of the directive, and prior to 1 August 1990, the date on which the transposition law came into force. The plans were made available to the public at the end of 1989. By two decisions of 16 December 1991 the Government of Lower Bavaria approved the projects. Pursuant to Paragraph 22(1) of the UVPG no environmental impact assessment was carried out as required by the directive.

14 The Bund Naturschutz in Bayern eV and 41 other plaintiffs brought actions for the annulment of the two consent decisions referred to above before the Bayerischer Verwaltungsgerichtshof. The plaintiffs maintained that the directive, which was transposed belatedly in the Federal Republic of Germany, did not permit the

adoption of national transitional rules such as those in Paragraph 22(1) of the UVPG.

15 Since it had doubts as to whether the transitional rules in question complied with the requirements of the directive, the national court suspended proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is Article 12 of the directive to be interpreted as meaning that

(a) the Member States were under an obligation to take by 3 July 1988 the measures necessary to ensure that all public projects which fell within the ambit of the directive and for which development consent was granted for the first time after that date were in accordance with the requirements of the directive,

or

(b) the Member States had to adopt the necessary measures by 3 July 1988 but were not prevented from enacting transitional provisions for development consent procedures already initiated?

2. If Question 1 is to be answered as indicated under (b) above:

Is Article 12 of the directive to be interpreted as meaning that

(a) the relevant date for transitional provisions must be 3 July 1988,

or

(b) the Member States may in the case of transitional provisions take as the relevant date that of the later entry into force of their national measures for the transposition of the directive?

3. If Question 2 is to be answered as indicated under 2(b) above:

Is the concept of "project" in Articles 1, 3 and 4 of and Annex I, point 7, to the directive to be understood as meaning, in its application to motorways and express roads, that the environmental impact

(a) is to be assessed solely for the section of a road link for which development consent has been sought,

or

(b) in addition to the area covered by that section, for the road link as a whole?'

Questions 1 and 2

16 As indicated in paragraph 13 above, it is clear from the order for reference that the procedure which resulted in the two consent decisions at issue in the main proceedings was initiated after 3 July 1988, the deadline for transposition of the directive. The first two questions must therefore be examined in the light of that fact.

17 The national court is asking essentially whether Article 12(1) of the directive should be interpreted as permitting a Member State which has transposed the directive into national law after 3 July 1988, the deadline for transposition, to waive, by a transitional provision, for projects in respect of which the consent procedure was initiated before the entry into force of the national law transposing the directive, but after 3 July 1988, the obligations concerning environmental impact assessment required under the directive.

18 It must be pointed out in this connection that there is nothing in the directive which could be construed as authorizing the Member States to exempt projects in respect of which the consent procedures were initiated after the deadline of 3 July 1988 from the obligation to carry out an environmental impact assessment. On the contrary, all the provisions in the directive were formulated on the basis that it was to be transposed into the legal systems of the Member States by 3 July 1988 at the latest.

19 Accordingly, regardless whether the directive permits a Member State to introduce transitional rules for consent procedures already initiated and in progress before the deadline of 3 July 1988, the directive in any case precludes the introduction in

respect of procedures initiated after that date of rules such as those at issue in the main proceedings by a national law which, in breach of the directive, transposes it belatedly into the domestic legal system. Such an interpretation would result in an extension of the deadline of 3 July 1988 and would be contrary to the obligations under the directive.

20 The reply to the first two questions referred to the Court must therefore be that Article 12(1) of the directive must be interpreted as not permitting a Member State which has transposed the directive into national law after 3 July 1988, the deadline for transposition, to waive, by a transitional provision, for projects in respect of which the consent procedure was already initiated before the entry into force of the national law transposing the directive, but after 3 July 1988, the obligations concerning the environmental impact assessment required by the directive.

Question 3

21 The third question was asked solely in case the reply to the first two questions was contrary to that given above. Since the Court did not so reply, there is no need to answer the third question.

Costs

22 The costs incurred by the United Kingdom, the Governments of the Federal Republic of Germany and the Netherlands and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in

the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bayerischer Verwaltungsgerichtshof, by order of 5 November 1992, hereby rules:

Article 12(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be interpreted as not permitting a Member State which has transposed the directive into national law after 3 July 1988, the deadline for transposition, to waive, by a transitional provision, for projects in respect of which the consent procedure was already initiated before the entry into force of the national law transposing the directive, but after 3 July 1988, the obligations concerning the environmental impact assessment required by the directive.

Due Mancini Moitinho de Almeida

Diez de Velasco Edward

Kakouris Joliet Schockweiler

Rodríguez Iglesias Grévisse

Zuleeg Kapteyn Murray

Delivered in open court in Luxembourg on 9 August 1994.

R. Grass — Registrar

O. Due — President

EUROPEAN
COMMISSION

Brussels, 26.10.2012
COM(2012) 628 final

2012/0297 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

(Text with EEA relevance)

{SWD(2012) 354 final}
{SWD(2012) 355 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

General context – Grounds for and objectives of the proposal

Directive 2011/92/EU[1] contains a legal requirement to carry out an environmental impact assessment (EIA) of public or private projects likely to have significant effects on the environment, prior to their authorisation. There is consensus that the main objective of the Directive has been achieved; the principles of environmental assessment have been harmonised throughout the EU by the introduction of minimum requirements concerning the type of projects subject to assessment, the main developer's obligations, the content of the assessment and the participation of the competent authorities and the public. In parallel, as part of the development consent process, the EIA is a tool to assess the environmental costs and benefits of specific projects with the aim of ensuring their sustainability. Hence, the Directive has become a key instrument of environmental integration and has also brought environmental and socio-economic benefits.

After 25 years of application, the EIA Directive has not significantly changed, while the policy, legal and technical context has evolved considerably. The experience with implementation, as reflected in the Commission reports on the application and effectiveness of the EIA Directive, including the latest one published in July 2009[2], has identified a number of shortcomings. In its mid-term review of the 6th Environment Action Programme[3], the Commission stressed the need for improving the assessment of environmental impacts at national level and announced a review of the EIA Directive. In the context of Better Regulation, the Directive has also been identified as a potential instrument for simplification[4]. The general objective of the proposal is to adjust the provisions of the codified EIA Directive, so as to correct shortcomings, reflect ongoing environmental and socio-economic changes and challenges, and align with the principles of smart regulation.

Consistency with other policies and objectives of the Union

As the revised EIA Directive can play a crucial role in achieving resource efficiency (e.g. by introducing new requirements for assessing issues such as biodiversity and climate change which are related to the use of natural resources), the proposal is part of the initiatives aiming to implement the Roadmap to a Resource-Efficient Europe[5]. Furthermore, the revision of the EIA Directive subscribes to the Europe 2020 strategy[6], in particular the priority of sustainable growth. The revised Directive can also contribute significantly to the duty of the Union to take cultural aspects into account in all its policies and actions.

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1 Directive 2011/92/EU (OJ L 26, 28.1.2012, p.1) codifies Directive 85/337/EEC and its three subsequent amendments (Directives 97/11/EC, 2003/35/EC and 2009/31/EC).

2 COM(2009) 378. All reports are available on http://ec.europa.eu/environment/eia/eia-support.htm.

3 COM(2007) 225.

4 COM(2009) 15.

5 COM(2011) 571.

6 COM(2010) 2020.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Consultation of interested parties

The consultation took place in 2010, in line with the Commission's standards. From June to September 2010, a wide public consultation on the review of the EIA Directive was launched, using a web questionnaire available in all EU official languages. 1365 replies were received (684 from citizens, 479 from organisations, companies and NGOs, 202 from public authorities and administrations). In addition, the Institute of Environmental Management & Assessment (IEMA)[7] sent a contribution (1815 responses) in the form of a survey incorporating a number of the Commission's questions. The consultation phase was concluded with a Conference (on 18-19/11/2010, at Leuven, Belgium), which complemented the wide public consultation as it looked for input from specialised stakeholders. 200 representatives from the EU and international institutions, public authorities – at national, regional and local levels – industry, environmental organisations, and the academic community were present at the conference. The results of the public consultation[8] and the conclusions of the Conference[9] have provided useful input for the development of the Commission's proposal.

Result of the impact assessment

The Impact Assessment (IA), which is submitted with this proposal, identified shortcomings in the current EIA legislation that lead to unsatisfactory implementation (no provisions that ensure quality of information and quality standards for the EIA process and implementation gaps) and socio-economic costs in the implementation of the Directive. If these problems are not adequately addressed, the Directive would become less effective and efficient and would not be able to ensure the integration of environmental considerations in decision-making. In addition, the socio-economic costs are likely to negatively affect internal market harmonisation. The shortcomings of the Directive can be grouped into three specific problem areas: (1) the screening procedure, (2) the quality and analysis of the EIA and (3) the risks of inconsistencies within the EIA process itself and in relation to other legislation.

The IA assessed a number of policy options with the aim of identifying cost-effective measures to address these problems. The outcome has led the Commission to propose a number of amendments, of which the main ones are as follows:

It is proposed to clarify the **screening** procedure, by modifying the criteria of Annex III and specifying the content and justification of screening decisions. These amendments would ensure that EIAs are carried out only for projects that would have significant environmental effects, avoiding unnecessary administrative burden for small-scale projects.

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7 The largest professional membership body for the environment with over 15,000 members working across all industry sectors.

8 http://ec.europa.eu/environment/consultations/eia.htm

9 http://ec.europa.eu/environment/eia/conference.htm

As regards the **quality and analysis of the EIA**, it is proposed to introduce amendments to reinforce the quality of the process (i.e. mandatory scoping and quality control of EIA information), specify the content of the EIA report (mandatory assessment of reasonable alternatives, justification of final decisions, mandatory post-EIA monitoring of significant adverse effects) and adapt the EIA to challenges (i.e. biodiversity, climate change, disaster risks, availability of natural resources).

As regards the risks **of inconsistencies**, it is proposed to specify the time-frames for the main stages required by the Directive (public consultation, screening decision, final EIA decision) and introduce a mechanism, a kind of EIA one-stop shop to ensure coordination or joint operation of the EIA with the environmental assessments required under other relevant EU legislation, e.g. Directives 2010/75/EU, 92/43/EEC, 2001/42/EC.

Nine of the twelve amendments analysed are expected to provide significant environmental and socio-economic benefits without additional administrative costs; moderate savings are also expected. Two amendments (assessment of alternatives and monitoring) are expected to provide high environmental and socio-economic benefits at moderate costs for developers and with limited or negligible costs for public authorities; one amendment (adaptation of the EIA to new challenges) is expected to provide high benefits at moderate to high costs for developers and public authorities. In the long term, the significant environmental and socio-economic benefits and the moderate savings associated with the proposed amendments are likely to exceed the administrative costs.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

The proposal will strengthen the provisions concerning the quality of the EIA with the aim of achieving a high level of environmental protection. Indeed, the ability to make valid decisions on the environmental impact of a project depends – to a large extent – on the quality of the information used in the EIA documentation and the quality of the EIA process. Furthermore, the proposal will enhance policy coherence and synergies with other EU law instruments and simplify procedures, with a view to reducing unnecessary administrative burdens.

Specific information on the amended Articles and Annexes of the EIA Directive is provided below.

The changes to Articles 1(2), 1(3) and 1(4) aim to clarify the terms of the Directive, based on the implementation experience and the Court case-law. The definition of 'project' is amended to make it clear that demolition works are included, in accordance with the Court ruling in case C-50/09; relevant definitions are also inserted. The possibility of not applying the Directive is limited to projects with national defence as their sole purpose and is extended to cover civil emergencies, as it is already the case under Directive 2001/42/EC.

Article 2(3) is amended to introduce an EIA 'one-stop shop', allowing the coordination or integration of assessment procedures under the EIA Directive and other EU legislation.

The modifications to Article 3 aim to ensure consistency with Article 2(1), i.e. by referring to ‘significant’ effects, and adapt the EIA to environmental issues (biodiversity, climate change, disaster risks, use of natural resources).

The changes introduced in Article 4 streamline the screening procedure and enhance the consistency of Member States' approaches to ensure that EIAs are required only when it is clear that there are significant environmental impacts. As regards projects listed in Annex II, a new paragraph is inserted concerning the obligation of the developer to provide specific information to the competent authority (detailed in Annex II.A). This Article also allows for specification of the selection criteria listed in Annex III via delegated acts. The content of the screening decision is specified to acknowledge the successful practice of adapting projects under certain preconditions (on the basis of a consideration of the most relevant impacts and information generated under other Union environmental legislation), which can avoid having to conduct a full assessment, as the most relevant environment impacts are satisfactorily addressed by the adapted project. The likelihood of significant effects and the subsequent need for an EIA would take into account the account the nature, complexity, location and size of the proposed project and would be based on objective factors, such as the scale of the project, the use of valuable resources, the environmental sensitivity of the location, and the magnitude or irreversibility of the potential impact. Furthermore, the lessons drawn from the case-law, where the Court stressed the need for "sufficiently reasoned" (C-75/08) screening decisions, which contain or are accompanied by all the information that makes it possible to check that the decision is based on adequate screening (C-87/02), are taken on board. Finally, a time-frame is set for adoption of the screening decision.

Article 5 is comprehensively modified, with a view to reinforcing the quality of information and streamlining the EIA process. The core requirement for the developer to submit environmental information is maintained, but its form and content is streamlined and specified in Annex IV. The scoping process becomes obligatory and the content of the opinion delivered by the competent authority is specified. Mechanisms are introduced to guarantee the completeness and sufficient quality of the environmental reports.

Article 6(6), which refers to the time-frames for public consultation, is modified with a view to reinforcing the role of environmental authorities and defining concrete time-frames for the consultation phase on the environmental report.

Article 7(5) is amended in order to include the establishment of time-frames for consultations among the issues to be determined by Member States when defining the arrangements for the implementation of projects likely to have significant transboundary environmental effects.

Article 8 is substantially amended and includes several new provisions. Firstly, a time-frame is set for the conclusion of the environmental impact assessment procedure. Secondly, the competent authority is required to include in the development consent decision itself some items substantiating the decision; this reflects the case-law (e.g. C-50/09). Thirdly, mandatory ex-post monitoring is introduced only for projects that will have significant adverse environmental effects, according to the consultations carried out and the information gathered (including the environmental report), with the purpose of assessing the implementation and

effectiveness of mitigation and compensation measures. Some Member States already require such monitoring, which should not duplicate that which may be required by other Union legislation (e.g. on industrial emissions or water quality), and it is appropriate therefore to establish common minimum requirements. This new obligation is cost-effective, as it may help to avoid adverse impacts on the environment and public health and costs of reparation, and is relevant for addressing impacts related to new challenges such as climate change and disaster risks. Fourthly, the competent authority is required to verify that the information of the environmental report is up to date, before deciding to grant or refuse development consent.

The main modification to Article 9 is the inclusion of a description of the monitoring arrangements in the information provided to the public when development consent is granted.

Article 12 is amended in order to specify the information required to monitor the implementation of the Directive.

Two new Articles (12a and 12b) are inserted concerning the adaptation of Annexes II.A, III and IV to scientific and technical progress through delegated acts.

Annex II.A, which is a new Annex, sets out the information to be submitted by the developer as regards projects listed in Annex II, for which screening is carried out to determine whether an EIA is required. This amendment is intended to harmonise the screening process.

Annex III, which lays down the criteria used for screening Annex II projects, is amended to clarify the existing criteria (e.g. cumulative effects or links with other EU legislation) and to include additional ones (mainly those related to new environmental issues).

Annex IV contains the items to be considered in the environmental report required by Article 5. The main changes are additional information requirements concerning the assessment of reasonable alternatives, the description of monitoring measures and the description of aspects related to new environmental issues (e.g. climate change, biodiversity, disaster risks, use of natural resources).

The amended Directive contains transitional provisions, which draw on the case-law (e.g. case C-81/96). The EIA should apply to projects for which the request for development consent was introduced before the time-limit for transposition and for which the environmental impact assessment has not been concluded before that date.

Explanatory documents

The Commission considers that explanatory documents are necessary in order to improve the quality of information on the transposition of the Directive for the following reasons.

The complete and correct transposition of the Directive is essential to guarantee that its objectives (i.e. protecting human health and the environment and ensuring a level play field) are achieved. The EIA is part of the process for assessing and granting development consent to a wide range of private and public projects in the Member

States, as either a separate or integrated part of assessment procedures. In addition, the implementation of the Directive is often highly decentralised, as the regional and local authorities are responsible for its application and, in some Member States, even for its transposition. Finally, the codification of the EIA Directive is likely to result in changes to the national measures that transposing progressively the initial directive and its three subsequent amendments. In order to implement the provisions of the revised Directive, which amends the codified version, Member States may have to act in different policy fields and amend a wide variety of legislative acts at national, regional and local levels.

The above factors are likely to increase the risks of incorrect transposition and implementation of the Directive, and complicate the Commission's task of monitoring the application of EU law. Clear information with respect to the transposition of the revised EIA Directive is instrumental in ensuring the conformity of national legislation with its provisions.

The requirement to provide explanatory documents may create an additional administrative burden on those Member States which do not work on this basis in any case. However, explanatory documents are necessary to allow effective verification of complete and correct transposition, which is essential for the reasons mentioned above, and there are no less burdensome measures to allow efficient verification. Moreover, the explanatory documents can contribute significantly to reducing the administrative burden of compliance monitoring by the Commission; without them, considerable resources and numerous contacts with national authorities would be required to track the methods of transposition in all Member States. Hence, the possible additional administrative burden of providing explanatory documents is proportionate to the aim pursued, namely to ensure effective transposition and fully achieve the objectives of the Directive.

In view of the above it is appropriate to ask Member States to accompany the notification of their transposition measures with one or more documents explaining the relationship between the provisions of the Directive and the corresponding parts of national transposition instruments.

Legal basis

As the primary objective of the Directive is the protection of the environment, in accordance with Article 191 TFEU, the proposal is based on Article 192(1) TFEU.

Subsidiarity and proportionality principles and choice of instrument

The subsidiarity principle applies insofar as the proposal does not fall under the exclusive competence of the European Union.

The objectives of the proposal cannot be sufficiently achieved by the Member States. The existing legislation sets minimum requirements for the environmental assessment of projects throughout the EU and aims to comply with international conventions (e.g. Espoo, Aarhus, Convention on Biological Diversity). This principle is maintained in the proposal which further harmonises the principles of environmental assessment and addresses inconsistencies. All Member States must take measures to comply with the minimum requirements; individual national actions

could impair the functioning of the internal market, as varying national regulation might hamper transboundary economic activities.

EU action will better achieve the objectives of the proposal. Since the adoption of the Directive in 1985, the EU has enlarged, while the scope and seriousness of environmental issues to be tackled and the number of major EU-scale infrastructure projects have also increased (e.g. transboundary projects in the field of energy or transport). Because of the transboundary nature of environmental issues (e.g. climate change, disaster risks) and of some projects, action at EU level is necessary and brings added value compared to individual national actions. The EU's action will also address issues that are important to the EU as a whole, such as adaptation to climate change and disaster prevention, and has a role to play in the achievement of Europe's 2020 objectives for sustainable growth.

The proposal therefore respects the subsidiarity principle.

The chosen legal instrument is a directive, as the proposal aims to modify an existing directive. The proposal lays down general objectives and obligations, while leaving sufficient flexibility to the Member States as regards the choice of measures for compliance and their detailed implementation. The proposal therefore complies with the proportionality principle.

4. BUDGETARY IMPLICATIONS

The proposal has no implications for the EU budget.

5. OPTIONAL ELEMENTS

The proposal concerns a matter relevant to the European Economic Area and should therefore be applicable to it.

2012/0297 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee[10],

Having regard to the opinion of the Committee of the Regions[11],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) Directive 2011/92/EU has harmonised the principles for the environmental assessment of projects by introducing minimum requirements (with regard to the type of projects subject to assessment, the main obligations of developers, the content of the assessment and the participation of the competent authorities and the public), and contributes to a high level of protection of the environment and human health.

(2) The mid-term review of the sixth Environment Action Programme[12] and the latest Report from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on the application and effectiveness of the EIA Directive (Directive 85/337/EEC)[13], the predecessor to Directive 2011/92/EU, stressed the need to improve the principles of environmental assessment of projects and adapting the Directive to the policy, legal and technical context, which has evolved considerably.

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10 OJ C , , p. .
11 OJ C , , p. .
12 COM(2007) 225.
13 COM(2009) 378.

(3) It is necessary to amend Directive 2011/92/EU in order to strengthen the quality of the environmental assessment procedure, streamline the various steps of the procedure and enhance coherence and synergies with other Union legislation and policies, as well as strategies and policies developed by Member States in areas of national competence.

(4) Over the last decade, environmental issues, such as resource efficiency, biodiversity, climate change, and disaster risks, have become more important in policy making and should therefore also constitute critical elements in assessment and decision-making processes, especially for infrastructure projects.

(5) In its Communication entitled 'Roadmap to a Resource Efficient Europe'[14], the Commission committed itself to including broader resource efficiency considerations in the context of the revision of Directive 2011/92/EU.

(6) The Soil Thematic Strategy[15] and the Roadmap to a Resource-Efficient Europe underline the importance of the sustainable use of soil and the need to address the unsustainable increase of settlement areas over time (land take). Furthermore, the final document of the United Nations Conference on Sustainable Development held in Rio de Janeiro on 20-22 June 2012 recognises the economic and social significance of good land management, including soil, and the need for urgent action to reverse land degradation. Public and private projects should therefore consider and limit their impact on land, particularly land take, and soil, including on organic matter, erosion, compaction and sealing, including through appropriate land use plans and policies at national, regional and local levels.

(7) The United Nations Convention on Biological Diversity ("the Convention"), to which the European Union is party, requires assessment, as far as possible and as appropriate, of the significant adverse effects of projects on biological diversity, which is defined in Article 2 of the Convention, with a view to avoiding or minimising such effects. This prior assessment of impacts should contribute to attaining the Union headline target adopted on 2010[16] of halting biodiversity loss and the degradation of ecosystem services by 2020 and restoring them where feasible.

(8) The measures taken to avoid, reduce and, if possible, offset significant adverse effects on the environment should contribute to avoiding any deterioration in the quality of the environment and any net loss of biodiversity, in accordance with the Union's commitments in the context of the Convention and the objectives and actions of the Union Biodiversity Strategy up to 2020[17].

(9) Climate change will continue to cause damage to the environment and compromise economic development. Accordingly, the environmental, social and economic resilience of the Union should be promoted so as to deal with climate change throughout the Union's territory in an efficient manner. Climate change adaptation and mitigation responses need to be addressed across many of the sectors of Union legislation.

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14 COM(2011) 571.
15 COM(2006) 231.
16 European Council conclusions, March 2010.
17 COM(2011) 244.

(10) Following the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on a Community approach on the prevention of natural and man-made disasters[18], in its conclusions of 30 November 2009, the Council of the EU invited the Commission to ensure that the implementation review and further development of EU initiatives take into consideration disaster risk prevention and management concerns and the United Nations Hyogo Framework for Action Programme (2005-2015), which stresses the need to put in place procedures for assessment of the disaster risk implications of major infrastructure projects.

(11) Protection and promotion of cultural heritage and landscapes, which are an integral part of the cultural diversity that the Union is committed to respect and promote in accordance with Article 167(4) of the Treaty on the Functioning of the European Union, can usefully build on definitions and principles developed in relevant Council of Europe Conventions, in particular the Convention for the Protection of the Architectural Heritage of Europe, the European Landscape Convention and the Framework Convention on the Value of Cultural Heritage for Society.

(12) When applying Directive 2011/92/EU, it is necessary to ensure a competitive business environment, especially for small and medium enterprises, in order to generate smart, sustainable and inclusive growth, in line with the objectives set out in the Commission's Communication entitled 'Europe 2020 – A strategy for smart, sustainable and inclusive growth'[19].

(13) Experience has shown that in cases of civil emergency compliance with the provisions of Directive 2011/92/EU may have adverse effects, and provision should therefore be made to authorise Member States not to apply that Directive in appropriate cases.

(14) The information which the developer is required to supply in order to enable the competent authority to determine whether projects listed in Annex II of Directive 2011/92/EU should be subject to an environmental assessment (screening procedure), should be specified.

(15) The selection criteria laid down in Annex III of Directive 2011/92/EU, which are taken into account by the Member States in order to determine which projects should be subject to assessment on the basis of their significant environmental effects, should be adapted and clarified in order to ensure that an environmental assessment is only required for projects likely to have significant environmental effects, such as projects using or affecting valuable resources, projects proposed for environmentally sensitive locations, or projects with potentially hazardous or irreversible effects.

(16) When determining whether significant environmental effects are likely to be caused, the competent authorities should identify the most relevant criteria to be considered and use the additional information that may be available following other assessments required by Union legislation in order to apply the screening procedure effectively. In this regard, it is appropriate to specify the content of the screening decision, in particular where no environmental assessment is required.

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18 COM(2009) 82.

19 COM(2010) 2020.

(17) The competent authorities should be required to determine the scope and level of detail of the environmental information to be submitted in the form of an environmental report (scoping). In order to improve the quality of the assessment and streamline the decision-making process, it is important to specify at Union level the categories of information on which the competent authorities should make that determination.

(18) The environmental report of a project to be provided by the developer should include an assessment of reasonable alternatives relevant to the proposed project, including the likely evolution of the existing state of the environment without implementation of the project (baseline scenario), as a means to improve quality of the assessment process and to allow integrating environmental considerations at an early stage in the project's design.

(19) Measures should be taken to ensure that the data and information included in the environmental reports, in accordance with Annex IV of Directive 2011/92/EU are complete and of sufficiently high quality. With a view to avoiding duplication of the assessment, Member States should take account of the fact that environmental assessments may be carried out at different levels or by different instruments.

(20) With a view to ensuring transparency and accountability, the competent authority should be required to substantiate its decision to grant development consent in respect of a project, indicating that it has taken into consideration the results of the consultations carried out and the relevant information gathered.

(21) It is appropriate to establish common minimum requirements for the monitoring of the significant adverse effects of the construction and operation of projects to ensure a common approach in all Member States and to ensure that, after the implementation of mitigation and compensation measures, no impacts exceed those initially predicted. Such monitoring should not duplicate or add to monitoring required pursuant to other Union legislation.

(22) Time-frames for the various steps of the environmental assessment of projects should be introduced, in order to stimulate more efficient decision-making and increase legal certainty, also taking into account the nature, complexity, location and size of the proposed project. Such time-frames should under no circumstances compromise the high standards for the protection of the environment, particularly those resulting from other Union environmental legislation, and effective public participation and access to justice.

(23) In order to avoid duplication of the assessment, reduce administrative complexity and increase economic efficiency, where the obligation to carry out environmental impact assessments arises simultaneously from this Directive and other Union legislation, such as Directives 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment[20], 2009/147/EC on the conservation of wild birds[21], 2000/60/EC establishing a framework for Community action in the field of water policy[22], 2010/75/EU on industrial emissions[23] and Council Directive 92/43/EEC on

[20] OJ L 197, 21.7.2001, p.30.
[21] OJ L 20, 26.1.2010, p.7.
[22] OJ L 327, 22.12.2000, p.1.
[23] OJ L 334, 17.12.2010, p.17.

the conservation of natural habitats and of wild fauna and flora[24], Member States should provide for coordinated or joint procedures fulfilling the requirements of the relevant Union legislation.

(24) The new provisions should also apply to projects for which the request for development consent is introduced before the time-limit for transposition but for which the environmental impact assessment has not been concluded before that date.

(25) In accordance with the Joint Political Declaration of Member States and the Commission of 28 September 2011 on explanatory documents, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(26) In order to adjust the selection criteria and the information to be provided in the environmental report to the latest developments in technology and relevant practices, the power to adopt acts, in accordance with Article 290 of the Treaty on the Functioning of the European Union, should be delegated to the Commission in respect of Annexes II.A, III and IV of Directive 2011/92/EU. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level.

(27) The Commission, when preparing and drawing up delegated acts, should ensure the simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and Council.

(28) Since the objective of this Directive, namely to ensure a high level of protection of the environment and of human health, through the establishment of minimum requirements for the environmental assessment of projects, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scope, seriousness and transboundary nature of the environmental issues to be addressed, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on the European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(29) Directive 2011/92/EU should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2011/92/EU is amended as follows:

(1) Article 1 is amended as follows:

[24] OJ L 206, 22.7.1992, p.7.

(a) in point (a) of paragraph 2, the first indent is replaced by the following:

"— the execution of construction or demolition works, or of other installations or schemes,"

(b) in paragraph 2, the following definition is added:

"(g) "environmental impact assessment" shall mean the process of preparing an environmental report, carrying out consultations (including with the public concerned and the environmental authorities), the assessment by the competent authority, taking into account the environmental report and the results of the consultations in the development consent procedure as well as the provision of information on the decision in accordance with Articles 5 to 10."

(c) paragraphs 3 and 4 are replaced by the following:

"3. Member States may decide, on a case-by-case basis and if so provided under national law, not to apply this Directive to projects having as their sole purpose national defence or the response to civil emergencies, if they deem that such application would have an adverse effect on those purposes."

4. This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, provided that the objectives of this Directive, including that of supplying information, are achieved through the legislative process. Every two years from the date specified in Article 2(1) of Directive XXX [OPOCE please introduce the n° of this Directive], Member States shall inform the Commission of any application which they have made of this provision."

(2) In Article 2, paragraph 3 is replaced by the following:

"3. Projects for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Union legislation shall be subject to coordinated or joint procedures fulfilling the requirements of the relevant Union legislation.

Under the coordinated procedure, the competent authority shall coordinate the various individual assessments required by the Union legislation concerned and issued by several authorities, without prejudice to any provisions to the contrary contained in other relevant Union legislation.

Under the joint procedure, the competent authority shall issue one environmental impact assessment, integrating the assessments of one or more authorities, without prejudice to any provisions to the contrary contained in other relevant Union legislation.

Member States shall appoint one authority, which shall be responsible for facilitating the development consent procedure for each project."

(3) Article 3 is replaced by the following:

"Article 3

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect significant effects of a project on the following factors:

(a) population, human health, and biodiversity, with particular attention to species and habitats protected under Council Directive 92/43/EEC(*) and Directive 2009/147/EC of the European Parliament and of the Council(**);

(b) land, soil, water, air and climate change;

(c) material assets, cultural heritage and the landscape;

(d) the interaction between the factors referred to in points (a), (b) and (c);

(e) exposure, vulnerability and resilience of the factors referred to in points (a), (b) and (c), to natural and man-made disaster risks."

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(*) OJ L 206, 22.7.1992, p.7.

(**) OJ L 20, 26.1.2010, p.7."

(4) Article 4 is amended as follows:

(a) paragraphs 3 and 4 are replaced by the following:

"3. For projects listed in Annex II, the developer shall provide information on the characteristics of the project, its potential impact on the environment and the measures envisaged in order to avoid and reduce significant effects. The detailed list of information to be provided is specified in Annex II.A."

4. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the competent authority shall take account of selection criteria related to the characteristics and location of the project and its potential impact on the environment. The detailed list of selection criteria to be used is specified in Annex III."

(b) The following paragraphs 5 and 6 are added:

"5. The competent authority shall make its decision pursuant to paragraph 2, on the basis of the information provided by the developer and taking into account, where relevant, the results of studies, preliminary verifications or assessments of the effects on the environment arising from other Union legislation. The decision pursuant to paragraph 2 shall:

(a) state how the criteria in Annex III have been taken into account;

(b) include the reasons for requiring or not requiring an environmental impact assessment pursuant to Articles 5 to 10;

(c) include a description of the measures envisaged to avoid, prevent and reduce any significant effects on the environment, where it is decided that no environmental impact assessment needs to be carried out pursuant to Articles 5 to 10;

(d) be made available to the public.

6. The competent authority shall make its decision pursuant to paragraph 2 within three months from the request for development consent and provided that the developer has submitted all the requisite information. Depending on the nature, complexity, location and size of the proposed project, the competent authority may extend that deadline by a further 3 months; in that case, the competent authority shall inform the developer of the reasons justifying the extension and of the date when its determination is expected.

Where the project is made subject to an environmental impact assessment in accordance with Articles 5 to 10, the decision pursuant to paragraph 2 of this Article shall include the information set out in Article 5(2)."

(5) In Article 5, paragraphs 1, 2 and 3 are replaced by the following:

"1. Where an environmental impact assessment must be carried out in accordance with Articles 5 to 10, the developer shall prepare an environmental report. The environmental report shall be based on the determination pursuant to paragraph 2 of this Article and include the information that may reasonably be required for making informed decisions on the environmental impacts of the proposed project, taking into account current knowledge and methods of assessment, the characteristics, technical capacity and location of the project, the characteristics of the potential impact, alternatives to the proposed project and the extent to which certain matters (including the evaluation of alternatives) are more appropriately assessed at different levels including the planning level, or on the basis of other assessment requirements. The detailed list of information to be provided in the environmental report is specified in Annex IV.

2. The competent authority, after having consulted the authorities referred to in Article 6(1) and the developer, shall determine the scope and level of detail of the information to be included by the developer in the environmental report, in accordance with paragraph 1 of this Article. In particular, it shall determine:

(a) the decisions and opinions to be obtained;

(b) the authorities and the public likely to be concerned;

(c) the individual stages of the procedure and their duration;

(d) reasonable alternatives relevant to the proposed project and its specific characteristics;

(e) the environmental features referred to in Article 3 likely to be significantly affected;

(f) the information to be submitted relevant to the specific characteristics of a particular project or type of project;

(g) the information and knowledge available and obtained at other levels of decision-making or through other Union legislation, and the methods of assessment to be used.

The competent authority may also seek assistance from accredited and technically competent experts referred to in paragraph 3 of this Article. Subsequent requests to the developer for additional information may only be made if these are justified by new circumstances and duly explained by the competent authority.

3. To guarantee the completeness and sufficient quality of the environmental reports referred to in Article 5(1):

(a) the developer shall ensure that the environmental report is prepared by accredited and technically competent experts or

(b) the competent authority shall ensure that the environmental report is verified by accredited and technically competent experts and/or committees of national experts.

Where accredited and technically competent experts assisted the competent authority to prepare the determination referred to in Article 5(2), the same experts shall not be used by the developer for the preparation of the environmental report.

The detailed arrangements for the use and selection of accredited and technically competent experts (for example qualifications required, assignment of evaluation, licensing, and disqualification), shall be determined by the Member States."

(6) Article 6 is amended as follows:

(a) paragraph 6 is replaced by the following:

"6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time:

(a) for informing the authorities referred to in Article 6(1) and the public and

(b) for the authorities referred to in Article 6(1) and the public concerned to prepare and participate effectively in the environmental decision-making subject to the provisions of this Article."

(b) the following paragraph 7 is added:

"7. The time-frames for consulting the public concerned on the environmental report referred to in Article 5(1) shall not be shorter than 30 days or longer than 60 days. In exceptional cases, where the nature, complexity, location or size of the proposed project so require, the competent authority may extend this time-frame by a further 30 days; in that case, the competent authority shall inform the developer of the reasons justifying the extension."

(7) In Article 7, paragraph 5 is replaced by the following:

"5. The detailed arrangements for implementing paragraphs 1 to 4 of this Article, including the establishment of time-frames for consultations, shall be determined by the Member States concerned, on the basis of the arrangements and time-frames referred to in Article 6(5) and (6), and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project."

(8) Article 8 is replaced by the following:

"Article 8

1. The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure. To this end, the decision to grant development consent shall contain the following information:

(a) the environmental assessment of the competent authority referred to in Article 3 and the environmental conditions attached to the decision, including a description of the main measures to avoid, reduce and, if possible, offset significant adverse effects;

(b) the main reasons for choosing the project as adopted, in the light of the other alternatives considered, including the likely evolution of the existing state of the environment without implementation of the project (baseline scenario);

(c) a summary of the comments received pursuant to Articles 6 and 7;

(d) a statement summarising how environmental considerations have been integrated into the development consent and how the results of the consultations and the information gathered pursuant to Articles 5, 6 and 7 have been incorporated or otherwise addressed.

For projects likely to have significant adverse transboundary effects, the competent authority shall provide information for not having taken into account comments received by the affected Member State during the consultations carried out pursuant to Article 7.

2. If the consultations and the information gathered pursuant to Articles 5, 6 and 7 conclude that a project will have significant adverse environmental effects, the competent authority, as early as possible and in close cooperation with the authorities referred to in Article 6(1) and the developer, shall consider whether the environmental report referred to in Article 5(1) should be revised and the project modified to avoid or reduce these adverse effects and whether additional mitigation or compensation measures are needed.

If the competent authority decides to grant development consent, it shall ensure that the development consent includes measures to monitor the significant adverse environmental effects, in order to assess the implementation and the expected effectiveness of mitigation and compensation measures, and to identify any unforeseeable adverse effects.

The type of parameters to be monitored and the duration of the monitoring shall be proportionate to the nature, location and size of the proposed project and the significance of its environmental effects.

Existing monitoring arrangements resulting from other Union legislation may be used if appropriate.

3. When all necessary information gathered pursuant to Articles 5, 6 and 7 has been provided to the competent authority, including, where relevant, specific assessments required under other Union legislation, and the consultations referred to in Articles 6 and 7 have been completed, the competent authority shall conclude its environmental impact assessment of the project within three months.

Depending on the nature, complexity, location and size of the proposed project, the competent authority may extend that deadline by a further 3 months; in that case, the competent authority shall inform the developer of the reasons justifying the extension and of the date when its decision is expected.

4. Before a decision to grant or refuse development consent is taken, the competent authority shall verify whether the information in the environmental report referred to in Article 5(1) is up to date, in particular concerning the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects."

(9) Article 9 is amended as follows:

(a) paragraph 1 is replaced by the following:

"1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public and the authorities referred to in Article 6(1) thereof, in accordance with the appropriate procedures, and shall make available to the public the following information:

(a) the content of the decision and any conditions attached thereto;

(b) having examined the environmental report and the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process;

(c) a description of the main measures to avoid, reduce and, if possible, offset the significant adverse effects;

(d) a description, where appropriate, of the monitoring measures referred to in Article 8(2)."

(b) the following paragraph 3 is added:

"3. Member States may also decide to make available to the public the information referred to in paragraph 1, when the competent authority concludes its environmental impact assessment of the project."

(10) In Article 12, paragraph 2 is replaced by the following:

"2. In particular, every six years from the date specified in Article 2(1) of Directive XXX [OPOCE please introduce the n° of this Directive] Member States shall inform the Commission of:

(a) the number of projects referred to in Annexes I and II made subject to an assessment in accordance with Articles 5 to 10;

(b) the breakdown of assessments according to the project categories set out in Annexes I and II;

(c) the breakdown of assessments undertaken by type of developer;

(d) the number of projects referred to in Annex II made subject to a determination in accordance with Article 4(2);

(e) the average duration of the environmental impact assessment process;

(f) the average cost of the environmental impact assessments."

(11) The following Articles 12a and12b are inserted:

"Article 12a

The Commission shall be empowered to adopt delegated acts, in accordance with Article 12b, concerning the selection criteria listed in Annex III and the information referred to in Annexes II.A and IV, in order to adapt them to scientific and technical progress.

Article 12b

1. The power to adopt delegated acts is conferred on the Commission subject to the condition laid down in this Article.

2. The delegation of power referred to in Article 12a shall be conferred on the Commission for an indeterminate period of time from the [OPOCE please introduce date of the entry into force of this Directive].

3. The delegation of power referred to in Article 12a may be revoked at any time by the European Parliament or by the Council. A revocation decision shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication of the decision in the Official Journal of the European Union or at a date specified therein. It shall not affect the validity of any delegated acts already in force.

4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Article 12a shall enter into force only if no objection has been expressed either by the European Parliament or by the Council within a period of two months of the notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not

object. That period shall be extended by two months at the initiative of the European Parliament or the Council."

(12) The Annexes to Directive 2011/92/EU are amended as provided in the Annex to this Directive.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [DATE] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a document explaining the relationship between them and this Directive.

   When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 3

Projects for which the request for development consent was introduced before the date referred to in the first subparagraph of Article 2(1) and for which the environmental impact assessment has not been concluded before that date shall be subject to the obligations referred to in Articles 3 to 11 of Directive 2011/92/EU as amended by this Directive.

Article 4

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union.*

Article 5

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*

ANNEX

(1) The following Annex II.A is inserted:

"ANNEX II.A – INFORMATION REFERRED TO IN ARTICLE 4(3)

1. A description of the project, including in particular:

(a) a description of the physical characteristics of the whole project, including, where relevant, its subsurface, during the construction and operational phases;

(b) a description of the location of the project, with particular regard to the environmental sensitivity of geographical areas likely to be affected.

2. A description of the aspects of the environment likely to be significantly affected by the proposed project.

3. A description of the likely significant effects of the proposed project on the environment resulting from:

(a) the expected residues and emissions and the production of waste;

(b) the use of natural resources, in particular soil, land, water, and biodiversity, including hydromorphological changes.

4. A description of the measures envisaged to avoid, prevent or reduce any significant adverse effects on the environment."

(2) Annexes III and IV are replaced by the following:

"ANNEX III – SELECTION CRITERIA REFERRED TO IN ARTICLE 4(4)

1. CHARACTERISTICS OF PROJECTS

The characteristics of projects must be considered with particular regard to:

(a) the size of the project, including, where relevant, its subsurface;

(b) cumulation with other projects and activities;

(c) the use of natural resources, in particular land, soil, water, and biodiversity, including hydromorphological changes;

(d) the production of waste;

(e) pollution and nuisances;

(f) the natural and man-made disaster risks and risk of accidents, with particular regard to hydromorphological changes, substances, or technologies or living organisms used, to specific surface and subsurface conditions or alternative use, and to the probability of accidents or disasters and the vulnerability of the project to these risks;

(g) impacts of the project on climate change (in terms of greenhouse gas emissions including from land use, land-use change and forestry), contribution of the project to an improved resilience, and the impacts of climate change on the project (e.g. if the project is coherent with a changing climate);

(h) impacts of the project on the environment, in particular on land (increase of settlement areas over time – land take), soil (organic matter, erosion, compaction, sealing), water (quantity and quality), air and biodiversity (population quality and quantity and ecosystem degradation and fragmentation);

(i) the risks to human health (e.g. due to water contamination or air pollution);

(j) impact of the project on cultural heritage and landscape.

2. LOCATION OF PROJECTS

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, with particular regard to:

(a) the existing and planned land use, including land take and fragmentation;

(b) the relative abundance, availability, quality and regenerative capacity of natural resources (including soil, land, water, and biodiversity) in the area;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas:

(i) wetlands, riparian areas, river mouths;

(ii) coastal zones;

(iii) mountain and forest areas;

(iv) nature reserves and parks, permanent pastures, agriculture areas with a high nature value;

(v) areas classified or protected under Member States' legislation; Natura 2000 areas designated by Member States pursuant to Directive 2009/147/EEC of the European Parliament or of the Council and Council Directive 92/43/EEC; areas protected by international conventions;

(vi) areas in which there has already been a failure to meet the environmental quality standards, laid down in Union legislation and relevant to the project, or is likely to be such a failure;

(vii) densely populated areas;

(viii) landscapes and sites of historical, cultural or archaeological significance.

3. CHARACTERISTICS OF THE POTENTIAL IMPACT

The potential significant effects of projects must be considered in relation to criteria set out under 1 and 2 above, with particular regard to:

(a) the magnitude and spatial extent of the impact (geographical area and size of the population likely to be affected);

(b) the nature of the impact;

(c) the transboundary nature of the impact;

(d) the intensity and complexity of the impact;

(e) the probability of the impact;

(f) the duration, frequency and reversibility of the impact;

(g) the speed of onset of the impact;

(h) the cumulation of impacts with the impacts of other projects (in particular existing and/or approved) by the same or different developers;

(i) the aspects of the environment likely to be significantly affected;

(k) the information and findings on environmental effects obtained from assessments required under other EU legislation.

(l) the possibility of reducing impacts effectively.

ANNEX IV – INFORMATION REFERRED TO IN ARTICLE 5(1)

1. Description of the project, including in particular:

(a) a description of the physical characteristics of the whole project, including, where relevant, its subsurface, and the water use and land-use requirements during the construction and operational phases;

(b) a description of the main characteristics of the production processes, for instance, nature and quantity of the materials, energy and natural resources (including water, land, soil and biodiversity) used;

(c) an estimate, by type and quantity, of expected residues and emissions (water, air, soil and subsoil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

2. A description, of the technical, locational or other aspects (e.g. in terms of project design, technical capacity, size and scale) of the alternatives considered, including the identification of the least environmentally impacting one, and an indication of the main reasons for the choice made, taking into account the environmental effects.

3. A description of the relevant aspects of the existing state of the environment and the likely evolution thereof without implementation of the project (baseline scenario). This description should cover any existing environmental problems relevant to the project, including, in particular, those relating to any areas of a particular environmental importance and the use of natural resources.

4. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, human health, fauna, flora, biodiversity and the ecosystem services it provides, land (land take), soil (organic matter, erosion, compaction, sealing), water (quantity and quality), air, climatic factors, climate change (greenhouse gas emissions, including from land use, land use change and forestry, mitigation potential, impacts relevant to adaptation, if the project takes into account risks associated with climate change), material assets, cultural heritage, including architectural and archaeological ones, landscape; such a description should include the inter-relationship between the above factors, as well as the exposure, vulnerability and resilience of the above factors to natural and man-made disaster risks.

5. A description of the likely significant effects of the proposed project on the environment resulting from, inter alia:

(a) the existence of the project;

(b) the use of natural resources, in particular land, soil, water, biodiversity and the ecosystem services it provides, considering as far possible the availability of these resources also in the light of changing climatic conditions;

(c) the emission of pollutants, noise, vibration, light, heat and radiation, the creation of nuisances, and the elimination of waste;

(d) the risks to human health, cultural heritage or the environment (e.g. due to accidents or disasters);

(e) the cumulation of effects with other projects and activities;

(f) the greenhouse gas emissions, including from land use, land use change and forestry;

(g) the technologies and the substances used;

(h) hydromorphological changes.

The description of the likely significant effects should cover the direct effects and any indirect, secondary, cumulative, transboundary, short-, medium- and long-term, permanent and temporary, positive and negative effects of the project. This description should take into account the environmental protection objectives established at EU or Member State level which are relevant to the project.

6. The description of the forecasting methods used to assess the effects on the environment referred to in point 5, as well as an account of the main uncertainties involved and their influence on the effect estimates and selection of the preferred alternative.

7. A description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment referred to in point 5 and, where appropriate, of any proposed monitoring arrangements, including the preparation of a post-project analysis of the adverse effects on the environment. This

description should explain the extent to which significant adverse effects are reduced or offset and should cover both the construction and operational phases.

8. An assessment of the natural and man-made disaster risks and risk of accidents to which the project could be vulnerable and, where appropriate, a description of the measures envisaged to prevent such risks, as well as measures regarding preparedness for and response to emergencies (e.g. measures required under Directive 96/82/EC as amended).

9. A non-technical summary of the information provided under the above headings.

10. An indication of any difficulties (technical deficiencies or lack of knowhow) encountered by the developer in compiling the required information and of the sources used for the descriptions and assessments made, as well as an account of the main uncertainties involved and their influence on the effect estimates and selection of the preferred alternative."

I

(Legislative acts)

DIRECTIVES

DIRECTIVE 2011/92/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 13 December 2011

on the assessment of the effects of certain public and private projects on the environment

(codification)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee [1],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure [2],

Whereas:

(1) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [3] has been substantially amended several times [4]. In the interests of clarity and rationality the said Directive should be codified.

(2) Pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes.

(3) The principles of the assessment of environmental effects should be harmonised, in particular with reference to the projects which should be subject to assessment, the main obligations of the developers and the content of the assessment. The Member States may lay down stricter rules to protect the environment.

(4) In addition, it is necessary to achieve one of the objectives of the Union in the sphere of the protection of the environment and the quality of life.

(5) The environmental legislation of the Union includes provisions enabling public authorities and other bodies to take decisions which may have a significant effect on the environment as well as on personal health and well-being.

(6) General principles for the assessment of environmental effects should be laid down with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.

(7) Development consent for public and private projects which are likely to have significant effects on the environment should be granted only after an assessment of the likely significant environmental effects of those projects has been carried out. That assessment should be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the public likely to be concerned by the project in question.

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[1] OJ C 248, 25.8.2011, p. 154.

[2] Position of the European Parliament of 13 September 2011 (not yet published in the Official Journal) and decision of the Council of 15 November 2011.

[3] OJ L 175, 5.7.1985, p. 40.

[4] See Annex VI, Part A.

(8) Projects belonging to certain types have significant effects on the environment and those projects should, as a rule, be subject to a systematic assessment.

(9) Projects of other types may not have significant effects on the environment in every case and those projects should be assessed where the Member States consider that they are likely to have significant effects on the environment.

(10) Member States may set thresholds or criteria for the purpose of determining which of such projects should be subject to assessment on the basis of the significance of their environmental effects. Member States should not be required to examine projects below those thresholds or outside those criteria on a case-by-case basis.

(11) When setting such thresholds or criteria or examining projects on a case-by-case basis, for the purpose of determining which projects should be subject to assessment on the basis of their significant environmental effects, Member States should take account of the relevant selection criteria set out in this Directive. In accordance with the subsidiarity principle, the Member States are in the best position to apply those criteria in specific instances.

(12) For projects which are subject to assessment, a certain minimal amount of information should be supplied, concerning the project and its effects.

(13) It is appropriate to lay down a procedure in order to enable the developer to obtain an opinion from the competent authorities on the content and extent of the information to be elaborated and supplied for the assessment. Member States, in the framework of this procedure, may require the developer to provide, inter alia, alternatives for the projects for which it intends to submit an application.

(14) The effects of a project on the environment should be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

(15) It is desirable to lay down strengthened provisions concerning environmental impact assessment in a transboundary context to take account of developments at international level. The European Community signed the Convention on Environmental Impact Assessment in a Transboundary Context on 25 February 1991, and ratified it on 24 June 1997.

(16) Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

(17) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public.

(18) The European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) on 25 June 1998 and ratified it on 17 February 2005.

(19) Among the objectives of the Aarhus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

(20) Article 6 of the Aarhus Convention provides for public participation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which may have a significant effect on the environment.

(21) Article 9(2) and (4) of the Aarhus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of that Convention.

(22) However, this Directive should not be applied to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.

(23) Furthermore, it may be appropriate in exceptional cases to exempt a specific project from the assessment procedures laid down by this Directive, subject to appropriate information being supplied to the Commission and to the public concerned.

(24) Since the objectives of this Directive cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(25) This Directive should be without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex V, Part B,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

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

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

(a) 'project' means:

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

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

(b) 'developer' means the applicant for authorisation for a private project or the public authority which initiates a project;

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

(d) 'public' means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

(e) 'public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;

(f) 'competent authority or authorities' means that authority or those authorities which the Member States designate as responsible for performing the duties arising from this Directive.

3. Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on those purposes.

4. This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.

Article 2

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

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3. Member States may provide for a single procedure in order to fulfil the requirements of this Directive and the requirements of Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [1].

4. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In that event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the decision granting exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where applicable, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the European Parliament and to the Council on the application of this paragraph.

[1] OJ L 24, 29.1.2008, p. 8.

Article 3

The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 12, the direct and indirect effects of a project on the following factors:

(a) human beings, fauna and flora;

(b) soil, water, air, climate and the landscape;

(c) material assets and the cultural heritage;

(d) the interaction between the factors referred to in points (a), (b) and (c).

Article 4

1. Subject to Article 2(4), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

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

(a) a case-by-case examination;

or

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

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.

Article 5

1. In the case of projects which, pursuant to Article 4, are to be made subject to an environmental impact assessment in accordance with this Article and Articles 6 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard, inter alia, to current knowledge and methods of assessment.

2. Member States shall take the necessary measures to ensure that, if the developer so requests before submitting an application for development consent, the competent authority shall give an opinion on the information to be supplied by the developer in accordance with paragraph 1. The competent authority shall consult the developer and authorities referred to in Article 6(1) before it gives its opinion. The fact that the authority has given an opinion under this paragraph shall not preclude it from subsequently requiring the developer to submit further information.

Member States may require the competent authorities to give such an opinion, irrespective of whether the developer so requests.

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

(a) a description of the project comprising information on the site, design and size of the project;

(b) a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects;

(c) the data required to identify and assess the main effects which the project is likely to have on the environment;

(d) an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects;

(e) a non-technical summary of the information referred to in points (a) to (d).

4. Member States shall, if necessary, ensure that any authorities holding relevant information, with particular reference to Article 3, make this information available to the developer.

Article 6

1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the information supplied by the developer and on the request for development consent. To that end, Member States shall designate the authorities to be consulted, either in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to those authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. The public shall be informed, whether by public notices or by other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places at which, and the means by which, the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [1], information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.

Article 7

1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken.

The Member State in whose territory the project is intended to be carried out shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to points (a) and (b) of Article 6(3).

3. The Member States concerned, each insofar as it is concerned, shall also:

(a) arrange for the information referred to in paragraphs 1 and 2 to be made available, within a reasonable time, to the authorities referred to in Article 6(1) and the public concerned in the territory of the Member State likely to be significantly affected; and

[1] OJ L 41, 14.2.2003, p. 26.

(b) ensure that the authorities referred to in Article 6(1) and the public concerned are given an opportunity, before development consent for the project is granted, to forward their opinion within a reasonable time on the information supplied to the competent authority in the Member State in whose territory the project is intended to be carried out.

4. The Member States concerned shall enter into consultations regarding, inter alia, the potential transboundary effects of the project and the measures envisaged to reduce or eliminate such effects and shall agree on a reasonable timeframe for the duration of the consultation period.

5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.

Article 8

The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure.

Article 9

1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

(a) the content of the decision and any conditions attached thereto;

(b) having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process;

(c) a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.

Article 10

The provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national laws, regulations and administrative provisions and accepted legal practices with regard to commercial and industrial confidentiality, including intellectual property, and the safeguarding of the public interest.

Where Article 7 applies, the transmission of information to another Member State and the receipt of information by another Member State shall be subject to the limitations in force in the Member State in which the project is proposed.

Article 11

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

(a) having a sufficient interest, or alternatively;

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

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

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

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

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

Article 12

1. The Member States and the Commission shall exchange information on the experience gained in applying this Directive.

2. In particular, Member States shall inform the Commission of any criteria and/or thresholds adopted for the selection of the projects in question, in accordance with Article 4(2).

3. On the basis of that exchange of information, the Commission shall if necessary submit additional proposals to the European Parliament and to the Council, with a view to ensuring that this Directive is applied in a sufficiently coordinated manner.

Article 13

Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.

Article 14

Directive 85/337/EEC, as amended by the Directives listed in Annex V, Part A, is repealed, without prejudice to the obligations of the Member States relating to the time limits for transposition into national law of the Directives set out in Annex V, Part B.

References to the repealed Directive shall be construed as references to this Directive and shall be read in accordance with the correlation table in Annex VI.

Article 15

This Directive shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

Article 16

This Directive is addressed to the Member States.

Done at Strasbourg, 13 December 2011.

For the European Parliament	*For the Council*
The President	*The President*
J. BUZEK	M. SZPUNAR

ANNEX I

PROJECTS REFERRED TO IN ARTICLE 4(1)

1. Crude-oil refineries (excluding undertakings manufacturing only lubricants from crude oil) and installations for the gasification and liquefaction of 500 tonnes or more of coal or bituminous shale per day.

2. (a) Thermal power stations and other combustion installations with a heat output of 300 megawatts or more;

   (b) Nuclear power stations and other nuclear reactors including the dismantling or decommissioning of such power stations or reactors [1] (except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).

3. (a) Installations for the reprocessing of irradiated nuclear fuel;

   (b) Installations designed:

      (i) for the production or enrichment of nuclear fuel;

      (ii) for the processing of irradiated nuclear fuel or high-level radioactive waste;

      (iii) for the final disposal of irradiated nuclear fuel;

      (iv) solely for the final disposal of radioactive waste;

      (v) solely for the storage (planned for more than 10 years) of irradiated nuclear fuels or radioactive waste in a different site than the production site.

4. (a) Integrated works for the initial smelting of cast iron and steel;

   (b) Installations for the production of non-ferrous crude metals from ore, concentrates or secondary raw materials by metallurgical, chemical or electrolytic processes.

5. Installations for the extraction of asbestos and for the processing and transformation of asbestos and products containing asbestos: for asbestos-cement products, with an annual production of more than 20 000 tonnes of finished products, for friction material, with an annual production of more than 50 tonnes of finished products, and for other uses of asbestos, utilisation of more than 200 tonnes per year.

6. Integrated chemical installations, i.e. those installations for the manufacture on an industrial scale of substances using chemical conversion processes, in which several units are juxtaposed and are functionally linked to one another and which are:

   (a) for the production of basic organic chemicals;

   (b) for the production of basic inorganic chemicals;

   (c) for the production of phosphorous-, nitrogen- or potassium-based fertilisers (simple or compound fertilisers);

   (d) for the production of basic plant health products and of biocides;

   (e) for the production of basic pharmaceutical products using a chemical or biological process;

   (f) for the production of explosives.

[1] Nuclear power stations and other nuclear reactors cease to be such an installation when all nuclear fuel and other radioactively contaminated elements have been removed permanently from the installation site.

7. (a) Construction of lines for long-distance railway traffic and of airports [1] with a basic runway length of 2 100 m or more;

   (b) Construction of motorways and express roads [2];

   (c) Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road or realigned and/or widened section of road would be 10 km or more in a continuous length.

8. (a) Inland waterways and ports for inland-waterway traffic which permit the passage of vessels of over 1 350 tonnes;

   (b) Trading ports, piers for loading and unloading connected to land and outside ports (excluding ferry piers) which can take vessels of over 1 350 tonnes.

9. Waste disposal installations for the incineration, chemical treatment as defined in Annex I to Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste [3] under heading D9, or landfill of hazardous waste, as defined in point 2 of Article 3 of that Directive.

10. Waste disposal installations for the incineration or chemical treatment as defined in Annex I to Directive 2008/98/EC under heading D9 of non-hazardous waste with a capacity exceeding 100 tonnes per day.

11. Groundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

12. (a) Works for the transfer of water resources between river basins where that transfer aims at preventing possible shortages of water and where the amount of water transferred exceeds 100 million cubic metres/year;

    (b) In all other cases, works for the transfer of water resources between river basins where the multi-annual average flow of the basin of abstraction exceeds 2 000 million cubic metres/year and where the amount of water transferred exceeds 5 % of that flow.

    In both cases transfers of piped drinking water are excluded.

13. Waste water treatment plants with a capacity exceeding 150 000 population equivalent as defined in point 6 of Article 2 of Council Directive 91/271/EEC of 21 May 1991 concerning urban waste-water treatment [4].

14. Extraction of petroleum and natural gas for commercial purposes where the amount extracted exceeds 500 tonnes/day in the case of petroleum and 500 000 cubic metres/day in the case of gas.

15. Dams and other installations designed for the holding back or permanent storage of water, where a new or additional amount of water held back or stored exceeds 10 million cubic metres.

16. Pipelines with a diameter of more than 800 mm and a length of more than 40 km:

    (a) for the transport of gas, oil, chemicals;

    (b) for the transport of carbon dioxide (CO_2) streams for the purposes of geological storage, including associated booster stations.

17. Installations for the intensive rearing of poultry or pigs with more than:

    (a) 85 000 places for broilers, 60 000 places for hens;

    (b) 3 000 places for production pigs (over 30 kg); or

    (c) 900 places for sows.

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[1] For the purposes of this Directive, 'airport' means an airport which complies with the definition in the 1944 Chicago Convention setting up the International Civil Aviation Organisation (Annex 14).

[2] For the purposes of this Directive, 'express road' means a road which complies with the definition in the European Agreement on Main International Traffic Arteries of 15 November 1975.

[3] OJ L 312, 22.11.2008, p. 3.

[4] OJ L 135, 30.5.1991, p. 40.

18. Industrial plants for the production of:

    (a) pulp from timber or similar fibrous materials;

    (b) paper and board with a production capacity exceeding 200 tonnes per day.

19. Quarries and open-cast mining where the surface of the site exceeds 25 hectares, or peat extraction, where the surface of the site exceeds 150 hectares.

20. Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km.

21. Installations for storage of petroleum, petrochemical, or chemical products with a capacity of 200 000 tonnes or more.

22. Storage sites pursuant to Directive 2009/31/EC of the European Parliament and of the Council of 23 April 2009 on the geological storage of carbon dioxide [1].

23. Installations for the capture of CO_2 streams for the purposes of geological storage pursuant to Directive 2009/31/EC from installations covered by this Annex, or where the total yearly capture of CO_2 is 1,5 megatonnes or more.

24. Any change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.

[1] OJ L 140, 5.6.2009, p. 114.

ANNEX II

PROJECTS REFERRED TO IN ARTICLE 4(2)

1. AGRICULTURE, SILVICULTURE AND AQUACULTURE

   (a) Projects for the restructuring of rural land holdings;

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

   (c) Water management projects for agriculture, including irrigation and land drainage projects;

   (d) Initial afforestation and deforestation for the purposes of conversion to another type of land use;

   (e) Intensive livestock installations (projects not included in Annex I);

   (f) Intensive fish farming;

   (g) Reclamation of land from the sea.

2. EXTRACTIVE INDUSTRY

   (a) Quarries, open-cast mining and peat extraction (projects not included in Annex I);

   (b) Underground mining;

   (c) Extraction of minerals by marine or fluvial dredging;

   (d) Deep drillings, in particular:

      (i) geothermal drilling;

      (ii) drilling for the storage of nuclear waste material;

      (iii) drilling for water supplies;

      with the exception of drillings for investigating the stability of the soil;

   (e) Surface industrial installations for the extraction of coal, petroleum, natural gas and ores, as well as bituminous shale.

3. ENERGY INDUSTRY

   (a) Industrial installations for the production of electricity, steam and hot water (projects not included in Annex I);

   (b) Industrial installations for carrying gas, steam and hot water; transmission of electrical energy by overhead cables (projects not included in Annex I);

   (c) Surface storage of natural gas;

   (d) Underground storage of combustible gases;

   (e) Surface storage of fossil fuels;

   (f) Industrial briquetting of coal and lignite;

   (g) Installations for the processing and storage of radioactive waste (unless included in Annex I);

   (h) Installations for hydroelectric energy production;

   (i) Installations for the harnessing of wind power for energy production (wind farms);

(j) Installations for the capture of CO_2 streams for the purposes of geological storage pursuant to Directive 2009/31/EC from installations not covered by Annex I to this Directive.

4. PRODUCTION AND PROCESSING OF METALS

(a) Installations for the production of pig iron or steel (primary or secondary fusion) including continuous casting;

(b) Installations for the processing of ferrous metals:

(i) hot-rolling mills;

(ii) smitheries with hammers;

(iii) application of protective fused metal coats;

(c) Ferrous metal foundries;

(d) Installations for the smelting, including the alloyage, of non-ferrous metals, excluding precious metals, including recovered products (refining, foundry casting, etc.);

(e) Installations for surface treatment of metals and plastic materials using an electrolytic or chemical process;

(f) Manufacture and assembly of motor vehicles and manufacture of motor-vehicle engines;

(g) Shipyards;

(h) Installations for the construction and repair of aircraft;

(i) Manufacture of railway equipment;

(j) Swaging by explosives;

(k) Installations for the roasting and sintering of metallic ores.

5. MINERAL INDUSTRY

(a) Coke ovens (dry coal distillation);

(b) Installations for the manufacture of cement;

(c) Installations for the production of asbestos and the manufacture of asbestos products (projects not included in Annex I);

(d) Installations for the manufacture of glass including glass fibre;

(e) Installations for smelting mineral substances including the production of mineral fibres;

(f) Manufacture of ceramic products by burning, in particular roofing tiles, bricks, refractory bricks, tiles, stoneware or porcelain.

6. CHEMICAL INDUSTRY (PROJECTS NOT INCLUDED IN ANNEX I)

(a) Treatment of intermediate products and production of chemicals;

(b) Production of pesticides and pharmaceutical products, paint and varnishes, elastomers and peroxides;

(c) Storage facilities for petroleum, petrochemical and chemical products.

7. FOOD INDUSTRY

(a) Manufacture of vegetable and animal oils and fats;

(b) Packing and canning of animal and vegetable products;

(c) Manufacture of dairy products;

(d) Brewing and malting;

(e) Confectionery and syrup manufacture;

(f) Installations for the slaughter of animals;

(g) Industrial starch manufacturing installations;

(h) Fish-meal and fish-oil factories;

(i) Sugar factories.

8. TEXTILE, LEATHER, WOOD AND PAPER INDUSTRIES

(a) Industrial plants for the production of paper and board (projects not included in Annex I);

(b) Plants for the pre-treatment (operations such as washing, bleaching, mercerisation) or dyeing of fibres or textiles;

(c) Plants for the tanning of hides and skins;

(d) Cellulose-processing and production installations.

9. RUBBER INDUSTRY

Manufacture and treatment of elastomer-based products.

10. INFRASTRUCTURE PROJECTS

(a) Industrial estate development projects;

(b) Urban development projects, including the construction of shopping centres and car parks;

(c) Construction of railways and intermodal transhipment facilities, and of intermodal terminals (projects not included in Annex I);

(d) Construction of airfields (projects not included in Annex I);

(e) Construction of roads, harbours and port installations, including fishing harbours (projects not included in Annex I);

(f) Inland-waterway construction not included in Annex I, canalisation and flood-relief works;

(g) Dams and other installations designed to hold water or store it on a long-term basis (projects not included in Annex I);

(h) Tramways, elevated and underground railways, suspended lines or similar lines of a particular type, used exclusively or mainly for passenger transport;

(i) Oil and gas pipeline installations and pipelines for the transport of CO_2 streams for the purposes of geological storage (projects not included in Annex I);

(j) Installations of long-distance aqueducts;

(k) Coastal work to combat erosion and maritime works capable of altering the coast through the construction, for example, of dykes, moles, jetties and other sea defence works, excluding the maintenance and reconstruction of such works;

(l) Groundwater abstraction and artificial groundwater recharge schemes not included in Annex I;

(m) Works for the transfer of water resources between river basins not included in Annex I.

11. OTHER PROJECTS

(a) Permanent racing and test tracks for motorised vehicles;

(b) Installations for the disposal of waste (projects not included in Annex I);

(c) Waste-water treatment plants (projects not included in Annex I);

(d) Sludge-deposition sites;

(e) Storage of scrap iron, including scrap vehicles;

(f) Test benches for engines, turbines or reactors;

(g) Installations for the manufacture of artificial mineral fibres;

(h) Installations for the recovery or destruction of explosive substances;

(i) Knackers' yards.

12. TOURISM AND LEISURE

(a) Ski runs, ski lifts and cable cars and associated developments;

(b) Marinas;

(c) Holiday villages and hotel complexes outside urban areas and associated developments;

(d) Permanent campsites and caravan sites;

(e) Theme parks.

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

(b) Projects in Annex I, undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than two years.

ANNEX III

SELECTION CRITERIA REFERRED TO IN ARTICLE 4(3)

1. CHARACTERISTICS OF PROJECTS

The characteristics of projects must be considered having regard, in particular, to:

(a) the size of the project;

(b) the cumulation with other projects;

(c) the use of natural resources;

(d) the production of waste;

(e) pollution and nuisances;

(f) the risk of accidents, having regard in particular to substances or technologies used.

2. LOCATION OF PROJECTS

The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

(a) the existing land use;

(b) the relative abundance, quality and regenerative capacity of natural resources in the area;

(c) the absorption capacity of the natural environment, paying particular attention to the following areas:

(i) wetlands;

(ii) coastal zones;

(iii) mountain and forest areas;

(iv) nature reserves and parks;

(v) areas classified or protected under Member States' legislation; special protection areas designated by Member States pursuant to Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [1] and to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [2];

(vi) areas in which the environmental quality standards laid down in Union legislation have already been exceeded;

(vii) densely populated areas;

(viii) landscapes of historical, cultural or archaeological significance.

3. CHARACTERISTICS OF THE POTENTIAL IMPACT

The potential significant effects of projects must be considered in relation to criteria set out in points 1 and 2, and having regard in particular to:

(a) the extent of the impact (geographical area and size of the affected population);

(b) the transfrontier nature of the impact;

(c) the magnitude and complexity of the impact;

(d) the probability of the impact;

(e) the duration, frequency and reversibility of the impact.

[1] OJ L 20, 26.1.2010, p. 7.
[2] OJ L 206, 22.7.1992, p. 7.

ANNEX IV

INFORMATION REFERRED TO IN ARTICLE 5(1)

1. A description of the project, including in particular:

   (a) a description of the physical characteristics of the whole project and the land-use requirements during the construction and operational phases;

   (b) a description of the main characteristics of the production processes, for instance, the nature and quantity of the materials used;

   (c) an estimate, by type and quantity, of expected residues and emissions (water, air and soil pollution, noise, vibration, light, heat, radiation, etc.) resulting from the operation of the proposed project.

2. An outline of the main alternatives studied by the developer and an indication of the main reasons for this choice, taking into account the environmental effects.

3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular, population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the interrelationship between the above factors.

4. A description [1] of the likely significant effects of the proposed project on the environment resulting from:

   (a) the existence of the project;

   (b) the use of natural resources;

   (c) the emission of pollutants, the creation of nuisances and the elimination of waste.

5. The description by the developer of the forecasting methods used to assess the effects on the environment referred to in point 4.

6. A description of the measures envisaged to prevent, reduce and where possible offset any significant adverse effects on the environment.

7. A non-technical summary of the information provided under headings 1 to 6.

8. An indication of any difficulties (technical deficiencies or lack of know-how) encountered by the developer in compiling the required information.

[1] This description should cover the direct effects and any indirect, secondary, cumulative, short, medium and long-term, permanent and temporary, positive and negative effects of the project.

ANNEX V

PART A

Repealed Directive with list of its successive amendments

(referred to in Article 14)

Council Directive 85/337/EEC
(OJ L 175, 5.7.1985, p. 40)

Council Directive 97/11/EC
(OJ L 73, 14.3.1997, p. 5)

Directive 2003/35/EC of the European Parliament and of the Council — Article 3 only
(OJ L 156, 25.6.2003, p. 17)

Directive 2009/31/EC of the European Parliament and of the Council — Article 31 only
(OJ L 140, 5.6.2009, p. 114)

PART B

List of time limits for transposition into national law

(referred to in Article 14)

Directive	Time limit for transposition
85/337/EEC	3 July 1988
97/11/EC	14 March 1999
2003/35/EC	25 June 2005
2009/31/EC	25 June 2011

ANNEX VI

Correlation table

Directive 85/337/EEC	This Directive
Article 1(1)	Article 1(1)
Article 1(2), first subparagraph	Article 1(2), introductory wording
Article 1(2), second subparagraph, introductory wording	Article 1(2)(a), introductory wording
Article 1(2), second subparagraph, first indent	Article 1(2), point (a), first indent
Article 1(2), second subparagraph, second indent	Article 1(2), point (a), second indent
Article 1(2), third subparagraph	Article 1(2), point (b)
Article 1(2), fourth subparagraph	Article 1(2), point (c)
Article 1(2), fifth subparagraph	Article 1(2), point (d)
Article 1(2), sixth subparagraph	Article 1(2), point (e)
Article 1(3)	Article 1(2), point (f)
Article 1(4)	Article 1(3)
Article 1(5)	Article 1(4)
Article 2(1)	Article 2(1)
Article 2(2)	Article 2(2)
Article 2(2a)	Article 2(3)
Article 2(3)	Article 2(4)
Article 3, introductory wording	Article 3, introductory wording
Article 3, first indent	Article 3, point (a)
Article 3, second indent	Article 3, point (b)
Article 3, third indent	Article 3, point (c)
Article 3, fourth indent	Article 3, point (d)
Article 4	Article 4
Article 5(1)	Article 5(1)
Article 5(2)	Article 5(2)
Article 5(3), introductory wording	Article 5(3), introductory wording
Article 5(3), first indent	Article 5(3), point (a)
Article 5(3), second indent	Article 5(3), point (b)
Article 5(3), third indent	Article 5(3), point (c)
Article 5(3), fourth indent	Article 5(3), point (d)
Article 5(3), fifth indent	Article 5(3), point (e)
Article 5(4)	Article 5(4)
Article 6	Article 6
Article 7(1), introductory wording	Article 7(1), first subparagraph, introductory wording

Directive 85/337/EEC	This Directive
Article 7(1), point (a)	Article 7(1), first subparagraph, point (a)
Article 7(1), point (b)	Article 7(1), first subparagraph, point (b)
Article 7(1), final wording	Article 7(1), second subparagraph
Article 7(2)-7(5)	Article 7(2)-7(5)
Article 8	Article 8
Article 9(1), introductory wording	Article 9, introductory wording
Article 9(1), first indent	Article 9(1), point (a)
Article 9(1), second indent	Article 9(1), point (b)
Article 9(1), third indent	Article 9(1), point (c)
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Article 10a, first paragraph	Article 11(1)
Article 10a, second paragraph	Article 11(2)
Article 10a, third paragraph	Article 11(3)
Article 10a, fourth and fifth paragraphs	Article 11(4), first and second subparagraphs
Article 10a, sixth paragraph	Article 11(5)
Article 11(1)	Article 12(1)
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Article 12(2)	Article 13
—	Article 14
—	Article 15
Article 14	Article 16
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Annex I, point 2, first indent	Annex I, point 2(a)
Annex I, point 2, second indent	Annex I, point 2(b)
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Annex I, point 3(b), introductory wording	Annex I, point 3(b), introductory wording
Annex I, point 3(b), first indent	Annex I, point 3(b)(i)
Annex I, point 3(b), second indent	Annex I, point 3(b)(ii)
Annex I, point 3(b), third indent	Annex I, point 3(b)(iii)
Annex I, point 3(b), fourth indent	Annex I, point 3(b)(iv)
Annex I, point 3(b), fifth indent	Annex I, point 3(b)(v)
Annex I, point 4, first indent	Annex I, point 4(a)

Directive 85/337/EEC	This Directive
Annex I, point 4, second indent	Annex I, point 4(b)
Annex I, point 5	Annex I, point 5
Annex I, point 6, introductory wording	Annex I, point 6, introductory wording
Annex I, point 6(i)	Annex I, point 6(a)
Annex I, point 6(ii)	Annex I, point 6(b)
Annex I, point 6(iii)	Annex I, point 6(c)
Annex I, point 6(iv)	Annex I, point 6(d)
Annex I, point 6(v)	Annex I, point 6(e)
Annex I, point 6(vi)	Annex I, point 6(f)
Annex I, points 7-15	Annex I, points 7-15
Annex I, point 16, introductory wording	Annex I, point 16, introductory wording
Annex I, point 16, first indent	Annex I, point 16(a)
Annex I, point 16, second indent	Annex I, point 16(b)
Annex I, points 17-21	Annex I, points 17-21
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Annex II, point 2(d), first indent	Annex II, point 2(d)(i)
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Annex II, point 2(d), final wording	Annex II, point 2(d), final wording
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Annex II, points 3-12	Annex II, points 3-12
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Annex III, point 1, introductory wording	Annex III, point 1, introductory wording
Annex III, point 1, first indent	Annex III, point 1(a)
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Annex III, point 1, fourth indent	Annex III, point 1(d)
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Annex III, point 2, introductory wording	Annex III, point 2, introductory wording

Directive 85/337/EEC	This Directive
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Annex III, point 2, second indent	Annex III, point 2(b)
Annex III, point 2, third indent, introductory wording	Annex III, point 2(c), introductory wording
Annex III, point 2, third indent, point (a)	Annex III, point 2(c)(i)
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Annex III, point 2, third indent, point (c)	Annex III, point 2(c)(iii)
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Annex III, point 3, introductory wording	Annex III, point 3, introductory wording
Annex III, point 3, first indent	Annex III, point 3(a)
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Annex IV, point 1, introductory wording	Annex IV, point 1, introductory wording
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Annex IV, points 2 and 3	Annex IV, points 2 and 3
Annex IV, point 4, introductory wording	Annex IV, point 4, first subparagraph, introductory wording
Annex IV, point 4, first indent	Annex IV, point 4, first subparagraph, point (a)
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Annex IV, point 4, third indent	Annex IV, point 4, first subparagraph, point (c)
Annex IV, point 4, final wording	Annex IV, point 5
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►B DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 26 May 2003

providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

(OJ L 156, 25.6.2003, p. 17)

Amended by:

		Official Journal		
		No	page	date
►M1	Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011	L 26	1	28.1.2012

▼B

DIRECTIVE 2003/35/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 26 May 2003

providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175 thereof,

Having regard to the proposal from the Commission ([1]),

Having regard to the opinion of the European Economic and Social Committee ([2]),

Having regard to the opinion of the Committee of the Regions ([3]),

Acting in accordance with the procedure laid down in Article 251 of the Treaty ([4]), in the light of the joint text approved by the Conciliation Committee on 15 January 2003,

Whereas:

(1) Community legislation in the field of the environment aims to contribute to preserving, protecting and improving the quality of the environment and protecting human health.

(2) Community environmental legislation includes provisions for public authorities and other bodies to take decisions which may have a significant effect on the environment as well as on personal health and well-being.

(3) Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

([1]) OJ C 154 E, 29.5.2001, p. 123.
([2]) OJ C 221, 7.8.2001, p. 65.
([3]) OJ C 357, 14.12.2001, p. 58.
([4]) Opinion of the European Parliament of 23 October 2001 (OJ C 112, 9.5.2002, p. 125 (E)), Council Common Position of 25 April 2002 (OJ C 170 E, 16.7.2002, p. 22) and Decision of the European Parliament of 5 September 2002 (not yet published in the Official Journal). Decision of the European Parliament of 30 January 2003 and Decision of the Council of 4 March 2003.

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(4) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including *inter alia* by promoting environmental education of the public.

(5) On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Århus Convention). Community law should be properly aligned with that Convention with a view to its ratification by the Community.

(6) Among the objectives of the Århus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.

(7) Article 6 of the Århus Convention provides for public participation in decisions on the specific activities listed in Annex I thereto and on activities not so listed which may have a significant effect on the environment.

(8) Article 7 of the Århus Convention provides for public participation concerning plans and programmes relating to the environment.

(9) Article 9(2) and (4) of the Århus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.

(10) Provision should be made in respect of certain Directives in the environmental area which require Member States to produce plans and programmes relating to the environment but which do not contain sufficient provisions on public participation, so as to ensure public participation consistent with the provisions of the Århus Convention, in particular Article 7 thereof. Other relevant Community legislation already provides for public participation in the preparation of plans and programmes and, for the future, public participation requirements in line with the Århus Convention will be incorporated into the relevant legislation from the outset.

(11) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1], and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [2] should be amended to ensure that they are fully compatible with the provisions of the Århus Convention, in particular Article 6 and Article 9(2) and (4) thereof.

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[1] OJ L 175, 5.7.1985, p. 40. Directive as amended by Directive 97/11/EC (OJ L 73, 14.3.1997, p. 5).

[2] OJ L 257, 10.10.1996, p. 26.

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(12) Since the objective of the proposed action, namely to contribute to the implementation of the obligations arising under the Århus Convention, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective

The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention, in particular by:

(a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

(b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.

Article 2

Public participation concerning plans and programmes

1. For the purposes of this Article, 'the public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

2. Member States shall ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under the provisions listed in Annex I.

To that end, Member States shall ensure that:

(a) the public is informed, whether by public notices or other appropriate means such as electronic media where available, about any proposals for such plans or programmes or for their modification or review and that relevant information about such proposals is made available to the public including *inter alia* information about the right to participate in decision-making and about the competent authority to which comments or questions may be submitted;

(b) the public is entitled to express comments and opinions when all options are open before decisions on the plans and programmes are made;

(c) in making those decisions, due account shall be taken of the results of the public participation;

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(d) having examined the comments and opinions expressed by the public, the competent authority makes reasonable efforts to inform the public about the decisions taken and the reasons and considerations upon which those decisions are based, including information about the public participation process.

3. Member States shall identify the public entitled to participate for the purposes of paragraph 2, including relevant non-governmental organisations meeting any requirements imposed under national law, such as those promoting environmental protection.

The detailed arrangements for public participation under this Article shall be determined by the Member States so as to enable the public to prepare and participate effectively.

Reasonable time-frames shall be provided allowing sufficient time for each of the different stages of public participation required by this Article.

4. This Article shall not apply to plans and programmes designed for the sole purpose of serving national defence or taken in case of civil emergencies.

5. This Article shall not apply to plans and programmes set out in Annex I for which a public participation procedure is carried out under Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment ([1]) or under Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy ([2]).

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Article 4

Amendment of Directive 96/61/EC

Directive 96/61/EC is hereby amended as follows:

1. Article 2 shall be amended as follows:

(a) the following sentence shall be added to point 10(b):

‘For the purposes of this definition, any change to or extension of an operation shall be deemed to be substantial if the change or extension in itself meets the thresholds, if any, set out in Annex I.’;

(b) the following points shall be added:

‘13. “the public” shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

([1]) OJ L 197, 21.7.2001, p. 30.
([2]) OJ L 327, 22.12.2000, p. 1. Directive as amended by Decision No 2455/2001/EC (OJ L 331, 15.12.2001, p. 1).

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14. “the public concerned” shall mean the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest;’

2. in Article 6(1), first subparagraph, the following indent shall be added:

‘— the main alternatives, if any, studied by the applicant in outline.’

3. Article 15 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

‘1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for:

— issuing a permit for new installations,

— issuing a permit for any substantial change in the operation of an installation,

— updating of a permit or permit conditions for an installation in accordance with Article 13, paragraph 2, first indent.

The procedure set out in Annex V shall apply for the purposes of such participation.’;

(b) the following paragraph shall be added:

‘5. When a decision has been taken, the competent authority shall inform the public in accordance with the appropriate procedures and shall make available to the public the following information:

(a) the content of the decision, including a copy of the permit and of any conditions and any subsequent updates; and

(b) having examined the concerns and opinions expressed by the public concerned, the reasons and considerations on which the decision is based, including information on the public participation process.’;

4. the following Article shall be inserted:

‘Article 15a

Access to justice

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

(a) having a sufficient interest, or alternatively,

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

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

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

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

5. Article 17 shall be amended as follows:

(a) paragraph 1 shall be replaced by the following:

'1. Where a Member State is aware that the operation of an installation is likely to have significant negative effects on the environment of another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the application for a permit pursuant to Article 4 or Article 12(2) was submitted shall forward to the other Member State any information required to be given or made available pursuant to Annex V at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between the two Member States on a reciprocal and equivalent basis.';

(b) the following paragraphs shall be added:

'3. The results of any consultations pursuant to paragraphs 1 and 2 must be taken into consideration when the competent authority reaches a decision on the application.

4. The competent authority shall inform any Member State, which has been consulted pursuant to paragraph 1, of the decision reached on the application and shall forward to it the information referred to in Article 15(5). That Member State shall take the measures necessary to ensure that that information is made available in an appropriate manner to the public concerned in its own territory.';

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6. an Annex V shall be added, as set out in Annex II to this Directive.

Article 5

Reporting and review

By 25 June 2009, the Commission shall send a report on the application and effectiveness of this Directive to the European Parliament and to the Council. With a view to further integrating environmental protection requirements, in accordance with Article 6 of the Treaty, and taking into account the experience acquired in the application of this Directive in the Member States, such a report will be accompanied by proposals for amendment of this Directive, if appropriate. In particular, the Commission will consider the possibility of extending the scope of this Directive to other plans and programmes relating to the environment.

Article 6

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 June 2005 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

Article 7

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Union*.

Article 8

Addressees

This Directive is addressed to the Member States.

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ANNEX I

PROVISIONS FOR PLANS AND PROGRAMMES REFERRED TO IN ARTICLE 2

(a) Article 7(1) of Council Directive 75/442/EEC of 15 July 1975 on waste ([1]).

(b) Article 6 of Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances ([2]).

(c) Article 5(1) of Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources ([3]).

(d) Article 6(1) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste ([4]).

(e) Article 14 of Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste ([5]).

(f) Article 8(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management ([6]).

([1]) OJ L 194, 25.7.1975, p. 39. Directive as last amended by Commission Decision 96/350/EC (OJ L 135, 6.6.1996, p. 32).
([2]) OJ L 78, 26.3.1991, p. 38. Directive as last amended by Commission Directive 98/101/EC (OJ L 1, 5.1.1999, p. 1).
([3]) OJ L 375, 31.12.1991, p. 1.
([4]) OJ L 377, 31.12.1991, p. 20. Directive as last amended by Directive 94/31/EC (OJ L 168, 2.7.1994, p. 28).
([5]) OJ L 365, 31.12.1994, p. 10.
([6]) OJ L 296, 21.11.1996, p. 55.

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ANNEX II

In Directive 96/61/EC, the following Annex shall be added:

'ANNEX V

Public participation in decision-making

1. The public shall be informed (by public notices or other appropriate means such as electronic media where available) of the following matters early in the procedure for the taking of a decision or, at the latest, as soon as the information can reasonably be provided:

   (a) the application for a permit or, as the case may be, the proposal for the updating of a permit or of permit conditions in accordance with Article 15(1), including the description of the elements listed in Article 6(1);

   (b) where applicable, the fact that a decision is subject to a national or transboundary environmental impact assessment or to consultations between Member States in accordance with Article 17;

   (c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

   (d) the nature of possible decisions or, where there is one, the draft decision;

   (e) where applicable, the details relating to a proposal for the updating of a permit or of permit conditions;

   (f) an indication of the times and places where, or means by which, the relevant information will be made available;

   (g) details of the arrangements for public participation and consultation made pursuant to point 5.

2. Member States shall ensure that, within appropriate time-frames, the following is made available to the public concerned:

   (a) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned were informed in accordance with point 1;

   (b) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information (*), information other than that referred to in point 1 which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with point 1.

3. The public concerned shall be entitled to express comments and opinions to the competent authority before a decision is taken.

4. The results of the consultations held pursuant to this Annex must be taken into due account in the taking of a decision.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Annex.

(*) OJ L 41, 14.2.2003, p. 26.'

DIRECTIVE 2001/42/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 27 June 2001
on the assessment of the effects of certain plans and programmes on the environment

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the Economic and Social Committee [2],

Having regard to the opinion of the Committee of the Regions [3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4], in the light of the joint text approved by the Conciliation Committee on 21 March 2001,

Whereas:

(1) Article 174 of the Treaty provides that Community policy on the environment is to contribute to, *inter alia*, the preservation, protection and improvement of the quality of the environment, the protection of human health and the prudent and rational utilisation of natural resources and that it is to be based on the precautionary principle. Article 6 of the Treaty provides that environmental protection requirements are to be integrated into the definition of Community policies and activities, in particular with a view to promoting sustainable development.

(2) The Fifth Environment Action Programme: Towards sustainability — A European Community programme of policy and action in relation to the environment and sustainable development [5], supplemented by Council Decision No 2179/98/EC [6] on its review, affirms the importance of assessing the likely environmental effects of plans and programmes.

(3) The Convention on Biological Diversity requires Parties to integrate as far as possible and as appropriate the conservation and sustainable use of biological diversity into relevant sectoral or cross-sectoral plans and programmes.

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

(5) The adoption of environmental assessment procedures at the planning and programming level should benefit undertakings by providing a more consistent framework in which to operate by the inclusion of the relevant environmental information into decision making. The inclusion of a wider set of factors in decision making should contribute to more sustainable and effective solutions.

(6) The different environmental assessment systems operating within Member States should contain a set of common procedural requirements necessary to contribute to a high level of protection of the environment.

(7) The United Nations/Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context of 25 February 1991, which applies to both Member States and other States, encourages the parties to the Convention to apply its principles to plans and programmes as well; at the second meeting of the Parties to the Convention in Sofia on 26 and 27 February 2001, it was decided to prepare a legally binding protocol on strategic environmental assessment which would supplement the existing provisions on environmental impact assessment in a transboundary context, with a view to its possible adoption on the occasion of the 5th Ministerial Conference 'Environment for Europe' at an extraordinary meeting of the Parties to the Convention, scheduled for May 2003 in Kiev, Ukraine. The systems operating within the Community for environmental assessment of plans and programmes should ensure that there are adequate transboundary consultations where the implementation of a plan or programme being prepared in one Member State is likely to have significant effects on the environment of another Member State. The information on plans and programmes having significant effects on the environment of other States should be forwarded on a reciprocal and equivalent basis within an appropriate legal framework between Member States and these other States.

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[1] OJ C 129, 25.4.1997, p. 14 and OJ C 83, 25.3.1999, p. 13.
[2] OJ C 287, 22.9.1997, p. 101.
[3] OJ C 64, 27.2.1998, p. 63 and OJ C 374, 23.12.1999, p. 9.
[4] Opinion of the European Parliament of 20 October 1998 (OJ C 341, 9.11.1998, p. 18), confirmed on 16 September 1999 (OJ C 54, 25.2.2000, p. 76), Council Common Position of 30 March 2000 (OJ C 137, 16.5.2000, p. 11) and Decision of the European Parliament of 6 September 2000 (OJ C 135, 7.5.2001, p. 155). Decision of the European Parliament of 31 May 2001 and Decision of the Council of 5 June 2001.
[5] OJ C 138, 17.5.1993, p. 5.
[6] OJ L 275, 10.10.1998, p. 1.

(8) Action is therefore required at Community level to lay down a minimum environmental assessment framework, which would set out the broad principles of the environmental assessment system and leave the details to the Member States, having regard to the principle of subsidiarity. Action by the Community should not go beyond what is necessary to achieve the objectives set out in the Treaty.

(9) This Directive is of a procedural nature, and its requirements should either be integrated into existing procedures in Member States or incorporated in specifically established procedures. With a view to avoiding duplication of the assessment, Member States should take account, where appropriate, of the fact that assessments will be carried out at different levels of a hierarchy of plans and programmes.

(10) All plans and programmes which are prepared for a number of sectors and which set a framework for future development consent of projects listed in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1], and all plans and programmes which have been determined to require assessment pursuant to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild flora and fauna [2], are likely to have significant effects on the environment, and should as a rule be made subject to systematic environmental assessment. When they determine the use of small areas at local level or are minor modifications to the above plans or programmes, they should be assessed only where Member States determine that they are likely to have significant effects on the environment.

(11) Other plans and programmes which set the framework for future development consent of projects may not have significant effects on the environment in all cases and should be assessed only where Member States determine that they are likely to have such effects.

(12) When Member States make such determinations, they should take into account the relevant criteria set out in this Directive.

(13) Some plans or programmes are not subject to this Directive because of their particular characteristics.

(14) Where an assessment is required by this Directive, an environmental report should be prepared containing relevant information as set out in this Directive, identifying, describing and evaluating the likely significant environmental effects of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme; Member States should communicate to the Commission any measures they take concerning the quality of environmental reports.

(15) In order to contribute to more transparent decision making and with the aim of ensuring that the information supplied for the assessment is comprehensive and reliable, it is necessary to provide that authorities with relevant environmental responsibilities and the public are to be consulted during the assessment of plans and programmes, and that appropriate time frames are set, allowing sufficient time for consultations, including the expression of opinion.

(16) Where the implementation of a plan or programme prepared in one Member State is likely to have a significant effect on the environment of other Member States, provision should be made for the Member States concerned to enter into consultations and for the relevant authorities and the public to be informed and enabled to express their opinion.

(17) The environmental report and the opinions expressed by the relevant authorities and the public, as well as the results of any transboundary consultation, should be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

(18) Member States should ensure that, when a plan or programme is adopted, the relevant authorities and the public are informed and relevant information is made available to them.

(19) Where the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, such as Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds [3], Directive 92/43/EEC, or Directive 2000/60/EC of the European Parliament and the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [4], in order to avoid duplication of the assessment, Member States may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation.

(20) A first report on the application and effectiveness of this Directive should be carried out by the Commission five years after its entry into force, and at seven-year intervals thereafter. With a view to further integrating environmental protection requirements, and taking into account the experience acquired, the first report should, if appropriate, be accompanied by proposals for amendment of this Directive, in particular as regards the possibility of extending its scope to other areas/sectors and other types of plans and programmes,

[1] OJ L 175, 5.7.1985, p. 40. Directive as amended by Directive 97/11/EC (OJ L 73, 14.3.1997, p. 5).
[2] OJ L 206, 22.7.1992, p. 7. Directive as last amended by Directive 97/62/EC (OJ L 305, 8.11.1997, p. 42).
[3] OJ L 103, 25.4.1979, p. 1. Directive as last amended by Directive 97/49/EC (OJ L 223, 13.8.1997, p. 9).
[4] OJ L 327, 22.12.2000, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objectives

The objective of this Directive is to provide for a high level of protection of the environment and to contribute to the integration of environmental considerations into the preparation and adoption of plans and programmes with a view to promoting sustainable development, by ensuring that, in accordance with this Directive, an environmental assessment is carried out of certain plans and programmes which are likely to have significant effects on the environment.

Article 2

Definitions

For the purposes of this Directive:

(a) 'plans and programmes' shall mean plans and programmes, including those co-financed by the European Community, as well as any modifications to them:

— which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and

— which are required by legislative, regulatory or administrative provisions;

(b) 'environmental assessment' shall mean the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in decision-making and the provision of information on the decision in accordance with Articles 4 to 9;

(c) 'environmental report' shall mean the part of the plan or programme documentation containing the information required in Article 5 and Annex I;

(d) 'The public' shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups.

Article 3

Scope

1. An environmental assessment, in accordance with Articles 4 to 9, shall be carried out for plans and programmes referred to in paragraphs 2 to 4 which are likely to have significant environmental effects.

2. Subject to paragraph 3, an environmental assessment shall be carried out for all plans and programmes,

(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC, or

(b) which, in view of the likely effect on sites, have been determined to require an assessment pursuant to Article 6 or 7 of Directive 92/43/EEC.

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

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

5. Member States shall determine whether plans or programmes referred to in paragraphs 3 and 4 are likely to have significant environmental effects either through case-by-case examination or by specifying types of plans and programmes or by combining both approaches. For this purpose Member States shall in all cases take into account relevant criteria set out in Annex II, in order to ensure that plans and programmes with likely significant effects on the environment are covered by this Directive.

6. In the case-by-case examination and in specifying types of plans and programmes in accordance with paragraph 5, the authorities referred to in Article 6(3) shall be consulted.

7. Member States shall ensure that their conclusions pursuant to paragraph 5, including the reasons for not requiring an environmental assessment pursuant to Articles 4 to 9, are made available to the public.

8. The following plans and programmes are not subject to this Directive:

— plans and programmes the sole purpose of which is to serve national defence or civil emergency,

— financial or budget plans and programmes.

9. This Directive does not apply to plans and programmes co-financed under the current respective programming periods [1] for Council Regulations (EC) No 1260/1999 [2] and (EC) No 1257/1999 [3].

[1] The 2000-2006 programming period for Council Regulation (EC) No 1260/1999 and the 2000-2006 and 2000-2007 programming periods for Council Regulation (EC) No 1257/1999.

[2] Council Regulation (EC) No 1260/1999 of 21 June 1999 laying down general provisions on the Structural Funds (OJ L 161, 26.6.1999, p. 1).

[3] Council Regulation (EC) No 1257/1999 of 17 May 1999 on support for rural development from the European Agricultural Guidance and Guarantee Fund (EAGGF) and amending and repealing certain regulations (OJ L 160, 26.6.1999, p. 80).

Article 4

General obligations

1. The environmental assessment referred to in Article 3 shall be carried out during the preparation of a plan or programme and before its adoption or submission to the legislative procedure.

2. The requirements of this Directive shall either be integrated into existing procedures in Member States for the adoption of plans and programmes or incorporated in procedures established to comply with this Directive.

3. Where plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy. For the purpose of, *inter alia*, avoiding duplication of assessment, Member States shall apply Article 5(2) and (3).

Article 5

Environmental report

1. Where an environmental assessment is required under Article 3(1), an environmental report shall be prepared in which the likely significant effects on the environment of implementing the plan or programme, and reasonable alternatives taking into account the objectives and the geographical scope of the plan or programme, are identified, described and evaluated. The information to be given for this purpose is referred to in Annex I.

2. The environmental report prepared pursuant to paragraph 1 shall include the information that may reasonably be required taking into account current knowledge and methods of assessment, the contents and level of detail in the plan or programme, its stage in the decision-making process and the extent to which certain matters are more appropriately assessed at different levels in that process in order to avoid duplication of the assessment.

3. Relevant information available on environmental effects of the plans and programmes and obtained at other levels of decision-making or through other Community legislation may be used for providing the information referred to in Annex I.

4. The authorities referred to in Article 6(3) shall be consulted when deciding on the scope and level of detail of the information which must be included in the environmental report.

Article 6

Consultations

1. The draft plan or programme and the environmental report prepared in accordance with Article 5 shall be made available to the authorities referred to in paragraph 3 of this Article and the public.

2. The authorities referred to in paragraph 3 and the public referred to in paragraph 4 shall be given an early and effective opportunity within appropriate time frames to express their opinion on the draft plan or programme and the accompanying environmental report before the adoption of the plan or programme or its submission to the legislative procedure.

3. Member States shall designate the authorities to be consulted which, by reason of their specific environmental responsibilities, are likely to be concerned by the environmental effects of implementing plans and programmes.

4. Member States shall identify the public for the purposes of paragraph 2, including the public affected or likely to be affected by, or having an interest in, the decision-making subject to this Directive, including relevant non-governmental organisations, such as those promoting environmental protection and other organisations concerned.

5. The detailed arrangements for the information and consultation of the authorities and the public shall be determined by the Member States.

Article 7

Transboundary consultations

1. Where a Member State considers that the implementation of a plan or programme being prepared in relation to its territory is likely to have significant effects on the environment in another Member State, or where a Member State likely to be significantly affected so requests, the Member State in whose territory the plan or programme is being prepared shall, before its adoption or submission to the legislative procedure, forward a copy of the draft plan or programme and the relevant environmental report to the other Member State.

2. Where a Member State is sent a copy of a draft plan or programme and an environmental report under paragraph 1, it shall indicate to the other Member State whether it wishes to enter into consultations before the adoption of the plan or programme or its submission to the legislative procedure and, if it so indicates, the Member States concerned shall enter into consultations concerning the likely transboundary environmental effects of implementing the plan or programme and the measures envisaged to reduce or eliminate such effects.

Where such consultations take place, the Member States concerned shall agree on detailed arrangements to ensure that the authorities referred to in Article 6(3) and the public referred to in Article 6(4) in the Member State likely to be significantly affected are informed and given an opportunity to forward their opinion within a reasonable time-frame.

3. Where Member States are required under this Article to enter into consultations, they shall agree, at the beginning of such consultations, on a reasonable timeframe for the duration of the consultations.

Article 8

Decision making

The environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of any transboundary consultations entered into pursuant to Article 7 shall be taken into account during the preparation of the plan or programme and before its adoption or submission to the legislative procedure.

Article 9

Information on the decision

1. Member States shall ensure that, when a plan or programme is adopted, the authorities referred to in Article 6(3), the public and any Member State consulted under Article 7 are informed and the following items are made available to those so informed:

(a) the plan or programme as adopted;

(b) a statement summarising how environmental considerations have been integrated into the plan or programme and how the environmental report prepared pursuant to Article 5, the opinions expressed pursuant to Article 6 and the results of consultations entered into pursuant to Article 7 have been taken into account in accordance with Article 8 and the reasons for choosing the plan or programme as adopted, in the light of the other reasonable alternatives dealt with, and

(c) the measures decided concerning monitoring in accordance with Article 10.

2. The detailed arrangements concerning the information referred to in paragraph 1 shall be determined by the Member States.

Article 10

Monitoring

1. Member States shall monitor the significant environmental effects of the implementation of plans and programmes in order, *inter alia*, to identify at an early stage unforeseen adverse effects, and to be able to undertake appropriate remedial action.

2. In order to comply with paragraph 1, existing monitoring arrangements may be used if appropriate, with a view to avoiding duplication of monitoring.

Article 11

Relationship with other Community legislation

1. An environmental assessment carried out under this Directive shall be without prejudice to any requirements under Directive 85/337/EEC and to any other Community law requirements.

2. For plans and programmes for which the obligation to carry out assessments of the effects on the environment arises simultaneously from this Directive and other Community legislation, Member States may provide for coordinated or joint procedures fulfilling the requirements of the relevant Community legislation in order, *inter alia*, to avoid duplication of assessment.

3. For plans and programmes co-financed by the European Community, the environmental assessment in accordance with this Directive shall be carried out in conformity with the specific provisions in relevant Community legislation.

Article 12

Information, reporting and review

1. Member States and the Commission shall exchange information on the experience gained in applying this Directive.

2. Member States shall ensure that environmental reports are of a sufficient quality to meet the requirements of this Directive and shall communicate to the Commission any measures they take concerning the quality of these reports.

3. Before 21 July 2006 the Commission shall send a first report on the application and effectiveness of this Directive to the European Parliament and to the Council.

With a view further to integrating environmental protection requirements, in accordance with Article 6 of the Treaty, and taking into account the experience acquired in the application of this Directive in the Member States, such a report will be accompanied by proposals for amendment of this Directive, if appropriate. In particular, the Commission will consider the possibility of extending the scope of this Directive to other areas/sectors and other types of plans and programmes.

A new evaluation report shall follow at seven-year intervals.

4. The Commission shall report on the relationship between this Directive and Regulations (EC) No 1260/1999 and (EC) No 1257/1999 well ahead of the expiry of the programming periods provided for in those Regulations, with a view to ensuring a coherent approach with regard to this Directive and subsequent Community Regulations.

Article 13

Implementation of the Directive

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 21 July 2004. They shall forthwith inform the Commission thereof.

2. When Member States adopt the measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.

3. The obligation referred to in Article 4(1) shall apply to the plans and programmes of which the first formal preparatory act is subsequent to the date referred to in paragraph 1. Plans and programmes of which the first formal preparatory act is before that date and which are adopted or submitted to the legislative procedure more than 24 months thereafter, shall be made subject to the obligation referred to in Article 4(1) unless Member States decide on a case by case basis that this is not feasible and inform the public of their decision.

4. Before 21 July 2004, Member States shall communicate to the Commission, in addition to the measures referred to in paragraph 1, separate information on the types of plans and programmes which, in accordance with Article 3, would be subject to an environmental assessment pursuant to this Directive. The Commission shall make this information available to the Member States. The information will be updated on a regular basis.

Article 14

Entry into force

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

Article 15

Addressees

This Directive is addressed to the Member States.

Done at Luxembourg, 27 June 2001.

For the European Parliament	*For the Council*
The President	*The President*
N. FONTAINE	B. ROSENGREN

ANNEX I

Information referred to in Article 5(1)

The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:

(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;

(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;

(c) the environmental characteristics of areas likely to be significantly affected;

(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;

(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;

(f) the likely significant effects [1] on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;

(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;

(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;

(i) a description of the measures envisaged concerning monitoring in accordance with Article 10;

(j) a non-technical summary of the information provided under the above headings.

[1] These effects should include secondary, cumulative, synergistic, short, medium and long-term permanent and temporary, positive and negative effects.

ANNEX II

Criteria for determining the likely significance of effects referred to in Article 3(5)

1. The characteristics of plans and programmes, having regard, in particular, to
   - the degree to which the plan or programme sets a framework for projects and other activities, either with regard to the location, nature, size and operating conditions or by allocating resources,
   - the degree to which the plan or programme influences other plans and programmes including those in a hierarchy,
   - the relevance of the plan or programme for the integration of environmental considerations in particular with a view to promoting sustainable development,
   - environmental problems relevant to the plan or programme,
   - the relevance of the plan or programme for the implementation of Community legislation on the environment (e.g. plans and programmes linked to waste-management or water protection).
2. Characteristics of the effects and of the area likely to be affected, having regard, in particular, to
   - the probability, duration, frequency and reversibility of the effects,
   - the cumulative nature of the effects,
   - the transboundary nature of the effects,
   - the risks to human health or the environment (e.g. due to accidents),
   - the magnitude and spatial extent of the effects (geographical area and size of the population likely to be affected),
   - the value and vulnerability of the area likely to be affected due to:
     - special natural characteristics or cultural heritage,
     - exceeded environmental quality standards or limit values,
     - intensive land-use,
   - the effects on areas or landscapes which have a recognised national, Community or international protection status.

JUDGMENT OF THE COURT (Grand Chamber)

18 October 2011 (*)

(Assessment of the effects of projects on the environment – Directive 85/337/EEC – Scope – Concept of 'specific act of national legislation' – Aarhus Convention – Access to justice in environmental matters – Extent of the right to a review procedure in respect of a legislative act)

In Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09,

REFERENCES for a preliminary ruling under Article 234 EC from the Conseil d'État (Belgium), made by decisions of 27 and 31 March 2009, received at the Court on 6, 9 and 10 April 2009, in the proceedings

Antoine Boxus,

Willy Roua (C-128/09),

Guido Durlet and Others (C-129/09),

Paul Fastrez,

Henriette Fastrez (C-130/09),

Philippe Daras (C-131/09),

Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh) (C-134/09 and C-135/09),

Bernard Page (C-134/09),

Léon L'Hoir,

Nadine Dartois (C-135/09)

v

Région wallonne,

interveners:

Société régionale wallonne du transport (SRWT) (C-128/09 and C-129/09),

Infrabel SA (C-130/09 and C-131/09),

Société wallonne des aéroports (SOWEAR) (C-135/09),

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot (Rapporteur), Presidents of Chambers, K. Schiemann, E. Juhász, G. Arestis, A. Borg Barthet, M. Ilešič, A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 8 June 2010,

after considering the observations submitted on behalf of:

– Mr Boxus, Mr Roua and Mr Durlet and Others, by A. Kettels, Rechtsanwältin,

– Mr and Mrs Fastrez, by T. Vandenput, avocat,

– Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), Mr Page, Mr L'Hoir and Ms Dartois, by A. Lebrun, avocat,

– the Belgian Government, by T. Materne, acting as Agent, and F. Haumont, avocat,

– the Greek Government, by G. Karipsiadis, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and G. Fiengo, avvocato dello Stato,

– the European Commission, by O. Beynet and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 May 2011,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Articles 6 and 9 of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention'), and of Articles 1, 5 to 8 and 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337').

2 The references have been made in the course of proceedings brought by persons living near Liège-Bierset and Brussels South Charleroi airports and the Brussels to Charleroi railway line against the Région wallonne (Walloon Region) concerning consents for works granted in respect of those installations.

Legal context

International law

3 Pursuant to Article 2(2) of the Aarhus Convention, 'public authority' as defined 'does not include bodies or institutions acting in a … legislative capacity'.

4 Article 6 of the Aarhus Convention states:

'1. Each Party:

(a) shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

(c) may decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defence purposes, if that Party deems that such application would have an adverse effect on these purposes.

2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:

(a) the proposed activity and the application on which a decision will be taken;

(b) the nature of possible decisions or the draft decision;

(c) the public authority responsible for making the decision;

(d) the envisaged procedure, including, as and when this information can be provided:

(i) the commencement of the procedure;

(ii) the opportunities for the public to participate;

(iii) the time and venue of any envisaged public hearing;

(iv) an indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;

(v) an indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and

(vi) an indication of what environmental information relevant to the proposed activity is available; and

(e) the fact that the activity is subject to a national or transboundary environmental impact assessment procedure.

3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.

4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.

…'

5 Article 9(2) of the Aarhus Convention states:

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

(a) having a sufficient interest or, alternatively,

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

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.'

European Union law

6 Article 1(2) of Directive 85/337 defines 'project' as 'the execution of construction works or of other installations or schemes' or 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. '[D]evelopment consent' is defined as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

7 Article 1(5) of Directive 85/337 provides:

‘This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.’

8 Article 2(1) of Directive 85/337 provides:

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

9 Article 5(4) of Directive 85/337 provides:

‘Member States shall, if necessary, ensure that any authorities holding relevant information … shall make this information available to the developer.’

10 Under Article 10a of Directive 85/337:

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

(a) having a sufficient interest, or alternatively,

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

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

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

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

National law

11 Articles 6, 7, 9 and 14 of the Decree of the Walloon Parliament of 17 July 2008 on certain consents for which there are overriding reasons in the general interest (decrét du Parlement wallon du 17 juillet 2008 relatif à quelques permis pour lesquels il existe des motifs impérieux d'intérêt général) (*Moniteur belge* of 25 July 2008, p. 38900) provide:

'Article 6. The following consent, for which overriding reasons in the general interest have been established, is hereby ratified:

– as regards the acts and development works relating to the infrastructure and reception buildings of regional airports, the Ministerial Order of 13 September 2006 granting planning consent to Société régionale wallonne des Transports for extension of the runway of Liège-Bierset Airport.

Article 7. The following consent, for which overriding reasons in the general interest have been established, is hereby ratified:

– as regards the acts and development works relating to the infrastructure and reception buildings of regional airports, the planning consent of 16 September 2003 issued by the designated official of the Charleroi Directorate General for Town and Country Planning, Housing and Heritage to SOWAER SA for the implementation of works to vault the Tintia stream and alteration of the ground relief in the north-eastern part of the airport area.

…

Article 9. The following consent, for which overriding reasons in the general interest have been established, is hereby ratified:

– as regards the acts and development works relating to the infrastructure and reception buildings of regional airports, the Ministerial Order of 27 July 2005 relating to the environmental consent issued to SOWAER SA to operate Brussels South Charleroi Airport.

…

Article 14. The following consent, for which overriding reasons in the general interest have been established, is hereby ratified:

– as regards the regional express network and the associated structures, access ways and service ways, the Ministerial Order of 9 February 2006 relating to the combined consent issued to SNCB (Belgian National Railways) for the construction and operation of the third and fourth tracks on Infrabel line 124 from Brussels to Charleroi in the municipalities of Waterloo, Braine-l'Alleud and Nivelles.'

12 It is clear, in essence, from the file that the Conseil d'État (Council of State) has jurisdiction to rule on actions for annulment brought against administrative acts and regulations of the administrative authorities and against the administrative acts of the legislative assemblies or their organs.

13 On the other hand, it does not have jurisdiction to hear actions brought against acts of a legislative nature.

14 The ratification by decree of the Walloon Parliament of building consents and authorisations to carry out works gives such acts legislative status. Consequently, the Conseil d'État ceases to have jurisdiction to hear actions for annulment brought against the acts which have been ratified; they can henceforth be challenged only before the Cour constitutionnelle (Constitutional Court), before which, however, only certain grounds may be pleaded.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 The Conseil d'État has before it six actions by which persons living near Liège-Bierset and Brussels South Charleroi airports and near the Brussels to Charleroi railway line have challenged a series of consents and authorisations adopted by the competent administrative authorities concerning the carrying out of works or the operation of installations in connection with those airports and transport links to them.

16 While those actions were pending before the Conseil d'État, the Decree of the Walloon Parliament of 17 July 2008, which is a legislative act adopted by the Walloon Parliament and approved by the government of the Walloon Region, 'ratified' those consents and authorisations, that is to say, it validated them on the basis of 'overriding reasons in the general interest'.

17 Several actions for annulment of that decree were brought before the Cour constitutionnelle.

18 In the proceedings before the referring court, the applicants argued that, since an act of a legislative nature has replaced the contested administrative acts and that legislative act can be challenged only before the Cour constitutionnelle, the effect of the adoption of the abovementioned decree of 17 July 2008 is to deprive the Conseil d'État of jurisdiction and to deprive them of their interest in the annulment of the administrative acts. In addition, the action for annulment before the Cour constitutionnelle does not, in the applicants' submission, comply with Article 9 of the Aarhus Convention and with Article 10a of Directive 85/337 inasmuch as the Cour constitutionnelle has only a limited power of review, in respect of the constitutionality of legislative acts and therefore the infringement of fundamental rights, and not a full power of review of the substance, with regard to compliance with all the provisions of national environmental law, and of the applicable procedural rules.

19 It was in that context that the Conseil d'État decided to stay the proceedings, to refer various questions to the Cour constitutionnelle for a preliminary ruling on the constitutionality of the Decree of the Walloon Parliament of 17 July 2008 and to refer to the Court of Justice for a preliminary ruling the following questions, which partly overlap with the questions referred to the Cour constitutionnelle and are identical in each of the cases before the referring court:

'(1) Can Article 1(5) of Directive 85/337 … be interpreted as excluding from its application legislation – such as the Decree of the Walloon [Parliament] … of 17 July 2008 – which merely states that "overriding reasons in the general interest have been established" for the grant of planning consents, environmental consents and combined planning and environmental consents relating to the acts and works listed therein and which "ratifies"

consents in respect of which it is stated that "overriding reasons in the general interest have been established"?

(2) Do Articles 1, 5, 6, 7, 8 and 10a of Directive 85/337 … preclude a legal regime in which the right to implement a project subject to an environmental impact assessment is conferred by a legislative act against which no review procedure is available before a court of law or another independent and impartial body established by law which makes it possible to challenge, both in terms of the substance and the procedure followed, the decision granting the right to implement the project?

(3) Must Article 9 of the Aarhus Convention … be interpreted as requiring the Member States to provide for the possibility of seeking a review before a court of law or another independent and impartial body established by law in order to be able to challenge the legality, in relation to any issue of substance or procedure relating to the substantive or procedural rules governing the authorisation of projects subject to an impact assessment, of decisions, acts or omissions subject to the provisions of Article 6?

(4) In the light of the Aarhus Convention …, must Article 10a of Directive 85/337 … be interpreted as requiring the Member States to provide for the possibility of seeking a review before a court of law or another independent and impartial body established by law in order to be able to challenge the legality of decisions, acts or omissions in relation to any issue of substance or procedure relating to the substantive or procedural rules governing the authorisation of projects subject to an impact assessment?'

20 By order of the President of the Court of 19 May 2009, Cases C-128/09 to C-131/09, C-134/09 and C-135/09 were joined for the purposes of the written and oral procedure and of the judgment.

Consideration of the questions referred

Admissibility

21 The Belgian Government claims that the references for a preliminary ruling are inadmissible. It asserts that those references do not set out sufficiently the factual and legislative context and the grounds which led the referring court to submit questions to the Court and, in addition, that the questions referred are hypothetical.

22 In that regard, it must be recalled that it is for the national court before which the dispute has been brought, which alone has direct knowledge of the facts giving rise to the dispute and must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of European Union law, the Court of Justice is bound, in principle, to give a ruling (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

23 However, it is clear from the settled case-law of the Court that the need to provide an interpretation of European Union law which will be of use to the national court makes it necessary for the national court to define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are

based (see, inter alia, Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6).

24 The information provided in orders for reference serves not only to enable the Court to give helpful answers but also to enable the governments of the Member States and the other interested parties to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is the Court's duty to ensure that the opportunity to submit observations is safeguarded, having regard to the fact that, by virtue of that provision, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language or languages of each Member State (See Joined Cases 141/81 to 143/81 *Holdijk and Others* [1982] ECR 1299, paragraph 6).

25 In the present instance, contrary to what the Belgian Government asserts, the factual and legislative context, as set out in the orders for reference, provides the grounds which led the referring court to submit questions to the Court and also the details enabling the governments of the Member States and the other interested parties to submit observations pursuant to Article 23 of the Statute of the Court of Justice and allowing the Court to give a helpful answer to the referring court.

26 That legal and factual context is sufficient to clarify the questions asked by the referring court, which concern the compatibility with the right of access to justice, guaranteed both by the Aarhus Convention and by Directive 85/337, of an act with legislative status whose adoption has the consequence that the referring court can no longer hear cases already brought before it.

27 The content of the observations submitted to the Court in the present cases shows, in any event, that the information on the factual and legal context was sufficient to enable the parties to the main proceedings and the other interested parties to state their views effectively on the questions referred.

28 Furthermore, the fact that adoption of the Decree of the Walloon Parliament of 17 July 2008 has the effect, under national law, of depriving the referring court of its jurisdiction to rule on the administrative acts at issue in the main proceedings does not, contrary to the Belgian Government's submissions, render the questions referred hypothetical. Those questions are intended to determine in advance whether, in the light of the relevant provisions of the Aarhus Convention and European Union law, that decree was capable of depriving the Conseil d'État of its jurisdiction to decide the cases in the main proceedings.

29 Finally, as regards the argument alleging that the Conseil d'État does not explain the reasons why it did not wait, before referring question to the Court, until the Cour constitutionnelle had ruled on other questions which it had referred to that court in the same cases, it is sufficient to recall that, as has been stated in paragraph 25 of the present judgment, the orders for reference provide the grounds which led the Conseil d'État to submit questions to the Court.

30 The Belgian Government puts forward, in the alternative, other objections of inadmissibility alleging that the meaning and scope of the provisions whose interpretation is sought are entirely unambiguous, that certain questions are irrelevant and, finally, that the Court has already ruled on the scope of Article 1(5) of Directive 85/337.

31 It must be recalled in that regard that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of European Union law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the provision of European Union law in question has already been interpreted by the Court or that the correct application of European Union law is so obvious as to leave no scope for any reasonable doubt (see, in particular, Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 21).

32 However, it follows from settled case-law that national courts and tribunals remain, in any event, entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so (see, in particular, *Cilfit and Others*, paragraph 15) and the fact that the provisions whose interpretation is sought have already been interpreted by the Court or can be regarded as leaving no scope for any reasonable doubt does not deprive the Court of jurisdiction to give a ruling (see, to that effect, in particular, Case C-260/07 *Pedro IV Servicios* [2009] ECR I-2437, paragraph 31).

33 Finally, it does not appear, in the light of the orders for reference, that the questions referred are irrelevant to the resolution of the disputes pending before the Conseil d'État. As has been stated in paragraph 28 of the present judgment, those questions are intended to determine in advance whether, in the light of the relevant provisions of the Aarhus Convention and European Union law, the Decree of the Walloon Parliament of 17 July 2008 was capable of depriving the Conseil d'État of its jurisdiction to decide the cases in the main proceedings.

34 It follows that the references for a preliminary ruling are admissible.

The first question

35 By its first question the referring court asks, in essence, whether Article 1(5) of Directive 85/337 must be interpreted as meaning that an act, such as the Decree of the Walloon Parliament of 17 July 2008, which 'ratifies', by giving them legislative status, planning, environmental or works consents previously granted by the administrative authorities, in respect of which it is declared that 'overriding reasons in the general interest have been established', is excluded from the scope of the directive.

36 It follows from that provision that, where the objectives of Directive 85/337, including that of supplying information, are achieved through a legislative process, the directive does not apply to the project in question (see Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 51).

37 The provision lays down two conditions for the exclusion of a project from the scope of Directive 85/337. The first requires the details of the project to be adopted by a specific legislative act. Under the second, the objectives of the directive, including that of supplying information, must be achieved through the legislative process (see Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 57).

38 The first condition entails, first of all, adoption of the project by a specific legislative act. It should be pointed out in this regard that the terms 'project' and 'consent' are defined in Article 1(2) of Directive 85/337. Thus, a legislative act adopting a project must, if it is to come within the scope of Article 1(5) of the directive, be specific and display the same

characteristics as a consent of that kind. It must in particular grant the developer the right to carry out the project (see *WWF and Others*, paragraph 58).

39 The project must also be adopted in detail, that is to say, in a sufficiently precise and definitive manner, so that the legislative act adopting the project must include, like a development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment (see *WWF and Others*, paragraph 59). The legislative act must therefore demonstrate that the objectives of Directive 85/337 have been achieved as regards the project in question (see *Linster*, paragraph 56).

40 It follows that the details of a project cannot be considered to be adopted by a legislative act, for the purposes of Article 1(5) of Directive 85/337, if that act does not include the elements necessary to assess the environmental impact of the project or if the adoption of other measures is needed in order for the developer to be entitled to proceed with the project (see *WWF and Others*, paragraph 62, and *Linster*, paragraph 57).

41 As regards the second condition, it is clear from Article 2(1) of Directive 85/337 that the fundamental objective of the directive is to ensure that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their environmental effects before consent is given (see *Linster*, paragraph 52).

42 In addition, the sixth recital in the preamble to Directive 85/337 states that the assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question (see *WWF and Others*, paragraph 61, and *Linster*, paragraph 53).

43 Consequently, the legislature must have sufficient information at its disposal at the time when the project is adopted. It is apparent from Article 5(3) of Directive 85/337 and Annex IV thereto that the minimum information to be supplied by the developer is to include a description of the project comprising information on the site, design and size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, and the data required to identify and assess the main effects which the project is likely to have on the environment (see *Linster*, paragraph 55).

44 Having regard to the characteristics of procedures for the approval of a plan in more than one phase, Directive 85/337 does not preclude a single project from being approved by two acts of national law which are considered, as a whole, to be a development consent within the meaning of Article 1(2) thereof (see, to that effect, Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraph 102). Consequently, the legislature can, when adopting the final act authorising a project, take advantage of the information gathered during a prior administrative procedure.

45 However, the existence of such an administrative procedure cannot have the effect of enabling a project to be regarded as a project the details of which are adopted by a specific legislative act in accordance with Article 1(5) of Directive 85/337 if that legislative act does not fulfil the two conditions set out in paragraph 37 of the present judgment. Thus, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative

process which enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the scope of Directive 85/337.

46 In particular, a legislative act adopted without the members of the legislative body having had available to them the information mentioned in paragraph 43 of the present judgment cannot fall within the scope of Article 1(5) of Directive 85/337.

47 It is for the national court to determine whether those conditions have been satisfied. For that purpose, it must take account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates.

48 The answer to the first question therefore is that Article 1(5) of Directive 85/337 must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the directive's scope. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the scope of Directive 85/337.

The second, third and fourth questions

49 By its second, third and fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as precluding the right to implement a project which falls within their scope from being granted by a legislative act against which, under national law, no review procedure is available before a court of law or another independent and impartial body established by law that enables that act to be challenged as to the substance and the procedure.

50 It follows from Article 2(2) of the Aarhus Convention, read together with Articles 6 and 9 thereof, and from Article 1(5) of Directive 85/337 that neither the Convention nor the directive applies to projects adopted by a legislative act satisfying the conditions set out in paragraph 37 of the present judgment.

51 For other projects, that is to say, those adopted either by an act which is not legislative in nature or by a legislative act which does not fulfil those conditions, it follows from the very terms of Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337 that the Member States must provide for a review procedure before a court of law or another independent and impartial body established by law for challenging the substantive or procedural legality of decisions, acts or omissions subject, respectively, to Article 6 of the Aarhus Convention or Directive 85/337.

52 By virtue of their procedural autonomy, the Member States have a discretion in implementing Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337, subject to compliance with the principles of equivalence and effectiveness. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedure referred to in those provisions and what procedural rules are applicable.

53 However, Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 would lose all effectiveness if the mere fact that a project is adopted by a legislative act which does not fulfil the conditions set out in paragraph 37 of the present judgment were to make it immune to any review procedure for challenging its substantive or procedural legality within the meaning of those provisions.

54 The requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337 presuppose in this regard that, when a project falling within the scope of Article 6 of the Aarhus Convention or of Directive 85/337 is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive and set out in paragraph 37 of the present judgment must be amenable to review, under the national procedural rules, by a court of law or an independent and impartial body established by law.

55 If no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous paragraph and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.

56 In the present instance, if the referring court finds that the Decree of the Walloon Parliament of 17 July 2008 does not satisfy the conditions laid down in Article 1(5) of Directive 85/337 and recalled in paragraph 37 of the present judgment, and if it turns out that, under the applicable national rules, no court of law or independent and impartial body established by law has jurisdiction to review the substantive or procedural validity of that decree, the decree must then be regarded as incompatible with the requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337. The referring court must then disapply it.

57 The answer to the second, third and fourth questions therefore is that Article 9(2) of the Aarhus Convention and Article 10a of Directive 85/337 must be interpreted as meaning that:

– when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law;

– if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.

Costs

58 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 1(5) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that only projects the details of which have been adopted by a specific legislative act, in such a way that the objectives of that directive have been achieved by the legislative process, are excluded from the directive's scope. It is for the national court to verify that those two conditions have been satisfied, taking account both of the content of the legislative act adopted and of the entire legislative process which led to its adoption, in particular the preparatory documents and parliamentary debates. In that regard, a legislative act which does no more than simply 'ratify' a pre-existing administrative act, by merely referring to overriding reasons in the general interest without a substantive legislative process enabling those conditions to be fulfilled having first been commenced, cannot be regarded as a specific legislative act for the purposes of that provision and is therefore not sufficient to exclude a project from the scope of Directive 85/337, as amended by Directive 2003/35.**

2. **Article 9(2) of the Convention on access to information, public participation in decision making and access to justice in environmental matters, concluded on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, and Article 10a of Directive 85/337, as amended by Directive 2003/35, must be interpreted as meaning that:**

– **when a project falling within the scope of those provisions is adopted by a legislative act, the question whether that legislative act satisfies the conditions laid down in Article 1(5) of that directive must be capable of being submitted, under the national procedural rules, to a court of law or an independent and impartial body established by law;**

– **if no review procedure of the nature and scope set out above were available in respect of such an act, any national court before which an action falling within its jurisdiction is brought would have the task of carrying out the review described in the previous indent and, as the case may be, drawing the necessary conclusions by disapplying that legislative act.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

30 April 2009 (*)

(Directive 85/337/EEC – Assessment of the effects of projects on the environment – Obligation to make public the reasons for a determination not to make a project subject to an assessment)

In Case C-75/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Court of Appeal (England & Wales) (Civil Division) (United Kingdom), made by decision of 8 February 2008, received at the Court on 21 February 2008, in the proceedings

The Queen, on the application of

Christopher Mellor

v

Secretary of State for Communities and Local Government,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot (Rapporteur), K. Schiemann, P. Kūris and L. Bay Larsen, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr C. Mellor, by R. Harwood, Barrister and R. Buxton, Solicitor,

– the United Kingdom Government, by L. Seeboruth, acting as Agent,

– the Commission of the European Communities, by P. Oliver and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 January 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain

public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337').

2 The reference has been made in the course of proceedings between Mr Mellor and the Secretary of State for Communities and Local Government ('the Secretary of State'), relating to whether or not it is necessary to give reasons for the determination made by the competent national authority not to proceed to an environmental impact assessment ('EIA') when evaluating a request for development consent to build a hospital, a project falling within Annex II to Directive 85/337.

Legal context

Community legislation

3 Article 2(1) of Directive 85/337 provides:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

4 Article 4 of Directive 85/337 states:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

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

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

5 Article 6 of Directive 85/337 provides:

‘1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or on a case-by-case basis. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure …;

…

(d) the nature of possible decisions or, where there is one, the draft decision;

…

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information …, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.'

6 Article 9 of Directive 85/337 states:

'1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

– the content of the decision and any conditions attached thereto,

– having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

– a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.'

7 Article 10a of Directive 85/337 provides:

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

(a) having a sufficient interest, or alternatively,

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

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

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

…’

National legislation

8 The rules governing EIA, laid down by Directive 85/337, were originally implemented by The Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 (S.I. 1988/1199).

9 Following the amendments to Directive 85/337 made by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), those regulations were replaced by The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 (S.I. 1999/293), as amended by The Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 2006 (S.I. 2006/3295), (‘the EIA Regulations’).

10 Schedules 1 to 3 to the EIA Regulations correspond to Annexes I to III to Directive 85/337.

11 Regulation 2(1) of the EIA Regulations provides that an ‘“EIA application” means an application for planning permission for EIA development’, that is to say a development for which an EIA is necessary.

12 Under that same provision, ‘EIA development’ means:

‘(a) Schedule 1 development;

or

(b) Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location.’

13 It is apparent from Regulation 2(1) of the EIA Regulations that a development is a ‘Schedule 2 Development’ when it is a:

‘… development, other than exempt development, of a description mentioned in Column 1 of the table in Schedule 2 where –

(a) any part of that development is to be carried out in a sensitive area; or

(b) any applicable threshold or criterion in the corresponding part of Column 2 of that table is respectively exceeded or met in relation to that development’.

14 Section 10(b) of Schedule 2 to the EIA Regulations concerns ‘urban development projects’ (column one) the area of which exceeds 0.5 hectares (column two).

15 Under Regulation 2(1)(h) of the EIA Regulations, areas of outstanding natural beauty are ‘sensitive areas’.

16 It is apparent from Regulation 4(2) of the EIA Regulations that a Schedule 2 development is regarded as EIA development, that is to say, a development for which an EIA

is necessary, where the applicant voluntarily submits an 'environmental statement' for the purposes of the EIA Regulations, or upon the adoption by the relevant planning authority, on an application or of its own motion, of a screening opinion to the effect that the development is EIA development.

17 Where a request for Schedule 2 Development consent is not accompanied by an environmental statement, determinations concerning the need for an EIA are made by the relevant planning authority in the form of screening opinion and by the Secretary of State in the form of a screening direction.

18 Under Regulation 2(1) of the EIA Regulations:

– a 'screening opinion' means 'a written statement of the opinion of the relevant planning authority as to whether development is EIA development'; and

– a 'screening direction' means 'a direction made by the Secretary of State as to whether development is EIA development'.

19 Under Regulation 4(3) of the EIA Regulations, a screening direction issued by the Secretary of State overrides environmental statements and screening opinions adopted by the local planning authority.

20 In accordance with Regulation 5(4) of the EIA Regulations, a screening opinion must be adopted within three weeks, or such longer period as may be agreed in writing with the person making the request.

21 Pursuant to Regulation 5(6) of the EIA Regulations, where an authority fails to adopt a screening opinion within the relevant period, or adopts an opinion to the effect that the development is EIA development, the person who requested the opinion may request the Secretary of State to make a screening direction.

22 According to Regulation 4(6) of the EIA Regulations, where a screening opinion or a screening direction to the effect that development is EIA development is adopted, 'that opinion or direction shall be accompanied by a written statement giving clearly and precisely the full reasons for that conclusion'.

23 In accordance with Regulation 4(5) of the EIA Regulations, a screening opinion or screening direction must take into account the criteria set out in Schedule 3 to the EIA Regulations.

24 Among the criteria set out in Schedule 3 to the EIA Regulations are:

– 'Characteristics of development';

– 'Location of development', and

– 'Characteristics of the potential impact'.

25 The EIA Regulations do not, however, provide for communication of the reasons for a screening opinion or screening direction which does not classify the development in question as EIA development.

The dispute in the main proceedings and the questions referred for a preliminary ruling

26 It is apparent from the order for reference that, in October 2004, Partnerships in Care ('PiC') lodged an application with the competent local planning authority, Harrogate Borough Council ('the Council'), for planning permission to construct a medium secure hospital unit at HMS Forest Moor on a site in the open countryside of the Nidderdale Area of Outstanding Natural Beauty ('Nidderdale AONB') on which a former naval base had been located. Planning permission was granted in August 2005.

27 Following proceedings brought by a local resident, the planning permission was quashed by the High Court of Justice (England & Wales), Queen's Bench Division, on 5 April 2006, on the ground, inter alia, that the Council had failed to adopt an EIA screening opinion.

28 On 7 July 2006, PiC's planning consultants applied to the Council for a screening opinion under Regulation 5 of the EIA Regulations.

29 On 24 July 2006, Residents for the Protection of Nidderdale then wrote to the Council arguing that an EIA was required for the project.

30 On 25 August 2006, the Council issued its screening opinion which concluded that the proposed development would not have a significant effect on the environment such as to warrant an EIA.

31 On 4 September 2006, Mr Mellor wrote to the Council on behalf of the Residents for the Protection of Nidderdale arguing that the screening opinion ought to have insisted on an EIA.

32 On 3 October 2006, PiC, relying on the Council's opinion of 25 August 2006, submitted the planning application at issue in the main proceedings.

33 On 20 October 2006, PiC's planning consultants, having been informed that the Council was changing its position on the need for an EIA, wrote to the Government Office for Yorkshire and the Humber to ask the Secretary of State for a screening direction.

34 On 23 October 2006, the Council did in fact alter its position in a fresh screening opinion and, on the basis of information provided by Mr Mellor and having sought further advice, decided that an EIA was required.

35 On 4 December 2006, the Secretary of State, to whom the matter had been referred by the PiC, issued a screening direction which was contrary to the latest opinion issued by the Council.

36 Considering that the development at issue was a 'Schedule 2 Development' within the meaning of the EIA Regulations, the Secretary of State decided as follows:

'… in the opinion of the Secretary of State and having taken into account the selection criteria in Schedule 3 to the 1999 Regulations and the representations made by Mr C. Mellor on behalf of Residents for the Protection of Nidderdale, the proposal would not be likely to have significant effects on the environment by virtue of factors such as its nature, size or location.

Accordingly, in exercise of the powers conferred on him by regulation 6(4) of the 1999 Regulations the Secretary of State hereby directs that the proposed development described in your request and the documents submitted with it, is not "EIA development" within the meaning of the 1999 Regulations. Any permitted development rights which your proposal may enjoy under the Town and Country Planning (General Permitted Development) Order 1995 are therefore unaffected.

Having regard to the above direction the planning application mentioned may proceed without submission of an environmental statement.'

37 On 20 February 2007, Mr Mellor applied to the High Court of Justice (England & Wales), Queen's Bench Division, for judicial review of the Secretary of State's decision, seeking to have that screening direction quashed.

38 The High Court refused leave to apply for judicial review on the basis that the Court of Appeal (England & Wales) (Civil Division) had decided in *R v Secretary of State for The Environment, Transport and The Regions ex p Marson* (*1998),* ENV LR 761, that, first, reasons did not have to be given for refusing to direct that an EIA was required and, second, if reasons were required, then the reasons normally provided by the Secretary of State were adequate.

39 In those circumstances, the Court of Appeal (England & Wales) (Civil Division), hearing the appeal, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Whether under Article 4 of [Directive 85/337] Member States must make available to the public reasons for a determination that in respect of an Annex II [to that directive] project there is no requirement to subject the project to assessment in accordance with Articles 5 to 10 of [that] directive?

2. If the answer to Question 1 is in the affirmative whether that requirement was satisfied by the content of the letter dated 4 December 2006 from the Secretary of State?

3. If the answer to Question 2 is in the negative, what is the extent of the requirement to give reasons in this context?'

The questions referred for a preliminary ruling

The first question

40 By its first question, the referring court seeks to ascertain whether Article 4 of Directive 85/337 must be interpreted as meaning that Member States are obliged to communicate to the public the reasons for a determination not to subject an Annex II project to an EIA.

Observations submitted to the Court

41 The appellant in the main proceedings takes the view that a determination that an EIA is not required must be sufficiently reasoned in order to guarantee effective judicial protection of the environment and the rights of citizens.

42 He points out that that issue has already been considered by the Court in Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 49, in which the Court found that the Italian Republic had failed to fulfil its obligations on account of its failure to provide reasons for a decree deciding that the project at issue in that case did not require to be subjected to an EIA.

43 He claims, in addition, that the merits of his view are underlined by the amendments made to Directive 85/337 in 1997. Since those amendments, that directive requires the competent authority, as is apparent from Article 4(3), to take account of the relevant selection criteria set out in Annex III to that directive when deciding whether a project falling under Annex II to that directive must be subject to an EIA and requires, pursuant to Article 4(4), that the determination on whether or not to have recourse to an EIA be made available to the public. The public cannot, however, assess the lawfulness of such a determination if the reasons for that determination are not given.

44 The United Kingdom Government contends, first, that, in contrast to other provisions of secondary Community law on the environment, Article 4 of Directive 85/337 does not require reasons to be given for a determination as to whether an EIA must be carried out. It concludes that the Community legislature chose not to impose a duty to state reasons in respect of that determination.

45 The United Kingdom of Great Britain and Northern Ireland contends, secondly, that the line of reasoning based on the Court's decision in *Commission* v *Italy*, cited above, cannot be applied in the dispute in the main proceedings since, in the case that gave rise to that judgment, the failure to fulfil obligations was based on the failure to indicate that the competent authority had carried out any screening at all of the need to subject the project at issue to an EIA or not, such screening being provided for under national law in accordance with Article 4(2) of Directive 85/337. The failure to fulfil obligations complained of did not concern the failure to give reasons for the determination not to subject the project to such an assessment.

46 The Commission of the European Communities disputes the United Kingdom's interpretation of the *Commission* v *Italy* judgment, cited above, pointing out, inter alia, that despite the absence of the word 'reasoning' in paragraph 49 of that judgment, it is obvious from that paragraph that the competent authority must make reference, in one way or the other, to all the information showing that it applied the correct criteria and took the relevant factors into account. That requirement is equivalent to a duty to state reasons.

47 The Commission submits, furthermore, that the amendments made by Directive 97/11, in particular the obligation on Member States to make public their determinations on whether or not to carry out an EIA under Article 4(4) of Directive 85/337, make the duty to state reasons for such determinations all the more necessary. In the Commission's view, that obligation would be devoid of purpose if there were no adequate statement of reasons for the determinations in question.

The Court's reply

48 An objective of Directive 85/337 is – as recital 5 in its preamble states – inter alia, to introduce general principles for EIAs governing public and private projects likely to have a major effect on the environment, with a view to supplementing and coordinating development consent procedures.

49 Directive 85/337 provides that certain projects listed in Annex I are required to be made subject to such assessment.

50 On the other hand, projects which appear in Annex II must only be subject to such an assessment if they are likely to have significant effects on the environment and, in that regard, Directive 85/337 allows the Member States some discretion. Nevertheless, the limits of that discretion are to be found in the obligation on the Member States, set out in Article 2(1) of Directive 85/337, to make projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment subject to an assessment (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50, and Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 53).

51 It is thus clear from the objectives of Directive 85/337 that the competent national authorities, when they receive a request for development consent for an Annex II project, must carry out a specific evaluation as to whether, taking account of the criteria set out in Annex III to that directive, an EIA should be carried out.

52 Thus the Court, in its judgment of 10 June 2004 in *Commission* v *Italy*, cited above, found that the Italian Republic had failed to fulfil its obligations under Directive 85/337, since it was clear from all the evidence which had been submitted to the Court that the competent authorities had not carried out 'screening' of the need for an assessment, provided for in Italian legislation to ensure application of Article 4(2) and (3) of Directive 85/337.

53 In that judgment, the obligation arising from Article 4(2) of Directive 85/337 to ensure that a project does not require an assessment before deciding to dispense with such an assessment was at issue.

54 As there was nothing in the evidence in the case-file submitted to the Court to indicate that such an evaluation had taken place in the course of the administrative consent procedure for a bypass project, the Court held that a failure to fulfil obligations resulting from Directive 85/337, as alleged by the Commission, was established.

55 The Court pointed out, moreover, in paragraph 49 of that judgment, that the determination by which the competent authority takes the view that a project's characteristics do not require it to be subjected to an EIA must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.

56 It does not follow, however, from Directive 85/337, or from the case-law of the Court, in particular, from that judgment, that a determination not to subject a project to an EIA must, itself, contain the reasons for which the competent authority determined that an assessment was unnecessary.

57 It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually

determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.

58 Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.

59 In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts. Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15).

60 That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made.

61 In the light of the foregoing, the answer to the first question is that Article 4 of Directive 85/337 must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an EIA, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.

Second and third questions

62 By its second and third questions, the referring court asks the Court of Justice on the one hand whether, in the event of an affirmative reply to Question 1, the content of a determination such as that at issue in the main proceedings will satisfy the duty to state reasons incumbent on the competent authorities and, on the other hand, if need be, to define the form that the statement of reasons should take.

63 While, as is clear from the reply to the first question, the reasons need not necessarily be contained in the determination not to carry out an EIA itself, the competent administrative authority can, under the applicable national legislation or of its own motion, indicate in the determination the reasons on which it is based.

64 In that case, the determination must be such as to enable interested parties to decide whether to appeal against the determination in question, taking into account any factors which might subsequently be brought to their attention.

65 It cannot, in those circumstances, be ruled out that in the case in the main proceedings the Secretary of State's reasons might be considered sufficient, taking into account, in

particular, factors which have already been brought to the attention of interested parties, provided that the latter can ask for and obtain from the competent authorities, subject to judicial review, the necessary supplementary information to fill any gaps in that reasoning.

66 The answer to the second and third questions is therefore that, if a determination of a Member State not to subject a project falling within Annex II to Directive 85/337 to an EIA in accordance with Articles 5 to 10 of that directive states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information that the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **Article 4 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as not requiring that a determination, that it is unnecessary to subject a project falling within Annex II to that directive to an environmental impact assessment, should itself contain the reasons for the competent authority's decision that the latter was unnecessary. However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination or the relevant information and documents in response to the request made.**

2. **If a determination of a Member State not to subject a project, falling within Annex II to Directive 85/337 as amended by Directive 2003/35, to an environmental impact assessment in accordance with Articles 5 to 10 of that directive, states the reasons on which it is based, that determination is sufficiently reasoned where the reasons which it contains, added to factors which have already been brought to the attention of interested parties, and supplemented by any necessary additional information which the competent national administration is required to provide to those interested parties at their request, can enable them to decide whether to appeal against that decision.**

[Signatures]

JUDGMENT OF THE COURT (Third Chamber)

25 July 2008 (*)

(Directives 85/337/EEC and 97/11/EC – Assessment of the effects of projects on the environment – Refurbishment and improvement works on urban roads – Whether subject to assessment)

In Case C-142/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Juzgado de lo Contencioso-Administrativo No 22 de Madrid (Spain), made by decision of 23 January 2007, received at the Court on 12 March 2007, in the proceedings

Ecologistas en Acción-CODA

v

Ayuntamiento de Madrid,

THE COURT (Third Chamber),

composed of A. Rosas, President of the Chamber, U. Lõhmus (Rapporteur), J. Klučka, P. Lindh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 April 2008,

after considering the observations submitted on behalf of:

– Ecologistas en Acción-CODA, by J. Doreste Hernández, abogado,

– the Ayuntamiento de Madrid, by I. Madroñero Peloche, acting as Agent, and A. Sánchez Cordero, abogada,

– the Italian Government, by I.M. Braguglia, acting as Agent, and G. Fiengo, avvocato dello Stato,

– the Commission of the European Communities, by A. Alcover San Pedro and J.-B. Laignelot, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 April 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('the amended directive').

2 The reference was made in the course of proceedings between Ecologistas en Acción-CODA ('CODA') and the Ayuntamiento de Madrid (Municipality of Madrid) concerning an administrative act approving various projects forming part of the refurbishment and improvement of virtually the whole of the Madrid urban ring road.

Legal background

Community legislation

3 Directive 85/337 was adopted with the aim of harmonising the principles for the assessment of the environmental effects of certain private and public projects, the main obligations of the developers and the content of the assessment of those effects. Annex I to the directive sets out the projects subject to such an assessment, while Annex II sets out the projects that, in accordance with Article 4(2) of the directive, the Member States could make subject to that assessment where they considered that the characteristics of the projects concerned so required.

4 The amendments that Directive 97/11 made to Directive 85/337 principally concern making projects likely to have effects on the environment subject to a requirement for development consent and an assessment of those effects, and the harmonisation of the criteria that the Member States must use in order to determine whether or not a project falling into one of the categories covered by Annex II must be made subject to such an assessment. Those criteria are henceforth listed in Annex III to the amended directive.

5 Article 1(2) of the amended directive contains the following definitions:

'"project" means:

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

– other interventions in the natural surroundings and landscape …

"developer" means:

the applicant for authorisation for a private project or the public authority which initiates a project;

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

6 Article 2(1) of the amended directive provides:

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

7 Article 3 of the amended directive provides:

‘The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.’

8 Under Article 4(1) of the amended directive, projects listed in Annex I thereto are to be made subject to an assessment, subject to the exceptional cases exempted under Article 2(3) of that directive.

9 In accordance with Article 4(2) and (3) of the amended directive, each Member State is to determine, through a case-by-case examination or on the basis of thresholds or criteria which it sets, by taking account of the selection criteria set out in Annex III to the directive, whether the projects referred to in Annex II are to be made subject to an assessment.

10 Point 7 of Annex I to the amended directive mentions, under heading (b), projects for ‘[c]onstruction of motorways and express roads’ and, under heading (c), projects for ‘construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a continuous length’.

11 Point 7(b) refers, for the definition of ‘express roads’, to that in the European Agreement on Main International Traffic Arteries of 15 November 1975 (‘the agreement’).

12 In point 10 of Annex II to the amended directive, entitled ‘Infrastructure projects’, subheading (b) mentions ‘[u]rban development projects’ and subheading (e) projects for ‘[c]onstruction of roads … (projects not included in Annex I)’.

13 The first indent of point 13 of Annex II covers ‘[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment’.

The agreement

14 The agreement was ratified by all the Member States except seven. The Kingdom of Spain did not ratify it.

15 Under Title II thereof, entitled 'Classification of International Roads', Annex II to the agreement contains inter alia the following definitions:

'II.2 Motorways

"Motorway" means a road specially designed and built for motor traffic, which does not serve properties bordering on it, and which:

(i) Is provided, except at special points or temporarily, with separate carriageways for the two directions of traffic, separated from each other by a dividing strip not intended for traffic or, exceptionally, by other means;

(ii) Does not cross at level with any road, railway or tramway track, or footpath; and

(iii) Is specially sign-posted as a motorway.

II.3 Express roads

An express road is a road reserved for motor traffic accessible only from interchanges or controlled junctions and on which, in particular, stopping and parking are prohibited on the running carriageway(s).'

The dispute in the main proceedings and the questions referred for a preliminary ruling

16 By decision of 17 January 2005, the Concejala del Área de Gobierno de Urbanismo, Vivienda e Infraestructuras del Ayuntamiento de Madrid (Councillor for Planning, Housing and Infrastructure of the Municipality of Madrid) approved various projects for refurbishment and improvement of the Madrid urban ring road, identified under number M-30.

17 Those projects concern specifically the re-routing underground, first, of the M-30 between Marquès de Monistrol and Puente de Segovia, between Puente de Segovia and Puente de San Isidro, between Puente de San Isidro and Puente de Praga and between Puente de Praga and Nudo Sur and, second, of the Avenida de Portugal as far as the San Vicente roundabout. According to CODA's observations, which are not contradicted in that respect, the M-30 is a road intended exclusively for motor traffic, without traffic lights, pavements or verges for pedestrians and without bus stops or taxi ranks.

18 The projects are part of a complex civil engineering scheme which consists in improving and refurbishing virtually the whole of the Madrid urban ring road. That scheme, also called 'Madrid calle 30', aims, according to the observations of the Ayuntamiento de Madrid, to reduce congestion on the roads and the risk of accidents, and not to increase the traffic capacity on that road.

19 After its administrative appeal against the abovementioned decision of 17 January 2005 had been rejected by decision of 23 May 2005, CODA brought an action before the referring court for annulment of the latter decision. Like the administrative appeal, the action for annulment is based, inter alia, on a plea alleging infringement of the national rules on environmental impact assessment applicable to such projects and which derive in part from the amended directive.

20 It is apparent from the order for reference that the Madrid City Council has split the larger 'Madrid calle 30' project into 15 independent sub-projects, treated separately, only one of which concerns alteration or rehabilitation work on any existing road on a section exceeding five kilometres, the threshold at which the regional rules applicable make a project subject to an environmental impact assessment, while the larger project taken as a whole substantially exceeds that threshold. It is also clear from the referring court's explanations that, according to certain estimates, the execution of the overall scheme will lead to an increase in traffic of nearly 25% and will involve different kinds of works in the urban area surrounding the M-30.

21 Having regard to the scale and the implications of the scheme, the referring court wonders whether, in accordance with the amended directive, it should not be made subject to an environmental impact assessment.

22 Before the referring court, the Ayuntamiento de Madrid, while asserting that it had never had the intention of preventing the application of the amended directive, pointed out that the dispute arose from an interpretation common to all the national authorities which have reviewed the legality of the relevant projects. It also submitted that to extend, in this case, the judgment in Case C-332/04 *Commission* v *Spain* of 16 March 2006 to situations other than that at issue in the case which gave rise to that judgment would require detailed reasoning by the Court of Justice.

23 The referring court also set out the observations submitted by the Communidad autónoma de Madrid (Autonomous Community of Madrid), according to which there is confusion between preliminary ruling proceedings and actions for failure to fulfil obligations, because the hearing mainly concerned possible infringements of Community law.

24 In those circumstances the national court decided to stay its proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the procedural requirements relating to environmental impact assessments arising from [the amended directive] applicable to urban road projects, having regard to their nature, size and effect on densely populated areas or on landscapes of historical, cultural or archaeological significance?

(2) Are the procedural requirements relating to environmental impact assessments arising from [the amended directive] applicable to the projects which form the subject-matter of these administrative appeal proceedings, having regard to their nature, the nature of the road on which they are to be carried out, their characteristics, size, effect on the surrounding area, density of population, budget and the possible splitting up of a larger project which contemplates similar works on the same road?

(3) Are the criteria set out in [*Commission* v *Spain*, paragraphs 69 to 88] applicable to the projects which are the subject-matter of these proceedings, having regard to their nature, the nature of the road on which they are to be carried out, their characteristics, size, effect on the surrounding area, budget and the possible splitting up of a larger project which contemplates similar works on the same road, such that there was a requirement to submit them to the prescribed environmental impact assessment procedure?

(4) Do the relevant administrative records and, specifically, the studies and reports contained therein, demonstrate that the Spanish authorities have, in practice, complied with the obligations arising from [the amended directive] relating to the environmental assessment of the projects which are the subject-matter of these proceedings, even if the project was not formally made subject to the prescribed environmental assessment procedure set out in the directive?'

The questions referred for a preliminary ruling

The first three questions

25 By the first three questions, which it is appropriate to examine together, the referring court asks essentially whether the amended directive must be interpreted as meaning that projects for the refurbishment and improvement of virtually the whole of an urban ring road must be made subject to an environmental impact assessment taking account, inter alia, of the nature of those projects, the type of road in question, the characteristics and size of the projects, their effect on densely populated areas or landscapes having a historical, cultural or archaeological significance, and the fact that they are the result of the splitting up of a larger project concerning the execution of a series of similar works on the same road.

26 Under Article 4(1) of the amended directive, projects listed in Annex I thereto are to be made subject to an environmental impact assessment. According to Article 4(2), the Member States are to determine, by taking account of the conditions set out in that provision, which projects listed in Annex II to the directive must be made subject to such an assessment.

27 According to the Ayuntamiento de Madrid, the ring road concerned in the main proceedings is an urban road. The amended directive does not refer to that type of road in Annexes I and II, which mention only motorways, express roads and roads. Furthermore, those terms are not defined, except, with respect to the notion of express road, by reference to the definition given by the agreement. According to the defendant in the main proceedings, in the absence of clarification as to those terms, the Spanish law transposing the amended directive repeated its exact words. Since urban roads are not mentioned there, it was entitled to take the view that projects for the alteration of such a road were not covered by the amended directive and, consequently, did not have to be made subject to an environmental impact assessment.

28 That argument cannot be accepted. The Court has stated on numerous occasions that the scope of Directive 85/337 and that of the amended directive is very wide (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 31; Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 40; and Case C-2/07 *Abraham and Others* [2008] ECR I-0000, paragraph 32). It would, therefore, be contrary to the very purpose of the amended directive to allow any urban road project to fall outside its scope solely on the ground that the directive does not expressly mention among the projects listed in Annexes I and II those concerning that kind of road.

29 Point 7(b) and (c) of Annex I to the amended directive mentions among the projects which must be made subject to an environmental impact assessment 'motorways', 'express roads' and '[c]onstruction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a

continuous length'. As to Annex II, it mentions in point 10(e) and the first indent of point 13 respectively '[c]onstruction of roads' and '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment' among the projects for which the Member States may require an environmental impact assessment to be carried out in accordance with Article 4(2) of that directive. In that regard it must be stated, first, as the Commission of the European Communities rightly submits, that the concepts in those annexes are Community law concepts which must be interpreted independently and, second, that it is conceivable that the types of road which are mentioned therein are sited both in and outside built-up areas.

30 The amended directive does not define the concepts mentioned above with the exception of 'express roads', for which it refers to the agreement thereby including the definition of 'express road' contained therein. Since not all the Member States are parties to that agreement, this reference concerns the version of the agreement in force when Directive 85/337 was adopted, that is the agreement of 15 November 1975

31 According to Annex II to the agreement, an express road is a road reserved for motor traffic accessible only from interchanges or controlled junctions and on which stopping and parking are prohibited on the running carriageway(s). It does not follow from that definition that roads sited in urban areas would a priori be excluded. On the contrary, unless roads in built-up areas are expressly excluded, the words 'express roads' cover urban roads which have the characteristics set out in that annex.

32 The same agreement defines the concept of 'motorway' as inter alia a road specially designed and built for motor traffic, which does not serve properties bordering on it, does not cross at level with any road, railway or tramway track, or footpath, and is specially sign-posted as a motorway. Even though the amended directive does not make express reference to that definition, the agreement may be a useful tool for understanding the similar concept in Annex I to the directive.

33 It follows from case-law which is now well established that the Member States must implement the amended directive, in the same way as Directive 85/337, in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to an assessment with regard to their effects (see, to that effect, Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 52, and Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 36).

34 Accordingly, urban road projects must be regarded as falling within the scope of the amended directive.

35 As is clear from CODA's observations, which are not contradicted in that respect, the projects at issue in the main proceedings concern a road intended exclusively for motor traffic, without traffic lights, pavements or verges for pedestrians and without bus stops or taxi ranks. It is for the referring court to make the findings of fact from which it may verify those aspects in order to determine, taking account of the guidance set out in paragraphs 30 to 33 of this judgment, whether those projects are covered by one of the concepts in Annex I to

the amended directive and must therefore be made subject to an environmental impact assessment.

36 For that purpose, the fact that point 7(b) and (c) of Annex I to the amended directive refers to projects for the 'construction' of the types of road mentioned, whereas the case in the main proceedings concerns projects for refurbishment and improvement of an existing road, does not mean that the latter are excluded from the scope of the amended directive. A project for refurbishment of a road which would be equivalent, by its size and the manner in which it is carried out, to construction may be regarded as a construction project for the purposes of that annex (see, to that effect, Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 46, and *Abraham and Others*, paragraph 32).

37 If it appeared that the projects at issue in the main proceedings do not concern motorways or express roads within the meaning of point 7(b) of Annex I to the amended directive or projects referred to in point 7(c) thereof, the referring court would still be required to examine whether the projects at issue in the main proceedings are covered by Annex II to the amended directive, either under point 10(e), inasmuch as they concern construction of a road, or under the first indent of point 13 read together with point 10(e) of Annex II, in so far as they concern a change to a road construction project.

38 In that respect, it must be recalled that if, like Article 4(2) of Directive 85/337, the same provision of the amended directive confers on Member States a measure of discretion in order to determine whether a project falling in the categories listed in Annex II thereto must be made subject to an environmental impact assessment, the limits of that discretion are to be found in the obligation set out in Article 2(1) of the amended directive that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (see, regarding Directive 85/337, *Kraaijeveld and Others*, paragraph 50, and *Abraham and Others*, paragraph 37). In applying their discretion, the Member States must take account of each of those criteria in order to determine whether projects are likely to have an effect on the environment (Case C-332/04 *Commission* v *Spain*, paragraph 77).

39 In that regard, in the same way as Directive 85/337, the amended directive adopts an overall assessment of the effects of projects or the alteration thereof on the environment. It would be simplistic and contrary to that approach to take account, when assessing the environmental impact of a project or of its modification, only of the direct effects of the works envisaged themselves, and not of the environmental impact liable to result from the use and exploitation of the end product of those works (see, as regards Directive 85/337, *Abraham and Others*, paragraphs 42 and 43).

40 As far as concerns the location of projects, point 2(g) and (h) of Annex III to the amended directive mentions densely populated areas and landscapes of historical, cultural or archaeological significance as selection criteria which the Member States must take into account, in accordance with Article 4(3) of the directive, for the case-by-case examination or the setting of the thresholds or criteria provided for in Article 4(2), in order to determine whether a project must be made subject to an assessment. Those selection criteria may also concern urban road projects (see, to that effect, Case C-332/04 *Commission* v *Spain*, paragraph 79).

41 However, the fact relied on by the Ayuntamiento de Madrid that the projects at issue in the main proceedings should have beneficial effects on the environment is not relevant in determining whether it is necessary to make those projects subject to an assessment of their environmental impact.

42 Moreover, like that in Article 3 of Directive 85/337, the list in Article 3 of the amended directive of the factors to be taken into consideration, such as the effects of a project on, inter alia, human beings, fauna and flora, soil, water, air or cultural heritage, shows, in itself, that the environmental impact whose assessment the amended directive is designed to enable is not only the impact of the works envisaged but also, and above all, the impact of the project to be carried out (see, to that effect, *Abraham and Others*, paragraph 44).

43 As the Advocate General rightly stated, in point 28 of her Opinion, projects concerning roads may have many environmental effects both within and outside urban areas, since those areas are particularly sensitive because of population density, existing pollution, but also given the presence of any places of historical, cultural or archaeological importance (see, to that effect, Case C-332/04 *Commission* v *Spain*, paragraph 81).

44 Lastly, as the Court has already noted with regard to Directive 85/337, the purpose of the amended directive cannot be circumvented by the splitting of projects and the failure to take account of the cumulative effect of several projects must not mean in practice that they all escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the amended directive (see, as regards Directive 85/337, Case C-392/96 *Commission* v *Ireland* [1999] ECR I-5901, paragraph 76, and *Abraham and Others*, paragraph 27).

45 As regards the projects at issue in the main proceedings, it is clear from the order for reference that they are all part of the larger project 'Madrid calle 30'. It is for the referring court to verify whether they must be dealt with together by virtue, in particular, of their geographical proximity, their similarities and their interactions.

46 Therefore, the answer to the first three questions must be that the amended directive must be interpreted as meaning that it provides for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by point 7(b) or (c) of Annex I to the directive, or where they are projects covered by point 10(e) of Annex II or the first indent of point 13 thereof, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment.

The fourth question

47 By its fourth question, the referring court asks essentially whether the studies undertaken and reports compiled on the projects at issue in the main proceedings satisfy the requirement of an environmental impact assessment as prescribed by the amended directive.

48 Under the procedure envisaged in Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. The Court of Justice is thus empowered only to rule on the interpretation or validity of Community provisions on the basis of the facts which the national court puts before it (see, in particular, Case C-235/95 *Dumon and Froment* [1998]

ECR I-4531, paragraph 25, and Case C-467/04 *Gasparini and Others* [2006] ECR I-9199, paragraph 41).

49 This question invites the Court to express a view on certain factual elements on which the dispute in the main proceedings is based, that is to determine whether the inquiries, hearings and analyses carried out by the national authorities constitute, with respect to the projects concerned, an environmental impact assessment within the meaning of the amended directive.

50 It is for the national court to undertake such an examination, in the knowledge that a formal assessment may be replaced by equivalent measures where they satisfy the minimum requirements set out in Article 3 and Articles 5 to 10 of the amended directive.

51 Therefore there is no need to answer the fourth question.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, must be interpreted as meaning that it provides for environmental impact assessment of refurbishment and improvement projects for urban roads, either where they are projects covered by point 7(b) or (c) of Annex I to the directive, or where they are projects covered by point 10(e) of Annex II or the first indent of point 13 thereof, which are likely, by virtue of their nature, size or location and, if appropriate, having regard to their interaction with other projects, to have significant effects on the environment.

[Signatures]

ORDER OF THE COURT (Sixth Chamber)

10 July 2008 (*)

(Preliminary ruling – Directive 85/337/EEC – Assessment of the impact of certain public and private projects on the environment – Construction of a road in Milan)

In Case C-156/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Consiglio di Stato (Italy), made by decision of 24 October 2006, received at the Court on 21 March 2007, in the proceedings

Salvatore Aiello and Others

v

Comune di Milano and Others,

intervening parties:

Euromilano SpA,

Metropolitana milanese SpA,

THE COURT (Sixth Chamber),

composed of L. Bay Larsen, President of the Chamber, J.-C. Bonichot, (Rapporteur) and C. Toader, Judges,

Advocate General: J. Mazák,

Registrar: R. Grass,

having informed the referring court that the Court proposes to give its decision by reasoned order in accordance with the second subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the impact of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5; 'Directive 85/337').

2 The reference was made in the course of proceedings between Salvatore Aiello and Others and the Comune di Milano (Municipality of Milan) and Others concerning the construction of a road linking certain districts in the north of Milan.

Legal context

3 Article 1(2) of Directive 85/337 states:

'For the purposes of this Directive:

…

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.'

4 Article 1(4) of Directive 85/337 provides:

'Projects serving national defence purposes are not covered by this Directive.'

5 Article 1(5) of Directive 85/337 states:

'This Directive shall not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.'

6 Article 2(1) of Directive 85/337 provides:

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

7 Article 2(3) of Directive 85/337 provides:

'Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.'

8 Article 4 of Directive 85/337 provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

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

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

9 Paragraph 7(c) of Annex I to Directive 85/337 refers to:

'Construction of a new road of four or more lanes, or realignment and/or widening of an existing road of two lanes or less so as to provide four or more lanes, where such new road, or realigned and/or widened section of road would be 10 km or more in a continuous length.'

10 Paragraph 10(e) of Annex II to Directive 85/337 refers to:

'Construction of roads, ...'

11 Annex III to Directive 85/337 states:

'1. Characteristics of projects

The characteristics of projects must be considered having regard, in particular, to:

– ...

– the cumulation with other projects,

...'

The dispute in the main proceedings and the questions referred for a preliminary ruling

12 By a decree of 15 November 2001, the Prime Minister of the Italian Republic declared a state of emergency in the city of Milan on account of the pollution resulting from car traffic and the inadequacy of the existing road network. By order of 28 December 2001, the Minister of the Interior appointed the Mayor of Milan as the Commissioner responsible for the implementation of the necessary measures to deal with that situation.

13 In his capacity as Commissioner for traffic and mobility issues in Milan, the Mayor of that city approved a programme of works, which included the construction project for a road linking certain districts in the north of Milan, of a length of 1 600m. On 29 October 2002, he approved the final project for that road.

14 Mr Aiello and other residents in the area affected challenged that decision before the Tribunale amministrativo regionale per la Lombardia (Lombardy Regional Administrative Court). They claimed, inter alia, that the procedure followed did not comply with Community law because no environmental impact assessment of the project had been carried out.

15 That court dismissed the action as unfounded, and Mr Aiello and Others lodged an appeal against that judgment before the Consiglio di Stato (Council of State).

16 The Consiglio di Stato ordered measures of inquiry from which it is apparent that, although the 1953 General Regulatory Plan for the municipality of Milan envisaged the construction of a road permitting a rapid connection between districts of the city more than 10 kilometres apart, that objective had finally been abandoned in favour of a different project, concerning the construction of a number of separate roads. Two roads are planned, the first of which is at the origin of the main proceedings and the second of which is a different road of a length of 1 300m.

17 The Consiglio di Stato considers, therefore, that the project at issue in the main proceedings does not fall within the context of the construction of a single road of more than 10 kilometres for the purposes of Annex I to Directive 85/337, which lists the projects for which an environmental impact assessment is obligatory, but within that of Annex II to that legislation, which refers merely to the construction of roads.

18 However, the Consiglio di Stato enquires whether the project being challenged should not be subject to such an assessment in accordance with, inter alia, Article 4 of Annex II read in conjunction with Annex III to Directive 85/337, on the ground that that project forms part of a larger operation for the restructuring of all the roads of the districts concerned, so that the competent authority should have taken into consideration the 'cumulation' of the separate projects, a factor expressly set out by Annex III. Accordingly, it decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Must Article 2 of Council Directive [85/337], in so far as it states that projects likely to have significant effects on the environment are to be made subject to an environmental impact assessment, and that such projects are defined in Article 4 [thereof], be interpreted as meaning:

– that any project with a significant effect on the environment must, even if it is not listed in Annexes I or II to the Directive, be made subject to an environmental impact assessment;

– or, conversely, that only projects of a kind listed in Annexes I and II to the Directive must be made subject to an environmental impact assessment?

2. Does Article 4 of Council Directive [85/337], in so far as it gives Member States the possibility of providing for environmental impact assessments to be carried out for projects in the classes listed in Annex II [thereto] on the basis of case-by-case assessments or predetermined criteria – account also being taken of the criteria set out in Annex III [thereto] – create a specific obligation or merely an option for the Member States to take account of all the criteria listed in Annex III ?

3. Does Article 1 of the Presidential Decree of 12 April 1996 constitute due transposition into national law of Article 4 of Directive [85/337] and Annex III thereto by the Italian

legislature, given that it does not provide, as a criterion for making projects in the classes listed in Annex II to the Directive subject to an environmental impact assessment, for the criterion of cumulation with other projects, as referred to in Annex III to the Directive?'

The questions referred

19 Under Article 104(3) of the Rules of Procedure, inter alia, where the answer to a question referred may be clearly deduced from its existing case-law or where the answer to that question leaves no scope for any reasonable doubt, the Court may, after hearing the Advocate General, give its decision by reasoned order.

Admissibility

20 The Comune di Milano (Municipality of Milan) submits that the questions raised by the Consiglio di Stato are inadmissible because the two projects for the construction of roads to which the latter refers in the order for reference are distinct projects and are not, moreover, such as to have a cumulative impact on the environment.

21 In accordance with settled case-law, in the context of the cooperation between the Court of Justice and the national courts under Article 234 EC, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted for a preliminary ruling concern the interpretation of Community law, the Court is, in principle, bound to give a ruling (see, inter alia, Joined Cases C-223/99 and C-260/99 *AgoràandExcelsior* [2001] ECR I-3605, paragraph 18).

22 In the present case, the referring court has clearly stated that it requires the interpretation of several of the provisions of Directive 85/337 in order to ascertain whether the road construction project at issue in the main proceedings should be subject to an environmental impact assessment.

23 In addition, the Court may not decline to give a ruling on a question referred to it by a national court unless it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, *Agorà and Excelsior*, paragraph 20).

24 In the present case, none of those conditions are met.

25 Accordingly, the reference for a preliminary ruling is admissible.

Substance

26 Taking the view that the answer to the three questions referred leaves no scope for any reasonable doubt, the Court, pursuant to the second paragraph of Article 104(3) of its Rules of Procedure, informed the referring court that it proposed to give its decision by reasoned order

and called on the interested parties referred to in Article 23 of the Statute of the Court of Justice to submit any observations they might have in that regard.

27 Aeillo and Others and the Commission of the European Communities replied to the Court's request. The Commission in its reply stated that it had no objection to the Court giving its decision by way of reasoned order. Aiello and Others submitted arguments similar to those raised in their written observations and requested that a hearing be held. However, those factors have not persuaded the Court to depart from the procedural approach envisaged.

– The first question

28 By its first question, the referring court is essentially asking whether Article 2(1) of Directive 85/337 must be interpreted as meaning that projects likely to have significant effects on the environment, but which are not referred to in Annexes I and II to that directive, must nevertheless be subject to an environmental impact assessment which complies with the assessment set out in that directive.

29 Article 2(1) of Directive 85/337 provides that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location and which must, therefore, be subject to an assessment with regard to those effects, are defined in Article 4 of that directive.

30 Article 4 provides, in paragraph 1 thereof, that the projects listed in Annex I shall be made subject to an environmental impact assessment and, in paragraph 2 thereof, that, with regard to projects listed in Annex II to that directive, it is for the Member States to determine whether they should be subject to such an assessment on the basis of certain thresholds or certain criteria.

31 It must also be noted that that article renders both situations referred to in the preceding paragraph subject to the application of Article 2(3) of Directive 85/337, which allows Member States, in exceptional cases, to exempt a specific project in whole or in part from the requirement to make an assessment.

32 Furthermore, Article 1 of Directive 85/337 provides, in paragraph 4 thereof, that the directive does not cover projects serving national defence purposes and, in paragraph 5 thereof, that it does not apply to projects the details of which are adopted by a specific act of national legislation, since the objectives of that directive are deemed to be achieved through the legislative process.

33 In any event, it must also be pointed out that the scope of Directive 85/337 is wide and its purpose very broad (see Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 31, and Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 46), and it must be implemented in that spirit.

34 Consequently, having regard to paragraphs 29 to 32 of this order, the answer to the first question referred must be that Article 2(1) of Directive 85/337 must be interpreted as not requiring that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that directive, but only those referred to in Annexes I and II to that directive, under the conditions set out in Article 4 thereof and subject to Articles 1(4) and (5) and 2(3) thereof.

– The second question

35 By its second question, the referring court essentially asks whether Member States are required to take account of the selection criteria listed in Annex III to Directive 85/337 when they determine, pursuant to Article 4(2) of that directive, in respect of the projects in the classes listed in Annex II thereto and on the basis of case-by-case assessments, or thresholds or criteria fixed by the Member State, whether those projects must be subject to the environmental impact assessment procedure.

36 In this connection, the Court has already held that, although Member States may establish the criteria and/or thresholds necessary to determine which of the projects in the classes listed in Annex II to Directive 85/337, in its original version, are to be subject to an assessment, their discretion is limited by the obligation, set out in Article 2(1) of that directive, to subject projects likely to have significant effects on the environment, particularly by virtue of their nature, size or location, to an assessment with regard to their impact (see, inter alia, Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 53).

37 Under Article 4(2) of Directive 85/337, it is for the Member States to determine themselves in which cases the projects in the classes listed in Annex II to that directive must be made subject to an environmental impact assessment, whereas the projects in Annex I thereto must always be subject to such a procedure.

38 That provision leaves the Member States two options. The first is to decide on a case-by-case basis whether a project covered by Annex II must be made subject to the assessment. The second is to determine, in a general and abstract manner and according to thresholds or criteria, the projects in that annex which must be made subject to the assessment.

39 It stems from the actual wording of Article 4(3) of Directive 85/337 that that Directive requires Member States, in both cases, to take into account the relevant selection criteria set out in Annex III to that directive, that is to say, those of the criteria which must be applied in the light of the characteristics of the project concerned.

40 Therefore, the answer to the second question referred is that Directive 85/337 does require the Member States to take account of the relevant selection criteria listed in Annex III to Directive 85/337 when they determine, in respect of the projects in the classes listed in Annex II thereto, either on the basis of case-by-case assessments, or on the basis of thresholds or criteria fixed by the Member State, whether the projects concerned must be subject to the environmental impact assessment procedure.

– The third question

41 By its third question, the referring court is essentially requesting the Court to specify whether the Italian legislation at issue in the main proceedings constitutes due transposition into national law of Article 4 of Directive 85/337, given that that secondary legislation does not set out the criterion of cumulation with other projects, which is none the less referred to in Annex III to that directive, as a selection criterion to be taken into account when the competent national authority determines whether projects in the classes listed in Annex II to that directive must be made subject to an environmental impact assessment.

42 It is settled case-law that the Court has no jurisdiction, in proceedings brought on the basis of Article 234 EC, to rule on the compatibility of national rules with Community law. On the other hand, the Court does have jurisdiction to provide the national court with all the guidance as to the interpretation of Community law necessary to enable that court to rule on the compatibility of those national rules with Community law (see Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 36 and the case-law cited).

43 In the present case, it is apparent from the order for reference that the national court wishes to establish whether the Member States, in the transposition of the Directive into their domestic legal order, are required to adopt a provision drawing attention to the obligation to apply the criteria of the cumulation of the project concerned with other projects, referred to in Annex III to that directive, when an assessment is made of whether a project in the classes listed in Annex II thereto must be made subject to the environmental impact assessment provided for in that directive.

44 First of all, it should be observed that each of the Member States to which a directive is addressed is obliged to adopt, within the framework of its national legal system, all the measures necessary to ensure that the directive is fully effective, in accordance with the objective it pursues (Case C-32/05 *Commission* v *Luxembourg* [2006] ECR I-11323, paragraph 32).

45 The Court has also held that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 26).

46 In the present case, Article 4 of Directive 85/337 must be interpreted as requiring the competent authority to take into account the relevant selection criteria set out in Annex III to that directive when an assessment is made of whether a project in the classes listed in Annex II thereto must be subject to an environmental impact assessment, both when that assessment is made on the basis of a case-by-case examination and when the Member State concerned has opted for general rules.

47 Where a Member State chooses to determine in a general and abstract manner, as it is permitted to do by Directive 85/337, the projects in the classes listed in Annex II to that directive which must be made subject to an environmental impact assessment, it bears responsibility for drawing up the list of those projects by applying one or more of the relevant criteria in Annex III, as appropriate. The criterion of cumulation can therefore, where relevant, be used to make one type of project subject to such an assessment, having regard to the completion of that project with other projects and if necessary taking into consideration the completion of all those projects during a specific period of time.

48 Where a Member State opts, on the contrary, wholly or partially, to determine on a case-by-case basis the projects in the classes listed in Annex II to Directive 85/337 which must be made subject to an environmental impact assessment, it bears responsibility for ensuring that the competent national authorities have regard to the various criteria listed in Annex III to that directive in so far as those criteria are relevant having regard to the characteristics of the project concerned.

49 For that purpose, the Member State may refer, in its national legislation, to the criteria in Annex III. It can also integrate those criteria into its legislation, by expressly providing that the competent authorities must refer to them for the purpose of determining, on a case-by-case basis, whether a project in the classes listed in Annex II to Directive 85/337 must be made subject to an environmental impact assessment.

50 In any event, where a Member State chooses to proceed by that route it cannot, without failing to fulfil its Community obligations, exclude expressly or impliedly one or more of the criteria in Annex III to Directive 85/337, in so far as any of those criteria may, depending on which project in the classes listed in Annex II is concerned, be relevant for the purposes of ascertaining whether an environmental impact procedure must be organised. Depending on the characteristics of the national legal order in question, such an exclusion might dissuade or even prevent the competent national authority from taking into account the criterion or criteria in question.

51 The answer to the third question referred is therefore that, where a Member State opts for determining on a case-by-case basis those of the projects in the classes listed in Annex II to Directive 85/337 which must be made subject to an environmental impact assessment, it must, either by referring in its national rules to Annex III to that directive or by reproducing in its national rules the criteria listed there, ensure that all of those criteria can in fact be taken into account where one or more of them is relevant for the purposes of the project concerned, and cannot expressly or impliedly exclude them.

Costs

52 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Sixth Chamber) hereby rules:

1. **Article 2(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, must be interpreted as not requiring that any project likely to have a significant effect on the environment be made subject to the environmental impact assessment provided for in that directive, but only those referred to in Annexes I and II to that directive, under the conditions set out in Article 4 thereof and subject to Articles 1(4) and (5) and 2(3) of that directive.**

2. **Member States are required to take into account the relevant selection criteria listed in Annex III to Directive 85/337, as amended by Directive 97/11, when they determine, in respect of the projects in the classes listed in Annex II thereto, either on the basis of case-by-case assessments or on the basis of thresholds or criteria fixed by the Member State, whether those projects must be subject to the environmental impact assessment procedure.**

3. **Where a Member State opts for determining on a case-by-case basis those of the projects in the classes listed in Annex II to Directive 85/337, as amended by Directive 97/11, which must be made subject to an environmental impact assessment, it must,**

either by referring in its national rules to Annex III to that directive or by reproducing in its national rules the criteria listed there, ensure that all of those criteria can in fact be taken into account where one or more of them is relevant for the purposes of the project concerned, and cannot expressly or impliedly exclude them.

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)

3 July 2008 (*)

(Failure of a Member State to fulfil obligations – No assessment of the environmental effects of projects within the scope of Directive 85/337/EEC – Regularisation after the event)

In Case C-215/06,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 11 May 2006,

Commission of the European Communities, represented by D. Recchia and D. Lawunmi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, J. Connolly SC and G. Simons BL, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, J. Makarczyk (Rapporteur), P. Kūris and J.-C. Bonichot, Judges,

Advocate General: J. Mazák,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 14 February 2008,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its action the Commission of the European Communities seeks a declaration from the Court that:

– by failing to adopt all measures necessary to ensure that projects which are within the scope of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) either before or after amendment by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have

significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and

– by failing to adopt all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects in accordance with Articles 5 to 10 of Directive 85/337,

Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

Legal context

Community legislation

2 By its action the Commission seeks a declaration that Ireland has failed to fulfil its obligations under Directive 85/337 both in its original version and in the version as amended by Directive 97/11.

Directive 85/337

3 The wording of Article 1(2) and (3) of Directive 85/337 is as follows:

‘2. For the purposes of this Directive:

“project” means

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

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

“developer” means:

the applicant for authorisation for a private project or the public authority which initiates a project;

“development consent” means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

3. The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this Directive.’

4 Article 2(1) and (2) and the first subparagraph of Article 2(3) of Directive 85/337 provide:

‘1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

3. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.’

5 Article 3 of Directive 85/337 provides:

‘The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora,

– soil, water, air, climate and the landscape,

– the inter-action between the factors mentioned in the first and second indents,

– material assets and the cultural heritage.’

6 Article 4 of that directive is worded as follows:

‘1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.’

7 Article 5 of Directive 85/337 states:

‘1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

– a description of the project comprising information on the site, design and size of the project,

– a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

– the data required to identify and assess the main effects which the project is likely to have on the environment,

– a non-technical summary of the information mentioned in indents 1 to 3.

3. Where they consider it necessary, Member States shall ensure that any authorities with relevant information in their possession make this information available to the developer.'

8 Article 6 of Directive 85/337 is worded as follows:

'1. Member States shall take the measures necessary to ensure that the authorities likely to be concerned by the project by reason of their specific environmental responsibilities are given an opportunity to express their opinion on the request for development consent. Member States shall designate the authorities to be consulted for this purpose in general terms or in each case when the request for consent is made. The information gathered pursuant to Article 5 shall be forwarded to these authorities. Detailed arrangements for consultation shall be laid down by the Member States.

2. Member States shall ensure that:

– any request for development consent and any information gathered pursuant to Article 5 are made available to the public,

– the public concerned is given the opportunity to express an opinion before the project is initiated.

…'

9 Article 7 of Directive 85/337 provides:

'Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article 5 to the other Member State at

the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.'

10 Article 8 of Directive 85/337 states:

'Information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure.'

11 Article 9 of that directive is worded as follows:

'When a decision has been taken, the competent authority or authorities shall inform the public concerned of:

– the content of the decision and any conditions attached thereto,

– the reasons and considerations on which the decision is based where the Member States' legislation so provides.

The detailed arrangements for such information shall be determined by the Member States.

If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question.'

12 Article 10 of that directive provides:

'The provisions of this Directive shall not affect the obligation on the competent authorities to respect the limitations imposed by national regulations and administrative provisions and accepted legal practices with regard to industrial and commercial secrecy and the safeguarding of the public interest.

Where Article 7 applies, the transmission of information to another Member State and the reception of information by another Member State shall be subject to the limitations in force in the Member State in which the project is proposed.'

13 Annex II to Directive 85/337 lists projects subject to Article 4(2) of that directive, namely those for which an environmental impact assessment is necessary only where the Member States consider that their characteristics so require. Projects referred to in that annex include, in point 2(a), extraction of peat, and in point 2(c), extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash.

14 Projects listed in point 10(d) of Annex II include the construction of roads.

Directive 97/11

15 Article 3 of Directive 97/11 is worded as follows:

‘1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 14 March 1999 at the latest. They shall forthwith inform the Commission thereof.

…

2. If a request for development consent is submitted to a competent authority before the end of the time-limit laid down in paragraph 1, the provisions of Directive 85/337/EEC prior to these amendments shall continue to apply.’

Directive 85/337 as amended by Directive 97/11 (‘Directive 85/337 as amended’)

16 In the interests of clarity, reference will be made only to the amendments to Directive 85/337 which have direct relevance to the alleged failure by Ireland to fulfil its obligations. Accordingly, reference will not be made to amendments introduced by Directive 97/11 to Articles 5 to 10 of Directive 85/337, since those have no bearing on the determination of this action which the Court is called upon to make.

17 Under Article 2(1) and (2) and the first subparagraph of Article 2(3) of Directive 85/337 as amended:

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

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

…

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.’

18 Article 3 of Directive 85/337 as amended provides:

‘The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.’

19 Article 4 of Directive 85/337 as amended provides:

‘1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

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

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.’

20 Point 3(i) of Annex II to Directive 85/337 as amended specifies installations for the harnessing of wind power for energy production (wind farms).

21 By virtue of point 13 of Annex II, any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (being a change or extension not listed in Annex I) must be regarded as a project within the scope of Article 4(2) of Directive 85/337 as amended.

22 Annex III to Directive 85/337 as amended, relating to the selection criteria referred to in Article 4(3) of that directive, provides that the characteristics of projects must be considered in relation, inter alia, to pollution and nuisances, and to the risk of accidents having regard in particular to technologies used. That annex also indicates that the environmental sensitivity of geographical areas likely to be affected by projects must be considered having regard, inter alia, to the absorption capacity of the natural environment, paying particular attention to certain areas, including mountain and forest areas.

National legislation

23 The requirements of Directive 85/337 as amended have been transposed into national law by, in particular, the Planning and Development Act, 2000, as amended (‘the PDA’), and the Planning and Development Regulations, 2001.

24 Section 32(1)(a) of the PDA lays down a general obligation to obtain consent for all development projects within the scope of Annexes I and II to Directive 85/337 as amended; the application for permission must be lodged and the permission obtained before the

commencement of works. In addition, section 32(1)(b) of the PDA provides that permission can be obtained to regularise unauthorised development (retention permission).

25 On receipt of an application for permission, the planning authority must decide whether the proposed development should be subject to an environmental impact assessment.

26 Section 151 of the PDA provides that any person who has carried out or is carrying out unauthorised development is guilty of an offence.

27 It is clear from sections 152 and 153 of the PDA that, on receipt of a complaint, planning authorities are, as a general rule, under an obligation to issue a warning letter, and must then decide whether or not it is appropriate to issue an enforcement notice. Failure to comply with the requirements of an enforcement notice constitutes an offence.

28 Under section 160 of the PDA:

'(1) Where an unauthorised development has been, is being or is likely to be carried out or continued, the High Court or the Circuit Court may, on the application of a planning authority or any other person, whether or not the person has an interest in the land, by order require any person to do or not to do, or to cease to do, as the case may be, anything that the Court considers necessary and specifies in the order to ensure, as appropriate, the following:

(a) that the unauthorised development is not carried out or continued;

(b) in so far as practicable, that any land is restored to its condition prior to the commencement of any unauthorised development;

(c) that any development is carried out in conformity with the permission pertaining to that development or any condition to which the permission is subject.

(2) In making an order under subsection (1), where appropriate, the Court may order the carrying out of any works, including the restoration, reconstruction, removal, demolition or alteration of any structure or other feature.'

29 Section 162 of the PDA makes clear that an application for retention permission does not entail any ongoing enforcement action being stayed or withdrawn.

Pre-litigation procedure

30 After sending a letter of formal notice on 5 April 2001, the Commission sent to Ireland a reasoned opinion dated 21 December 2001.

31 On 7 July 2004, the Commission sent an additional letter of formal notice to Ireland.

32 On 5 January 2005, after the receipt of Ireland's observations as set out in a letter dated 6 December 2004, an additional reasoned opinion was sent to Ireland.

33 Since the Commission considered that Ireland's response to that reasoned opinion, in letters of 8 March, 17 June and 1 December 2005, was unsatisfactory, it brought this action under the second paragraph of Article 226 EC.

The action

The first complaint

34 The Commission's complaint is that Ireland has not taken all the measures necessary to comply with Articles 2, 4 and 5 to 10 of Directive 85/337 either in its original version or as amended by Directive 97/11. This complaint will be examined, first, in relation to Directive 85/337 as amended.

35 The first complaint, that transposition of Directive 85/337 as amended is incomplete and that, as a result, the directive is not properly implemented is based on three pleas in law.

36 First, the Commission claims that Ireland has not taken the measures necessary in order to ensure that checks are made to ascertain, in accordance with Article 2(1) of Directive 85/337 as amended, whether proposed works are likely to have significant effects on the environment, and, if that is the case, in order to render it obligatory that an environmental impact assessment be carried out, as laid down by that provision, before the grant of development consent.

37 Secondly, the Commission considers that the Irish legislation which allows an application for retention permission to be made after a development has been executed in whole or in part without consent undermines the preventive objectives of Directive 85/337 as amended.

38 Thirdly, the Commission claims that the enforcement regime established by Ireland does not guarantee the effective application of the directive, and that Ireland has thereby failed to fulfil its general obligation under Article 249 EC.

39 In support of the third plea in law, the Commission reports a number of examples which, in its opinion, illustrate the deficiencies in the application of the system of enforcement.

The first two pleas in law

– Arguments of the parties

40 The Commission claims that since it is possible, under the national legislation, to comply with the obligations imposed by Directive 85/337 as amended during or after execution of a development, there is no clear obligation to subject developments to an assessment of their effects on the environment before they are carried out.

41 In accepting that projects can be scrutinised, in an environmental impact assessment, after their execution, when the principal objective pursued by Directive 85/337 as amended is that effects on the environment should be taken into account at the earliest possible stage in all planning and decision-making processes, the national legislation in question recognises a possibility of regularisation which results in the undermining of that directive's effectiveness.

42 The Commission adds that the rules relating to retention permission are incorporated within the general provisions applicable to normal planning permission, and that there is

nothing to indicate that applications for retention permission and the grant of such permission are limited to exceptional cases.

43 Ireland contends that the Commission's analysis of the Irish legislation which transposes Directive 85/337 as amended is not accurate. Ireland states that Irish law expressly requires that permission be obtained for any new development before the commencement of works and that, as regards development which must be subject to an environmental impact assessment, the assessment must be carried out before the works. Failure to comply with those obligations is, moreover, a criminal offence and may result in enforcement action.

44 Ireland contends, in addition, that retention permission, established by the PDA and the Planning and Development Regulations, 2001, is an exception to the general rule which requires permission to be obtained before the commencement of a development, and best meets the objectives of Directive 85/337 as amended, in particular the general objective of protection of the environment, since the removal of an unauthorised development may not be the most appropriate measure to achieve that protection.

45 According to that Member State, the requirements of Directive 85/337 as amended are wholly procedural and are silent as to whether there may or may not be an exception by virtue of which an environmental impact assessment might, in certain cases, be carried out after commencement of works. Ireland adds that nowhere in the directive is it expressly stated that an assessment can solely be carried out before the execution of a project, and refers to the definition of the term 'development consent' given by Directive 85/337 as amended to argue that the use of 'proceed' is significant, that term not being confined to the commencement of works but also applying to the continuation of a development project.

46 Ireland contends, in addition, that retention permission is a reasonable fall-back mechanism to be resorted to in exceptional circumstances, designed to take account of the fact that some projects will inevitably, for various reasons, commence before the grant of development consent within the meaning of Directive 85/337 as amended.

47 On that point, Ireland relies on Case C-201/02 *Wells* [2004] ECR I-723 to argue that a remedial assessment may be carried out at a later stage, by way of exception to the general rule that the assessment must be carried out at the earliest possible stage in the decision-making process.

48 That Member State considers also that it would be disproportionate to order the removal of some structures in circumstances where, after consideration of an application for retention permission, retention is held to be compatible with proper planning and sustainable development.

– Findings of the Court

49 Member States must implement Directive 85/337 as amended in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before development consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a requirement for development consent and an assessment with regard to their effects (see, to that effect, Case C-287/98 *Linster* [2004] ECR I-723, paragraph 52, and Case C-486/04 *Commission* v *Italy* [2006] ECR I-11025, paragraph 36).

50 Further, development consent, under Article 1(2) of Directive 85/337 as amended, is the decision of the competent authority or authorities which entitles the developer to proceed with the project.

51 Given that this wording regarding the acquisition of entitlement is entirely unambiguous, Article 2(1) of that directive must necessarily be understood as meaning that, unless the applicant has applied for and obtained the required development consent and has first carried out the environmental impact assessment when it is required, he cannot commence the works relating to the project in question, if the requirements of the directive are not to be disregarded.

52 That analysis is valid for all projects within the scope of Directive 85/337 as amended, whether they fall under Annex I and must therefore systematically be subject to an assessment pursuant to Articles 2(1) and 4(1), or whether they fall under Annex II and, as such, and in accordance with Article 4(2), are subject to an impact assessment only if, in the light of thresholds or criteria set by the Member State and/or on the basis of a case-by-case examination, they are likely to have significant effects on the environment.

53 A literal analysis of that kind of Article 2(1) is moreover consonant with the objective pursued by Directive 85/337 as amended, set out in particular in recital 5 of the preamble to Directive 97/11, according to which 'projects for which an assessment is required should be subject to a requirement for development consent [and] the assessment should be carried out before such consent is granted'.

54 As the Irish legislation stands, it is undisputed that environmental impact assessments and planning permissions must, as a general rule, be respectively carried out and obtained, when required, prior to the execution of works. Failure to comply with those obligations constitutes under Irish law a contravention of the planning rules.

55 However, it is also undisputed that the Irish legislation establishes retention permission and equates its effects to those of the ordinary planning permission which precedes the carrying out of works and development. The former can be granted even though the project to which it relates and for which an environmental impact assessment is required pursuant to Articles 2 and 4 of Directive 85/337 as amended has been executed.

56 In addition, the grant of such a retention permission, use of which Ireland recognises to be common in planning matters lacking any exceptional circumstances, has the result, under Irish law, that the obligations imposed by Directive 85/337 as amended are considered to have in fact been satisfied.

57 While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

58 A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their

prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects.

59 Lastly, Ireland cannot usefully rely on *Wells*. Paragraphs 64 and 65 of that judgment point out that, under the principle of cooperation in good faith laid down in Article 10 EC, Member States are required to nullify the unlawful consequences of a breach of Community law. The competent authorities are therefore obliged to take the measures necessary to remedy failure to carry out an environmental impact assessment, for example the revocation or suspension of a consent already granted in order to carry out such an assessment, subject to the limits resulting from the procedural autonomy of the Member States.

60 This cannot be taken to mean that a remedial environmental impact assessment, undertaken to remedy the failure to carry out an assessment as provided for and arranged by Directive 85/337 as amended, since the project has already been carried out, is equivalent to an environmental impact assessment preceding issue of the development consent, as required by and governed by that directive.

61 It follows from the foregoing that, by giving to retention permission, which can be issued even where no exceptional circumstances are proved, the same effects as those attached to a planning permission preceding the carrying out of works and development, when, pursuant to Articles 2(1) and 4(1) and (2) of Directive 85/337 as amended, projects for which an environmental impact assessment is required must be identified and then – before the grant of development consent and, therefore, necessarily before they are carried out – must be subject to an application for development consent and to such an assessment, Ireland has failed to comply with the requirements of that directive.

62 Consequently, the first two pleas in law are well founded.

The third plea in law

– Arguments of the parties

63 According to the Commission, there are shortcomings in the Irish legislation relating to enforcement measures and in the resulting enforcement practices which undermine the proper transposition and implementation of Directive 85/337 as amended, when, under that directive, an effective system of control and enforcement is mandatory.

64 First, the Commission claims that the enforcement measures provided for by Irish planning legislation do not offset the absence of provisions requiring compliance with the obligations as to an environmental impact assessment before development is carried out.

65 Secondly, the Commission claims that enforcement practices undermine the proper transposition of Directive 85/337 as amended. The Commission refers to specific situations which illustrate, in its opinion, the deficiencies of the Irish legislation regarding supervising compliance with the rules established by that directive.

66 As regards the procedure relating to enforcement, Ireland contends the choice and form of enforcement is a matter within the discretion of Member States, in particular as there has been no harmonisation at Community level of planning and environmental controls.

67 In any event, Ireland states that the system of enforcement established by the Irish legislation is comprehensive and effective. The Member State adds that, under environmental law, the applicable provisions are legally binding.

68 Thus, the legislation places planning authorities under the obligation of sending a warning letter when they learn that an unauthorised development is being carried out, unless they consider that the development is of minor importance.

69 Once the warning letter has been sent, the planning authorities must decide whether it is appropriate to issue an enforcement notice.

70 The warning letter is intended to enable the persons responsible for unauthorised developments to undertake remedial action before the enforcement notice and the other stages of enforcement proceedings.

71 If an enforcement notice is issued, that sets out obligations and failure to comply with its requirements constitutes an offence.

72 Ireland adds that the enforcement regime must take account of various competing rights held by developers, landowners, the public and individuals directly affected by the development, and the weight of those various rights must be measured in order to reach a fair result.

73 Lastly, Ireland does not accept that the examples reported by the Commission prove the alleged failure to fulfil its obligations, since the Commission limits itself to general assertions.

– Findings of the Court

74 It is undisputed that, in Ireland, the absence of an environmental impact assessment required by Directive 85/337 as amended can be remedied by obtaining a retention permission which makes it possible, in particular, to leave projects which were not properly authorised undisturbed, provided that the application for such a permission is made before the commencement of enforcement proceedings.

75 The consequence of that possibility, as indeed Ireland recognises, may be that the competent authorities do not take action to suspend or put an end to a project that is within the scope of Directive 85/337 as amended and is being carried out or has already been carried out with no regard to the requirements relating to development consent and to an environmental impact assessment prior to issue of that development consent, and that they refrain from initiating the enforcement procedure provided for by the PDA, in relation to which Ireland points out that the powers are discretionary.

76 The inadequacy of the enforcement system set up by Ireland is accordingly demonstrated inasmuch as the existence of retention permission deprives it of any effectiveness, and that inadequacy is the direct consequence of the Member State's failure to

fulfil its obligations which was found in the course of consideration of the first two pleas in law.

77 That conclusion is not affected by the fact that, according to Ireland, the enforcement regime must take account of the various competing rights held by developers, landowners, the public and individuals directly affected by the development. The need to weigh those interests cannot in itself provide justification for the ineffectiveness of a system of control and enforcement.

78 Accordingly, it becomes superfluous to analyse the various examples put forward by the Commission to illustrate the deficiencies in application of the enforcement measures, since those deficiencies are the direct result of the inadequacies of the Irish legislation itself.

79 Consequently, the third plea in law is also well founded, and therefore the first complaint must be upheld on all of the pleas in law.

80 Lastly, the decision that the first complaint is well founded holds good both with regard to Directive 85/337 as amended and with regard to Directive 85/337. Under both the original and the amended version of the directive, projects likely to have significant effects on the environment must be subject to an assessment of their effects before the grant of development consent, the definition of development consent moreover remaining unchanged. In addition, the characteristics of the retention permission that are specified by the Irish legislation have remained the same.

81 It follows from the foregoing that, by failing to adopt all measures necessary to ensure that projects which are within the scope of Directive 85/337 either before or after amendment by Directive 97/11 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of that directive, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

The second complaint

82 This complaint relates to the circumstances obtaining for the construction of a wind farm at Derrybrien, County Galway, in relation to which it is useful first to note the various consents obtained.

83 As is clear from the documents before the Court, applications for consent relating to the first two phases of the development, each involving 23 wind turbines, were submitted on 4 and 18 December 1997. Fresh applications were lodged on 23 January 1998, since the earlier applications for consent were held to be invalid. Permission was issued on 12 March 1998. On 5 October 2000, an application was made for consent for a third phase of works relating, inter alia, to 25 turbines and service roadways, which was approved on 15 November 2001. On 20 June 2002, the developer applied for consent to alter the first two phases of the development, and those changes were authorised on 30 July 2002. In October 2003, when the consent granted for the first two phases of the works had expired, the developer applied for renewal of that consent, which was granted in November 2003.

Arguments of the parties

84 By this complaint, the Commission claims that Ireland did not take all the measures necessary to ensure that the development consents relating to the wind farm and associated works were preceded by an assessment of the environmental effects of the project, in accordance with Articles 5 to 10 of Directive 85/337 and of Directive 85/337 as amended.

85 The Commission argues that, while, pursuant to the Irish legislation, environmental impact assessments were carried out for various constituent parts of the development, those assessments were deficient.

86 In particular, the environmental impact assessment carried out in 1998 did not properly address the environmental risks attached to execution of the various constituent parts of the development. The impact assessment carried out for the third phase of the development was vitiated by the same inadequacies.

87 The Commission adds that the wind farm is the largest terrestrial wind-energy development ever planned in Ireland and one of the largest in Europe.

88 The Commission claims also that the construction of the wind farm required the destruction of large areas of coniferous forest amounting to 263 hectares, a felling licence having been granted on 20 May 2003. However, no environmental impact assessment was carried out for that operation, contrary to the very requirements of the Irish legislation.

89 The Commission adds that, after the landslide which occurred on 16 October 2003 and the consequent ecological disaster, when the mass of peat which was dislodged from an area under development for the wind farm polluted the Owendalulleegh river, causing the death of about 50 000 fish and lasting damage to the fish spawning beds, Ireland carried out no fresh environmental impact assessment of this construction before the resumption of work on the site by the developer in 2004.

90 Ireland contends that, when consents were applied for, in 1997 and in 1998, for the first two phases of construction of the wind farm, neither Annex I nor Annex II to Directive 85/337 referred to that category of project as being among those within its scope. Accordingly, it was not necessary that consent be preceded by an environmental impact assessment as governed by that directive. Ireland adds that the applications submitted in 1998 were, however, accompanied, in accordance with the Irish legislation, by an environmental impact statement.

91 Ireland considers, moreover, that it is artificial to attempt to suggest that ancillary aspects of the wind farm project, such as road construction, peat extraction, quarrying or electricity transmission, were of such importance that they made an environmental impact assessment within the meaning of Directive 85/337 necessary.

92 Ireland considers, in addition, that an application to extend the duration of a planning permission does not constitute 'development consent' within the meaning of Directive 85/337 as amended.

93 Ireland contends lastly that the landslide was caused by the construction methods used and that there was no question of difficulties which could have been anticipated by an

environmental impact assessment, even one in conformity with the Community requirements. It also states that, in order to ensure the safe completion of the wind farm, construction work practices were changed, after construction work had been suspended and an investigation carried out.

Findings of the Court

94 First, as regards the circumstances in which the consents relating to the first two phases of construction of the wind farm project were granted on 12 March 1998 following applications submitted on 23 January 1998, it is necessary to begin by deciding whether Directive 85/337 is applicable.

95 It is clear from Article 3 of Directive 97/11 that if an application for development consent was submitted to a competent authority before 14 March 1999, the provisions of Directive 85/337 continued to apply.

96 Moreover, while it is common ground that installations for the harnessing of wind power for energy production are not listed in either Annex I or Annex II to Directive 85/337, it is not disputed by Ireland that the first two phases of construction of the wind farm required a number of works, including the extraction of peat and of minerals other than metalliferous and energy-producing minerals, and also road construction, which are listed in Annex II to that directive, respectively in point 2(a) and (c) and in point 10(d).

97 Consequently, Directive 85/337 was applicable to the first two phases of construction of the wind farm in so far as they involved specifically the carrying out of work on projects referred to in Annex II to that directive.

98 It follows that Ireland was bound to subject the work on the projects to an impact assessment if they were likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location (see, to that effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 50, and Case C-2/07 *Abraham and Others* [2008] ECR I-0000, paragraph 37).

99 However, Ireland states that the competent authorities took the view that Annex II to Directive 85/337 was not applicable, since the ancillary works of peat extraction and road construction were minor aspects of the project of wind farm construction itself.

100 The competent authorities therefore considered that there was no need either to investigate whether the intended projects were likely to have significant effects on the environment or, accordingly, to conduct an environmental impact assessment meeting the requirements of Directive 85/337 prior to granting the consents.

101 However, the fact that the abovementioned projects falling under Annex II to that directive may have been of secondary importance vis-à-vis the wind farm construction project taken as a whole did not mean that, by virtue of that fact alone, those projects were not likely to have significant effects on the environment.

102 The intended projects of peat and mineral extraction and road construction were not insignificant in terms of scale by comparison with the overall area of the wind farm project which covered 200 hectares of peat bog and which was the largest project of its kind in

Ireland, and they were moreover essential both to the installation of the turbines and to the progress of the construction works as a whole. In addition, those works were carried out on the slopes of Cashlaundrumlahan Mountain, where there are layers of peat up to 5.5 metres in depth, largely covered by plantation forestry.

103 It follows from those factors, which are not disputed by Ireland, that the location and size of the projects of peat and mineral extraction and road construction, and the proximity of the site to a river, all constitute specific characteristics which demonstrate that those projects, which were inseparable from the installation of 46 wind turbines, had to be regarded as likely to have significant effects on the environment and, accordingly, had to be subject to an assessment of their effects on the environment.

104 The purpose of carrying out an environmental impact assessment in conformity with the requirements of Directive 85/337 is to identify, describe and assess in an appropriate manner the direct and indirect effects of a project on factors such as fauna and flora, soil and water and the interaction of those factors. In the present case, the environmental impact statements supplied by the developer had certain deficiencies and did not examine, in particular, the question of soil stability, although that is fundamental when excavation is intended.

105 Consequently, by failing to take all measures necessary to ensure that the grant of development consents relating to the first two phases of construction of the wind farm was preceded by an environmental impact assessment in conformity with Articles 5 to 10 of Directive 85/337 and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under that directive.

106 Secondly, as regards the application for consent relating to the third phase of construction of the wind farm, submitted on 5 October 2000, and the application for consent to alter the first two originally authorised phases of construction, lodged on 20 June 2002, the complaint must be considered in the light of Directive 85/337 as amended, since the applications for consent concerned were submitted after 14 March 1999.

107 It is not disputed, first, that the competent authorities gave their approval to the change in the type of wind turbines originally planned without requiring an environmental impact assessment in conformity with Directive 85/337 as amended and, secondly, that the consent given for the third phase of construction was also not accompanied by such an assessment. In addition, such an assessment did not precede the deforestation authorised in May 2003, contrary to the requirements of the Irish legislation.

108 However, point 3(i) of Annex II to Directive 85/337 as amended refers to installations for the harnessing of wind power for energy production (wind farms) and point 13 of that annex refers to any change or extension of projects listed in Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment.

109 In addition, the relevant selection criteria in Annex III to Directive 85/337 as amended, which are applicable to the projects listed in Annex II and are referred to in Article 4(3) of that directive, include the risk of accidents having regard inter alia to the technologies used. Noteworthy among those criteria is the environmental sensitivity of the geographical area,

which must be considered having regard, inter alia, to 'the absorption capacity of the natural environment', paying particular attention to mountain and forest areas.

110 Since the installation of 25 new turbines, the construction of new service roadways and the change in the type of wind turbines initially authorised, which was intended to increase the production of electricity, are projects which are referred to in Annex II to Directive 85/337 as amended and which were likely, having regard to the specific features of the site noted in paragraph 102 of this judgment and the criteria referred to in the preceding paragraph of this judgment, to have significant effects on the environment, they should, before being authorised, have been subject to a requirement for development consent and to an assessment of their effects on the environment, in conformity with the conditions laid down in Articles 5 to 10 of Directive 85/337 as amended.

111 Consequently, by failing to take all measures necessary to ensure that the grant of the amending consents and the consent relating to the third phase of construction of the wind farm was preceded by such an assessment, and by merely attaching to the applications for consent environmental impact statements which did not satisfy those requirements, Ireland has failed to fulfil its obligations under Directive 85/337 as amended.

112 It follows from the foregoing that, by failing to take all measures necessary to ensure that the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11, Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive.

Costs

113 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Ireland and the latter has been unsuccessful, Ireland must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by failing to adopt all measures necessary to ensure that:**

– **projects which are within the scope of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment either before or after amendment by Council Directive 97/11/EC of 3 March 1997 are, before they are executed in whole or in part, first, considered with regard to the need for an environmental impact assessment and, secondly, where those projects are likely to have significant effects on the environment by virtue of their nature, size or location, that they are made subject to an assessment with regard to their effects in accordance with Articles 5 to 10 of Directive 85/337, and**

– **the development consents given for, and the execution of, wind farm developments and associated works at Derrybrien, County Galway, were preceded by an assessment with regard to their environmental effects, in accordance with Articles 5 to 10 of Directive 85/337 either before or after amendment by Directive 97/11,**

Ireland has failed to fulfil its obligations under Articles 2, 4 and 5 to 10 of that directive;

2. **Orders Ireland to pay the costs.**

[Signatures]

JUDGMENT OF THE COURT (First Chamber)

4 May 2006 *

In Case C-508/03,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 1 December 2003,

Commission of the European Communities, represented by F. Simonetti and X. Lewis, acting as Agents,

applicant,

v

United Kingdom of Great Britain and Northern Ireland, represented by K. Manji, acting as Agent, D. Elvin QC and J. Maurici, Barrister,

defendant,

* Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Schiemann, N. Colneric, E. Juhász and E. Levits, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2005,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that:

— by failing to apply correctly Articles 2(1) and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and

private projects on the environment (OJ 1985 L 175, p. 40) in relation to the proposed urban development projects at White City and at Crystal Palace as projects falling within point 10(b) of Annex II to the directive, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive;

— by failing to ensure the correct application of Articles 2(1), 4(2), 5(2) and 8 of Directive 85/337, as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337, as amended'), when development consent is granted in a multi-stage procedure, the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under that directive.

Legal context

Community legislation

2 According to the fifth recital in the preamble thereto, Directive 85/337 is intended to establish general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects which are likely to have an effect on the environment.

3 For this purpose, Article 1(2) of Directive 85/337 defines 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

4 Article 2(1) of the directive states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

5 Article 4 of the directive provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

6 Article 5(2) of the directive provides that 'the information to be provided by the developer in accordance with paragraph 1 shall include at least:

— a description of the project comprising information on the site, design and size of the project,

— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

— the data required to identify and assess the main effects which the project is likely to have on the environment,

— a non-technical summary of the information mentioned in indents 1 to 3'.

7 Under Article 8 of the directive, 'information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure'.

8 Point 10(b) of Annex II to the directive refers to 'urban development projects'.

9 Directive 85/337, in particular the rules relating to projects falling within Annex II, was substantially amended by Directive 97/11, which had to be transposed in the United Kingdom by 14 March 1999 at the latest. Since the applications seeking consent for the two projects at issue in the first complaint were submitted to the competent authorities before that date, those amendments are not relevant to the projects, as is clear from Article 3(2) of Directive 97/11.

10 The second complaint, however, must be considered in the light of Directive 85/337, as amended.

11 In that regard, while Article 1(2) of Directive 85/337, as amended, remains unchanged, Article 2(1) of the directive now provides that 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects. These projects are defined in Article 4'.

12 Directive 97/11 also made a minor amendment to the wording of Article 5(2) of Directive 85/337 by inserting an indent requiring the developer also to provide:

'— an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects'.

13 The numbering of that provision also changed and it became Article 5(3) of Directive 85/337, as amended.

14 Article 8 of the directive provides, in its amended version, that 'the results of consultations and the information gathered pursuant to Articles 5, 6 and 7 must be taken into consideration in the development consent procedure'.

National legislation

15 In England, the principal legal instrument relating to land planning is the Town and Country Planning Act 1990 ('the Town and Country Planning Act'), which lays down general rules concerning both the grant of planning permission and the modification or revocation of such permission. This Act is amplified by the Town and Country Planning (General Development Procedure) Order 1995 ('the General Development Procedure Order') and the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ('the Assessment of Environmental Effects Regulations').

16 The Assessment of Environmental Effects Regulations were replaced by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999 ('the 1999 Regulations'). Since these new regulations apply only to applications lodged on or after 14 March 1999, they are not relevant to the two

projects at issue in the first complaint. On the other hand, they determine the relevant national law for the purposes of the second complaint.

— The Town and Country Planning Act and the General Development Procedure Order

17 Under section 57(1) of the Town and Country Planning Act, planning permission is required for any 'development' within the meaning of section 55, a term which includes 'the carrying out of building ... or other operations in, on, over or under land ...'.

18 Planning permission may be granted in several forms, one of which is outline permission with a requirement of subsequent approval of the reserved matters.

19 Section 92(1) of the Town and Country Planning Act provides that 'outline planning permission' is permission 'granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority or the Secretary of State of matters not particularised in the application ("reserved matters")'.

20 Article 1(2) of the General Development Procedure Order defines such 'reserved matters' as 'any of the following matters in respect of which details have not been given in the application, namely (a) siting, (b) design, (c) external appearance, (d) means of access, (e) the landscaping of the site'.

21 Section 92(2) of the Town and Country Planning Act implicitly provides that consent is deemed to be finally given for a reserved matter by the decision granting subsequent approval.

22 It is apparent from section 73 of the Town and Country Planning Act that an application for an amendment to an existing permission constitutes an application for a new planning permission.

— The Assessment of Environmental Effects Regulations and the 1999 Regulations

23 By virtue of the Assessment of Environmental Effects Regulations, certain projects must be subject to an environmental impact assessment before consent is granted.

24 Schedule 2 to the Assessment of Environmental Effects Regulations sets out the classes of project which are listed in Annex II to Directive 85/337, including 'urban development project[s]'.

25 Under regulation 2(1) of the Assessment of Environmental Effects Regulations, 'Schedule 2 application' means 'an application for planning permission ... for the carrying out of development of any description mentioned in Schedule 2, which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location', this being a matter to be assessed by the competent authority on a case-by-case basis.

26 As provided in regulation 4(1) and (2) of the Assessment of Environmental Effects Regulations, the competent authority cannot grant planning permission in respect of, inter alia, a Schedule 2 application unless it has first taken the environmental information into consideration and states in its decision that it has done so.

27 When faced with an application for planning permission in respect of a project envisaged in Schedule 2 to the regulations, the competent authority must therefore, on a case-by-case basis, determine prior to any grant of planning permission whether the characteristics of the project require an assessment of its environmental impact, that is to say whether the project is likely to have significant effects on the environment, and refuse permission if it does not have sufficient information to come to a decision on this point.

28 Under national law, outline planning permission constitutes 'planning permission' for the purposes of regulation 4 of the Assessment of Environmental Effects Regulations, whereas the decision approving reserved matters does not. For this reason, an environmental impact assessment can, under national law, be carried out in respect of a project only at the initial outline planning permission stage, and not at the later stage of approval of the reserved matters.

29 While the 1999 Regulations made substantive amendments to the rules applying to environmental impact assessment, they in no way altered the fact, at issue in the second complaint, that an assessment cannot be carried out at the reserved matters stage.

National implementing measures

30 Circular 15/88, issued by the Department of the Environment, provides non-statutory guidance to help the competent authorities to identify projects as referred to in Schedule 2 to the Assessment of Environmental Effects Regulations which must be the subject of an environmental impact assessment.

31 After stating, in paragraph 18, that the basic question to be asked is whether a project is likely to give rise to significant environmental effects, Circular 15/88 then explains, in paragraph 20, that in general terms an assessment is needed (i) for projects which are of more than local importance, (ii) for projects proposed in sensitive locations and (iii) for projects with unusually complex and potentially adverse effects.

32 Paragraphs 30 and 31 of Circular 15/88 state that, for certain categories of project, criteria and thresholds are listed in Appendix A to the circular that are intended to give a broad indication of the types of cases in which, in the Secretary of State's view, an environmental assessment may be required under the Assessment of Environmental Effects Regulations or, conversely, is not likely to be required. The circular adds, however, that those criteria and thresholds are purely indicative and the fundamental test to be applied in each case is whether the project is likely to have significant environmental effects.

33 With regard, more particularly, to urban development projects, the circular states, in paragraph 15 of Appendix A, that redevelopment of previously developed land is unlikely to require an assessment, unless the proposed development is one of certain specific types or is on a very much greater scale than the previous development.

34 The circular states, in paragraph 16 of Appendix A, with regard to projects on sites which have not previously been intensively developed that 'the need for [an assessment] should be considered in the light of the sensitivity of the particular location'. Thus, 'such schemes ... may require [an assessment] where:

(i) the site area of the scheme is more than five hectares in an urbanised area; or

(ii) there are significant numbers of dwellings in close proximity to the site of the proposed development, e.g. more than 700 dwellings within 200 metres of the site boundaries; or

(iii) the development would provide a total of more than 10 000 square metres (gross) of shops, offices or other commercial uses'.

35 In addition, paragraph 42 of the circular states that the preparation of an environmental statement is bound to require the developer to work out his proposals in some detail. Otherwise any thorough appraisal of likely effects will be impossible. It will be for the planning authority to judge how much information is required in the particular case. The information given in the environmental statement will have an important bearing on whether matters may be reserved in an outline planning permission. Where the information states or implies a particular treatment of any matter, it will not be appropriate to reserve that matter in the planning permission.

36 Paragraph 48 of Circular 2/99 issued by the Department of the Environment, Transport and the Regions, which replaced Circular 15/88 in March 1999 (in order to take account of the 1999 Regulations), notes that, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an environmental impact assessment can be carried out only at the initial stage of granting such permission and not at the later stage of approval of the reserved matters.

Facts and pre-litigation procedure

White City

37 In December 1993 Chesfield Plc ('Chesfield') applied to the London Borough of Hammersmith & Fulham ('Hammersmith & Fulham LBC'), the competent planning authority, for outline planning permission to develop retail and leisure facilities at White City, London (the 'White City development project'), a project falling within Annex II to Directive 85/337.

38 After considering the effects of the project, as set out in a number of reports, and following public consultation, Hammersmith & Fulham LBC took the view that an assessment of the effects that the project might have on the environment was not required.

39 In March 1996 Hammersmith & Fulham LBC granted outline planning permission. Certain matters were reserved for subsequent approval by that authority.

40 In October 1997 and September 1998 Chesfield made applications for approval of the reserved matters.

41 On 12 October 1999 Hammersmith & Fulham LBC gave such approval.

42 Works commenced after the approval.

43 Following receipt of a complaint, the Commission, by letter of 19 April 2001, gave the United Kingdom the opportunity to submit its observations and, on 20 August 2002, sent it a reasoned opinion, alleging that it had infringed Articles 2(1) and 4(2) of Directive 85/337 in relation to the White City development project, a project falling within point 10(b) of Annex II to that directive. The Commission set the United Kingdom a time-limit of two months for it to take the measures necessary to comply with the reasoned opinion. Being dissatisfied with the response given by the United Kingdom Government in its letter of 29 October 2002, the Commission brought the present action.

Crystal Palace

44 Crystal Palace Park, in London, is Metropolitan Open Land listed as a Grade II* historic park on the statutory register kept by English Heritage. Part of the site at issue relating to the access and adjoining land fall within the Crystal Palace Park Conservation Area.

45 On 4 April 1997 London & Regional Properties Ltd ('L&R') applied to the London Borough of Bromley ('Bromley LBC'), the competent planning authority, for outline planning permission to develop a leisure complex in Crystal Palace Park ('the Crystal Palace development project'), a project falling within Annex II to Directive 85/337.

46 After consideration which took into account a number of reports and additional information, Bromley LBC concluded that an environmental impact assessment was not required for the project.

47 On 24 March 1998 Bromley LBC granted outline planning permission, reserving certain matters for subsequent approval before any development was commenced.

48 On 25 January 1999 L&R applied to Bromley LBC for final determination of certain reserved matters. The details of the Crystal Palace development project then showed: (i) on the ground floor, 18 cinemas, a leisure area and an exhibition area; (ii) at the gallery level, restaurants and cafes, two leisure areas and public toilets; (iii) at roof level, a roof-top car park with a maximum of 950 spaces, four viewing areas and areas enclosing plant and equipment; (iv) the addition of a mezzanine floor of 800 square metres; and (v) changes to the construction of the external walls.

49 Those matters fell wholly within the parameters of the outline permission already granted.

50 However, at the meeting where a decision was to be taken on approval of the reserved matters, some Bromley LBC councillors expressed the wish that an environmental impact assessment should be carried out. After legal advice had been sought, they were informed that as a matter of domestic law an assessment could be carried out only at the initial outline planning permission stage.

51 Bromley LBC issued the notice of approval on 10 May 1999.

52 However, the planning permission has expired in the meantime without the project being carried out.

53 Following receipt of a complaint, the Commission, by letter of 6 November 2000, gave the United Kingdom the opportunity to submit its observations and, on 26 July 2001, sent it a reasoned opinion, alleging that it had infringed Articles 2(1) and 4(2) of Directive 85/337 in relation to the Crystal Palace development project, a project falling within point 10(b) of Annex II to that directive. The Commission set the United Kingdom a time-limit of two months for it to take the measures necessary to comply with the reasoned opinion. Being dissatisfied with the response given by the United Kingdom Government in its letter of 3 December 2001, the Commission brought the present action.

Incorrect transposition of Directive 85/337, as amended, regarding outline planning permission with a requirement of subsequent approval of the reserved matters

54 On 26 July 2001, having given the United Kingdom the opportunity to submit its observations, the Commission sent it a reasoned opinion, in which it stated that some aspects of the national legislation concerning assessment of the environmental

impact of projects, in particular as regards outline planning permission with a requirement of subsequent approval of the reserved matters, appeared to it to be incompatible with Directive 85/337, as amended. The Commission set the United Kingdom a time-limit of two months for it to take the measures necessary to comply with the reasoned opinion. Being dissatisfied with the response given by the United Kingdom Government in its letter of 3 December 2001, the Commission brought the present action.

The action

55 The Commission puts forward two complaints in support of its action.

56 The first complaint, as advanced by the Commission during the pre-litigation procedure and in its reply, is in essence divided into three limbs:

— infringement of Articles 2(1) and 4(2) of Directive 85/337 in that Hammersmith & Fulham LBC failed to investigate whether the White City development project required an environmental impact assessment;

— infringement of Articles 2(1) and 4(2) of Directive 85/337 in that Hammersmith & Fulham LBC failed to adopt a formal decision allowing it to be checked that the decision was based on adequate prior investigation;

— infringement of Articles 2(1) and 4(2) of Directive 85/337 in that neither Hammersmith & Fulham LBC nor Bromley LBC carried out an environmental impact assessment of the White City and Crystal Palace development projects respectively.

57 However, in its application the Commission mentions only the third limb of this complaint.

58 The second complaint concerns the incorrect transposition into national law of Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended, in the national rules which provide that, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an assessment may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage ('the rules at issue in the present case').

The first complaint: breach of the obligations to investigate whether an assessment was required, to adopt a formal decision in that regard and to carry out such an assessment (Articles 2(1) and 4(2) of Directive 85/337)

Admissibility of the first complaint

59 The United Kingdom Government puts forward four pleas of inadmissibility, alleging that a new complaint is involved, that the principle of legal certainty is infringed, that the national courts have jurisdiction and that the action is devoid of purpose.

— A new complaint

60 The United Kingdom Government contends that the first and second limbs of the first complaint, as set out in the Commission's reply, constitute a new complaint. While mention was admittedly made of those limbs in the letter of formal notice and the reasoned opinion and they were subsequently restated in the reply submitted to the Court, they were not, however, set out in the application initiating the proceedings. It is the application which defines the subject-matter of a case.

61 As to those submissions, it is not permissible for a party to alter the very subject-matter of the case during the proceedings, and the merits of the action must be examined solely in the light of the claims contained in the application initiating the proceedings (see, to that effect, Case 232/78 *Commission* v *France* [1979] ECR 2729, paragraph 3, and Case C-256/98 *Commission* v *France* [2000] ECR I-2487, paragraph 31).

62 Furthermore, by virtue of Article 21 of the Statute of the Court of Justice and Article 38(1)(c) of its Rules of Procedure, the Commission must, in any application made under Article 226 EC, indicate the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based (see Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17).

63 In the present case, no mention is made of the first and second limbs of the first complaint in the claims at the end of the application. Nor do they appear in the part of the application headed 'in law'.

64 Accordingly, the first two limbs of the first complaint, which were not included in the application initiating proceedings, are inadmissible although they were set out in the Commission's reply and mention is made of them in the letter of formal notice and the reasoned opinion.

65 It remains to consider, therefore, the admissibility of the third limb of the first complaint in the light of the other pleas of inadmissibility raised by the United Kingdom Government.

— Infringement of the principle of legal certainty

66 The United Kingdom Government contends that, in view of the considerable length of time that has passed since the planning permissions at issue were granted, the action for failure to fulfil obligations offends against the principle of legal certainty and undermines the legitimate expectations which developers derive from acquired rights.

67 It should be stated with regard to those submissions, first, that the infringement procedure is based on the objective finding that a Member State has failed to fulfil its obligations under the Treaty or secondary legislation (see, to that effect, Case C-71/97 *Commission* v *Spain* [1998] ECR I-5991, paragraph 14, and Case C-83/99 *Commission* v *Spain* [2001] ECR I-445, paragraph 23).

68 Secondly, it follows from case-law that, while the principles of legal certainty and of the protection of legitimate expectations require the withdrawal of an unlawful measure to occur within a reasonable time and regard must be had to how far the person concerned might have been led to rely on the lawfulness of the measure, the

fact remains that such withdrawal is, in principle, permitted (see, in particular, Joined Cases 7/56 and 3/57 to 7/57 *Algera and Others* v *Common Assembly of the ECSC* [1957] ECR 39, at 55 and 56; Case 14/81 *Alpha Steel* v *Commission* [1982] ECR 749, paragraph 10; and Case 15/85 *Consorzio Cooperative d'Abruzzo* v *Commission* [1987] ECR 1005, paragraph 12).

69 A Member State cannot therefore rely on legal certainty and legitimate expectations derived by developers from acquired rights in order to prevent the Commission from bringing an action seeking an objective finding that the Member State has failed to fulfil its obligations under Directive 85/337 with regard to assessment of the effects of certain projects on the environment.

— The jurisdiction of the national courts

70 The United Kingdom Government contends that it is for national courts and not the Court of Justice to determine whether a competent authority has correctly assessed whether a project will have significant effects on the environment.

71 As to that submission, the fact that proceedings have been brought before a national court to challenge the decision of a competent authority which is the subject of an action for failure to fulfil obligations and the decision of that court cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of the remedies available through the national courts cannot prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects (see Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraph 9; Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 24; and Case C-87/02 *Commission* v *Italy* [2004] ECR I-5975, paragraph 39).

— The action is devoid of purpose

72 The United Kingdom Government maintains that the permission granted in respect of the Crystal Palace development project expired in March 2003 without being implemented and that any infringement, even if established, is therefore wholly theoretical.

73 As to that submission, an action in respect of an infringement which no longer existed on the date upon which the period laid down in the reasoned opinion expired is, according to the case-law, inadmissible because it is devoid of purpose (see Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 13, and Case C-209/02 *Commission* v *Austria* [2004] ECR I-1211, paragraphs 17 and 18).

74 It is clear from settled case-law that the purpose of an action brought under Article 226 EC is to obtain a declaration that the State concerned has failed to fulfil its obligations under the Treaty and that it has failed to put an end to that infringement within the time set by the Commission in its reasoned opinion (Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 40). The Court has also consistently held that the question whether a Member State has failed to fulfil its obligations must be assessed by reference to the situation prevailing in the Member State concerned at the end of the period laid down in the reasoned opinion (see Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13, and Case C-362/90 *Commission* v *Italy*, paragraph 10).

75 In the present case, the fact that on expiry of the period laid down in the reasoned opinion, namely on 26 September 2001, the planning permission at issue was still in force is sufficient to preclude the action for failure to fulfil obligations from being regarded as devoid of purpose.

76 It follows from the above considerations that the pleas of inadmissibility in respect of the third limb of the first complaint must be dismissed.

The merits of the third limb of the first complaint

77 Before considering the merits, it is appropriate first to note that in proceedings under Article 226 EC for failure to fulfil obligations it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumptions (see, in particular, Case C-494/01 *Commission* v *Ireland* [2005] ECR I-3331, paragraph 41 and the case-law cited).

78 Thus, with regard more specifically to Directive 85/337, the Court held in Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, at paragraph 85, that the Commission must furnish at least some evidence of the effects that the project in question is likely to have on the environment.

79 However, the Member States are required, under Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article 211 EC, in ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied (see, in particular, *Commission* v *Ireland*, paragraph 42 and the case-law cited).

80 It follows in particular that, where the Commission has adduced sufficient evidence of certain matters in the territory of the defendant Member State, it is incumbent on

the latter to challenge in substance and in detail the information produced and the consequences flowing therefrom (see *Commission* v *Ireland*, paragraph 44 and the case-law cited).

81 It is in the light of those principles that the merits should be considered.

82 The Commission submits, in the third limb of its first complaint, that Articles 2(1) and 4(2) of Directive 85/337 have been infringed, on the ground that neither Hammersmith & Fulham LBC nor Bromley LBC carried out an environmental impact assessment of the White City and Crystal Palace development projects respectively, although those projects are likely to have significant effects.

83 The Commission notes that the White City development project involves about 58 000 square metres of retail and leisure development, including a major new road junction, 4 500 car parking spaces and a link to the Underground network. In its opinion, for a project of that size there is a presumption that an assessment is necessary, unless such a presumption is mitigated by other factors.

84 The Commission notes that the Crystal Palace development project includes leisure and commercial uses (18 cinemas, galleries, restaurants) covering 52 000 square metres, a roof-top car park with 950 spaces and a car park at ground level. The Commission is of the view that the scale and size of the project are such that it is likely to have significant effects on the environment, and that the competent authority therefore exceeded the limits of its discretion.

85 The United Kingdom Government considers that the competent authorities, in the light of the reports and studies in their possession and following the consultations that they carried out, were entitled to conclude that neither of the two projects was likely to have significant effects on the environment, and that they did not therefore need to be the subject of an environmental impact assessment.

86 As to those submissions, it should be noted that, as provided in Article 2(1) of Directive 85/337, 'projects' within the meaning of Article 4 of that directive which are likely to have significant effects must be made subject to an assessment with regard to their effects on the environment before consent for them is given.

87 For that purpose, Article 4(2) of Directive 85/337, read in conjunction with Annex II thereto, lists the projects to be made subject to an impact assessment where Member States consider that their characteristics so require.

88 Although in those circumstances Article 4(2) of Directive 85/337 gives the competent authority a degree of freedom in appraising whether or not a particular project must be made subject to an assessment, it is, however, clear from settled case-law that the limits of that discretion are to be found in the obligation, set out in Article 2(1) of the directive, that all projects which are likely to have significant effects on the environment are to be subject to an assessment (see, to that effect, Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraphs 44 and 45; Case C-87/02 *Commission* v *Italy*, paragraphs 43 and 44; and Case C-83/03 *Commission* v *Italy* [2005] ECR I-4747, paragraph 19).

89 Thus, it is clear from case-law that Directive 85/337 requires that all projects falling within Annex II that are likely to have significant effects on the environment be

made subject to an assessment (see, to that effect, *WWF and Others*, paragraph 45; *Commission* v *Portugal*, paragraph 82; and Case C-87/02 *Commission* v *Italy*, paragraph 44).

90 However, as has already been noted in paragraphs 77 to 80 above, proof that Article 2(1) of Directive 85/337 has been infringed requires the Commission to demonstrate that a Member State has failed to adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects. That proof may effectively be furnished by demonstrating that a Member State did not take the measures necessary to ascertain whether a project which does not reach the thresholds envisaged in Article 4(2) of Directive 85/337 is nevertheless likely to have significant effects on the environment by virtue inter alia of its nature, size or location. The Commission might also establish that a project likely to have significant effects on the environment was not the subject of an impact assessment although it should have been (*Commission* v *Portugal*, paragraph 82).

91 In that last respect, it is also clear from paragraphs 85 and 87 of *Commission* v *Portugal* that, in order to demonstrate that the national authorities exceeded the limits of their discretion by failing to require that an impact assessment be carried out before giving consent for a specific project, the Commission cannot limit itself to general assertions by, for example, merely pointing out that the information provided shows that the project in question is located in a highly sensitive area, without presenting specific evidence to demonstrate that the national authorities concerned made a manifest error of assessment when they gave consent to a project. The Commission must furnish at least some evidence of the effects that the project is likely to have on the environment.

92 In the present case, it is clear that the Commission did not satisfy the burden of proof placed upon it. It cannot merely rely on presumptions that large-scale projects are automatically likely to have significant effects on the environment without establishing, on the basis of at least some specific evidence, that the competent authorities made a manifest error of assessment.

93 Despite the analytical material and documents supplied by the United Kingdom Government, the Commission did not seek to back up its own assertions and refute those of the defendant Member State through detailed examination of that material or by obtaining, producing, examining or providing an analytical presentation of tangible and specific evidence which might have enabled the Court to assess whether the competent authorities did in fact exceed the limits of their discretion.

94 In those circumstances, the third limb of the first complaint must be dismissed as unfounded.

The second complaint: incorrect transposition into domestic law of Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended

95 By its second complaint, the Commission in essence contends that the national rules at issue, under which an assessment may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage, incorrectly transpose into domestic law Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended.

96 The Commission argues that, where national law provides for a consent procedure comprising more than one stage, Directive 85/337, as amended, requires that an assessment may in principle be carried out at each stage in that procedure if it appears that the project in question is likely to have significant effects on the environment.

97 The Commission contends that, in so far as the national rules at issue in the present case preclude an assessment at the later reserved matters stage, they do not satisfy that requirement.

98 In its view, those rules allow some projects to escape assessment although they are likely to have significant effects on the environment.

99 The United Kingdom Government contends, on the other hand, that Article 2(1) of that directive makes it clear that a project must be subject to an assessment 'before consent is given'. Since that 'consent' is given when outline planning permission is granted (and not when the reserved matters are subsequently approved), the rules at issue correctly transpose Articles 2(1), 4(2), 5(3) and 8 of Directive 85/337, as amended.

100 As to those submissions, it should be noted that Article 1(2) of that directive defines 'development consent' for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project.

101 In the present case, it is common ground that, under national law, a developer cannot commence works in implementation of his project until he has obtained reserved matters approval. Until such approval has been granted, the development in question is still not (entirely) authorised.

102 Therefore, the two decisions provided for by the rules at issue in the present case, namely outline planning permission and the decision approving reserved matters, must be considered to constitute, as a whole, a (multi-stage) 'development consent' within the meaning of Article 1(2) of Directive 85/337, as amended.

103 In those circumstances, it is clear from Article 2(1) of Directive 85/337, as amended, that projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to their effects before (multi-stage) development consent is given (see, to that effect, Case C-201/02 *Wells* [2004] ECR I-723, paragraph 42).

104 In that regard, the Court stated in *Wells*, at paragraph 52, that where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

105 In the present case, the rules at issue provide that an environmental impact assessment in respect of a project may be carried out only at the initial outline planning permission stage, and not at the later reserved matters stage.

106 Those rules are therefore contrary to Articles 2(1) and 4(2) of Directive 85/337, as amended. The United Kingdom has thus failed to fulfil its obligation to transpose those provisions into domestic law.

107 However, so far as concerns Articles 5(3) and 8 of Directive 85/337, as amended, the Commission has not provided any explanation as to why it considers that those two provisions have not been complied with.

108 Accordingly, the second complaint is partly well founded.

109 In the light of all the above considerations, it must be held that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Community law by incorrectly transposing into domestic law Articles 2(1) and 4(2) of Directive 85/337, as amended, as a result of the national rules under which, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an assessment may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage.

Costs

110 Under Article 69(3) of the Rules of Procedure, the Court may order that the costs be shared or that the parties bear their own costs, if each party succeeds on some and fails on other heads. Since the parties have respectively been unsuccessful on a number of heads, they must be ordered to bear their own costs.

On those grounds, the Court (First Chamber) hereby:

1. **Declares that the United Kingdom of Great Britain and Northern Ireland has failed to fulfil its obligations under Community law by incorrectly transposing into domestic law Articles 2(1) and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, as a result of the national rules under which, in the case of outline planning permission with a requirement of subsequent approval of the reserved matters, an assessment may be carried out only at the initial stage of granting such permission, and not at the later reserved matters stage;**

2. **Dismisses the action as to the remainder;**

3. **Orders the Commission of the European Communities and the United Kingdom to bear their own costs.**

[Signatures]

JUDGMENT OF THE COURT (First Chamber)

4 May 2006 *

In Case C-290/03,

REFERENCE for a preliminary ruling under Article 234 EC from the House of Lords (United Kingdom), made by order of 30 June 2003, received at the Court on 3 July 2003, in the proceedings

The Queen, on the application of:

Diane Barker,

v

London Borough of Bromley,

intervener:

First Secretary of State,

* Language of the case: English.

THE COURT (First Chamber),

composed of P. Jann (Rapporteur), President of the Chamber, K. Schiemann, N. Colneric, E. Juhász and E. Levits, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2005,

after considering the observations submitted on behalf of:

— Ms Barker, by R. McCracken QC and G. Jones and J. Pereira, Barristers, instructed by R.M. Buxton, Solicitor,

— the London Borough of Bromley, by T. Straker QC and J. Strachan, Barrister, instructed by Sharpe Pritchard, Solicitors,

— the United Kingdom Government, by K. Manji, acting as Agent, D. Elvin QC and J. Maurici, Barrister,

— the French Government, by G. de Bergues and D. Petrausch, acting as Agents,

— the Commission of the European Communities, by F. Simonetti and X. Lewis, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 1(2), 2(1) and 4(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

2 The reference was made in the course of proceedings between Ms Barker and the London Borough of Bromley ('Bromley LBC'), the competent planning authority, concerning the grant of planning permission to develop a leisure complex in Crystal Palace Park, London, without an environmental impact assessment having been carried out.

Legal context

Community legislation

3 According to the fifth recital in the preamble thereto, Directive 85/337 is intended to establish general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects which are likely to have an effect on the environment.

4 For this purpose, Article 1(2) of Directive 85/337 defines 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

5 Article 2(1) of the directive states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue inter alia of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

6 Article 4 of the directive provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

7 Point 10(b) of Annex II to the directive refers to 'urban development projects'.

8 Directive 85/337, in particular the rules relating to projects falling within Annex II, was substantially amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), which had to be transposed in the United Kingdom by 14 March 1999 at the latest. Since the application seeking consent for the project at issue in the main proceedings was submitted to the competent authority before the latter date, those amendments are not relevant to the project, as is clear from Article 3(2) of Directive 97/11.

National legislation

9 In England, the principal legal instrument relating to land planning is the Town and Country Planning Act 1990 ('the Town and Country Planning Act'), which lays down general rules concerning both the grant of planning permission and the modification or revocation of such permission. This Act is amplified by the Town and Country Planning (General Development Procedure) Order 1995 ('the General Development Procedure Order') and the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988 ('the Assessment of Environmental Effects Regulations').

10 The Assessment of Environmental Effects Regulations were replaced by the Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999. However, since these new regulations apply only to applications lodged on or after 14 March 1999, they are not relevant to the project at issue in the main proceedings.

— The Town and Country Planning Act and the General Development Procedure Order

11 Under section 57(1) of the Town and Country Planning Act, planning permission is required for any 'development' within the meaning of section 55, a term which includes 'the carrying out of building ... or other operations in, on, over or under land ...'.

12 Planning permission may be granted in several forms, one of which is outline permission with a requirement of subsequent approval of the reserved matters.

13 Section 92(1) of the Town and Country Planning Act provides that 'outline planning permission' is permission 'granted, in accordance with the provisions of a development order, with the reservation for subsequent approval by the local planning authority or the Secretary of State of matters not particularised in the application ("reserved matters")'.

14 Article 1(2) of the General Development Procedure Order defines such 'reserved matters' as 'any of the following matters in respect of which details have not been given in the application, namely (a) siting, (b) design, (c) external appearance, (d) means of access, (e) the landscaping of the site'.

15 Section 92(2) of the Town and Country Planning Act implicitly provides that consent is deemed to be finally given for a reserved matter by the decision granting subsequent approval.

16 It is apparent from section 73 of the Town and Country Planning Act that an application for an amendment to an existing permission constitutes an application for a new planning permission.

— The Assessment of Environmental Effects Regulations

17 By virtue of the Assessment of Environmental Effects Regulations, certain projects must be subject to an environmental impact assessment before consent is granted.

18 Schedule 2 to the regulations sets out the classes of project which are listed in Annex II to Directive 85/337, including 'urban development project[s]'.

19 Under regulation 2(1) of the Assessment of Environmental Effects Regulations, 'Schedule 2 application' means 'an application for planning permission ... for the carrying out of development of any description mentioned in Schedule 2, which is not exempt development and which would be likely to have significant effects on the environment by virtue of factors such as its nature, size or location', this being a matter to be assessed by the competent authority on a case-by-case basis.

20 As provided in regulation 4(1) and (2) of the Assessment of Environmental Effects Regulations, the competent authority cannot grant planning permission in respect of, inter alia, a Schedule 2 application unless it has first taken the environmental information into consideration and states in its decision that it has done so.

21 When faced with an application for planning permission in respect of a project envisaged in Schedule 2 to the regulations, the competent authority must therefore, on a case-by-case basis, determine prior to any grant of planning permission whether the characteristics of the project require an assessment of its environmental

impact, that is to say whether the project is likely to have significant effects on the environment, and refuse permission if it does not have sufficient information to come to a decision on this point.

22 Under national law, outline planning permission constitutes 'planning permission' for the purposes of regulation 4 of the Assessment of Environmental Effects Regulations, whereas the decision approving reserved matters does not. For this reason, an environmental impact assessment can, under national law, be carried out in respect of a project only at the initial outline planning permission stage, and not at the later stage of approval of the reserved matters.

Implementing measures

23 Circular 15/88, issued by the Department of the Environment, provides non-statutory guidance to help the competent authorities to identify projects as referred to in Schedule 2 to the Assessment of Environmental Effects Regulations which must be the subject of an environmental impact assessment.

24 After stating, in paragraph 18, that the basic question to be asked is whether a project is likely to give rise to significant environmental effects, Circular 15/88 then explains, in paragraph 20, that in general terms an assessment is needed (i) for projects which are of more than local importance, (ii) for projects proposed in sensitive locations and (iii) for projects with unusually complex and potentially adverse effects.

25 Paragraphs 30 and 31 of Circular 15/88 state that, for certain categories of project, criteria and thresholds are listed in Appendix A to the circular that are intended to give a broad indication of the types of cases in which, in the Secretary of State's view, an environmental assessment may be required under the Assessment of Environmental Effects Regulations or, conversely, is not likely to be required. The circular adds, however, that those criteria and thresholds are purely indicative and the fundamental test to be applied in each case is whether the project is likely to have significant environmental effects.

26 With regard, more particularly, to urban development projects, the circular states, in paragraph 15 of Appendix A, that redevelopment of previously developed land is unlikely to require an assessment, unless the proposed development is one of certain specific types or is on a very much greater scale than the previous development.

27 The circular states, in paragraph 16 of Appendix A, with regard to projects on sites which have not previously been intensively developed that 'the need for [an assessment] should be considered in the light of the sensitivity of the particular location'. Thus, 'such schemes ... may require [an assessment] where:

(i) the site area of the scheme is more than five hectares in an urbanised area; or

(ii) there are significant numbers of dwellings in close proximity to the site of the proposed development, e.g. more than 700 dwellings within 200 metres of the site boundaries; or

(iii) the development would provide a total of more than 10 000 square metres (gross) of shops, offices or other commercial uses'.

28 In addition, paragraph 42 of the circular states that the preparation of an environmental statement is bound to require the developer to work out his proposals in some detail. Otherwise any thorough appraisal of likely effects will be impossible. It will be for the planning authority to judge how much information is required in the particular case. The information given in the environmental statement will have an important bearing on whether matters may be reserved in an outline planning permission. Where the information states or implies a particular treatment of any matter, it will not be appropriate to reserve that matter in the planning permission.

The main proceedings and the questions referred for a preliminary ruling

29 Ms Barker lives in the vicinity of Crystal Palace Park.

30 On 4 April 1997 London & Regional Properties Ltd ('L&R') applied to Bromley LBC for outline planning permission to develop a leisure complex in Crystal Palace Park ('the Crystal Palace development project'), a project falling within Annex II to Directive 85/337.

31 After consideration which took into account a number of reports and additional information, Bromley LBC concluded that an environmental impact assessment was not required for the project.

32 On 24 March 1998 Bromley LBC granted outline planning permission, reserving certain matters for subsequent approval before any development was commenced.

33 On 25 January 1999 L&R applied to Bromley LBC for final determination of certain reserved matters. The details of the Crystal Palace development project then showed: (i) on the ground floor, 18 cinemas, a leisure area and an exhibition area; (ii) at the gallery level, restaurants and cafes, two leisure areas and public toilets; (iii) at roof level, a roof-top car park with a maximum of 950 spaces, four viewing areas and areas enclosing plant and equipment; (iv) the addition of a mezzanine floor of 800 square metres; and (v) changes to the construction of the external walls.

34 At the meeting where a decision was to be taken on approval of the reserved matters, some Bromley LBC councillors expressed the wish that an environmental impact assessment should be carried out. However, after legal advice had been sought, they were informed that as a matter of domestic law an assessment could be carried out only at the initial outline planning permission stage.

35 Bromley LBC issued the notice of approval on 10 May 1999.

36 Ms Barker's action challenging that approval and the legal advice on which it was based was dismissed at first instance and by the Court of Appeal.

37 Since the House of Lords, before which Ms Barker brought an appeal, had doubts as to the compatibility with Community law of the national rules according to which an

environmental impact assessment can be carried out only at the outline planning permission stage and not when the reserved matters are subsequently approved ('the rules at issue in the main proceedings'), it decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is identification of "the decision of the competent authority or authorities which entitles the developer to proceed with the project" (Article 1(2) of Directive 85/337/EEC ("the Directive")) exclusively a matter for the national court applying national law?

(2) Does the Directive require an EIA [environmental impact assessment] to be carried out if, following the grant of outline planning permission subject to conditions that reserved matters be approved, without an EIA being carried out, it appears when approval of reserved matters is sought that the project may have significant effects on the environment by virtue inter alia of its nature, size or location (Article 2(1) of the Directive)?

(3) In circumstances where:

(a) national planning law provides for the grant of outline planning permission at an initial stage of the planning process and requires consideration by the competent authority at that stage as to whether an EIA is required for purposes of the Directive; and

(b) the competent authority then determines that it is unnecessary to carry out an EIA and grants outline planning permission subject to conditions reserving specified matters for later approval; and

(c) that decision can then be challenged in the national courts;

may national law, consistently with the Directive, preclude a competent authority from requiring that an EIA be carried out at a later stage of the planning process?'

Consideration of the questions

Question 1

38 By its first question, the national court essentially asks whether classification of a decision as a 'development consent' within the meaning of Article 1(2) of Directive 85/337 depends exclusively on national law.

39 Article 1(2) of Directive 85/337 defines 'development consent' for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project.

40 Thus, while this term is modelled on certain elements of national law, it remains a Community concept which, contrary to the submissions of Bromley LBC and the United Kingdom Government, falls exclusively within Community law. According to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope are normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question (see, to this effect, Case 327/82 *Ekro* [1984] ECR 107, paragraph 11; Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43; and Case C-201/02 *Wells* [2004] ECR I-723, paragraph 37).

41 The answer to the first question must therefore be that classification of a decision as a 'development consent' within the meaning of Article 1(2) of Directive 85/337 must be carried out pursuant to national law in a manner consistent with Community law.

Questions 2 and 3

42 By its second and third questions, which it is appropriate to consider together, the national court essentially asks whether Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, following the grant of outline planning permission, it appears at the time of approval of the reserved matters that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.

43 First, according to Article 2(1) of Directive 85/337, projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to their effects before development consent is given (*Wells*, paragraph 42).

44 As has been noted in paragraph 39 of the present judgment, Article 1(2) of Directive 85/337 defines 'development consent' for the purposes of the directive as the decision of the competent authority or authorities which entitles the developer to proceed with the project.

45 It is apparent from the scheme and the objectives of Directive 85/337 that this provision refers to the decision (involving one or more stages) which allows the developer to commence the works for carrying out his project.

46 Having regard to those points, it is therefore the task of the national court to verify whether the outline planning permission and decision approving reserved matters which are at issue in the main proceedings constitute, as a whole, a 'development consent' for the purposes of Directive 85/337 (see, in this connection, the judgment delivered today in Case C-508/03 *Commission* v *United Kingdom* [2006] ECR I-3969, paragraphs 101 and 102).

47 Second, as the Court explained in *Wells*, at paragraph 52, where national law provides for a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, the effects which a project may have on the environment must be identified and assessed at the time of

the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

48 If the national court therefore concludes that the procedure laid down by the rules at issue in the main proceedings is a consent procedure comprising more than one stage, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters set by the principal decision, it follows that the competent authority is, in some circumstances, obliged to carry out an environmental impact assessment in respect of a project even after the grant of outline planning permission, when the reserved matters are subsequently approved (see, in this regard, *Commission* v *United Kingdom*, paragraphs 103 to 106). This assessment must be of a comprehensive nature, so as to relate to all the aspects of the project which have not yet been assessed or which require a fresh assessment.

49 In the light of all of the foregoing, the answer to the second and third questions must be that Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Classification of a decision as a 'development consent' within the meaning of Article 1(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be carried out pursuant to national law in a manner consistent with Community law.**

2. **Articles 2(1) and 4(2) of Directive 85/337 are to be interpreted as requiring an environmental impact assessment to be carried out if, in the case of grant of consent comprising more than one stage, it becomes apparent, in the course of the second stage, that the project is likely to have significant effects on the environment by virtue inter alia of its nature, size or location.**

[Signatures]

JUDGMENT OF THE COURT (Second Chamber)
16 September 2004 *

In Case C-227/01,

ACTION under Article 226 EC for failure to fulfil obligations,

brought on 7 June 2001,

Commission of the European Communities, represented by G. Valero Jordana, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by S. Ortiz Vaamonde, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Spanish.

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, C. Gulmann, J.N. Cunha Rodrigues, R. Schintgen (Rapporteur) and F. Macken, Judges,

Advocate General: L. Poiares Maduro,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 February 2004,

after considering the observations submitted by the parties,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2004,

gives the following

Judgment

1 By its application the Commission of the European Communities has brought an action for a declaration that in failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations

under Articles 2, 3, 5(2) and 6(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

Legal framework

Community legislation

2 According to the first and sixth recitals in its preamble, Directive 85/337 seeks to prevent pollution and other damage to the environment by making certain public and private projects subject to prior assessment of their environmental effects.

3 As is clear from the fifth recital in the preamble, to that end the Directive introduces general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.

4 The eighth and eleventh recitals in the preamble to Directive 85/337 state that certain types of projects have significant effects on the environment and must as a rule be subject to systematic assessment in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

5 The provisions of Directive 85/337 relevant in this case, in their wording prior to Council Directive 97/11/EC of 3 March 1997 amending that directive (OJ 1997 L 73, p. 5), are as follows.

6 Article 1 of Directive 85/337 reads:

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

— 2. For the purposes of this Directive:

— "project" means:

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

— other interventions in the natural surroundings and landscape ...'.

7 Article 2 of the Directive states:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter

alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

...

3. Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;

(b) make available to the public concerned the information relating to the exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

...'

8 Article 3 of the Directive provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the inter-action between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

9 Article 4 of Directive 85/337, to which the second subparagraph of Article 2(1) thereof refers, states:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

...'

10 Point 7 of Annex I to that directive refers, among other projects, to 'construction of ... lines for long-distance railway traffic'.

11 Point 12 of Annex II to the Directive refers, inter alia, to 'modifications to development projects included in Annex I'.

12 Article 5(1) and (2) of Directive 85/337 state:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

— a description of the project comprising information on the site, design and size of the project,

— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

— the data required to identify and assess the main effects which the project is likely to have on the environment,

— a non-technical summary of the information mentioned in indents 1 to 3.'

13 According to Article 6(2) of the Directive:

'Member States shall ensure that:

— any request for development consent and any information gathered pursuant to Article 5 are made available to the public,

— the public concerned is given the opportunity to express an opinion before the project is initiated.'

14 Article 12 of Directive 85/337 provides:

'1. Member States shall take the measures necessary to comply with this Directive within three years of its notification.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.'

15 The Directive was notified to the Member States on 3 July 1985.

National legislation

16 The Spanish legislation which implements point 7 of Annex I to Directive 85/337 lists, among the projects which must be made subject to an environmental impact assessment procedure, 'long-distance railway lines which involve a new route'.

The pre-litigation procedure

17 Following receipt of a complaint in May 1999 and an exchange of letters between the Commission and the Spanish authorities, the Commission gave the Kingdom of Spain formal notice by letter of 13 April 2000 to submit its observations within two months. It took the view that those authorities had incorrectly implemented Directive 85/337 by not subjecting to a prior environmental impact assessment the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor'.

18 Since it was not satisfied with the explanations provided by the Spanish Government, the Commission sent a reasoned opinion to the Kingdom of Spain on 26 September 2000, requesting that it adopt, within two months from the notification of that opinion, the measures necessary to comply therewith.

19 After the Spanish Government replied to that reasoned opinion by a letter of 2 January 2001 in which it repeated its earlier arguments, the Commission decided to bring the present action.

The application

20 The Commission complains that the Spanish Government failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Directive 85/337 by not carrying out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of

the project known as the 'Mediterranean corridor' linking the Spanish region of Levante to Catalonia and the French border.

Admissibility

21 At the hearing, the Spanish Government challenged the admissibility of the action on the ground that the application was based on a complaint different from that relied on during the pre-litigation procedure.

22 That Government maintains that during the pre-litigation procedure, the subject-matter of the dispute was clearly limited to a 13.2-km-long section of the railway line which separates Las Palmas from the town of Oropesa. At that stage of the proceedings the Commission complained more particularly that the Spanish Government had not complied with the requirements of Directive 85/337 as regards a 7.64-km-long part of that section, where the route was moved a maximum of 800 m to the west in order to bypass the town of Benicasim. The Commission did not, however, in either the letter of formal notice or the reasoned opinion, refer to the doubling of the track on the rest of the section, which is 13.2 km in length; in particular, it at no point stated that the doubling of existing track falls within the scope of the Directive.

23 In its application, the Commission insists that such a doubling of the track of an existing railway line should be held to be subject to the requirements of the Directive. In addition, it refers to the entire length of the Valencia-Tarragona line, which is 251 km.

24 Under those conditions, the subject-matter of the dispute has clearly been expanded.

25 First of all, in this case, the Court notes that the validity of the reasoned opinion and of the procedure which preceded it is not in dispute. Nevertheless, the Spanish Government maintains that the complaint put forward in the application differs from that contained in the letter of formal notice and the reasoned opinion.

26 It is settled case-law that the subject-matter of proceedings brought under Article 226 EC is circumscribed by the pre-litigation procedure provided for by that provision and that, consequently, the Commission's reasoned opinion and the application must be based on the same complaints (see, inter alia, Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraph 18).

27 In the present case, however, it cannot be maintained that the subject-matter of the dispute as defined during the pre-litigation procedure has been expanded or modified.

28 First, in response to a question by the Court, the Commission confirmed that the subject-matter of the present action is limited to a 13.2-km-long section between Las Palmas and Oropesa and that, contrary to the Spanish Government's assertion, it in no way extends to the whole of the route of the Valencia-Tarragona line, which is 251 km in length.

29 Secondly, both the letter of formal notice and the reasoned opinion sent by the Commission to the Kingdom of Spain refer, as does the application, to the 'Las Palmas-Oropesa section', which the defendant Government does not deny is 13.2 km in length. Moreover, the defence lodged by the Spanish Government shows unambiguously that it in no way misunderstood the scope of the proceedings, since it itself considers that the project at issue concerns the 13.2 km section which separates the towns of Las Palmas and Oropesa, on which the existing track is doubled and adapted for speeds of up to 220 km/h, a 7.64-km-long section of which constitutes a new route intended to bypass the town of Benicasim.

30 Consequently, the present action is admissible.

Substance

Arguments of the parties

31 In support of its action, the Commission states that it is common ground that the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', was not made subject to the environmental impact assessment procedure laid down in Directive 85/337.

32 According to the Commission, such an assessment was mandatory in the present case, since it involved one of the projects mentioned in point 7 of Annex I to the Directive, to which Article 4(1) thereof refers.

33 The Commission infers from this that Directive 85/337 was incorrectly implemented in respect of the project in question and that the Kingdom of Spain has therefore infringed Articles 2, 3, 5(2) and 6(2) of the Directive.

34 In the opinion of the Commission, none of the reasons relied on by the Spanish Government to justify its method of proceeding in the present case can be accepted.

35 The line of argument put forward by that Government conflicts with the letter of Directive 85/337, and in particular the actual wording of point 7 of Annex I thereto, and is incompatible with the spirit and purpose of that directive.

36 The Spanish Government admits that the project at issue was not formally made subject to the environmental impact assessment procedure laid down by Directive 85/337, but it takes the view that that procedure was not necessary in the present case.

37 That directive was not applicable since the work undertaken merely consisted in improving an already existing railway line by doubling the original single track without constructing a new railway line and with no need for a new long-distance route.

38 That view is supported by the wording of the national legislation transposing point 7 of Annex I to Directive 85/337 into Spanish law, which the Commission at no time claimed was incompatible with the requirements of the Directive. Moreover, as regards the wording of point 7, the English-language version also uses the term 'lines' rather than the term 'tracks'.

39 In addition, the project at issue is not intended for long-distance traffic within the meaning of point 7, since it links two towns which are only 13.2 km distant from one another.

40 Moreover, the doubling of the tracks does not in fact have environmental effects beyond those caused by the construction of the original line and, in any event, the Commission has not furnished evidence of the existence of such effects.

41 The Spanish Government adds, in the alternative, that the requirements of the Directive have in the present case been complied with in substance, since the revision of the general development plan for Benicasim, which took place in 1992, was preceded by an impact assessment submitted to a public inquiry and an environmental impact declaration. Since the subject-matter of that revision was precisely the setting aside of an area for construction of the loop line around the town of Benicasim, a new study on the effects of the work undertaken for that purpose was not required.

42 Finally, the competent national authorities acted in good faith in the present case and demonstrated their cooperative spirit by accepting the Commission's position as regards the part of the project where it was still possible to do so, since they submitted 'modification No 3' of that project, which in essence relates to the construction of a 754.5-m-long viaduct, to a public inquiry before completion of the works.

Findings of the Court

43 Given the line of argument of the defendant Government, in order to assess the merits of the Commission's action it is appropriate to establish whether Directive 85/337 and, in particular, the obligation which it lays down to carry out an environmental impact assessment, apply to the project in question and, if so, whether that project was carried out in compliance with the rules set out in that directive.

44 As regards the first point, the argument put forward by the Spanish Government that point 7 of Annex I to the Directive refers only to the construction of a new line in the sense of a new railway connection between two towns and therefore does not apply to a doubling of existing tracks cannot be upheld.

45 While it is not necessary in the context of these proceedings to give a ruling on whether all the language versions of point 7 of Annex I to Directive 85/337 use a

term equivalent to the term 'tracks' ('vias' in the Spanish-language version) or on the compatibility with the Directive of the Spanish legislation adopted to implement that provision inasmuch as it uses the term 'lines' ('líneas'), it is clear from the Court's case-law that the need for a uniform interpretation of Community law requires, in the case of divergence between different language versions of a provision, that it be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, inter alia, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 28).

46 The Court has already held that the wording of Directive 85/337 indicates that its scope is wide and its purpose very broad (*Kraaijeveld and Others*, cited above, paragraphs 31 and 39).

47 In particular, Articles 1(1) and 2(1) and the first, fifth, sixth, eighth and 11th recitals in the preamble make clear that the Directive's fundamental objective is that, before consent is granted, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be made subject to a mandatory assessment with regard to their effects (see to that effect Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 52).

48 On the basis of those considerations alone, point 7 of Annex I to Directive 85/337 must be understood to include the doubling of an already existing railway track.

49 A project of that kind can have a significant effect on the environment within the meaning of that directive, since it is likely to have lasting effects on, for example, flora and fauna and the composition of soil or even on the landscape and produce significant noise effects, inter alia, so that it must be included in the scope of the Directive. The objective of Directive 85/337 would be seriously undermined if that type of project for the construction of new railway track, even parallel to existing track, could be excluded from the obligation to carry out an assessment of its effects on the environment. Accordingly, a project of that sort cannot be considered a mere modification to an earlier project within the meaning of point 12 of Annex II to the Directive.

50 Moreover, that conclusion is all the more obvious when, as in the present case, the execution of the project at issue involves a new track route, even if that applies only to part of the project. Such a construction project is by its nature likely to have significant effects on the environment within the meaning of Directive 85/337.

51 The argument of the Spanish Government that the conditions for applying point 7 of Annex I to the Directive are not fulfilled, since the project in question does not relate to long-distance traffic within the meaning of that provision but rather only to a 13.2 km section between neighbouring towns, is also without substance.

52 As the Commission rightly maintains, the project in question is part of a 251-km-long railway line between Valencia and Tarragona, which forms part of the project known as the 'Mediterranean corridor', linking the Spanish region of Levante to Catalonia and the French border.

53 If the argument of the Spanish Government were upheld, the effectiveness of Directive 85/337 could be seriously compromised, since the national authorities concerned would need only to split up a long-distance project into successive shorter sections in order to exclude from the requirements of the Directive both the project as a whole and the sections resulting from that division.

54 In the light of all those considerations, the project which is the subject of the Commission's action, which concerns laying a supplementary 13.2-km-long railway track, a 7.64 km section of which covers a new route in order to bypass the town of Benicasim, and which is part of a 251-km-long railway line, belongs in one of the categories listed in Annex I to Directive 85/337 which must in principle be made subject to a mandatory systematic assessment pursuant to Articles 4(1) and 5(1) of the Directive.

55 As to whether that project was carried out in compliance with the rules set out in Directive 85/337, it should be noted that the Spanish Government admits that the project as such was not made subject to the requirements of the Directive as regards assessment of its effects on the environment. Moreover, that Government does not claim that the conditions laid down in Article 2(3) of the Directive are fulfilled in this case.

56 Next, as regards the Spanish Government's argument that the 1992 revision of the general development plan for Benicasim was preceded by an impact assessment submitted to a public inquiry and an environmental impact declaration, it must be pointed out that even if that plan included all the information necessary to fulfil the

minimum conditions set by Directive 85/337 it could not, in any event, be considered adequate since, as the Commission claims without being seriously contradicted on that point by the defendant Government, the plan involves only the territory of the town of Benicasim and, more specifically, the bypass around that town, while the parties agree that the contested project is far broader. It follows that, at least for the remaining part of that project, the Directive's requirements have not been correctly applied.

57 Nor is the Spanish Government's assertion that the competent authorities complied with the requirements of that directive as regards 'modification No 3' of the project justified. First, according to the defendant Government, the information intended for the public was published only after work on the project had begun. Such a method of proceeding is clearly contrary to the requirements of Article 6(2) of Directive 85/337, which states that the public concerned is to be given the opportunity to express an opinion before the project is initiated. The fact, invoked by the Spanish Government, that the public inquiry took place before the work was completed is therefore wholly irrelevant. Secondly, that procedure related to only one part of the section in question, which is 13.2 km in length, namely 'modification No 3', relating essentially to the construction of a viaduct of some 750 m in length.

58 Moreover, the fact that the national authorities acted in good faith is also irrelevant. It is settled case-law that an action for failure to fulfil obligations is objective in nature and the fact that a failure to fulfil obligations results from a Member State's incorrect interpretation of the Community-law provisions in question cannot preclude the Court from declaring that there has been such a failure (Case C-73/92 *Commission* v *Spain* [1993] ECR I-5997, paragraph 19).

59 Finally, as regards the Spanish Government's contention that the Commission failed to provide a proper statement of reasons for the alleged infringement since it did not furnish evidence that the doubling of an existing track has effects on the environment beyond those produced by the construction of the original line, suffice it to point out that the relevant criterion for the implementation of Directive 85/337 is the significant effect that a particular project is 'likely' to have on the environment (see, in that regard, Article 1(1) of the Directive and the fifth and sixth recitals in the preamble thereto). Under those conditions, it is not for the Commission to establish the concrete negative effects that a project in fact has on the environment. On the other hand, the Commission has in the present case proved to the requisite legal standard that the project in question falls within the scope of one of the provisions of Annex I to that directive and must therefore be made subject to a mandatory environmental impact assessment. Moreover, it is indisputable that a project of this type is such as to create significant new nuisances, even if only as the result of the adaptation of the railway line with a view to traffic which can attain a speed of 220 km/h.

60 In the light of all the foregoing considerations, the Commission's application must be considered well-founded.

61 Consequently, it must be held that by failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Directive 85/337.

Costs

62 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Spain has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that by failing to carry out an assessment of the effects on the environment of the 'project for a Valencia-Tarragona railway line, Las Palmas-Oropesa section. Roadbed', which forms part of the project known as the 'Mediterranean corridor', the Kingdom of Spain has failed to fulfil its obligations under Articles 2, 3, 5(2) and 6(2) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment;**

2. **Orders the Kingdom of Spain to pay the costs.**

Signatures.

JUDGMENT OF THE COURT (First Chamber)

10 June 2004 *

In Case C-87/02,

Commission of the European Communities, represented by M. van Beek and R. Amorosi, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Italian Republic, represented by I.M. Braguglia, acting as Agent, assisted by M. Massella Ducci Teri, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

APPLICATION for a declaration that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero-Variante, tra Teramo (Italy) e Giulianova, alla strada statale SS 80'), of a

* Language of the case: Italian

type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive,

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas (Rapporteur), A. La Pergola, R. Silva de Lapuerta and K. Lenaerts, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: R. Grass,

having regard to the Report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 January 2004,

gives the following

Judgment

1 By an application lodged at the Registry of the Court on 13 March 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (Italy) (a project known as 'Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80', hereinafter the 'Lotto zero' project), of a type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), required an environmental impact assessment in accordance with Articles 5 to 10 of the Directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.

Legal background

Community legislation

2 Directive 85/337 applies, according to Article 1(1) thereof, to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment.

3 Article 1(2) of the Directive defines a project as:

'— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

4 Article 2(1) of Directive 85/337 states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

5 Article 4 of Directive 85/337 provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

6 Annex II to Directive 85/337, relating to projects subject to Article 4(2) thereof, lists in paragraph (d) of point 10, headed 'Infrastructure projects':

'Construction of roads, harbours, including fishing harbours, and airfields (projects not listed in Annex I)'.

7 Article 5 of Directive 85/337 in essence specifies the minimum information to be provided by the developer. Article 6 requires Member States to take the measures necessary to ensure that the authorities and members of the public concerned are informed and are able to express an opinion before the project is initiated. Article 8 requires the competent authorities to take into consideration information gathered pursuant to Articles 5 and 6. Article 9 imposes an obligation on the competent authorities to inform the public of the decision taken and any conditions attached to it.

8 Article 12 of Directive 85/337 provides that Member States are to take the measures necessary to comply with the Directive within three years of its notification. It was notified to Member States on 3 July 1985.

9 That directive was amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5), Article 3(1) of which provides for implementation by 14 March 1999 at the latest. Directive 97/11 was therefore not applicable in the present case at the material time.

10 Article 4(2) et seq. of Directive 85/337, as amended by Directive 97/11, states:

'2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

National legislation

11 The Decree of the President of the Republic of 12 April 1996, entitled 'Atto di indirizzo e coordinamento per l'attuazione dell'art. 40, comma 1, della L. 22 febbraio 1994, n. 146, concernente disposizioni in materia di valutazione di impatto ambientale' (Policy and coordination measure for the application of Article 40(1) of Law No 146 of 22 February 1994 on the provisions relating to the assessment of environmental effects) (GURI No 210, of 7 September 1996, p. 28, hereinafter 'the Decree of 12 April 1996') states, in Article 1:

'1. The Regions and the Autonomous Provinces of Trento and Bolzano shall ensure that an environmental impact assessment is carried out for projects listed in Annexes A and B, in conformity with Directive 85/337/EEC, following the guidelines contained in the present measure.

...

4. Projects included in Annex B which are situated, even in part, within the protected natural areas defined by Law No 394 of 6 December 1991 shall be made subject to an assessment of their effects on the environment.

...

6. For projects listed in Annex B which are not situated in a protected natural area, the competent authority shall ascertain, in accordance with the rules laid down in Article 10 and on the basis of the information provided in Annex D, whether the characteristics of a project require an assessment of its effects on the environment to be undertaken.'

12 Article 10(1) and (2) of the Decree of 12 April 1996 states:

'1. For the projects referred to in paragraph 6 of Article 1, the developer or authority which submits the proposal shall request the screening provided for in that paragraph. The information which the proposing developer or authority must provide for that screening shall contain a description of the project and the information necessary in order to understand and assess the main effects which the project could have on the environment.

2. The competent authority shall take a decision within 60 days on the basis of the information required under Annex D and shall identify potential measures making it possible to mitigate effects and to monitor works and/or installations. In the event that the competent authority does not respond within the period referred to above, the project shall be considered exempted from the procedure. The Regions and Autonomous Provinces of Trento and Bolzano shall adopt the measures necessary to make public the list of projects for which screening has been requested and the results thereof.'

13 Annex B to the Decree of 12 April 1996 on the types of projects referred to in Article 1(4) of that decree lists in point 7(g) and (h):

'(g) Secondary outer roads,

(h) Construction of relief roads in urban areas or reinforcement of existing roads of four or more lanes of a length greater than 1 500 metres in an urban area.'

14 Annex D to the Decree of 12 April 1996 specifies the information which the competent authority must take into account when examining the characteristics and location of a project in the context of the screening provided for in the sixth paragraph of Article 1 of that decree.

15 The Abruzzo Region transposed the Decree of 12 April 1996 by Regional Law No 112, of 23 September 1997, entitled 'Norme urgenti per il recepimento del decreto del Presidente della Repubblica 12 aprile 1996' (Urgent rules for the transposition of the Decree of the President of the Republic, of 12 April 1996).

Pre-litigation procedure

16 It is apparent from the application made by the Commission that on 11 May 1998 it asked the Italian authorities to provide information on the 'Lotto zero' project. According to the information available to the Commission at the time, consent for

that project was given without its being made subject to an environmental impact assessment and to screening intended to determine whether an assessment of its effects on the environment was necessary.

17 The Commission had been informed, in the context of a question put by a Member of the European Parliament, that the purpose of the project was to construct a stretch of express relief road 10.50 metres wide, comprising four viaducts and four tunnels. The road, which would cross an area close to residences some metres from the historic centre of the commune of Teramo in Abruzzo (Italy), would affect the bed of the Tordino river, the subject of the environmental improvement project known as 'Fiume Tordino medio corso', financed by the Community. That area was proposed by the Italian Republic as a site of Community importance under the procedure intended to set up the European ecological network known as 'Natura 2000', within the meaning of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7).

18 By letter of 23 July 1998, the Republic of Italy confirmed to the Commission that the project concerned construction of a two-lane road 10.50 metres in width and of an unspecified length, one section of which, crossing the territory of the commune of Teramo, would affect the right part of the basin of the Tordino river and would measure 5 440 metres in length, including 2 260 metres of viaduct and 930 metres of tunnel.

19 It emerges from the correspondence between the Commission, the Italian Environment Ministry and the Permanent Representation that, on 12 March 1999, the Abruzzo Region gave its consent to carrying out the works and that the special commissioner appointed for that work decided not to subject the operation to either an environmental impact assessment or screening.

20 By letter of 21 May 1999, the Ministry drew attention to the requirements imposed by the Decree of 12 April 1996 and asked the special commissioner for the project and the Abruzzo Region to give reasons for the decision not to subject that project to either an impact assessment or screening. The special commissioner then asked the Abruzzo Region to initiate the regional procedures for screening environmental compatibility, in accordance with the Decree of 12 April 1996.

21 The project was subjected to the procedure intended to ascertain whether it was required to undergo an assessment of its effects on the environment. Since the Abruzzo Region considered that the area in question was not part of a protected area within the meaning of Law No 394/91 and Regional Law No 38/96, it decided, by means of Regional Decree No 25/99, prot. No 3624 of 15 November 1999, to approve the screening of environmental compatibility and thereby exempt the project from the environmental impact assessment procedure.

22 By letter of 30 May 2000, sent to the Commission by a note of 16 June 2000 from the Permanent Representation, the Italian Environment Ministry pointed out that Regional Decree No 25/99 had been adopted following the favourable opinion by the Comitato di Coordinamento Regionale sulla Valutazione di Impatto Ambientale (Regional Coordinating Committee on environmental impact assessment, hereinafter 'the Coordinating Committee') No 3/76 of 22 October 1999, which for its part referred back to a civil engineering opinion which was not mentioned in Regional Decree No 25/99. The Decree provided no explanation for that omission and no argument in support of the decision taken by the regional administration.

23 On 24 October 2000, the Commission sent a letter of formal notice to the Italian Republic, stating that the information available to it did not indicate that the Abruzzo Region had subjected the project in question, which is listed in Annex II to Directive 85/337, to screening intended to establish whether its characteristics required an assessment within the meaning of Articles 5 to 10 of the Directive.

24 Since the Commission did not consider the various responses by the Italian authorities to that formal notice to be satisfactory, it delivered a reasoned opinion to the Italian Republic by letter of 18 July 2001, giving it two months in which to adopt the measures required in order to comply with it.

Procedure before the Court

25 The Court decided to ask various questions of the Italian Republic and of the Commission and to request that they produce several documents. In particular, it asked the Italian Republic to produce the civil engineer's opinion referred to in the context of the pre-litigation procedure. After examining the responses and documents, the Court decided, in accordance with Article 44a of the Rules of Procedure, to give judgment without a hearing.

Substance

Arguments of the parties

26 The Commission points out that, under the first paragraph of Article 4(2) of Directive 85/337, projects listed in Annex II are to be made subject to an assessment, in accordance with Articles 5 to 10 of the Directive, when Member States consider that their characteristics require it. The second paragraph of Article 4(2) of Directive 85/337 authorises Member States, inter alia, to set criteria or thresholds in order to determine which of the projects listed in the classes set out in Annex II must be made subject to an assessment in accordance with Articles 5 to 10 of that directive.

27 The Commission states that, as is clear from Case C-435/97 *WWF and Others* [1999] ECR I-5613, in the absence of a legislative measure which specifies, from the outset and in its entirety, which projects to subject to an environmental impact assessment procedure, Member States have the power to exclude a specific project from that procedure only following a concrete examination of that project which makes clear, on the basis of a full screening, the reasons why it cannot have an effect on the environment.

28 In the Decree of 12 April 1996, the Italian Republic failed to specify, from the outset and in their entirety, in accordance with the second paragraph of Article 4(2) of Directive 85/337, what projects must be made subject to an environmental impact assessment. It merely referred to those likely to be made subject to screening intended to establish the need to carry out an environmental impact assessment. Such is the case for the projects listed in Annex B to the Decree of 12 April 1996, in particular in point 7(g) (secondary outer roads) or 7(h) (construction of relief roads in urban areas or widening of an existing road to four or more lanes, of a length greater than 1 500 metres within an urban area), which correspond to the projects listed in Annex II to Directive 85/337, in particular in point 10(d) and (e) (construction of airfields, roads, harbours, including fishing harbours).

29 Since the project 'Lotto zero' corresponds to the projects provided for by those provisions, it should have been made subject to screening, and clear and precise reasons should have been given for the decision not to carry out an assessment in accordance with Articles 5 to 10 of Directive 85/337. However, the decision not to make the project subject to assessment makes no mention of any established assessment criteria and fails to explain whether the screening referred to in the sixth paragraph of Article 1 of the Decree of 12 April 1996 was carried out or, if it was, how it was carried out. The statement of reasons provided for Regional Decree No 25/99 therefore suggests that the Abruzzo Region did not ascertain whether it was necessary for the project to be made subject to an assessment in accordance with Articles 5 to 10 of Directive 85/337. In its reply, the Commission states that the opinion of the Coordinating Committee referred to in Decree No 25/99 was never brought to its attention.

30 It points out that, even if the content and mechanism of the screening referred to in Article 4(2) of Directive 85/337 were elaborated only by Directive 97/11, which amends Directive 85/337 but which is not applicable in the present case, it is not acceptable that it be completely ignored without any reasons being given for the decision.

31 In addition, the argument that the rejection by national courts of applications brought by environmental protection associations prevents the Commission from ascertaining whether a Member State has fulfilled its obligations under the Directive is without any foundation and contrary to the Court's case-law. It is in fact clear from *WWF*, cited above, that it is for the national court to ascertain whether the competent authorities have correctly assessed the significance of the effects of a project on the environment. However, that does not preclude the Court's ruling on the obligations for Member States which result from Article 4(2) of Directive 85/337 and, accordingly, the Commission, on the basis of the powers conferred on it under Article 226 EC, has the duty to draw attention to a failure to comply with a provision of Community law.

32 Finally, the Commission points out that a Member State must deal with infringements not only by its central government but also those by its local and decentralised authorities.

33 The Italian Republic recalls the circumstances in which the Abruzzo Region adopted Regional Decree No 25/99 of 15 November 1999.

34 As regards the reasons for that decision, it maintains that Article 4(2) of Directive 85/337 allows a case-by-case examination to determine whether the project must be made subject to assessment. That directive thus provides for the adoption of an express measure before subjecting a project to an assessment. Accordingly, it is

warranted to allow the competent authorities not to respond when no assessment is needed and not to require them to adopt formal measures unless the project must be made subject to an impact assessment.

35 Such would be the procedure under Article 10(2) of the Decree of 12 April 1996, by which the competent authority may fail to respond where it takes the view that no assessment is needed, which is tantamount to a decision to close the screening procedure.

36 The Italian Republic in any event denies the alleged infringement, since the national competent authority adopted an explicit measure, namely Decree No 25/99, on the basis of an opinion by the Coordinating Committee.

37 It points out that, as is clear from the judgment in *WWF*, cited above, it is for the national court to review whether the competent authorities have correctly assessed the significance of the effects of a project on the environment. In the present case, the project 'Lotto zero' was subjected to review by the Tribunale amministrativo regionale del Lazio as the result of an application introduced by the Associazione Italiana Nostra-Onlus and the Associazione Italiana per il World Wildlife Fund. By an order of 21 June 2000, that court rejected the application to suspend implementation of the contested decisions relating to that project.

Findings of the Court

38 First of all, it should be recalled that the fact that a Member State has conferred on its regions the responsibility for giving effect to directives cannot have any bearing on the application of Article 226 EC. The Court has consistently held that a Member

State cannot plead conditions existing within its own legal system in order to justify its failure to comply with obligations and time-limits resulting from Community directives. While each Member State may freely allocate internal legislative powers as it sees fit, the fact remains that it alone is responsible towards the Community under Article 226 EC for compliance with obligations arising under Community law (Case C-33/90 *Commission* v *Italy* [1991] ECR I-5987, paragraph 24; also, to that effect, the order in Case C-180/97 *Regione Toscana* v *Commission* [1997] ECR I-5245, paragraph 7). Therefore, it is not relevant in the present case that the infringement results from a decision by the Abruzzo Region.

39 The fact that proceedings have been brought before a national court to challenge the decision of a national authority which is the subject of an action for failure to fulfil obligations and the decision of that court not to suspend implementation of that decision cannot affect the admissibility of the action for failure to fulfil obligations brought by the Commission. The existence of remedies available through the national courts cannot in any way prejudice the bringing of an action under Article 226 EC, since the two procedures have different objectives and effects (Case 31/69 *Commission* v *Italy* [1970] ECR 25, paragraph 9, and Case 85/85 *Commission* v *Belgium* [1986] ECR 1149, paragraph 24).

40 As regards the present action, in accordance with the first paragraph of Article 4(2) of Directive 85/337, projects of the classes listed in Annex II are to be made subject to an assessment where Member States consider that their characteristics so require. The second paragraph of Article 4(2) of the Directive provides that 'Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10'.

41 The Court has already held that the second paragraph of Article 4(2) mentions, by way of indication, methods to which the Member States may have recourse when determining which of the projects falling within Annex II are to be subject to an assessment within the meaning of Directive 85/337 (*WWF*, paragraph 42).

42 Consequently, Directive 85/337 confers a measure of discretion on the Member States and does not therefore prevent them from using other methods to specify the projects requiring an environmental impact assessment under the Directive. So the Directive in no way excludes the method consisting in the designation, on the basis of an individual examination of each project concerned or pursuant to national legislation, of a particular project falling within Annex II to the Directive as not being subject to the procedure for assessing its environmental effects (*WWF*, paragraph 43).

43 However, the fact that the Member State has the discretion referred to in the previous paragraph is not in itself sufficient to exclude a given project from the assessment procedure under the Directive. If that were not the case, the discretion accorded to the Member States by Article 4(2) of the Directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it could have significant environmental effects (*WWF*, paragraph 44).

44 Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis

of a comprehensive screening, be regarded as not being likely to have such effects (*WWF*, paragraph 45).

45 In the present case, the infringement relates to a project to construct a road which, in accordance with the Italian legislation which transposes Directive 85/337 and with the Directive itself, should have been screened to determine whether it needed to be subjected to an assessment. The Commission claims that the Italian Republic in essence failed to state reasons for the decision by the Abruzzo Region not to carry out an impact assessment, which suggests that no preliminary screening was carried out.

46 Examination of the documents produced shows that Decree No 25/99, by which the Abruzzo Region gives a favourable opinion as regards the outcome of the screening procedure and decides to exempt the project from the assessment procedure, is based on a cursory statement of reasons and merely refers to the favourable opinion by the Coordinating Committee. The latter opinion, which appears in the handwritten minutes of the Committee's meeting of 22 October 1999, contains a sentence which conveys the favourable opinion and states that in adopting that opinion, the Committee had available to it the civil engineer's opinion No 8634 of 6 July 1999.

47 As the Advocate General rightly observes in point 33 of his Opinion, that opinion by Teramo's civil engineering department, produced at the Court's request, is not an opinion on the environmental effects of the project, but merely an authorisation 'solely for hydraulic purposes' to cross the Tordino river and carry out certain works. The document attached by the Italian Republic to its defence, the cover page of which gives the necessary details as to the nature of the document and which was produced at the Court's request, does not appear to be required under the Law as part of the screening procedure. Moreover, the Court does not have information which would allow it to conclude that it was used by the competent authority as a basis for its decision.

48 That information indicates that no screening was carried out to determine whether to subject the project 'Lotto zero' to an impact study and that the failure to fulfil obligations as set out by the Commission in its claims is established.

49 It should be pointed out, however, that if the civil engineer's opinion had not been produced at the request of the Court, it would have been impossible to determine whether the screening had been carried out or not. It must be observed that a decision by which the national competent authority takes the view that a project's characteristics do not require it to be subjected to an assessment of its effects on the environment must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening, carried out in accordance with the requirements of Directive 85/337.

50 In conclusion, it must be held that since the Abruzzo Region did not ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero — Variante, tra Teramo e Giulianova, alla strada statale SS 80'), of a type listed in Annex II to Directive 85/337, required an environmental impact assessment in accordance with Articles 5 to 10 of that directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.

Costs

51 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Declares that, since the Abruzzo Region failed to ascertain whether the project to construct an outer ring road at Teramo (a project known as 'Lotto zero-Variante, tra Teramo e Giulianova, alla strada statale SS 80'), of a type listed in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, required an environmental impact assessment in accordance with Articles 5 to 10 of that directive, the Italian Republic has failed to fulfil its obligations under Article 4(2) of that directive.**

2. **Orders the Italian Republic to pay the costs.**

Jann Rosas La Pergola

Silva de Lapuerta Lenaerts

Delivered in open court in Luxembourg on 10 June 2004.

Registrar President of the First Chamber

R. Grass P. Jann

JUDGMENT OF THE COURT (Fifth Chamber)

7 January 2004 *

In Case C-201/02,

REFERENCE to the Court under Article 234 EC by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), for a preliminary ruling in the proceedings pending before that court between

The Queen on the application of **Delena Wells**

and

Secretary of State for Transport, Local Government and the Regions,

on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment,

* Language of the case: English.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), acting for the President of the Fifth Chamber, D.A.O. Edward and A. La Pergola, Judges,

Advocate General: P. Léger,
Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mrs Wells, by R. Gordon QC and J. Pereira, barrister, instructed by R. Buxton, solicitor,

— the United Kingdom Government, by P. Ormond, acting as Agent, D. Elvin QC and J. Maurici, barrister,

— the Commission of the European Communities, by X. Lewis, acting as Agent, and N. Khan, barrister,

having regard to the Report for the Hearing,

after hearing the oral observations of Mrs Wells, represented by R. Gordon and J. Pereira, instructed by S. Ring, solicitor; the United Kingdom Government, represented by R. Caudwell, acting as Agent, and D. Elvin; and the Commission, represented by X. Lewis and N. Khan, at the hearing on 12 June 2003,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2003,

gives the following

Judgment

1 By order of 12 February 2002, received at the Court on 6 May 2002, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40).

2 Those questions were raised in proceedings between Mrs Wells and the Secretary of State for Transport, Local Government and the Regions (hereinafter 'the Secretary of State') concerning the grant of a new consent for mining operations at Conygar Quarry without an environmental impact assessment having first been carried out.

Legal context

Community legislation

3 As stated in the fifth recital in its preamble, Directive 85/337 is intended to introduce general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures for public and private projects likely to have a major effect on the environment.

4 Article 1(2) of the directive defines 'development consent' as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'.

5 Article 2(1) of the directive states:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

6 In Article 4, the directive divides projects into two wide categories: those likely by their nature to give rise to significant effects on the environment and those which will not necessarily do so in all cases. Article 4(2) thus provides:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may inter alia specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

7 Point 2(c) of Annex II to the directive refers to projects for 'extraction of minerals other than metalliferous and energy-producing minerals, such as marble, sand, gravel, shale, salt, phosphates and potash'.

National legislation

8 Prior to the Town and Country Planning Act 1947, the Town and Country Planning (General Interim Development) Order 1946 empowered the competent authorities to grant, by interim development orders, consents for mineral

extraction ('old mining permissions') in order to respond to the need for construction materials which arose during the period immediately following World War II.

9 Since then, the Town and Country Planning Act, as enacted in 1947 and in its subsequent versions, has constituted the principal legal instrument relating to land planning in the United Kingdom.

10 The Act lays down general rules concerning both the grant of planning permission and the modification or revocation of such permission.

11 Thus, under sections 97 and 100 of the Town and Country Planning Act 1990, the competent authorities have the power to revoke or modify any permission on planning grounds. The power to revoke a permission may be exercised at any time before the operations authorised have been completed.

12 By virtue of paragraphs 1 and 11 of Schedule 9 to the Town and Country Planning 1990, the competent authorities may by order require discontinuance of the use of land for the winning and working of minerals or impose certain conditions on the continuance of such use.

13 Section 22 of the Planning and Compensation Act 1991 lays down a special set of rules for old mining permissions.

14 Section 22(3) of the Planning and Compensation Act 1991 provides that if no development has, at any time in the period of two years ending on 1 May 1991, been carried out to any substantial extent, operations may not resume until 'the conditions to which the [old mining] permission is to be subject' have been determined and registered in accordance with section 22(2). On the other hand, if no application for registration is made before 25 March 1992, the old mining permission will cease to have effect (section 22(4) of the Act and paragraph 1(3) of Schedule 2 thereto).

15 Schedule 2 to the Planning and Compensation Act 1991 describes in detail the procedures for determining the registration conditions.

16 Under paragraphs 1 and 2 of Schedule 2 to the Planning and Compensation Act 1991, applications for registration and for determination of planning conditions are to be made to the competent mineral planning authority (hereinafter 'MPA').

17 If the conditions determined by the MPA differ from those set out in the application, the applicant may appeal to the Secretary of State (paragraph 5(2) of Schedule 2 to the Planning and Compensation Act 1991).

18 In accordance with section 22(7) of the Planning and Compensation Act 1991, the provisions relating to old mining permissions are to have effect as if they were included in the Town and Country Planning Act 1990. That presumption has the effect of integrating the provisions relating to old mining permissions into the general land use planning regime, in so far as no specific provision was adopted in the Planning and Compensation Act 1991.

19 Under the Town and Country Planning (Assessment of Environmental Effects) Regulations 1988, mining permissions granted pursuant to the Town and Country Planning Act 1990 are subject to environmental impact assessment in accordance with Directive 85/337. The regime prescribed in section 22 of the Planning and Compensation Act 1991 for old mining permissions was not, on the other hand, considered to be subject to such an environmental impact assessment procedure.

The main proceedings and the questions referred for a preliminary ruling

20 In 1947 an old mining permission was granted for Conygar Quarry by interim development order under the Town and Country Planning (General Interim Development) Order 1946.

21 Conygar Quarry is divided into two sections, of slightly more than 7.5 hectares each, separated by a road on which Mrs Wells's house is situated. Mrs Wells bought her house in 1984, that is to say 37 years after the permission had been granted, but at a time when the quarry had long since been dormant. However, in June 1991 operations recommenced for a short period.

22 The site is recognised to be environmentally extremely sensitive. The area in or adjacent to which the quarry lies is subject to several designations of nature and environmental conservation importance.

23 At the beginning of 1991, the owners of Conygar Quarry applied to the competent MPA for registration of the old mining permission under the Planning and Compensation Act 1991.

24 Registration was granted by a decision of 24 August 1992, which stated that no development could lawfully be carried out unless and until an application for the determination of new planning conditions had been made to the MPA and finally determined ('the registration decision').

25 The owners of Conygar Quarry therefore applied to the competent MPA for determination of new planning conditions.

26 After the MPA, by decision of 22 December 1994, had imposed more stringent conditions than those submitted by the owners of Conygar Quarry, the latter exercised their right of appeal to the Secretary of State.

27 By decision of 25 June 1997 (hereinafter, together with the decision of 22 December 1994, 'the decision determining new conditions'), the Secretary of State imposed 54 planning conditions, leaving some matters to be decided by the competent MPA.

28 Those matters were approved by the competent MPA by decision of 8 July 1999 (hereinafter 'the decision approving matters reserved by the new conditions').

29 Neither the Secretary of State nor the competent MPA examined whether it was necessary to carry out an environmental impact assessment pursuant to Directive 85/337. At no time was a formal environmental statement considered.

30 By letter of 10 June 1999, Mrs Wells requested the Secretary of State to take appropriate action, namely revocation or modification of the planning permission, to remedy the lack of an environmental impact assessment in the consent procedure. Since she received no reply to her request, she brought proceedings before the High Court of Justice.

31 Pursuant to an undertaking given to the High Court at the first hearing, the Secretary of State, by letter of 28 March 2001, provided a reasoned response to Mrs Wells's letter, in which he declined to revoke or modify the planning permission. Mrs Wells then amended her initial application to include a challenge to the decision contained in the letter of 28 March 2001.

32 Since the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), considered that interpretation of Community law was needed in the case before it, it decided to stay proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'[1] Whether an approval of a new set of conditions on an existing permission granted by an Interim Development Order ("old mining permission") pursuant to section 22 and Schedule 2 of the Planning and Compensation Act 1991 is a "development consent" for the purposes of the EIA [Environmental Impact Assessment] Directive.

[2] Whether, following the approval of a new scheme of conditions on an IDO "old mining permission" under the Planning and Compensation Act 1991, the approval of further matters required under the new scheme of conditions is itself capable of being a "development consent" for the purposes of the EIA Directive.

[3] If the answer to [1.] is "yes" but [2.] is "no", is the Member State nevertheless under a continuing duty to remedy its failure to require EIA, and if so, how?

[4] Whether (i) it is open to individual citizens to challenge the State's failure to require EIA, or whether (ii) that may be prohibited under the limitations imposed by the Court on the doctrine of direct effect e.g. by "horizontal direct effect" or by the imposition of burdens or obligations on individuals by an emanation of the State.

[5] If the answer to [4.](ii) is "yes" what are the limits of such prohibitions on direct effect in the present circumstances and what steps may the UK lawfully take consistent with the EIA Directive?'

Consideration of the questions referred for a preliminary ruling

The first and second questions: the obligation to carry out an environmental impact assessment

33 By its first two questions, which it is appropriate to consider together, the referring court essentially asks whether Article 2(1) of Directive 85/337, read in

conjunction with Article 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as section 22 of the Planning and Compensation Act 1991 and Schedule 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, involve a 'development consent' within the meaning of Article 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

Classification as a 'development consent'

— Admissibility

34 While recognising that Community law favours giving an autonomous interpretation to concepts used in Community measures, the Commission contends that in Case C-81/96 *Gedeputeerde Staten van Noord-Holland* [1998] ECR I-3923 the Court held that the question of when 'development consent' is granted is a question of national law. In the Commission's submission, the Court did not resile from that position in Case C-435/97 *WWF and Others* [1999] ECR I-5613 and Case C-287/98 *Linster* [2000] ECR I-6917. The question whether certain procedural measures in national law are development consents for the purpose of Directive 85/337 is therefore inadmissible.

35 As to that, a question referred by a national court for a preliminary ruling is inadmissible only if it is quite obvious that the question does not concern the interpretation of Community law or that it is hypothetical (see, inter alia, Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraphs 25 and 32, Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 10, and Case C-143/94 *Furlanis* [1995] ECR I-3633, paragraph 12).

36 That is not the case here.

37 The question whether the decision determining new conditions and the decision approving matters reserved by the new conditions constitute development consent within the meaning of Article 1(2) of Directive 85/337 is a question concerning the interpretation of Community law. The Court has consistently held that, in light of both the principle that Community law should be applied uniformly and the principle of equality, the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope is normally to be given throughout the Community an autonomous and uniform interpretation which must take into account the context of the provision and the purpose of the legislation in question (Case 327/82 *Ekro* [1984] ECR 107, paragraph 11, and *Linster*, cited above, paragraph 43).

38 Accordingly, the question whether the decision determining new conditions and the decision approving matters reserved by the new conditions constitute development consent within the meaning of Article 1(2) of Directive 85/337 is admissible.

— Substance

39 The United Kingdom Government contends that neither the decision determining new conditions nor the decision approving matters reserved by the new conditions constitutes development consent within the meaning of Article 1(2) of Directive 85/337.

40 It states with regard to the decision determining new conditions that development was authorised many years before Directive 85/337 created obligations for the Member States. The determination of conditions under the Planning and Compensation Act 1991 involves merely the detailed regulation of activities for which the principal consent has already been given. In the United Kingdom Government's submission, the reasoning with regard to the decision determining new conditions and the decision approving matters reserved by the new conditions is therefore the same as in 'pipeline' cases (see paragraph 43 of this judgment). For reasons of legal certainty, the directive does not apply to such projects.

41 As regards the decision approving matters reserved by the new conditions, the United Kingdom Government observes that the decision likely to affect the environment had already been taken and the approval of details may not extend beyond the parameters set by the initial determination of the scheme of planning conditions.

42 As to those submissions, under Article 2(1) of Directive 85/337 projects likely to have significant effects on the environment, as referred to in Article 4 of the directive read in conjunction with Annexes I and II thereto, must be made subject to an assessment with regard to such effects before consent is given.

43 This does not apply only where consent was granted before 3 July 1988 (an old consent), that is to say before the time-limit laid down for implementation of Directive 85/337, or where consent was granted after 3 July 1988 but the consent procedure was initiated before that date ('pipeline' projects) (see, to this effect, Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 32, and

Gedeputeerde Staten van Noord-Holland, cited above, paragraph 23). The directive thus requires an assessment of the environmental effects of the project in question in the case of new consents.

44 In the main proceedings, the owners of Conygar Quarry were obliged under the Planning and Compensation Act 1991, if they wished to resume working of the quarry, to have the old mining permission registered and to seek decisions determining new planning conditions and approving matters reserved by those conditions. Had they not done so, the permission would have ceased to have effect.

45 Without new decisions such as those referred to in the previous paragraph, there would no longer have been 'consent', within the meaning of Article 2(1) of Directive 85/337, to work the quarry.

46 It would undermine the effectiveness of that directive to regard as mere modification of an existing 'consent' the adoption of decisions which, in circumstances such as those of the main proceedings, replace not only the terms but the very substance of a prior consent, such as the old mining permission.

47 Accordingly, decisions such as the decision determining new conditions and the decision approving matters reserved by the new conditions for the working of Conygar Quarry must be considered to constitute, as a whole, a new 'consent' within the meaning of Article 2(1) of Directive 85/337, read in conjunction with Article 1(2) thereof.

48 It should be added that, since those decisions were adopted on 25 June 1997 and 8 July 1999 respectively, an old consent granted before 3 July 1988 is not in issue. Nor is this a 'pipeline' case since the applications leading to the decisions were submitted in 1993 or 1994 and in 1997 or 1998 respectively.

The time at which the environmental impact assessment must be carried out

49 Given that, in the context of a consent procedure comprising several stages, merely establishing that there is a 'development consent' within the meaning of Directive 85/337 cannot provide the referring court with a complete answer as regards the obligation on Member States to carry out an assessment of the environmental effects of the project at issue, it is necessary to consider the question as to when such an assessment must be carried out.

50 As provided in Article 2(1) of Directive 85/337, the environmental impact assessment must be carried out 'before consent is given'.

51 According to the first recital in the preamble to the directive, the competent authority is to take account of the environmental effects of the project in question 'at the earliest possible stage' in the decision-making process.

52 Accordingly, where national law provides that the consent procedure is to be carried out in several stages, one involving a principal decision and the other involving an implementing decision which cannot extend beyond the parameters

set by the principal decision, the effects which the project may have on the environment must be identified and assessed at the time of the procedure relating to the principal decision. It is only if those effects are not identifiable until the time of the procedure relating to the implementing decision that the assessment should be carried out in the course of that procedure.

53 The answer to the first two questions must therefore be that Article 2(1) of Directive 85/337, read in conjunction with Article 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as section 22 of the Planning and Compensation Act 1991 and Schedule 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a 'development consent' within the meaning of Article 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment.

The fourth and fifth questions: the ability of individuals to invoke the provisions of Directive 85/337

54 By its fourth and fifth questions, which it is appropriate to consider together, the referring court essentially asks whether, in circumstances such as those of the main proceedings, an individual may, where appropriate, rely on Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof, or whether the principle of legal certainty precludes such an interpretation.

The 'direct effect' of Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2)

55 According to the United Kingdom Government, acceptance that an individual is entitled to invoke Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof, would amount to 'inverse direct effect' directly obliging the Member State concerned, at the request of an individual, such as Mrs Wells, to deprive another individual or individuals, such as the owners of Conygar Quarry, of their rights.

56 As to that submission, the principle of legal certainty prevents directives from creating obligations for individuals. For them, the provisions of a directive can only create rights (see Case 152/84 *Marshall* [1986] ECR 723, paragraph 48). Consequently, an individual may not rely on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party (see, to this effect, Case C-221/88 *Busseni* [1990] ECR I-495, paragraphs 23 to 26, and Case C-97/96 *Daihatsu Deutschland* [1997] ECR I-6843, paragraphs 24 and 26).

57 On the other hand, mere adverse repercussions on the rights of third parties, even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned (see to this effect, in particular, Case 103/88 *Fratelli Costanzo* [1989] ECR 1839, paragraphs 28 to 33, *WWF and Others*, cited above, paragraphs 69 and 71, Case C-194/94 *CIA Security International* [1996] ECR I-2201, paragraphs 40 to 55, Case C-201/94 *Smith & Nephew and Primecrown* [1996] ECR I-5819, paragraphs 33 to 39, and Case C-443/98 *Unilever* [2000] ECR I-7535, paragraphs 45 to 52).

58 In the main proceedings, the obligation on the Member State concerned to ensure that the competent authorities carry out an assessment of the environmental effects of the working of the quarry is not directly linked to the performance of any obligation which would fall, pursuant to Directive 85/337, on the quarry owners. The fact that mining operations must be halted to await the results of the assessment is admittedly the consequence of the belated performance of that State's obligations. Such a consequence cannot, however, as the United Kingdom claims, be described as 'inverse direct effect' of the provisions of that directive in relation to the quarry owners.

The period that elapsed between the decision determining new conditions and Mrs Wells's request that the situation be remedied

59 The United Kingdom Government further submits that the considerable period which has elapsed since the decision determining new conditions in 1997 renders revocation of that decision contrary to the principle of legal certainty. The claimant in the main proceedings should have challenged the decision in due time before the competent court.

60 As to that submission, the final stage of the planning consent procedure was not completed when the claimant in the main proceedings submitted her request to the Secretary of State. It cannot therefore be contended that revocation of the consent would have been contrary to the principle of legal certainty.

61 Accordingly, the answer to the fourth and fifth questions must be that, in circumstances such as those of the main proceedings, an individual may, where appropriate, rely on Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof.

The third question: the obligation to remedy the failure to carry out an environmental impact assessment

62 By its third question, the referring court essentially seeks to ascertain the scope of the obligation to remedy the failure to carry out an assessment of the environmental effects of the project in question.

63 The United Kingdom Government contends that, in the circumstances of the main proceedings, there is no obligation on the competent authority to revoke or modify the permission issued for the working of Conygar Quarry or to order discontinuance of the working.

64 As to that submission, it is clear from settled case-law that under the principle of cooperation in good faith laid down in Article 10 EC the Member States are required to nullify the unlawful consequences of a breach of Community law (see, in particular, Case 6/60 *Humblet* [1960] ECR 559, at 569, and Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 36). Such an obligation is owed, within the sphere of its competence, by every organ of the Member State concerned (see, to this effect, Case C-8/88 *Germany* v *Commission* [1990] ECR I-2321, paragraph 13).

65 Thus, it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to this effect, Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraph 61, and *WWF and Others*, cited above, paragraph 70). Such particular measures include, subject to the limits laid down

by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by Directive 85/337.

66 The Member State is likewise required to make good any harm caused by the failure to carry out an environmental impact assessment.

67 The detailed procedural rules applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness) (see to this effect, inter alia, Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12, and Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 31).

68 So far as the main proceedings are concerned, if the working of Conygar Quarry should have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 85/337, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment.

69 In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.

70 The answer to the third question must therefore be that under Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337.

The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).

In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.

Costs

71 The costs incurred by the United Kingdom Government and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), by order of 12 February 2002, hereby rules:

1. Article 2(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, read in conjunction with Article 4(2) thereof, is to be interpreted as meaning that, in the context of applying provisions such as section 22 of the Planning and Compensation Act 1991 and Schedule 2 to that Act, the decisions adopted by the competent authorities, whose effect is to permit the resumption of mining operations, comprise, as a whole, a 'development consent' within the meaning of Article 1(2) of that directive, so that the competent authorities are obliged, where appropriate, to carry out an assessment of the environmental effects of such operations.

   In a consent procedure comprising several stages, that assessment must, in principle, be carried out as soon as it is possible to identify and assess all the effects which the project may have on the environment.

2. In circumstances such as those of the main proceedings, an individual may, where appropriate, rely on Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4(2) thereof.

3. Under Article 10 EC the competent authorities are obliged to take, within the sphere of their competence, all general or particular measures for remedying the failure to carry out an assessment of the environmental effects of a project as provided for in Article 2(1) of Directive 85/337.

The detailed procedural rules applicable in that context are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the Community legal order (principle of effectiveness).

In that regard, it is for the national court to determine whether it is possible under domestic law for a consent already granted to be revoked or suspended in order to subject the project to an assessment of its environmental effects, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered.

Jann Edward La Pergola

Delivered in open court in Luxembourg on 7 January 2004.

R. Grass V. Skouris

Registrar President

JUDGMENT OF THE COURT (Third Chamber)

14 June 2001 *

In Case C-230/00,

Commission of the European Communities, represented by H. van Lier, acting as Agent, assisted by M.H. van der Woude and T.E.M. Chellingsworth, lawyers, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by A. Snoecx, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to implement fully the following:

* Language of the case: Dutch.

— Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32),

— Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23),

— Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43),

— Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ 1984 L 188, p. 20), and

— Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40),

the Kingdom of Belgium has failed to fulfil its obligations under Articles 9 of Directive 75/442, 3, 4, 5, and 7 of Directive 76/464, 3, 4, 5, 7 and 10 of Directive 80/68, 3, 4, 9 and 10 of Directive 84/360, 2 and 8 of Directive 85/337 and Article 189 of the EC Treaty (now Article 249 EC),

THE COURT (Third Chamber),

composed of: C. Gulmann, President of the Chamber, J.-P. Puissochet and J.N. Cunha Rodrigues (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: R. Grass,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 8 March 2001,

gives the following

Judgment

1 By application lodged at the Registry of the Court on 9 June 2000, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt the laws, regulations and administrative provisions necessary to implement fully:

— Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32),

— Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23),

— Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43),

— Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants (OJ 1984 L 188, p. 20), and

— Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40),

the Kingdom of Belgium has failed to fulfil its obligations under Articles 9 of Directive 75/442, 3, 4, 5, and 7 of Directive 76/464, 3, 4, 5, 7 and 10 of Directive 80/68, 3, 4, 9 and 10 of Directive 84/360, 2 and 8 of Directive 85/337 and Article 189 of the EC Treaty (now Article 249 EC).

Legal context

2 Directives 75/442, 76/464, 80/68 and 84/360 require the Member States to take the necessary measures to ensure that the activities or industrial plants which they regulate are subjected to prior authorisation.

3 Article 2 of Directive 85/337 provides that the Member States are to adopt all measures necessary to ensure that projects likely to have significant effects on the environment are made subject to an assessment of such effects prior to the grant of authorisation.

4 The provisions of Belgian law which were intended to implement Directives 75/442, 76/464, 80/68, 84/360 and 85/337 imposed a requirement to seek authorisation. However, some of the provisions, particularly those contained in the rules of the Regions of Flanders and Wallonia, provide for a system of tacit grant and refusal of authorisation.

5 If the first-level competent authority does not determine a request for authorisation, it is deemed to have been refused. On the other hand, at second level, in the absence of a decision by the competent authority within the time allowed, authorisation is deemed to have been granted. Such is, essentially, the system laid down in Articles 34 to 42 and 49 to 55 of the Order of the Flemish Government of 6 February 1991 enacting the regulations concerning environmental consent (*Moniteur belge* of 26 June 1991, p. 14269), and in Article 11 of the Decree of the Walloon Regional Council of 27 June 1996 on waste (*Moniteur belge* of 2 August 1996, p. 20685).

Pre-litigation procedure

6 Taking the view that the Kingdom of Belgium had not properly implemented Directives 75/442, 76/464, 80/68, 84/360 and 85/337, by letter of 6 July 1998, the Commission gave the Member State an opportunity to submit its observations in accordance with the procedure laid down in the Treaty in respect of the failure by a Member State to fulfil its obligations.

7 Since no reply to that letter was received, the Commission sent a reasoned opinion to the Kingdom of Belgium on 18 December 1998.

8 On 6 January 1999 the Commission received a letter from the Belgian Government to which was attached a letter from the Flemish Government of 8 December 1998. In this, the Flemish authorities submitted the observations requested in the Commission's letter of 6 July 1998, emphasising particularly the limited field of application of tacit authorisation and the small number of such authorisations issued. The Flemish Government added that all the competent authorities and all the consultative bodies concerned were well aware of the consequences of the lack of a decision so that they always ensured that every request for authorisation was subjected to a thorough examination.

9 The reply of the Flemish Government to the reasoned opinion, which was received by the Commission on 15 March 1999, repeated the arguments set out in its letter of 8 December 1998. The Regional Government added, however, that tacit authorisation did not imply passive assessment or neglect on the part of the competent authority, as each request for authorisation gave rise to a detailed assessment.

10 Taking the view that the Kingdom of Belgium had not taken all the measures necessary to comply with the reasoned opinion, the Commission decided to bring the present action.

Substance

11 The Commission submits that the Court has already held that a system of tacit authorisation is incompatible with the requirements of Directive 80/68 (Case C-360/87 *Commission* v *Italy* [1991] ECR I-791, paragraph 31). That case-law should also apply to the authorisation referred to in Directives 75/442, 76/464, 84/360 and 85/337.

12 The system of tacit authorisation described in paragraph 5 of this judgment is therefore, according to the Commission, incompatible with the provisions of the directives in question.

13 Without disputing the failure of which it is accused, the Kingdom of Belgium confines itself to pointing out, in its defence, that the Flemish Government is in the process of preparing a draft decree on this subject and that the Walloon Government has adopted two preliminary drafts of orders, as well as various measures implementing the Decree of 11 March 1999 relating to environmental consents (*Moniteur belge* of 8 June 1999, p. 21101).

14 In this respect it should be noted that the Court has held, in respect of Directive 80/68, that it 'requires that after each investigation and in the light of the results thereof an express measure, either prohibition or authorisation, must be adopted' (Case C-131/88 *Commission* v *Germany* [1991] ECR I-825, paragraph 38).

15 Moreover, as was pointed out at paragraph 52 of the judgment in Case C-287/98 *Linster* [2000] ECR I-6917, the essential aim of Directive 85/337 'is that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location should be made subject to an assessment with regard to their effects'.

16 It follows from that case-law that tacit authorisation cannot be compatible with the requirements of the directives referred to in this action because they prescribe, in the case of Directives 75/442, 76/464, 80/68 and 84/360, systems of prior authorisation, and, in the case of Directive 85/337, assessment procedures preceding the grant of authorisation. The national authorities are therefore required under each of those directives to examine individually every request for authorisation.

17 As for the additional implementing measures which the Regions of Flanders and Wallonia are in the course of adopting, it is appropriate to point out that under the third paragraph of Article 189 of the Treaty, directives are binding upon each Member State to which they are addressed as to the result to be achieved. It follows from settled case-law that that obligation requires compliance with the time-limits set by directives (see, among others, Case 10/76 *Commission* v *Italy* [1976] ECR 1359, paragraphs 11 and 12, and Case C-176/00 *Commission* v *Greece* [2001] ECR I-2063, paragraph 7).

18 In those circumstances it must be held that, by failing to adopt the laws, regulations and administrative provisions necessary to implement fully Directives 75/442, 76/464, 80/68, 84/360 and 85/337, the Kingdom of Belgium has failed to fulfil its obligations under Articles 9 of Directive 75/442, 3, 4, 5 and 7 of Directive 76/464, 3, 4, 5, 7 and 10 of Directive 80/68, 3, 4, 9 and 10 of Directive 84/360 and 2 and 8 of Directive 85/337.

Costs

19 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. Declares that by failing to adopt the laws, regulations and administrative provisions necessary to implement fully:

— Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991,

— Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community,

— Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances,

— Council Directive 84/360/EEC of 28 June 1984 on the combating of air pollution from industrial plants, and

— Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 9 of Directive 75/442, as amended by Directive 91/156, 3, 4, 5, and 7 of Directive 76/464, 3, 4, 5, 7 and 10 of Directive 80/68, 3, 4, 9 and 10 of Directive 84/360 and 2 and 8 of Directive 85/337.

2. Orders the Kingdom of Belgium to pay the costs.

Gulmann Puissochet Cunha Rodrigues

Delivered in open court in Luxembourg on 14 June 2001.

R. Grass

Registrar

C. Gulmann

President of the Third Chamber

JUDGMENT OF THE COURT (Fifth Chamber)

21 September 1999 *

In Case C-392/96,

Commission of the European Communities, represented by Richard B. Wainwright, Principal Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Ireland, represented by Michael A. Buckley, Chief State Solicitor, acting as Agent, Philip O'Sullivan SC and Niamh Hyland BL, with an address for service in Luxembourg at the Irish Embassy, 28 Route d'Arlon,

defendant,

APPLICATION for a declaration that, by failing to adopt all the necessary measures to ensure the correct transposition of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), Ireland has failed to fulfil its

* Language of the case: English.

obligations under that directive, in particular Article 12 thereof, and under the EC Treaty,

THE COURT (Fifth Chamber),

composed of: J.-P. Puissochet, President of the Chamber, J.C. Moitinho de Almeida, C. Gulmann, D.A.O. Edward and L. Sevón (Rapporteur), Judges,

Advocate General: A. La Pergola,

Registrar: L. Hewlett, Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 24 September 1998, at which the Commission was represented by Richard B. Wainwright and the Irish Government by James Connolly SC and Niamh Hyland,

after hearing the Opinion of the Advocate General at the sitting on 17 December 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 5 December 1996, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by failing to adopt all the necessary measures to ensure the correct transposition of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, hereinafter 'the Directive'), Ireland has failed to fulfil its obligations under the Directive, in particular Article 12 thereof, and under the EC Treaty.

2 The Commission alleges that Ireland has incorrectly transposed Article 4(2) of the Directive and points 1(b) and (d) and 2(a) of Annex II thereto, as well as Articles 2(3), 5 and 7.

3 Article 2(1) of the Directive specifies the types of projects which are to be subject to an assessment:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

4 An assessment is always required for certain projects, set out in Annex I to the Directive.

5 As regards other types of projects, Article 4(2) provides:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

6 Annex II lists a number of projects, including:

'1. Agriculture

...

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

...

(d) Initial afforestation where this may lead to adverse ecological changes and land reclamation for the purposes of conversion to another type of land use;

...

2. Extractive industry

(a) Extraction of peat

...'

7 Article 2(3) of the Directive states:

'Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate and whether the information thus collected should be made available to the public;

(b) make available to the public concerned the information relating to the exemption and the reasons for granting it;

(c) inform the Commission, prior to granting consent, of the reasons justifying the exemption granted, and provide it with the information made available, where appropriate, to their own nationals.

The Commission shall immediately forward the documents received to the other Member States.

The Commission shall report annually to the Council on the application of this paragraph.'

8 Article 3 provides that an environmental impact assessment is to identify, describe and assess the direct and indirect effects of a project, in particular on human beings, fauna and flora, soil, water, air, climate, landscape, material assets and cultural heritage.

9 Article 5 states:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member

States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex III inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard *inter alia* to current knowledge and methods of assessment.

2. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

— a description of the project comprising information on the site, design and size of the project,

— a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

— the data required to identify and assess the main effects which the project is likely to have on the environment,

— a non-technical summary of the information mentioned in indents 1 to 3.

3. Where they consider it necessary, Member States shall ensure that any authorities with relevant information in their possession make this information available to the developer.'

10 Article 7 provides:

'Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article 5 to the other Member State at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.'

11 Under Article 12(1) of the Directive, the Member States had to take the measures necessary to comply with the Directive within three years of its notification. As the Directive was notified on 3 July 1985, that period expired on 3 July 1988.

12 Since the Commission considered that Ireland had not transposed the Directive correctly, on 13 October 1989 it sent a first letter of formal notice, in which it alleged that Articles 2 and 4 of the Directive had been inadequately transposed, having regard to the projects listed in Annexes I and II, and that Articles 5 to 9 had not been transposed.

13 In reply to that letter, Ireland sent the text of two legislative measures:

— the European Communities (Environmental Impact Assessment) Regulations, 1989 (S.I. No 349 of 1989) (hereinafter 'S.I. No 349 of 1989'); and

— the Local Government (Planning and Development) Regulations, 1990 (S.I. No 25 of 1990) (hereinafter 'S.I. No 25 of 1990').

14 However, since the Commission took the view that this new legislation still did not produce a correct transposition of the Directive, it sent Ireland a further letter of formal notice on 7 November 1991.

15 By letter of 12 May 1992 Ireland replied that the provisions of the Directive were, in practice, complied with.

16 On 28 April 1993 the Commission, dissatisfied with that reply, sent Ireland a reasoned opinion in which it alleged, in particular, that Ireland had failed:

— to transpose properly Article 4(2) of the Directive and Annex II thereto;

— to make proper provision for exemptions under Article 2(3) of the Directive;

— to specify properly the information to be supplied by the developer in accordance with Article 5 of the Directive; and

— to make proper provision for the information to be supplied to other Member States in accordance with Article 7 of the Directive.

17 By letter of 20 August 1993 Ireland disputed some of the objections formulated in its regard. It then sent, by letter of 7 December 1994, the text of the Local Government (Planning and Development) Regulations 1994 and last, by letter of 7 May 1996, the text of the European Communities (Environmental Impact Assessment) (Amendment) Regulations, 1996 (S.I. No 101 of 1996) (hereinafter 'S.I. No 101 of 1996').

18 In addition, after the reasoned opinion had been sent, correspondence was exchanged regarding complaints related to classes of projects at issue in this action, namely Complaint No P 95/4724 concerning afforestation on Pettigo Plateau and Complaint No P 95/4219 concerning peat extraction, in particular from Clonfinane Bog.

Infringement of Article 4(2) of the Directive and points 1(b) and (d) and 2(a) of Annex II thereto

19 The Commission alleges that Ireland has transposed Article 4(2) of the Directive incorrectly by setting absolute thresholds for the classes of projects covered by points 1(b) (use of uncultivated land or semi-natural areas for intensive agricultural purposes), 1(d) (initial afforestation/land reclamation) and 2(a) (extraction of peat) of Annex II to the Directive. The absolute nature of the thresholds means that it is not possible to ensure that every project likely to have significant effects on the environment is subject to an impact assessment, because the mere fact that a project does not reach the threshold is sufficient for it not to

subjected to such assessment, regardless of its other characteristics. Under Article 4(2) of the Directive, however, account must be taken of all the characteristics of a project, not the single factor of size or capacity. Furthermore, Article 2(1) refers also to a project's nature and location as criteria for assessing whether it is likely to have significant environmental effects. The Commission considers that this analysis is consistent with the judgments of the Court in Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323 and in Case C-72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

20 According to the Commission, projects which do not exceed the thresholds set may none the less have significant environmental effects. Two factors are important in that regard.

21 The first factor is that certain sites which are particularly sensitive or valuable may be damaged by projects which do not exceed the thresholds set. That is the case with areas identified as valuable and important for nature conservation and areas of particular archaeological or geomorphological interest.

22 The second factor is that the legislation fails to take account of the cumulative effect of projects. A number of separate projects, which individually do not exceed the threshold set and therefore do not require an impact assessment may, taken together, have significant environmental effects.

23 The Commission considers that the setting of absolute thresholds for the classes of projects covered by points 1(b) (use of uncultivated land or semi-natural areas for intensive agricultural purposes), 1(d) (initial afforestation/land reclamation) and 2(a) (extraction of peat) of Annex II to the Directive infringes Article 4(2) because one or both factors apply. It gives a number of examples of projects which are likely to have, or have had, significant environmental effects but which have not been the subject of any impact assessment because of the absolute nature of the thresholds.

24 As regards projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, covered by point 1(b) of Annex II to the Directive, the Commission challenges the threshold of 100 ha set by Article 24 of S.I. No 349 of 1989 and paragraph 1(a) of Part II of the First Schedule thereto, in conjunction with other provisions of the Irish legislation transposing the Directive. It states that 60 000 ha of semi-natural terrain in the west of Ireland have come to be used for intensive sheep farming and are suffering from serious degradation. The increase in sheep numbers should, in its view, have been the subject of an impact assessment, in which the intensity of use could have been determined by reference to a criterion of stocking density per hectare. Furthermore, 'project' is defined broadly in the Directive and also covers an 'intervention' relating to open land such as sheep grazing. Projects of that type have significant environmental effects in that they involve an alteration in uncultivated land or semi-natural areas through overgrazing which leads to soil degradation and erosion.

25 So far as concerns initial afforestation covered by point 1(d) of Annex II to the Directive, the Commission contests in particular the threshold of 70 ha prescribed by S.I. No 101 of 1996. According to that provision, an impact assessment is to be carried out in the case of initial afforestation only where the area involved, either on its own or taken together with any adjacent area planted by or on behalf of the applicant within the previous three years, would result in a total area planted exceeding 70 ha.

26 The Commission states that afforestation projects may have a significant effect on the environment even where they fall below the 70 ha threshold.

27 In that regard, it refers to the acidification and eutrophication of waters caused by afforestation. It cites the report *The Trophic Status of Lough Conn, An Investigation into the Causes of Recent Accelerated Eutrophication* (McGarrigle and others on behalf of the Lough Conn Committee, published by Mayo County Council in association with the Environmental Protection Agency, Central Fisheries Board, North Western Fisheries Board, Teagasc, Bord na Mona, Department of Agriculture and Department of Marine, December 1993) and *A*

Study of the Effects of Stream Hydrology and Water Quality in Forested Catchments on Fish and Invertebrates (known as the 'Aquafor Report').

28 It also points out the failure of the Irish legislation to take account of the significant environmental effects which afforestation projects may have in areas of active blanket bog. Since afforestation entails ploughing, drainage, the use of fertilisers and a radical change in vegetation, it transforms the peatland ecosystem so fundamentally that it is effectively destroyed. The Commission refers in that regard to *Birds, Bogs and Forestry, the Peatlands of Caithness and Sutherland* (Strout, Reeds and Others, Nature Conservancy Council, United Kingdom), which analyses the effects of afforestation on blanket bog.

29 The Commission cites, by way of example, the afforestation carried out at Dunragh Loughs and Pettigo Plateau which was brought to its attention by Complaint No P 95/4724. Those sites are included in the list of Natural Heritage Areas (hereinafter 'NHAs') drawn up by the Irish authorities. Pettigo Plateau, in particular, is a vast intact blanket bog (approximately 2 097 ha) of great scientific interest and is one of the sites covered by the contract entered into on 28 December 1995 between the Commission and the National Parks and Wildlife Service pursuant to Council Regulation (EEC) No 1973/92 of 21 May 1992 establishing a financial instrument for the environment (LIFE) (OJ 1992 L 206, p. 1). Part of the plateau (619.2 ha) has been classified as a special protection area under Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1). It is also a cross-border site in that the plateau extends into County Fermanagh in the United Kingdom, which proposes to classify the portion of the plateau in its territory as a special protection area under Directive 79/409 and as a special area of conservation under Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7). There is a risk that the part of the plateau in the United Kingdom will be subjected to the significant effects of the afforestation projects on the environment, since planting is liable to affect adversely the hydrology of the peatlands on both sides of the border. Notwithstanding the interest of that area, planting, some grant-aided, has been carried out there, without the threshold set being exceeded in any case.

30 The Commission acknowledges that S.I. No 101 of 1996 is an improvement on the previous legislation inasmuch as it has lowered the threshold from 200 ha to 70 ha. Nevertheless, the protection remains inadequate because the whole of a proposed NHA could, in theory, be afforested without an impact assessment being required if the afforestation were carried out by different developers who all kept within the threshold of 70 ha over three years. The Irish legislation fails to take sufficient account of the cumulative effect of projects.

31 As regards land reclamation for the purposes of conversion to another type of land use, covered by point 1(d) of Annex II to the Directive, the Commission objects to the threshold of 100 ha set by the Irish legislation (Article 24 of S.I. No 349 of 1989 and paragraph 1(c)(ii) of Part II of the First Schedule thereto, in conjunction with other provisions of the Irish legislation transposing the Directive) and retained in the more recent legislation (S.I. No 101 of 1996).

32 It considers that the Irish legislation fails to ensure that a prior assessment is carried out with regard to the significant environmental effects of land reclamation projects which, because of their size, do not have to be the subject of an impact assessment but, considered together, are nevertheless likely to have such effects.

33 It refers in that regard to the reclamation which has taken place in the Burren, an extensive area of limestone pavement in County Clare which is of exceptional interest for its fauna, flora and natural landscape and rich in archaeological remains. The cumulative effects of this reclamation drew the attention of the Heritage Council and a report in 1996 commissioned by it, entitled 'A survey of recent reclamation in the Burren', shows that there are 59 'new' reclamation sites totalling 256 ha in that area, including 31 sites in proposed NHAs. The interventions involve the levelling of limestone pavement with bulldozers, the clearance of scrub (hazel bushes are a characteristic feature of that habitat) and the seeding and fertilisation of the cleared land. The report also records the loss of numerous archaeological and historical remains, such as holy wells and ancient field systems.

34 As regards, finally, peat extraction projects, covered by point 2(a) of Annex II to the Directive, the Commission objects to the threshold of 50 ha set by Article 24 of S.I. No 349 of 1989 and paragraph 2(a) of Part II of the First Schedule thereto, in conjunction with other provisions of the Irish legislation transposing the Directive.

35 It explains that peat extraction entails drainage, which has a drying effect on the plants which form the peat. The vegetation changes from a sphagnum and peatmoss-dominated community to a vegetation dominated by dry bog species, after which the bog is colonised by trees. The lowering of the water table causes a reduction in peat volume. The sloping of the bog increases water run-off, which exacerbates the drying-out process. Peat extraction accordingly has significant and irreversible environmental effects.

36 The Commission cites the example of Ballyduff-Clonfinane Bog in County Tipperary, which it examined specifically following Complaint No P 95/4219. That site of approximately 312 ha comprises two bogs, Ballyduff and Clonfinane (187 ha). Following a survey carried out by the National Parks and Wildlife Service in 1983, the site was designated as an area of scientific interest (ASI). Under a report prepared in 1990 for the Irish Minister of Finance the site was to become part of a raised bog nature reserve network. In 1995 it became a proposed NHA. The site was also among those covered by the contract entered into on 28 December 1995 between the Commission and the National Parks and Wildlife Service pursuant to Regulation No 1973/92. In addition, it benefited from Commission Decision C(96) 2113 of 29 July 1996 in respect of the Cohesion Fund, which approved the grant of ECU 344 000 for the preservation of the bogs. None the less, a peat extraction project began in 1994 at Clonfinane without an impact assessment being required, as the area being developed was below the 50 ha threshold. When, in 1996, the question was raised as to whether an impact assessment was required, the development already covered more than 50 ha.

37 The Commission compares the threshold applicable to bogs (50 ha) with that applicable to the extraction of stone, gravel, sand or clay (5 ha) and notes that in the latter case an impact assessment is required below an area of 5 ha where the competent local authority considers that significant effects on the environment

are likely (Article 24 of S.I. No 349 of 1989, paragraph 2 of Part II of the First Schedule thereto, and Articles 4(1) and 6(1) of S.I. No 25 of 1990). The absolute nature of the threshold applicable to bogs precludes any real assessment as to whether a project might have significant environmental effects.

38 The Commission notes that there are at least 49 peat-producing companies, that the economics of small-scale extraction have been transformed by the introduction of new peat-extraction equipment and that the quantity of peat extracted by small producers has therefore increased considerably since 1980. The fact that no peat extraction project has given rise to an assessment, despite continuing losses harmful to nature conservation, shows that the Irish threshold is such that the Directive has no impact with regard to bogs of conservation importance.

39 In its defence, Ireland contests the admissibility of the objection relating to the cumulative effect of projects on the ground that it was not raised during the pre-litigation procedure and, in particular, in the reasoned opinion. It also maintains that the complaints to which the Commission refers cannot be used in evidence because they were not mentioned in the reasoned opinion and are the subject of separate investigation.

40 Generally, Ireland submits that the Commission has failed to prove actual abuse of thresholds through cumulative projects. The theoretical possibility of such abuse does not make the use of thresholds unlawful: their use is envisaged by the Directive and has been approved in the two cases considered by the Court (*Commission* v *Belgium* and *Kraaijeveld*, both cited above). It is only Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337 (OJ 1997 L 73, p. 5) which has required account to be taken of the cumulation of projects.

41 As regards projects for the use of uncultivated land or semi-natural areas for intensive agricultural purposes, covered by point 1(b) of Annex II to the

Directive, Ireland disputes that sheep grazing as practised in its territory comes under intensive agriculture and can be considered to be a project within the meaning of Article 1(2) of the Directive. It is not an intervention in the natural surroundings and landscape within the meaning of that provision and it would be absurd to suggest that a farmer is obliged to seek prior consent whenever he wants to increase the number of sheep able to graze on a piece of land. That suggestion is particularly impracticable because much of the land used for the grazing of sheep is commonage, shared between a number of farmers who all have the right to graze their sheep there.

42 Ireland considers that the Directive was never intended to cover certain types of agriculture, such as sheep farming on vast areas of land, and is unsuited to such practices, in particular because of the cost of carrying out impact assessments in relation to the farmers' income. On the other hand, environmental protection is the object of the scheme established by Council Regulation (EEC) No 2078/92 of 30 June 1992 on agricultural production methods compatible with the requirements of the protection of the environment and the maintenance of the countryside (OJ 1992 L 215, p. 85), implemented by Commission Regulation (EC) No 746/96 of 24 April 1996 laying down detailed rules for the application of Regulation No 2078/92 (OJ 1996 L 102, p. 19). More than 15% of Irish farmers already participate in that Rural Environment Protection Scheme, which seeks to stop farmers from farming their land intensively, and the Minister for Agriculture submitted proposals to the Commission pursuant to the Operational Programme for Agriculture, Rural Development and Forestry under the Community Support Framework for Ireland 1994-99 to the effect that, from 1 January 1998, farmers in degraded areas are entitled to sheep/ewe headage premium grants only if they are participating in the Rural Environment Protection Scheme.

43 As regards the objection relating to afforestation, Ireland submits that the Commission has adduced no objectively verifiable evidence that afforestation below the threshold has had significant effects on waters. It failed to annex to the application the two reports which it cites (the report on Lough Conn and the Aquafor Report), one of which, moreover, is not yet final.

44 Nor is there any evidence that afforestation on peatland has had significant environmental effects. Besides, little forestry development takes place on peatland, because of the minimum productivity requirements of the grant system and the fact that peatland has a lower forestry yield per hectare than other types of land.

45 Ireland contends, furthermore, that the Commission's presentation of the issues relating to Pettigo Plateau is inaccurate. The afforestation took place on a very small area only and therefore did not require consultation with the United Kingdom authorities under Article 7 of the Directive. Furthermore, the part of Pettigo classified as a special protection area under Directive 79/409 belongs to the National Parks and Wildlife Service and was not affected by the afforestation. Finally, it was only after the afforestation grant was given that the National Parks and Wildlife Service decided to designate the area as a proposed NHA, without knowing that afforestation was to take place there. In any event, the allegations made in that complaint concern only the management of the regime and not Ireland's implementation of Article 4(2) of the Directive or Annex II thereto.

46 As regards land reclamation, covered by point 1(d) of Annex II to the Directive, Ireland states that the only example given by the Commission is the unique area of the Burren. The Commission relies on an unpublished and incomplete study and fails to identify the land reclamation which has taken place. Besides, the total area surveyed in the report which the Commission cites (approximately 250 ha) is not significant given the size of the Burren as a whole (approximately 30 000 ha). In the light of those factors, the Commission has not carried out an overall assessment of land reclamation projects in Ireland, as required by the judgment in *Kraaijeveld*, cited above.

47 Ireland puts forward the same argument in relation to peat extraction projects, referred to in point 2(a) of Annex II to the Directive, alleging that the Commission has provided just one example of an extraction project below the threshold which has supposedly had significant effects on the environment.

48 Also, the Commission's objections relate only to peat extraction from bogs which are of conservation interest. Legal and administrative measures exist to protect such bogs, namely the Habitats Regulations and the designation of areas as NHAs. The complaint concerning peat extraction from Ballyduff-Clonfinane Bog simply demonstrates the need for conservation measures. Ireland accepts that different thresholds could have been set but, given the adoption of special areas of conservation under the Habitats Regulations, it had not considered that to be necessary.

49 As for bogs which are not subject to the Habitats Regulations, Ireland justifies the threshold of 50 ha by stating that it is intended to distinguish between commercial peat extraction, which may have significant effects on the environment, and the non-commercial cutting of turf, which is a traditional activity in Irish rural life. The Directive was not intended to be interpreted as requiring an impact assessment for small-scale non-commercial peat extraction. The effect of requiring impact assessments for very small areas of bog would be to prevent all extraction because of the cost of an assessment compared with the likely return. Such an interpretation of the Directive would frustrate the traditional rights of landowning and tenant farmers to cut turf from the bog for their own needs.

Findings of the Court

50 It is necessary to consider first of all the plea raised by Ireland that the objection relating to the cumulative effect of projects is inadmissible on the ground that it was not relied on during the pre-litigation procedure and, in particular, in the reasoned opinion.

51 It should be remembered that the purpose of the pre-litigation procedure is to give the State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the objections formulated by the Commission. The subject-matter of an action brought under Article 169 of the Treaty is delimited by the pre-litigation procedure provided for by that article. Consequently, the action cannot be founded on any objections other than those set out in the reasoned opinion (see, in particular, Case C-206/96 *Commission* v *Luxembourg* [1998] ECR I-3401, paragraph 13).

52 In the present case, it is apparent from an examination of the documents exchanged in the course of the pre-litigation procedure that, while the Commission did not expressly use the words 'cumulative effect of projects', it was nevertheless addressing this question as part of the more general problem of the setting of thresholds and made the very point that a developer can avoid an impact assessment by splitting an initial project into a number of projects which do not exceed the threshold.

53 In those circumstances, it cannot be considered that the pre-litigation procedure did not allow Ireland to avail itself of its right to defend itself against the objection relating to the cumulative effect of projects.

54 Ireland also defends itself by pleading that the Commission cannot use complaints not mentioned in the reasoned opinion as evidence of an infringement, because they were received subsequent to the reasoned opinion and are still the subject of separate investigation.

55 This plea is linked, however, to the question of proof of the infringement, which should be examined as a whole.

56 Ireland disputes that the Commission has demonstrated that thresholds have actually been misused. In its view, such proof is necessary in order to establish that it has failed to fulfil its obligations.

57 The Commission replies that it is the use of absolute thresholds which constitutes the infringement and that all it had to do was put forward a body of evidence demonstrating that use of such thresholds could mean that projects likely to have significant effects on the environment escaped an impact assessment because they did not reach the threshold prescribed by law. It also maintains that it would be contrary to the objective of prevention pursued by the Directive if it were necessary to establish serious and grave environmental harm in order to prove inadequate transposition in Treaty infringement proceedings. Finally, it points out its difficulty in producing concrete evidence in the case of projects below the thresholds.

58 In that regard, it must be observed that the infringement alleged by the Commission is Ireland's incorrect transposition of Article 4(2) of the Directive through the use of thresholds which have the effect that all the characteristics of a project are not taken into consideration when it comes to determining whether the project is to be subject to an impact assessment. Certain projects likely to have significant effects on the environment may thus escape the assessment requirement because they do not reach the thresholds set.

59 So, the alleged infringement has to do with the way in which the Directive has been transposed into Irish law and not with the actual result of the application of the transposing legislation.

60 In order to prove that the transposition of a directive is insufficient or inadequate, it is not necessary to establish the actual effects of the legislation transposing it into national law: it is the wording of the legislation itself which harbours the insufficiencies or defects of transposition.

61 There is, therefore, nothing to prevent the Commission from demonstrating that transposition is defective or insufficient without waiting for the application of the transposing legislation to produce harmful effects.

62 Since the Directive forms part of Community environmental policy, which, as pointed out in the first recital in the preamble to the Directive, consists in preventing the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects, the opposite conclusion would be even more unjustified in this case.

63 It does not therefore matter that the evidence adduced by the Commission in support of its action consists of mere complaints which have not yet been investigated.

64 As far as the objection to thresholds is concerned, although the second subparagraph of Article 4(2) of the Directive confers on Member States a measure of discretion to specify certain types of projects which are to be subject to an assessment or to establish the criteria or thresholds applicable, the limits of that discretion lie in the obligation set out in Article 2(1) that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (*Kraaijeveld*, cited above, paragraph 50).

65 Thus, a Member State which established criteria or thresholds taking account only of the size of projects, without also taking their nature and location into consideration, would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

66 Even a small-scale project can have significant effects on the environment if it is in a location where the environmental factors set out in Article 3 of the Directive,

such as fauna and flora, soil, water, climate or cultural heritage, are sensitive to the slightest alteration.

67 Similarly, a project is likely to have significant effects where, by reason of its nature, there is a risk that it will cause a substantial or irreversible change in those environmental factors, irrespective of its size.

68 In order to demonstrate that Ireland has failed to fulfil its obligations in this regard, the Commission has put forward several convincing examples of projects which, whilst considered solely in relation to their size, may none the less have significant effects on the environment by reason of their nature or location.

69 The most significant example is afforestation because, when carried out in areas of active blanket bog, it entails, by its nature and location, the destruction of the bog ecosystem and the irreversible loss of biotopes that are original, rare and of great scientific interest. In itself, it may also cause the acidification or eutrophication of waters.

70 It was however necessary, and possible, to take account of factors such as the nature or location of projects, for example by setting a number of thresholds corresponding to varying project sizes and applicable by reference to the nature or location of the project.

71 Ireland's explanation that other environmental protection legislation, such as the Habitats Regulations, made it unnecessary to assess afforestation, land reclamation or peat extraction projects carried out in environmentally sensitive locations must be dismissed. Nothing in the Directive excludes from its scope regions or

areas which are protected under other Community provisions from other aspects.

72 It follows that, by setting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive, thresholds which take account only of the size of projects, to the exclusion of their nature and location, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

73 As regards the cumulative effect of projects, it is to be remembered that the criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State (*Commission* v *Belgium*, cited above, paragraph 42, *Kraaijeveld*, cited above, paragraph 51, and Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135, paragraph 45).

74 The question whether, in laying down such criteria and/or thresholds, a Member State goes beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project, but depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State concerned (*Kraaijeveld*, paragraph 52).

75 So, a Member State which established criteria and/or thresholds at a level such that, in practice, all projects of a certain type would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all the projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see, to that effect, *Kraaijeveld*, paragraph 53).

76 That would be the case where a Member State merely set a criterion of project size and did not also ensure that the objective of the legislation would not be circumvented by the splitting of projects. Not taking account of the cumulative effect of projects means in practice that all projects of a certain type may escape the obligation to carry out an assessment when, taken together, they are likely to have significant effects on the environment within the meaning of Article 2(1) of the Directive.

77 In order to demonstrate that Ireland has failed to fulfil its obligations in this regard, the Commission has also provided various examples of the effects of the Irish legislation as drafted.

78 Ireland has not denied that no project for the extraction of peat, covered by point 2(a) of Annex II to the Directive, has been the subject of an impact assessment, although small-scale peat extraction has been mechanised, industrialised and considerably intensified, resulting in the unremitting loss of areas of bog of nature conservation importance.

79 As regards initial afforestation, covered by point 1(d) of Annex II to the Directive, such projects, encouraged by the grant of aid, may be implemented in proximity to one another without any impact assessment at all being carried out, if they are conducted by different developers who all keep within the threshold of 70 ha over three years.

80 The Commission has also cited the example of land reclamation projects, covered by point 1(d) of Annex II to the Directive, whose cumulative effect is not taken into account by the Irish legislation. Nor has it been disputed that much land clearance has taken place in the Burren without a single impact assessment being carried out, although it is an area of unquestionable interest. Limestone pavement, which is characteristic of the area, has been destroyed, as have vegetation and archaeological remains, giving way to pasture. Considered together, those interventions were likely to have significant environmental effects.

81 As regards sheep farming in particular, the Commission has proved that, again encouraged by the grant of aid, this has grown in an unrestrained fashion, which is a development which may have adverse environmental consequences. However, it has not demonstrated that sheep farming as practised in Ireland constitutes a project within the meaning of Article 1(2) of the Directive.

82 It follows from all of the foregoing that, by setting thresholds for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive without also ensuring that the objective of the legislation will not be circumvented by the splitting of projects, Ireland has exceeded the limits of its discretion under Articles 2(1) and 4(2) of the Directive.

83 Consequently, the objection relating to infringement of Article 4(2) of the Directive in respect of the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive is well founded.

Infringement of Article 2(3) of the Directive

84 The Commission explains that S.I. No 349 of 1989 provides for an exemption formula enabling the competent Minister to dispense with an impact assessment for a project where he considers this to be warranted by exceptional circumstances. It points out that this provision is inconsistent with the Directive inasmuch as, first, the Minister is not required to consider whether another form of assessment would be appropriate and whether the information collected should be made available to the public and, second, he is not required to inform the Commission.

85 Ireland stated at the hearing that amending legislation had just been adopted.

86 However, it is settled case-law that amendments to national legislation are irrelevant for the purposes of giving judgment on the subject-matter of an action for failure to fulfil obligations if they have not been implemented before the expiry of the period set by the reasoned opinion (see, in particular, Case C-123/94 *Commission* v *Greece* [1995] ECR I-1457, paragraph 7).

87 It must accordingly be held that the objection relating to the infringement of Article 2(3) of the Directive is well founded.

Infringement of Article 5 of the Directive

88 The Commission considers that the Irish legislation does not properly transpose Article 5 since it makes no provision for considering the relevance or reasonableness of asking a developer for the information specified in Annex III. Article 2(5) of S.I. No 349 of 1989 merely provides that an impact assessment may include that information.

89 Ireland indicated at the hearing that amending legislation had just been adopted.

90 For the reason referred to in paragraph 86 above, it must be held that the objection relating to the infringement of Article 5 of the Directive is well founded.

Infringement of Article 7 of the Directive

91 The Commission states that Article 17 of S.I. No 25 of 1990 appears to be the transposition of Article 7 in respect of projects requiring consent under the Irish Local Government (Planning and Development) Acts 1963-1983. Article 17 provides a mechanism whereby local authorities are to notify the Irish Minister for the Environment of any application likely to have significant effects on the environment of another Member State. The Minister may then ask the local authority to provide him with the information and documents which he considers necessary.

92 The Commission considers, however, that that provision does not properly transpose Article 7 of the Directive since the Minister is not expressly required to transmit the information to the other Member State. Nor does the Minister have the power to require information from local authorities when it is the other Member State which has asked to be consulted.

93 Ireland stated in the course of the written procedure that it intended to clarify its legislation and that the amending legislation was in the process of being drafted. It added at the hearing that the Northern Ireland Agreements would enable better communication with the United Kingdom in the future.

94 For the reason given in paragraph 86 above, it must be held that the objection relating to the infringement of Article 7 of the Directive is well founded.

95 It follows from all of the foregoing that, by not adopting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to the Directive, the measures necessary to transpose Article 4(2) of the Directive correctly, and by not transposing Articles 2(3), 5 and 7 of the Directive, Ireland has failed to fulfil its obligations under the Directive. The remainder of the action is to be dismissed.

Costs

96 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The Commission has applied for an order of costs against Ireland. Since the latter has been essentially unsuccessful in its defence, it must be ordered to pay the costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. **Declares that, by not adopting, for the classes of projects covered by points 1(d) and 2(a) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the measures necessary to transpose Article 4(2) of that directive correctly, and by not transposing Articles 2(3), 5 and 7 thereof, Ireland has failed to fulfil its obligations under that directive;**

2. **Dismisses the remainder of the application;**

3. Orders Ireland to pay the costs.

Puissochet Moitinho de Almeida Gulmann

Edward Sevón

Delivered in open court in Luxembourg on 21 September 1999.

R. Grass

Registrar

J.-P. Puissochet

President of the Fifth Chamber

JUDGMENT OF THE COURT (Sixth Chamber)

16 September 1999 *

In Case C-435/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, Italy, for a preliminary ruling in the proceedings pending before that court between

World Wildlife Fund (WWF) and Others

and

Autonome Provinz Bozen and Others

on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn, President of the Chamber, J.L. Murray and H. Ragnemalm (Rapporteur), Judges,

Advocate General: J. Mischo,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the World Wildlife Fund (WWF) and Others, by W. Wielander, of the Bolzano Bar,

— Autonome Provinz Bozen, by H. Heiss and R. von Guggenberg, of the Bolzano Bar,

— Südtiroler Transportstrukturen AG, by C. Baur, of the Bolzano Bar, and S. Weber, Rechtsanwalt, Vienna,

— Airport Bolzano-Bozen AG, by P. Platter, of the Bolzano Bar,

— the Italian Government, by Professor U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by P.G. Ferri, Avvocato dello Stato,

— the Netherlands Government, by M.A. Fierstra, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and D. Wyatt QC, and

— the Commission of the European Communities, by G. zur Hausen, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of the World Wildlife Fund (WWF) and other applicants, Autonome Provinz Bozen, Südtiroler Transportstrukturen AG, Airport Bolzano-Bozen AG, the Italian Government, the United Kingdom Government and the Commission at the hearing on 18 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 29 April 1999,

gives the following

Judgment

1 By order of 3 December 1997, received at the Court on 24 December 1997, the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen (Administrative Court, Autonomous Division for the Province of Bolzano) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) six questions on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40; hereinafter 'the Directive').

2 Those questions have been raised in proceedings brought before the national court by the applicants, who are persons claiming to live near Bolzano-St Jacob Airport and two environmental associations, to have Decision No 1230 of 27 March 1997 of the Government of the Autonomous Province of Bolzano and a letter of the Landeshauptmann (Regional Prime Minister) of 11 April 1997, which approved a project for the restructuring of that airport, set aside.

3 It is apparent from the order for reference that the purpose of the project is to transform an airfield, which since 1925/26 has been used for military purposes, for private flying and, during a certain period and to a limited extent, also for civil purposes, into an airport which can be used commercially, with the aim of having regular scheduled flights as well as charter and cargo flights.

4 The works and alterations envisaged are essentially the following: renewal of the existing runway, construction of access roads and car parks, construction of a control tower with air traffic control installations, construction of a departure building and of a hangar, the carrying out of the necessary connections and diversions and so forth, and extension of the runway from 1 040 to 1 400 metres. It is not in dispute that, at the date of the order for reference, the extension had not yet been approved because the local development plan had to be altered first.

5 This restructuring of Bolzano Airport was provided for in the regional development plan approved by Law No 3 of the Autonomous Province of Bolzano of 18 January 1995 (hereinafter 'Law No 3/95'), which required, in particular, that an environmental impact study be carried out. That study, which the developer, Südtiroler Transportstrukturen AG, entrusted to a team of experts, was drawn up in June 1996. In addition, various bodies, including the agency responsible for the environment, were consulted, the municipalities concerned were informed and opinions were sought.

6 In particular, following one of those requests for an opinion, the project was considered by the Amtsdirektorenkonferenz (Regional Directors' Conference) which issued an opinion under the procedure referred to by the national court as 'simplified environmental assessment', provided for by Articles 11, 12 and 13 of Law No 27 of the Autonomous Province of Bolzano of 7 July 1992 introducing an environmental impact assessment procedure in the version in force at the material time (B.V. Ordinary Supplement, 28 July 1992, No 31; hereinafter 'Law No 27/92'). However, it is common ground that the procedure under which the contested measures were adopted, with the exception of the extension of the runway which remained unapproved, was not that laid down by the Directive.

Legislation

The Directive

7 The Directive, as provided in Article 1(1) thereof, applies to the assessment of the environmental effects of public and private projects which are likely to have significant effects on the environment.

8 Article 1(2) defines 'project' as:

'— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'.

9 Article 1(4) and (5) respectively provide that the Directive does not cover 'projects serving national defence purposes' and that it is not to apply 'to projects the details of which are adopted by a specific act of national legislation, since the objectives of [the] Directive, including that of supplying information, are achieved through the legislative process'.

10 Article 2(1) of the Directive provides: 'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects. These projects are defined in Article 4.'

11 Article 4 distinguishes between two types of projects.

12 Article 4(1) provides that, subject to Article 2(3), projects of the classes listed in Annex I are to be made subject to an assessment in accordance with Articles 5 to 10. The projects covered by Article 4(1) include the 'construction of... airports with a basic runway length of 2 100 m or more', referred to in point 7 of Annex I.

13 So far as concerns other types of projects, Article 4(2) states:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

14 As for the projects caught by Article 4(2), point 10(d) of Annex II refers to 'Construction of... airfields (projects not listed in Annex I)' and point 12 of Annex II refers to modifications to development projects in Annex I.

15 Articles 5 to 9 of the Directive, to which Article 4 refers, essentially provide as follows: Article 5 specifies the minimum information to be provided by the developer, Article 6 imposes, in particular, an obligation on the developer to inform the authorities and the public, Article 8 requires the competent authorities to take into consideration the information gathered in the course of the assessment procedure and Article 9 imposes a duty on the competent authorities to inform the public of the decision adopted and any conditions attached to it.

Law No 27/92

16 Law No 27/92 contains two annexes, Annex I and Annex II, which list various projects and, in conjunction with the main body of the Law, lay down the conditions in which those projects are subject to the environmental impact assessment procedure.

17 As regards airports, paragraph 11(e) of Annex II to Law No 27/92 makes all projects for the new construction of airports subject to such assessment.

18 On the other hand, the extension or alteration of existing airports, like all other projects comprising extensions or alterations, falls within Article 2(2) of Law No 27/92, which requires an environmental impact assessment for projects exceeding the thresholds referred to in Annex II by more than 20% and for projects required to be assessed under Annex I of that Law.

19 Annex II of Law No 27/92 does not set a threshold for airport projects while, under Annex I, an assessment is required only for airports with a runway length of 2 100 metres or more.

Proceedings before the national court

20 The applicants in the main proceedings have challenged before the national court the legality of the contested measures on the ground that the procedure followed for approving the project is not in conformity with the requirements of the Directive. According to them, since the project is likely, by virtue of its nature, size and location, to have significant effects on the environment, it falls within Article 2(1) of the Directive and should have been made subject to the assessment procedure under Article 4(2) thereof in conjunction with Annex II and not to a mere 'environmental impact study' followed by an examination of the project by the Amtsdirektorenkonferenz, which do not meet the Directive requirements.

21 According to the respondents in the main proceedings, on the other hand, the Directive is inapplicable to the project at issue for three fundamental reasons.

22 First, it is merely a small-scale project to improve an airport, which does not have a significant effect on the environment because it is designed to improve air traffic

and remedy the environmental harm caused by that traffic; furthermore, the extension of the runway from 1 040 to 1 400 metres remained unapproved.

23 Next, the project is not subject to environmental impact assessment under the Directive because, as is apparent from the provisions of Law No 27/92, it falls within the projects included in Annex II to the Directive which, in accordance with Article 4(2) thereof, are to be made subject to the assessment procedure under Articles 5 to 10 where Member States consider that their characteristics so require; it follows that Law No 27/92, which was adopted within the limits of the discretion allowed to the Member States by Article 4(2) of the Directive, is in conformity with the latter provision.

24 Finally, since the project serves both civil and military purposes and Law No 3/95, approving the regional development plan, makes provision for it, the exceptions respectively set out in Article 1(4) and (5) of the Directive apply.

25 The applicants in the main proceedings have challenged those arguments. They contend that, by allowing the national authorities not to subject to an impact assessment a project likely to have significant effects on the environment, Law No 27/92 is not in conformity with the Directive and should be disapplied in favour of the relevant provisions of the latter.

26 In its order for reference, the national court found that, inasmuch as the project at issue related to an airport with a runway shorter than 2 100 metres, it fell within the projects set out in Annex II to the Directive and was covered by Article 4(2);

also, by virtue of Article 2(2) of Law No 27/92, the extension or restructuring of airports with a runway shorter than 2 100 metres was not made subject to an environmental impact assessment by that Law since no threshold was set for airport projects. Nevertheless, the project at issue, by reason of its nature and size, and probably also by reason of its location in a hollow in the immediate vicinity of an industrial and a residential area, could have a significant effect on the environment.

27 Having regard to its findings of fact and the conclusions which it drew therefrom, to the arguments of the parties and to the relevant Community and national legislation, the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, was uncertain as to the interpretation of the Directive. It therefore decided to stay proceedings and to submit the following questions for a preliminary ruling:

'(1) Is Article 4(2) of Directive 85/337/EEC to be interpreted as meaning:

(a) that certain classes of the projects listed in Annex II may from the outset, in the absolute discretion of the Member States, be excluded in their entirety from the obligation to carry out an environmental assessment; or

(b) that the margin of discretion enjoyed by the Member States is limited by the obligation laid down in Article 2(1) of the Directive to subject to an environmental assessment in any event those projects likely to have

significant effects on the environment, by virtue *inter alia* of their nature, size or location?

(c) Does Article 4(2) of the Directive, in conjunction with Article 2(1) thereof, allow a Member State to specify (or not to specify) types of project or criteria and/or thresholds so that the restructuring of an airport with a runway shorter than 2 100 metres is excluded from environmental assessment from the outset although it is environmentally significant, or is the margin of discretion which the Member State enjoys under Article 4(2) of the Directive (if (b) is answered in the affirmative) thereby exceeded?

(2) Is Article 4(2) of the Directive, in conjunction with Article 2(1), to be interpreted as meaning that the obligation to carry out an environmental assessment also applies to the extension and restructuring of the projects in Annex II if significant effects on the environment are likely, or do Articles 4(2) and 2(1) allow environmentally significant projects comprising restructuring to be excluded, expressly or *impliedly* (for example, by rules which are not applicable to airports), from environmental assessment from the outset?

(3) To what extent does Article 2(1) of the Directive, also in conjunction with Article 2(2), allow the Member States to introduce (or use) alternative

assessment procedures to that of an ordinary environmental assessment and if a positive answer is given to this question:

(a) what essential requirements or minimum requirements must such an assessment satisfy in order to accord with the objectives of the Directive and, in particular,

(b) is the participation of the public within the meaning of Article 6 of the Directive an essential requirement of an environmental assessment?

(4) May Article 1(5) of Directive 85/337 be interpreted as also covering projects which, while provided for in a legislative provision which sets out a programme, are approved under a separate administrative procedure?

What minimum environmental requirements must the "legislative process" contain in order to achieve the "objectives... including that of supplying information" pursued by the Directive?

(5) Is the exclusion of projects from the scope of the Directive pursuant to Article 1(4) to be applied to an airfield used for both civil and military purposes?

Could the applicable criterion be the *predominant use* or is it sufficient for the exclusion to apply that the airfield is *also* used for military purposes?

(6) If the Directive has been incorrectly transposed, is Article 4(2) thereof, in conjunction with Article 2(1), vertically directly effective (self-executing) in the sense that the authorities of the Member State are required to subject the projects at issue to an environmental assessment?'

Preliminary issues

28 In their observations to the Court, the applicants in the main proceedings state that the national court, by a further order determining their ancillary application for interim measures, suspended the project at issue on the ground that no environmental impact assessment had been carried out; that order was contested in an action brought by the respondents and quashed by the Consiglio di Stato (Council of State) by judgment No 1411/97 of 29 August 1997, with the result that the works at issue have been pursued since then. The applicants ask the Court to rule, first, on the question whether the suspension of operation of the contested measure on which, according to them, the national court had validly decided in the present case, should have been upheld by the Consiglio di Stato and, second, should the Court consider that an environmental impact assessment was necessary, on the practical consequences of its own decision.

29 In response to those requests it is sufficient to state that the national court has not submitted any question in that regard and that there is therefore no need to consider them (see Case 5/72 *Grassi* v *Italian Finance Administration* [1972] ECR 443, paragraph 4, and Case C-196/89 *Nespoli and Crippa* [1990] ECR I-3647, paragraph 23).

30 One of the respondents in the main proceedings, Airport Bolzano-Bozen AG, disputes a number of facts set out by the national court in its order for reference. Relying on national law, it also challenges the jurisdiction of that court to adjudicate on the merits of the case, on the ground that its jurisdiction is limited to questions of law.

31 So far as concerns the contesting of certain facts by Airport Bolzano-Bozen AG, it should be remembered that Article 177 of the Treaty is based on a clear separation of functions between the national courts and the Court of Justice, so that, when ruling on the interpretation or validity of Community provisions, the latter is empowered to do so only on the basis of the facts which the national court puts before it (see Case C-30/93 *AC-ATEL Electronics Vertriebs* v *Hauptzollamt München-Mitte* [1994] ECR I-2305, paragraph 16, and Case C-326/96 *Levez* v *T.H. Jennings (Harlow Pools)* [1998] ECR I-7835, paragraph 25).

32 It is not for the Court of Justice but for the national court to ascertain the facts which have given rise to the dispute and to establish the consequences which they have for the judgment which it is required to deliver (see Case 17/81 *Pabst & Richarz* v *Hauptzollamt Oldenburg* [1982] ECR 1331, paragraph 12, *AC-ATEL Electronics Vertriebs*, cited above, paragraph 17, and *Levez*, cited above, paragraph 26).

33 As regards the challenge to the jurisdiction of the referring court made on the basis of national law, it is not for the Court of Justice, in view of the distribution of functions between itself and the national courts, to determine whether the decision whereby a matter is brought before it has been taken in accordance with the rules of national law governing the organisation of the courts and their procedure (see Joined Cases C-332/92, C-333/92 and C-335/92 *Eurico Italia and Others* v *Ente Nazional Risi* [1994] ECR I-711, paragraph 13).

The first and second questions

34 By its first and second questions, which should be considered together, the national court essentially raises two issues.

35 The first is whether Articles 4(2) and 2(1) of the Directive are to be interpreted as conferring on a Member State the power to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, such as projects for the restructuring of an airport whose runway is shorter than 2 100 metres, even if they have significant effects on the environment.

36 In that regard, the second subparagraph of Article 4(2) of the Directive confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria or thresholds applicable. However, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (see Case C-72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 50, and Case C-301/95 *Commission* v *Germany* [1998] ECR I-6135, paragraph 45).

37 Thus, ruling on legislation of a Member State under which certain entire classes of projects listed in Annex II to the Directive were excluded from the assessment obligation, the Court held, in Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, at paragraph 42, that the criteria and/or thresholds mentioned in Article 4(2) of the Directive are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State.

38 The Court also held in paragraph 53 of its judgment in *Kraaijeveld*, cited above, that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the Directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

39 As regards modifications to such projects, the Court found in paragraph 40 of its judgment in *Kraaijeveld* that the mere fact that the Directive did not expressly refer to modifications to projects included in Annex II, as opposed to modifications to projects included in Annex I, did not justify the conclusion that they were not covered by the Directive.

40 Thus, observing that the scope of the Directive was wide and its purpose very broad, the Court held that the Directive covered 'modifications to development projects' even in relation to projects falling within Annex II, on the ground that its purpose would be undermined if 'modifications to development projects' were so construed as to enable certain works to escape the requirement of an impact assessment when, by reason of their nature, size or location, they were likely to have significant effects on the environment (*Kraaijeveld*, paragraph 39).

41 The second issue raised by the national court is whether, taking into account the fact that an airport is the only airport in the region in which it is located that can be restructured, Articles 4(2) and 2(1) of the Directive nevertheless confer on a Member State the power to exclude from the assessment procedure established by the Directive a specific project such as that in issue in the main proceedings as not being likely to have significant effects on the environment, either under national legislation, in the present case Law No 27/92, or on the basis of an individual examination of the project.

42 The second subparagraph of Article 4(2) of the Directive provides that '... Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10'. That provision thus mentions, by way of indication, methods to which the Member States may have recourse when determining which of the projects falling within Annex II are to be subject to an assessment within the meaning of the Directive.

43 Consequently, the Directive confers a measure of discretion on the Member States and does not therefore prevent them from using other methods to specify the projects requiring an environmental impact assessment under the Directive. So the Directive in no way excludes the method consisting in the designation, on the basis of an individual examination of each project concerned or pursuant to national legislation, of a particular project falling within Annex II to the Directive as not being subject to the procedure for assessing its environmental effects.

44 However, the fact that the Member State has the discretion referred to in the previous paragraph is not in itself sufficient to exclude a given project from the assessment procedure under the Directive. If that were not the case, the discretion accorded to the Member States by Article 4(2) of the Directive could be used by them to take a particular project outside the assessment obligation when, by virtue of its nature, size or location, it could have significant environmental effects.

45 Consequently, whatever the method adopted by a Member State to determine whether or not a specific project needs to be assessed, be it by legislative designation or following an individual examination of the project, the method adopted must not undermine the objective of the Directive, which is that no project likely to have significant effects on the environment, within the meaning

of the Directive, should be exempt from assessment, unless the specific project excluded could, on the basis of a comprehensive assessment, be regarded as not being likely to have such effects.

46 It should be added, with regard to the exclusion of the project at issue in the main proceedings from the assessment procedure under Law No 27/92, that, even if that project concerns the only airport in the province which can be restructured and it has actually been specified by the legislature, the latter cannot in any event exempt the project from the assessment obligation unless, on the date when Law No 27/92 was adopted, it was able to assess precisely the overall environmental impact which all the works entailed by the project were likely to have.

47 As for the exclusion of the project on the basis of an individual examination carried out by the national authorities, the file shows that the contested measures were preceded by an environmental impact study carried out by a team of experts, that information was communicated to the municipalities concerned and that the public was informed by press notices. In addition, the environmental agency and the Amtsdirektorenkonferenz were consulted.

48 It is for the national court to review whether, on the basis of the individual examination carried out by the competent authorities which resulted in the exclusion of the specific project at issue in the main proceedings from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.

49 In view of the foregoing considerations, the answer to the first and second questions must be that Articles 4(2) and 2(1) of the Directive are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a

runway shorter than 2 100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.

The third question

50 By its third question, the national court asks essentially whether, in the case of a project requiring assessment under the Directive, Article 2(1) and (2) thereof are to be interpreted as allowing a Member State to use an assessment procedure other than the procedure introduced by the Directive and whether, where that alternative procedure is incorporated in a national procedure which exists or is to be established within the meaning of Article 2(2), it must satisfy the requirements of Articles 3 and 5 to 10 of the Directive, including public participation as provided for in Article 6.

51 In its order for reference the national court explains that it has doubts as to whether the consent procedure laid down in Articles 11, 12 and 13 of Law No 27/92 is appropriate for fully identifying the effects of the project on the environment. It states that neither noise nor the effects on the atmosphere were investigated, as Article 3 of the Directive requires, and that the public did not participate in that procedure, contrary to Article 6 of the Directive.

52 In that regard, Article 2(2) of the Directive provides: 'The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of [the] Directive.' It is therefore clear from that provision that the Directive does not prevent the assessment procedure which it introduces from being incorporated in a national procedure which exists or is to be established, provided that the aims of the Directive are met.

53 However, where a project requires assessment within the meaning of the Directive, a Member State cannot, without undermining the Directive's objective, use an alternative procedure, even one incorporated in a national procedure which exists or is to be established, to exempt that project from the requirements laid down in Articles 3 and 5 to 10 of the Directive.

54 The answer to third question must therefore be that, in the case of a project requiring assessment under the Directive, Article 2(1) and (2) thereof are to be interpreted as allowing a Member State to use an assessment procedure other than the procedure introduced by the Directive where that alternative procedure is incorporated in a national procedure which exists or is to be established within the meaning of Article 2(2). However, an alternative procedure of that kind must satisfy the requirements of Articles 3 and 5 to 10 of the Directive, including public participation as provided for in Article 6.

The fourth question

55 By its fourth question, the national court asks essentially whether Article 1(5) of the Directive is to be interpreted as also applying to a project, such as that at issue in the main proceedings, which, while provided for by a legislative provision setting out a programme, has received development consent under a separate administrative procedure and, if so, what requirements such a provision and the

process under which it has been adopted must satisfy in order that the objectives of the Directive, including that of supplying information, can be regarded as achieved.

56 Article 1(5) provides that the Directive is not to apply 'to projects the details of which are adopted by a specific act of national legislation, since the objectives of [the] Directive, including that of supplying information, are achieved through the legislative process'.

57 That provision accordingly exempts projects envisaged by the Directive from the assessment procedure subject to two conditions. The first requires the details of the project to be adopted by a specific legislative act; under the second, the objectives of the Directive, including that of supplying information, must be achieved through the legislative process.

58 With regard to the first condition, it is to be observed that Article 1(2) of the Directive refers not to legislative acts but to development consent, which it defines as 'the decision of the competent authority or authorities which entitles the developer to proceed with the project'. Therefore, if it is a legislative act, instead of a decision of the competent authorities, which grants the developer the right to carry out the project, that act must be specific and display the same characteristics as the development consent specified in Article 1(2) of the Directive.

59 Consequently, in order for a legislative act to display the same characteristics as development consent, as defined by Article 1 of the Directive, the act must lay down the project in detail, that is to say in a sufficiently precise and definitive manner so as to include, like development consent, following their consideration by the legislature, all the elements of the project relevant to the environmental impact assessment.

60 It is only by complying with such requirements that the objectives referred to in the second condition laid down by Article 1(5) can be achieved through the legislative process. If the specific legislative act by which a particular project is adopted, and therefore authorised, does not include the elements of the specific project which may be relevant to the assessment of its impact on the environment, the objectives of the Directive would be undermined, because a project could be granted consent without prior assessment of its environmental effects even though they might be significant.

61 That interpretation is borne out by the sixth recital in the preamble to the Directive, which states that development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of those projects, and that this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project.

62 It follows that the details of a project cannot be considered to be adopted by a Law, for the purposes of Article 1(5) of the Directive, if the Law does not include the elements necessary to assess the environmental impact of the project but, on the contrary, requires a study to be carried out for that purpose, which must be drawn up subsequently, and if the adoption of other measures are needed in order for the developer to be entitled to proceed with the project.

63 The answer to the fourth question must therefore be that Article 1(5) of the Directive is to be interpreted as not applying to a project, such as that at issue in the main proceedings, which, while provided for by a legislative provision setting out a programme, has received development consent under a separate administrative procedure. The requirements which such a provision and the process under which it has been adopted must satisfy in order that the objectives of the Directive, including that of supplying information, can be regarded as achieved

consist in the adoption of the project by a specific legislative act which includes all the elements which may be relevant to the assessment of the impact of the project on the environment.

The fifth question

64 By its fifth question, the national court asks whether Article 1(4) of the Directive is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the Directive.

65 The Directive, as stated in Article 1(4), does not cover 'projects serving national defence purposes'. That provision thus excludes from the Directive's scope and, therefore, from the assessment procedure for which it provides, projects intended to safeguard national defence. Such an exclusion introduces an exception to the general rule laid down by the Directive that environmental effects are to be assessed in advance and it must accordingly be interpreted restrictively. Only projects which mainly serve national defence purposes may therefore be excluded from the assessment obligation.

66 It follows that the Directive covers projects, such as that at issue in the main proceedings which, as the file shows, has the principal objective of restructuring an airport in order for it to be capable of commercial use, even though it may also be used for military purposes.

67 Accordingly, the answer to the fifth question must be that Article 1(4) of the Directive is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the Directive.

The sixth question

68 By its sixth question, the national court is essentially asking whether Articles 4(2) and 2(1) of the Directive are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, the national court is asking whether it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

69 As regards the right of individuals to rely on a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect conferred on directives by Article 189 of the EC Treaty (now Article 249 EC) for the possibility for those concerned to rely on the obligation which directives impose to be excluded in principle. Particularly where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods for implementing the directive, had kept within the limits of its discretion set out in the directive (Case 51/76 *Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraphs 22, 23 and 24, and *Kraaijeveld*, cited above, paragraph 56).

70 Consequently, if that discretion has been exceeded and the national provisions must therefore be set aside on that account, it is for the authorities of the Member State, according to their relevant powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine

whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see *Kraaijeveld*, paragraph 61).

71 The answer to the sixth question must therefore be that Articles 4(2) and 2(1) of the Directive are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

Costs

72 The costs incurred by the Italian, Netherlands and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgericht, Autonome Sektion für die Provinz Bozen, by order of 3 December 1997, hereby rules:

1. Articles 4(2) and 2(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment are to be interpreted as not conferring on a Member State the power either to exclude, from the outset and in their entirety, from the environmental impact assessment procedure established by the Directive certain classes of projects falling within Annex II to the Directive, including modifications to those projects, or to exempt from such a procedure a specific project, such as the project of restructuring an airport with a runway shorter than 2 100 metres, either under national legislation or on the basis of an individual examination of that project, unless those classes of projects in their entirety or the specific project could be regarded, on the basis of a comprehensive assessment, as not being likely to have significant effects on the environment. It is for the national court to review whether, on the basis of the individual examination carried out by the national authorities which resulted in the exclusion of the specific project at issue from the assessment procedure established by the Directive, those authorities correctly assessed, in accordance with the Directive, the significance of the effects of that project on the environment.

2. In the case of a project requiring assessment under Directive 85/337, Article 2(1) and (2) thereof are to be interpreted as allowing a Member State to use an assessment procedure other than the procedure introduced by the Directive where that alternative procedure is incorporated in a national procedure which exists or is to be established within the meaning of Article 2(2) of the Directive. However, an alternative procedure of that kind

must satisfy the requirements of Articles 3 and 5 to 10 of the Directive, including public participation as provided for in Article 6.

3. Article 1(5) of Directive 85/337 is to be interpreted as not applying to a project, such as that at issue in the main proceedings, which, while provided for by a legislative provision setting out a programme, has received development consent under a separate administrative procedure. The requirements which such a provision and the process under which it has been adopted must satisfy in order that the objectives of the Directive, including that of supplying information, can be regarded as achieved consist in the adoption of the project by a specific legislative act which includes all the elements which may be relevant to the assessment of the impact of the project on the environment.

4. Article 1(4) of Directive 85/337 is to be interpreted as meaning that an airport which may simultaneously serve both civil and military purposes, but whose main use is commercial, falls within the scope of the Directive.

5. Articles 4(2) and 2(1) of Directive 85/337 are to be interpreted as meaning that, where the discretion conferred by those provisions has been exceeded by the legislative or administrative authorities of a Member State, individuals may rely on those provisions before a court of that Member State against the national authorities and thus obtain from the latter the setting aside of the national rules or measures incompatible with those provisions. In such a case, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to

have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

Kapteyn Murray Ragnemalm

Delivered in open court in Luxembourg on 16 September 1999.

R. Grass

Registrar

P.J.G. Kapteyn

President of the Sixth Chamber

JUDGMENT OF THE COURT (Sixth Chamber)
22 October 1998 *

In Case C-301/95,

Commission of the European Communities, represented by Götz zur Hausen, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, acting as Agent, and Dieter Sellner, Rechtsanwalt, Bonn, D-53107 Bonn,

defendant,

APPLICATION for a declaration that the Federal Republic of Germany has failed to comply with its obligations under Articles 5 and 189 of the EC Treaty and under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), in particular Articles 2, 3, 5(2), 6(2), 8, 9 and 12(1) and (2) thereof,

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P. J. G. Kapteyn, President of the Chamber, G. F. Mancini, J. L. Murray, H. Ragnemalm and K. M. Ioannou (Rapporteur), Judges,

Advocate General: J. Mischo,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 22 January 1998,

after hearing the Opinion of the Advocate General at the sitting on 12 March 1998,

gives the following

Judgment

1 By application lodged at the Court Registry on 20 September 1995, the Commission of the European Communities brought an action under Article 169 of the EC Treaty for a declaration that the Federal Republic of Germany had failed to comply with its obligations under Articles 5 and 189 of the EC Treaty and under Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, 'the Directive'), in particular Articles 2, 3, 5(2), 6(2), 8, 9 and 12(1) and (2) thereof.

2 The Directive was adopted on the basis of Articles 100 and 235 of the EEC Treaty. According to the 11th recital in the preamble, 'the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life'.

3 Article 1 of the Directive provides:

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

2. For the purposes of this Directive:

"project" means:

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

...

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

...'

4 Article 3 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the interaction between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

5 Pursuant to Article 12(1), the Member States were required to take the measures necessary to comply with the Directive within three years of its notification. Since the Directive was notified on 3 July 1985, that period expired on 3 July 1988.

6 In Germany the Directive was transposed by the Gesetz über die Umweltverträglichkeitsprüfung (Law on environmental impact assessment, 'the UVPG') of 12 February 1990, which came into force on 1 August 1990 (BGBl. I, p. 205).

7 On examining the provisions of the UVPG, the Commission reached the conclusion that the legislation in force in Germany, as notified to it, did not comply with the provisions of the Directive. It therefore sent a letter of formal notice on 4 February 1992 informing the German Government of the various points with which it took issue.

8 The German Government replied by letter of 16 June 1992, and the Commission reconsidered its position with regard to certain of the points raised in its letter of formal notice, finally limiting them, in its reasoned opinion sent to the German Government on 4 July 1994, to those falling under six headings each constituting a distinct instance of failure to transpose the Directive correctly. The Commission called on the German Government to take the measures necessary to comply with the reasoned opinion within two months from its notification.

9 Having received no reply to its reasoned opinion, the Commission brought the matter before the Court. Its action related to instances of failure to fulfil obligations falling under six different headings: delay in transposing the Directive; failure to communicate all the provisions adopted in the field covered by the Directive; failure to apply the Directive to all projects for which consent was given after 3 July 1988; incomplete transposition of Article 2 of the Directive with regard to the

projects listed in Annex II thereto; incomplete transposition of Article 5(2) of the Directive; and failure to apply the Directive to the implementation of two specific projects.

10 In the light of details furnished by the German Government in its defence, the Commission has withdrawn its claim concerning the aspects referred to under the sixth heading in its application.

Delay in transposing the Directive

11 The Commission submits that the German Government failed to take the measures necessary to comply with the Directive within the prescribed period, which expired on 3 July 1988 whereas the UVPG came into force on 1 August 1990. Germany has thus failed to fulfil its obligations under Article 5 and the third paragraph of Article 189 of the Treaty, read in conjunction with Article 12(1) of the Directive.

12 The German Government considers that it would be inappropriate to make a formal declaration of the alleged failure to fulfil obligations, since the Court has already held, in Case C-396/92 *Bund Naturschutz in Bayern and Others* v *Freistaat Bayern* [1994] ECR I-3717, that there had been a delay in transposing the Directive in Germany.

13 Here, though, it must be noted that the *Bund Naturschutz in Bayern* judgment was given in response to a request for a preliminary ruling on the interpretation of Article 12(1) of the Directive. An action for failure to fulfil obligations differs, however, in both its purpose and its consequences.

14 The purpose of such an action is to obtain a formal finding that a Member State has failed to fulfil its obligations under Community law.

15 As regards its consequences, that formal finding is a prerequisite for the initiation, where appropriate, of the procedure provided for in Article 171 of the EC Treaty, as amended by the Treaty on European Union.

16 Finally, as the Court has consistently held, the Commission, given its role as guardian of the Treaty, is alone competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations (Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, paragraph 22).

17 It must therefore be held that, by failing to take the necessary measures to comply with the Directive within the prescribed period, the Federal Republic of Germany has failed to fulfil its obligations under Article 12(1) thereof.

Failure to communicate all the provisions adopted in the field covered by the Directive

18 Article 12(2) of the Directive provides: 'Member States shall communicate to the Commission the texts of the provisions of national law which they adopt in the field covered by this Directive.'

19 The Commission states that the German Government did not communicate all the national provisions intended to transpose the Directive, in particular those adopted by the *Länder*. Such provisions, having been adopted in the field covered by the Directive, should in the Commission's view have been communicated in accordance with Article 12(2). Germany has thus failed to fulfil its obligations under Article 5 and the third paragraph of Article 189 of the Treaty, read in conjunction with Article 12(2) of the Directive.

20 The German Government counters that neither Article 12(2) nor any other provision of Community law obliges it to communicate to the Commission all the measures it has taken to comply with the Directive.

21 It further argues that under Paragraph 4 of the UVPG, that Law takes precedence over specific Laws and over the legislation of the *Länder*. In any instance where the requirements laid down by the latter fall short of those contained in the UVPG, the rules in the UVPG are directly applicable. The UVPG thus ensures that the requirements of the Directive are fully satisfied, making it unnecessary to communicate other provisions to the Commission.

22 Here it must be noted that the wording of Article 12(2) of the Directive leaves no doubt as to the scope of the obligation placed on Member States to communicate to the Commission all the provisions which they adopt in the field covered by the Directive. Nor does it give any reason to suppose that distinctions may be drawn as to the nature of that obligation according to whether a Member State has a federal or centralised structure or according to the legislative technique which it employs.

23 Since the obligation to communicate national provisions concerns all such provisions adopted in the field covered by the Directive, the finding that the Member State has failed to fulfil its obligations as alleged cannot be affected by the consideration that the provisions of the UVPG, which have been communicated to the Commission, take precedence over those which have not been communicated.

24 It must therefore be held that, by failing to communicate to the Commission all the measures which it has taken to comply with the Directive, the Federal Republic of Germany has failed to fulfil its obligations under Article 12(2) thereof.

Failure to apply the Directive to all projects for which consent was given after 3 July 1988

25 Paragraph 22(1) of the UVPG contains a transitional provision under which consent procedures already commenced are to be completed in accordance with the provisions of that Law where the project had not yet been made public by 1 August 1990, when the UVPG came into force.

26 In the Commission's submission, that transitional provision limits the scope *ratione temporis* of the UVPG, in that consent procedures commenced before 1 August 1990 but after 3 July 1988, when the period within which the Directive was to be transposed expired, are not subject to an environmental impact assessment in accordance with the requirements of the Directive. Germany has thus failed to fulfil its

obligations under Article 5 and the third paragraph of Article 189 of the Treaty, read in conjunction with Article 12(1) of the Directive.

27 The Federal Government argues that it was already made clear in the *Bund Naturschutz in Bayern* and *Commission* v *Germany* judgments, cited above, that the Federal Republic of Germany was not entitled to adopt a derogating provision such as that contained in Paragraph 22(1) of the UVPG concerning projects for which the consent application had been lodged before 3 July 1988 and thus to exempt such projects from the environmental impact assessment requirement. That question having been settled by those two judgments, there is no reason for the Court to rule afresh on the same point of law.

28 Here it must be observed that the subject-matter of the *Commission* v *Germany* case, cited above, was different, since it concerned a finding that Germany had failed to fulfil its obligations by failing to comply with the environmental impact assessment requirement laid down by the Directive in a specific case relating to a specific project. The application in that case did not seek a finding that the Member State had failed to fulfil its obligations by adopting Paragraph 22 of the UVPG.

29 Consequently, having regard to the considerations set out in paragraphs 13 to 15 above, it must be held that, by not requiring an environmental impact assessment for all projects on which such an assessment had to be carried out in compliance with the Directive, where the consent procedure was commenced after 3 July 1988, the Federal Republic of Germany has failed to fulfil its obligations under Article 12(1) of the Directive.

Incomplete transposition of Article 2 of the Directive with regard to the projects listed in Annex II thereto

30 Article 2 of the Directive provides:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

...'

31 Article 4 provides:

'1. Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

32 Annex I to the Directive lists nine categories of projects defined according to their nature, such as oil refineries, integrated chemical installations, construction of motorways and trading ports. Annex II, entitled 'Projects subject to Article 4(2)', lists 12 categories of projects. Unlike those in Annex I, the categories in Annex II are divided into sub-categories, each preceded by a letter of the alphabet, with the exception of those listed under points 5, 9 and 12.

33 The Federal Republic of Germany, availing itself of its right under Article 4(2) of the Directive in conjunction with Annex II thereto, defined certain projects in Paragraph 3 of the UVPG and in the Annex thereto which it decided to subject to the obligation to carry out an environmental impact assessment.

34 The Commission argues that the German legislation does not include all the classes of projects listed in Annex II to the Directive. In its opinion, all the projects listed in Annex II under the various letters of the alphabet preceding the subdivisions of the categories listed in that annex must be considered as 'classes' within the meaning of Article 4(2) of the Directive. The Commission does not dispute that the Member States may, under Article 4(2), distinguish on the basis of their characteristics between the projects falling within a particular class in Annex II to the Directive, but it considers that it is unacceptable not to impose the environmental assessment requirement on whole classes in general.

35 The Commission therefore asks the Court to find that, by excluding in advance whole classes of projects listed in Annex II to the Directive from the environmental impact assessment requirement, Germany has failed to fulfil its obligations under Article 5 and the third paragraph of Article 189 of the Treaty, read in conjunction with Articles 2(1) and 12(1) of the Directive.

36 The German Government considers that a distinction is to be drawn between the concepts of 'classes' and 'projects'. In its opinion, Annex II to the Directive lists a total of '12 classes of projects' within which there are 'specific' projects. Each of the 12 categories in the annex thus constitutes a class of projects and each of the subdivisions of those categories, preceded by a letter of the alphabet, constitutes a specific project.

37 It submits that, under Article 4(2) of the Directive, each Member State may decide, at its own discretion, which of the specific projects listed under the 12 classes has to be subject to the assessment requirement. The UVPG takes account of all the classes of projects in Annex II to the Directive and, within those classes, requires an environmental impact assessment to be carried out on those projects whose characteristics warrant it in the opinion of the federal legislature. To that end, the German Government used its discretionary power to set criteria and/or thresholds for certain types of projects in respect of the assessment obligation. It is thus wrong to claim that the Federal Republic of Germany has excluded whole classes of projects from the assessment requirement.

38 The Court has held that Article 4(2) of the Directive does not empower the Member States to exclude generally and definitively from possible assessment one or more classes mentioned in Annex II (see Case C-133/94 *Commission* v *Belgium* [1996] ECR I-2323, paragraph 43). In order to settle the dispute on this point, therefore, the question of the interpretation of the concept of classes of projects, within the meaning of Article 4 of the Directive, must first be dealt with.

39 Here, it must be noted that Article 4 of the Directive uses the same wording in both paragraphs 1 and 2 in relation to the concept in question, namely 'projects of the classes listed in Annex I shall be made subject to an assessment ...' and 'projects of the classes listed in Annex II shall be made subject to an assessment ... where ...'.

40 The tenor and scope of that concept thus clearly cannot differ depending whether it is used in Annex I or Annex II of the Directive.

41 Referring as it does in Annex I to categories of projects defined according to their nature, it can only refer to the same kind of categories of projects with regard to Annex II.

42 However, the nine categories of projects in Annex I cannot, by their nature, correspond to the 12 categories in Annex II, each of which constitutes a vast field of economic activity; they must rather correspond to the subdivisions of those categories, each preceded by a letter of the alphabet. That consideration is borne out by the fact that categories 5, 9 and 12 in Annex II, which are not subdivided, each constitute an activity confined within clear limits.

43 For example, the category of projects entitled 'Construction of motorways, express roads and lines for long-distance railway traffic and of airports ...' under point 7 in Annex I cannot correspond, as a class of projects, to the category under point 10 of Annex II, entitled 'Infrastructure projects'; it must rather correspond to subdivision (d) within that point, which refers to 'Construction of roads, harbours, including fishing harbours, and airfields (projects not listed in Annex I)'.

44 Any other interpretation of the concept in question would negate the effectiveness of the rule laid down in Article 2(1) of the Directive, that projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are to be made subject to an environmental impact assessment, and would leave Member States free to apply Annex II as they saw fit.

45 It is specifically on the basis of that rule that the Court has held that the limits of the discretion conferred on the Member States by Article 4(2) of the Directive are to be found in the obligation set out in Article 2(1) (Case C-72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 50), and that the criteria and/or thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State (Case C-133/94 *Commission* v *Belgium*, cited above, paragraph 42).

46 It must therefore be held that, by excluding in advance from the environmental impact assessment requirement whole classes of projects listed in Annex II to the Directive, the Federal Republic of Germany has failed to fulfil its obligations under Articles 2(1) and 4(1) of the Directive.

Incomplete transposition of Article 5(2) of the Directive

47 Article 5(1) of the Directive requires Member States to adopt the necessary measures to ensure that the developer supplies certain information concerning any project subject to an environmental impact assessment. That information is specified in Article 5(2) and in Annex III to the Directive.

48 The Commission notes that the provisions of Paragraph 6(3) and (4) of the UVPG, in transposing Article 5(1) of the Directive, define the information which the developer must supply. However, the second sentence of Paragraph 6(2) of the UVPG states that those provisions are applicable only 'if the information listed in subparagraphs 3 and 4 is not defined in detail by a statutory provision'.

49 According to the Commission, this means that other statutory provisions, defining in detail the information that must be provided by the developer, take precedence over the provisions of the UVPG and thus replace them in such cases. The Commission therefore considers that, by failing to lay down a general requirement in respect of the information to be supplied under the Directive, Germany has failed to fulfil its obligations under Article 5 and the third paragraph of Article 189 of the Treaty, in conjunction with Articles 5(2) and 12(1) of the Directive.

50 The German Government claims that the Commission's approach is based on a misinterpretation of Paragraph 6(2) of the UVPG. That provision does not derogate from the general rule in Paragraph 4 of the UVPG, governing the relationship between that Law and other statutory provisions laid down by the Federation or the *Länder* within the field covered by the Directive. In accordance with that rule, if the requirements laid down by such statutory provisions fall short of those of the UVPG, then the latter take precedence.

51 Here, it must be noted that Article 5(2) of the Directive specifies the minimum scope of the information to be supplied by the developer. The Commission does not claim that the provisions of Paragraph 6(3) and (4) of the UVPG do not provide a correct transposition of their counterpart in the Directive.

52 If, for reasons which may be linked to the federal structure of the State, other specific provisions of the Federation or the *Länder* lay down particular requirements corresponding, possibly, to the individual needs of the various fields of activity covered by the Directive, it must be noted that Article 13 of the Directive allows

the Member States to lay down stricter rules than those contained in the Directive. Furthermore, the general rule in Paragraph 4 of the UVPG ensures, as has been explained by the German Government, that the provisions of Paragraph 6(3) and (4) are to apply when the requirements contained in specific provisions fall short of those laid down in the corresponding provision of the UVPG.

53 In the light of those considerations, this part of the application must therefore be dismissed.

54 In view of all the foregoing, it must accordingly be held that

— by failing to take the necessary measures to comply with the Directive within the prescribed period,

— by failing to communicate to the Commission all the measures which it has taken to comply with the Directive,

— by not requiring an environmental impact assessment for all projects on which such an assessment had to be carried out in compliance with the Directive, where the consent procedure was commenced after 3 July 1988, and

— by excluding in advance from the environmental impact assessment requirement whole classes of projects listed in Annex II to the Directive,

the Federal Republic of Germany has failed to fulfil its obligations under Articles 2(1), 4(2) and 12(1) and (2) of the Directive.

55 The remainder of the application must be dismissed.

Costs

56 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful in all essential respects, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1) Declares that,

— **by failing to take the necessary measures to comply with Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment within the prescribed period,**

— **by failing to communicate to the Commission all the measures which it has taken to comply with that directive,**

— **by not requiring an environmental impact assessment for all projects on which such an assessment had to be carried out in compliance with that directive, where the consent procedure was commenced after 3 July 1988, and**

— **by excluding in advance from the environmental impact assessment requirement whole classes of projects listed in Annex II to that directive,**

the Federal Republic of Germany has failed to fulfil its obligations under Articles 2(1), 4(2) and 12(1) and (2) of that directive;

2) Dismisses the remainder of the application;

3) Orders the Federal Republic of Germany to bear the costs.

Kapteyn Mancini Murray

Ragnemalm Ioannou

Delivered in open court in Luxembourg on 22 October 1998.

R. Grass

Registrar

P. J. G. Kapteyn

President of the Sixth Chamber

JUDGMENT OF THE COURT
24 October 1996 *

In Case C-72/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Nederlandse Raad van State (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Aannemersbedrijf P. K. Kraaijeveld BV and Others

and

Gedeputeerde Staten van Zuid-Holland

on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) and on the duty of national courts to ensure that a directive having direct effect is complied with although no individual has invoked it,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, G. F. Mancini, J. L. Murray, L. Sevón (Rapporteur), (Presidents of Chambers), C. N. Kakouris, P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch and M. Wathelet, Judges,

* Language of the case: Dutch.

Advocate General: M. B. Elmer,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Aannemersbedrijf P. K. Kraaijeveld BV and Others, by J. A. Kraaijeveld, J. Kraaijeveld Sr., J. Kraaijeveld Jr., W. Kraaijeveld and P. K. Kraaijeveld,

— the Government of the Netherlands, by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent,

— the Italian Government, by U. Leanza, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by P. G. Ferri, Avvocato dello Stato,

— the United Kingdom Government, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, assisted by D. Wyatt QC,

— the Commission of the European Communities, by M. van der Woude, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Aannemersbedrijf P. K. Kraaijeveld BV and Others, represented by J. Kraaijeveld Jr. and W. Kraaijeveld; the Government of the Netherlands, represented by J. S. van den Oosterkamp, Assistant Legal Adviser at the Ministry of Foreign Affairs, acting as Agent, assisted by J. Poot, expert adviser; the Italian Government, represented by P. G. Ferri; the United Kingdom

Government, represented by J. E. Collins, assisted by D. Wyatt; and the Commission, represented by W. Wils of its Legal Service, acting as Agent, at the hearing on 14 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 26 March 1996,

gives the following

Judgment

1 By judgment of 8 March 1995, received at the Court on 14 March 1995, the Nederlandse Raad van State (Netherlands State Council) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty four questions on the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, hereinafter 'the directive') and on the duty of national courts to ensure that a directive having direct effect is complied with although no individual has invoked it.

2 The questions were raised in proceedings brought by Aannemersbedrijf P. K. Kraaijeveld BV and Others (hereinafter 'Kraaijeveld') for annulment of a decision of 18 May 1993 by which the South Holland Provincial Executive approved a zoning plan entitled 'Partial modification of zoning plans in connection with dyke reinforcement' adopted by the Sliedrecht Municipal Council pursuant to the Wet op de ruimtelijke ordening (Regional Development Law).

Directive 85/337

3 The directive provides that, before certain works or other interventions in the natural surroundings are executed, an environmental impact assessment is to be carried out.

4 According to the sixth, eighth, ninth and eleventh recitals in the preamble to the directive:

'... development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; ... this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;

... projects belonging to certain types have significant effects on the environment and these projects must as a rule be subject to systematic assessment;

... projects of other types may not have significant effects on the environment in every case and ... these projects should be assessed where the Member States consider that their characteristics so require;

... the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life'.

5 Article 1(1) of the directive states:

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

6 Article 1(2) states that for the purposes of the directive 'project' means:

'— the execution of construction works or of other installations or schemes,

— other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources.'

7 Article 2(1) specifies the types of projects which are to be subject to an assessment:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

8 Article 3 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the inter-action between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

9 Article 4 distinguishes between two different types of projects. The first paragraph provides that an assessment is always required for projects described in Annex I. As regards other projects, Article 4(2) provides:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10'.

10 Annex II lists a number of projects, including:

'10. Infrastructure projects

...

(e) Canalization and flood-relief works.

...

12. Modifications to development projects included in Annex I and projects in Annex I undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than one year.'

11 The directive contains no specific provision in relation to modifications to projects listed in Annex II.

12 Lastly, the directive provides for the public to be given information and the opportunity to express an opinion. Article 6(3) of the directive provides that the detailed arrangements for such information and consultation are to be determined by the Member States, in particular as regards determination of the public concerned and the way in which the public will be informed.

13 Article 12(1) of the directive provides that 'Member States shall take the measures necessary to comply with this directive within three years of its notification'.

The provisions of Netherlands law applicable to the facts of the main proceedings

14 In the Netherlands the Deltawet (of 8 May 1958) houdende de afsluiting van de zeearmen tussen de Westerschelde en de Rotterdamse Waterweg en de versterking van de hoogwaterkering ter beveiliging van het land tegen stormvloeden (*Staatsblad 246*, Delta Law providing for the closure of the sea inlets linking the Western Scheldt to the Rotterdam Waterway and consolidating the tide control scheme to protect land against storm tides, hereinafter the 'Delta Law') provides in particular for the construction of works intended to reinforce high-water protection along the Rotterdam Waterway and along the waters communicating with it (Article 1(II)d). Pursuant to that Law, studies were undertaken, mainly in 1987 and 1988, by the Dyke Reinforcement Coordinating Committee responsible to the South Holland Provincial Executive. A new dyke line in the West, Central and East Sliedrecht sector was proposed by the Committee, approved by the South Holland Provincial Executive and adopted by the Minister for Transport and Water Control on 26 April 1990 in accordance with Article 2(4) of the Delta Law. Subsequently the Sliedrecht Municipal Council adopted the zoning plan for that sector on 23 November 1992 under the Regional Development Law.

15 The directive was transposed into national law in the Netherlands by an amendment to the Wet algemene bepalingen milieuhygiëne (Law laying down general provisions on environmental health) of 13 June 1979 (hereinafter 'the 1979 Law'), Article 41b(1) of which provided, at the material time: 'Activities which are likely to have significant adverse effects on the environment shall be designated by a general administrative measure. The same instrument shall designate the decision(s) of the public authorities concerning such activities prior to which an environmental impact assessment must be made.' The 1979 Law was itself implemented by the Besluit milieu-effectrapportage (Environmental Impact Assessment Decision) of 20 May 1987. In Article 2 of the decision and Section C 12.1 of the annex thereto, in the version in force at the material time, defined the 'construction of a dyke' as an activity within the meaning of Article 41(b) of the Law if the dyke was 5 km or more in length, with a cross-section of at least 250 m^2. They also characterize as a

decision in respect of which an environmental impact assessment must be made the adoption of an outline plan or a decision made pursuant to Article 2(3) and (4) of the Delta Law.

16 The 1979 Law was amended and became, in 1994, the Wet milieubeheer (Environmental Management Law). A further implementing decision was adopted on 4 July 1994, omitting the criteria in respect of the size of the works. That decision is not applicable, however, to the facts of the case in the main proceedings.

Procedure before the national court and the questions referred for a preliminary ruling

17 Kraaijeveld contested the zoning plan adopted on 23 November 1992 by the Sliedrecht Municipal Council, in so far as it concerned the Merwede dyke, before the South Holland Provincial Executive which, by decision of 18 May 1993, nevertheless approved the plan. On 20 July 1993 Kraaijeveld brought an action before the Raad van State seeking annulment of that decision.

18 According to the new plan, the waterway to which Kraaijeveld has access will no longer be linked to navigable waterways; the removal of access to navigable waterways would be ruinous to Kraaijeveld's business, whose economic activity is related to waterways ('natte waterbouw').

19 The Nederlandse Raad van State observes that no environment impact assessment was made because the size of the works was less than the minimum laid down by national legislation.

20 By judgment of 8 March 1995 the Nederlandse Raad van State decided to refer to the Court of Justice for a preliminary ruling the following four questions:

'1. Must the expression "canalization and flood-relief works" in Annex II to Directive 85/337/EEC be interpreted as including certain types of work on a dyke running alongside waterways?

2. Having regard in particular to the terms "projects" and "modifications to development projects" employed in the directive, does it make any difference to the answer to Question 1 whether what is involved is:

(a) the construction of a new dyke;

(b) the relocation of an existing dyke;

(c) the reinforcement and/or widening of an existing dyke;

(d) the replacement *in situ* of a dyke whether or not the new dyke is stronger and/or wider than the old one; or

(e) a combination of two or more of (a) to (d) above?

3. Must Article 2(1) and Article 4(2) of the directive be interpreted as meaning that where a Member State in its national implementing legislation has laid down specifications, criteria or thresholds for a particular project covered by Annex II in accordance with Article 4(2) of the directive, but those specifica-

tions, criteria or thresholds are incorrect, Article 2(1) requires that an environmental impact assessment be made if the project is likely to have "significant effects on the environment by virtue *inter alia* of [its] nature, size or location" within the meaning of that provision?

4. If Question 3 is answered in the affirmative, does that obligation have direct effect, that is to say, may it be relied upon by an individual before a national court and must it be applied by the national court even if it was not in fact invoked in the matter pending before that court?'

Question 1

21 In this question the Nederlandse Raad van State asks whether the expression 'canalization and flood-relief works' in point 10(e) of Annex II to the directive is to be interpreted as including certain types of work on a dyke running alongside waterways.

22 In view of the wording of the English version of the directive ('canalization and flood-relief works'), the national court considers that projects falling under that heading of Annex II involve activities likely to have significant effects on the environment, so that the expression could encompass certain works relating to a dyke.

23 According to Kraaijeveld, river dyke projects are works which tend to alter the frequency with which river banks and the surrounding areas are submerged and

which thus have a significant effect on the environment. In the regulation of watercourses, dykes are no less important than other canalization and flood-relief works.

24 The Government of the Netherlands contends that there is a distinction between work on a dyke and flood-relief and canalization work. The latter are carried out to regulate water flow or for the benefit of river navigation. They change the character of the watercourse itself, that is to say, the quantity or quality of the water and the riverbanks and riverside, so that they have a considerable impact on aquatic flora and fauna. Dyke reinforcement work, on the other hand, consists in constructing or increasing the height of the embankment with sand or clay. The Rivierenwet (Law on Rivers) ensures that the works now undertaken do not affect the regulated level already achieved for any given river. Such work therefore has little effect on the fauna and flora of a river.

25 As regards the reference to the English version of the directive, the Government of the Netherlands considers that the Dutch version of the directive is, as far as it is concerned, the only authentic language version. It cites the Court's case-law to the effect that the elimination of linguistic discrepancies by way of interpretation may in certain circumstances run counter to the principle of legal certainty, inasmuch as one or more of the texts involved may have to be interpreted in a manner at variance with the natural and usual meaning of the words (Case 80/76 *North Kerry Milk Products* v *Minister for Agriculture and Fisheries* [1977] ECR 425, paragraph 11). Uniform interpretation cannot be determined by one particular language. The various language versions are equally authentic (Case 283/81 *CILFIT* [1982] ECR 3415).

26 Lastly, the Government of the Netherlands refers to the purpose of the directive, which is to create equal conditions of competition in the various Member States. The work referred to in the directive can therefore only refer to work which can be undertaken in practically all the Member States, not to work which is mainly carried out in only one Member State, such as the construction of dykes. The

Government of the Netherlands therefore concludes that reinforcement work on dykes along waterways in the Netherlands is not covered by the expression 'canalization and flood-relief works'.

27 According to the Commission, canalization of a river has an inevitable effect on its flow rate and water level. It may make it necessary to erect dykes along the river banks in order to prevent floods and safeguard the population. A dyke of that type must therefore be held to be flood-relief works. Moreover, it is necessary to take into account the purpose of the directive, which concerns the effects certain projects may have on the environment, regardless of their social objective. The construction of river dykes affects the environment, whether their purpose is to improve the navigability of a watercourse or to protect the population living on territory liable to flood. Works on a river dyke capable of having significant effects on the environment are therefore covered by the term 'canalization and flood-relief works'.

28 As the case-law of the Court shows, interpretation of a provision of Community law involves a comparison of the language versions (see Case 283/81 *CILFIT*, cited above, paragraph 18). Moreover, the need for a uniform interpretation of those versions requires, in the case of divergence between them, that the provision in question be interpreted by reference to the purpose and general scheme of the rules of which it forms part (Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28).

29 Examination of the various language versions of point 10(e) of Annex II to the directive shows that they fall into two categories according to whether the terms employed denote the idea of flooding. The English ('canalization and flood-relief works') and Finnish ('kanavointi-ja tulvasuojeluhankkeet') versions are similar, whereas the German, Greek, Spanish, French, Italian, Dutch and Portuguese versions refer to canalization and regulation of watercourses, the Greek version including in addition the French term 'canalisation' in brackets after the Greek

term 'διευθέτησης'. The Danish and Swedish versions contain only a single expression reflecting the idea of regulating watercourses ('anlæg til regulering af vandløb', 'anläggningar för reglering av vattenflöden').

30 Given that divergence, one must go to the purpose and general scheme of the directive. According to Article 1(2) of the directive, 'project' means 'the execution of construction works or of other installations or schemes' and 'other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources'. According to Article 2(1), the directive is aimed at 'projects likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location'. Article 3 provides that the environmental impact assessment is to identify, describe and assess the direct and indirect effects of a project on human beings, fauna and flora, soil, water, air, climate and the landscape, material assets and the cultural heritage.

31 The wording of the directive indicates that it has a wide scope and a broad purpose. That observation alone should suffice to interpret point 10(e) of Annex II to the directive as encompassing all works for retaining water and preventing floods — and therefore dyke works — even if not all the linguistic versions are so precise.

32 Even if, as argued by the Government of the Netherlands, dyke works consist in the construction or raising of the height of embankments in order to contain watercourses and avoid flooding, works retaining a static quantity of water, rather than a running watercourse, may have a significant effect on the environment within the meaning of the directive where they are liable permanently to affect the composition of the soil, flora and fauna or the landscape. Such works must therefore fall under the directive.

33 Consequently, the argument of the Government of the Netherlands that dyke work does not alter the course of a waterway is not well founded.

34 Lastly, the submission of the Government of the Netherlands that dykes do not fall within the scope of a Community directive because such work is specific to the Netherlands is irrelevant, since, as explained above, the criterion to be applied is the significance of the effect that a project is likely to have on the environment.

35 The reply to the first question is therefore that the expression 'canalization and flood-relief works' in point 10(e) of Annex II to the directive must be interpreted as including certain types of work on a dyke running alongside waterways.

Question 2

36 In this question the Nederlandse Raad van State asks whether, having regard in particular to the expressions 'projects' and 'modifications to development projects' employed in the directive, it makes any difference to the answer to Question 1 whether what is involved is:

(a) the construction of a new dyke;

(b) the relocation of an existing dyke;

(c) the reinforcement and/or widening of an existing dyke;

(d) the replacement *in situ* of a dyke whether or not the new dyke is stronger and/or wider than the old one; or

(e) a combination of two or more of (a) to (d) above.

37 Under the terms of the directive, modifications to development projects included in Annex I are to be subject to the same system as projects included in Annex II, and are thus subject to Article 4(2) of the directive. The lack of any reference to modifications of projects of the classes included in Annex II is construed, in the observations submitted, in different ways as regards their inclusion in the scope of the directive. According to the Italian and United Kingdom Governments, modifications of projects included in Annex II are also covered by that annex, whereas the Government of the Netherlands and the Commission argue that they do not fall within the scope of the directive. The Commission specifies, however, that it depends on the meaning attributed to the expression 'modifications to development projects' and in certain cases modifications may be so significant that they constitute a new project.

38 Since the directive provides no specific definition of 'modifications to development projects', the expression must be interpreted in the light of the general scheme and purpose of the directive.

39 It has already been pointed out in paragraph 31 above that the scope of the directive is wide and its purpose very broad. Its purpose would be undermined if 'modifications to development projects' were so construed as to enable certain works to escape the requirement of an impact assessment although, by reason of their nature, size or location, such works were likely to have significant effects on the environment.

40 Furthermore, the mere fact that the directive does not expressly refer to modifications to projects included in Annex II, as opposed to modifications to projects included in Annex I, does not justify the conclusion that they are not covered by the directive. The distinction between a 'project' and a 'modification to a project', where projects included in Annex I are concerned, relates to the different systems to which they are subject under the directive, whereas such a distinction in the case of projects included in Annex II would relate to the general scope of the directive.

41 Moreover, in Case C-431/92 *Commission* v *Germany* [1995] ECR I-2189, which concerned the Großkrotzenburg thermal power station, the Court held (paragraph 35) that links with a pre-existing construction of a new block of a thermal power station with a heat output of 500 megawatts did not prevent the project being a 'thermal power station with a heat output of 300 megawatts or more' so as to bring it within the category headed 'Modifications to development projects included in Annex I' mentioned in point 12 of Annex II. In that judgment the Court held that, in order to establish whether the work envisaged should undergo an impact assessment, such projects should be assessed irrespective of whether they were separate constructions, were added to a pre-existing construction, or even had close functional links with a pre-existing construction.

42 In the light of those considerations, the reply to the second question must be that the expression 'canalization and flood-relief works' in point 10(e) of Annex II to the directive is to be interpreted as including not only construction of a new dyke but also modification of an existing dyke involving its relocation, reinforcement or widening, replacement of a dyke by constructing a new dyke *in situ*, whether or not the new dyke is stronger or wider than the old one, or a combination of such works.

Questions 3 and 4

43 By these questions, which will be examined together, the national court asks whether Articles 2(1) and 4(2) of the directive should be interpreted as meaning that where a Member State in its national implementing legislation has laid down specifications, criteria or thresholds for a particular project covered by Annex II in accordance with Article 4(2) of the directive, but those specifications, criteria or thresholds are incorrect, Article 2(1) requires that an environmental impact assessment be made if the project is likely to have 'significant effects on the environment by virtue *inter alia* of [its] nature, size or location' within the meaning of that provision. If that question is answered in the affirmative, the national court asks whether that obligation to make an environmental impact assessment of the project has direct effect, so that it may be relied upon by an individual before a national court, and whether it must be applied by the national court even if it was not in fact invoked in the matter pending before that court.

44 Referring to Case C-355/90 *Commission* v *Spain* [1993] ECR I-4221, the Nederlandse Raad van State states that it is possible to argue that the measure of discretion which Article 4(2) allows the Member States in establishing the specifications, criteria or thresholds is limited by the expression 'likely to have significant effects on the environment by virtue *inter alia* of their nature, size or location' in Article 2(1).

45 Kraaijeveld and the Commission put forward a similar argument. The Commission states that the specifications, criteria or thresholds established by the Member States are primarily designed to facilitate examination of projects in order to determine whether they should undergo an impact assessment, but that the existence of those specifications, criteria or thresholds does not exempt the Member States from undertaking an actual examination of the project in order to verify that it satisfies the criteria in Article 2(1) of the directive. Both consider that the Kingdom of the Netherlands has not properly performed its obligation to implement the directive since the minimum size criteria laid down by the national legislation on

dykes was fixed at a level such that no river dyke projects met the criteria and hence all dyke reinforcement projects remained outside the ambit of impact assessments. On this issue Kraaijeveld produced a decision of a Netherlands court supporting its argument.

46 According to the Government of the Netherlands, however, the discretion allowed to the Member States is not limited in a precise manner in the directive. Moreover, the choice of thresholds for dyke length and cross-section measurements was made with due account taken of the impact of such work on the environment. The fact that, in practice, the Netherlands legislation transposing the directive left numerous projects free of the requirement of an assessment is wholly immaterial, since those projects had no harmful effects. It therefore considers that it did not go beyond the limits of its discretion in establishing those thresholds.

47 As regards the direct effect of the obligation to make impact assessments for some projects, the national court considers that that obligation may be regarded as resulting from a precise and unconditional provision of the directive. Kraaijeveld and the Commission have submitted observations to that effect, and the Commission adds that since the rules are of a procedural nature they leave no latitude as far as the result to be achieved is concerned. Conversely, the Netherlands and United Kingdom Governments consider that Article 2(1), read in conjunction with Article 4(2), of the directive is not sufficiently precise and unconditional to have direct effect, in view of the discretion conferred on Member States with regard to establishing thresholds and criteria or the procedure for consulting the public.

48 It should be noted that Article 2(1) of the directive refers to Article 4 for the definition of projects which must undergo an assessment of their effects. Article 4(2) allows Member States a certain discretion, since it states that projects of the classes listed in Annex II are to be subject to an assessment 'where Member States consider that their characteristics so require' and that, to that end, Member States may *inter alia* specify certain types of projects as being subject to an assessment or may

establish the criteria or thresholds necessary to determine which projects are to be subject to an assesment.

49 The interpretation put forward by the Commission — namely that the existence of specifications, criteria and thresholds does not remove the need for an actual examination of each project in order to verify that it fulfils the criteria of Article 2(1) — would deprive Article 4(2) of any point. A Member State would have no interest in fixing specifications, thresholds and criteria if, in any case, every project had to undergo an individual examination with respect to the criteria in Article 2(1).

50 However, although the second paragraph of Article 4(2) of the directive confers on Member States a measure of discretion to specify certain types of projects which will be subject to an assessment or to establish the criteria or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) that projects likely, by virtue *inter alia* of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment.

51 Thus, ruling on the legislation of a Member State in terms of which certain entire classes of projects included in Annex II were excluded from the obligation of an impact assessment, the Court held in its judgment of 2 May 1996, in Case C-133/94 *Commission* v *Belgium*, [1996] ECR I-2323, at paragraph 42, that the criteria and/or the thresholds mentioned in Article 4(2) are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement of assessment, not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged as taking place on the territory of a Member State.

52 In a situation such as the present, it must be accepted that the Member State concerned was entitled to fix criteria relating to the size of dykes in order to establish

which dyke projects had to undergo an impact assessment. The question whether, in laying down such criteria, the Member State went beyond the limits of its discretion cannot be determined in relation to the characteristics of a single project. It depends on an overall assessment of the characteristics of projects of that nature which could be envisaged in the Member State.

53 Thus a Member State which established criteria or thresholds at a level such that, in practice, all projects relating to dykes would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of the directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

54 Lastly, as regards more particularly the fourth question, it appears from the order for reference that in its action Kraaijeveld did not raise the question whether an environmental impact assessment ought to have been made. In order to reply to the question, it must therefore be considered whether the national court hearing an action for annulment of a decision approving a zoning plan is required to raise of its own motion the question whether an environmental impact assessment should have been carried out pursuant to Article 2(1) and Article 4(2) of the directive.

55 First of all it should be recalled that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189 of the EC Treaty and by the directive itself (see Case 51/76 *Verbond van Nederlandse Ondernemingen* [1977] ECR 113, paragraph 22, and Case 152/84 *Marshall* [1986] ECR 723,

paragraph 48). That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8).

56 As regards the right of an individual to invoke a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive (*Verbond van Nederlandse Ondernemingen*, paragraphs 22 to 24).

57 Secondly, where, by virtue of national law, courts or tribunals must, of their own motion, raise points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned (see, in particular, Joined Cases C-430/93 and C-431/93 *Van Schijndel and Van Veen* v *SPF* [1995] ECR I-4705, paragraph 13).

58 The position is the same if national law confers on courts and tribunals a discretion to apply of their own motion binding rules of law. Indeed, pursuant to the principle of cooperation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provi-

sions of Community law (see, in particular, Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 19, and *Van Schijndel and Van Veen* v *SPF*, cited above, at paragraph 14).

59 The fact that in this case the Member States have a discretion under Articles 2(1) and 4(2) of the directive does not preclude judicial review of the question whether the national authorities exceeded their discretion (see, in particular, *Verbond van Nederlandse Ondernemingen*, paragraphs 27 to 29).

60 Consequently where, pursuant to national law, a court must or may raise of its own motion pleas in law based on a binding national rule which were not put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment.

61 If that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

62 Consequently, the replies to the third and fourth questions must be that:

— Article 4(2) of the directive and point 10(e) of Annex II must be interpreted as meaning that a Member State which establishes the criteria or thresholds neces-

sary to classify projects relating to dykes at a level such that, in practice, all such projects are exempted in advance from the requirement of an impact assessment exceeds the limits of its discretion under Articles 2(1) and 4(2) of the directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

— Where under national law a court must or may raise of its own motion pleas in law based on a binding national rule which have not been put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State have remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment.

— Where that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

Costs

63 The costs incurred by the Netherlands, Italian and United Kingdom Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Nederlandse Raad van State, by judgment of 8 March 1995, hereby rules:

1. The expression 'canalization and flood-relief works' in point 10(e) of Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment must be interpreted as including certain types of work on a dyke running alongside waterways.

2. The expression 'canalization and flood-relief works' in point 10(e) of Annex II to Directive 85/337 is to be interpreted as including not only construction of a new dyke but also modification of an existing dyke involving its relocation, reinforcement or widening, replacement of a dyke by constructing a new dyke *in situ*, whether or not the new dyke is stronger or wider than the old one, or a combination of such works.

3. Article 4(2) of Directive 85/337 and point 10(e) of Annex II must be interpreted as meaning that a Member State which establishes the criteria or thresholds necessary to classify projects relating to dykes at a level such that, in practice, all such projects are exempted in advance from the requirement of an impact assessment exceeds the limits of its discretion under Articles 2(1) and 4(2) of the directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment.

Where under national law a court must or may raise of its own motion pleas in law based on a binding national rule which have not been put forward by the parties, it must, for matters within its jurisdiction, examine of its own motion whether the legislative or administrative authorities of the Member State have remained within the limits of their discretion under Articles 2(1) and 4(2) of the directive, and take account thereof when examining the action for annulment.

Where that discretion has been exceeded and consequently the national provisions must be set aside in that respect, it is for the authorities of the Member State, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

Rodríguez Iglesias Mancini Murray

Sevón Kakouris Kapteyn

Gulmann Edward Puissochet

Hirsch Wathelet

Delivered in open court in Luxembourg on 24 October 1996.

R. Grass G. C. Rodríguez Iglesias

Registrar President

JUDGMENT OF THE COURT (Sixth Chamber)
2 May 1996 *

In Case C-133/94,

Commission of the European Communities, represented by Rolf Wägenbaur, Principal Legal Adviser, and Marc H. van der Woude, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by Jan Devadder, Director of Administration in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

supported by

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, D-53107 Bonn,

intervener,

* Language of the case: Dutch.

APPLICATION for a declaration that, by not completely and correctly transposing into Belgian law Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), the Kingdom of Belgium has failed to fulfil its obligations under that directive and Articles 5 and 189 of the EC Treaty,

THE COURT (Sixth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber, G. Hirsch, G. F. Mancini, F. A. Schockweiler and P. J. G. Kapteyn, Judges,

Advocate General: P. Léger,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 November 1995, at which the Kingdom of Belgium was represented by Jan Devadder, the Federal Republic of Germany by Ernst Röder and the Commission by Wouter Wils, of its Legal Service,

after hearing the Opinion of the Advocate General at the sitting on 11 January 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 6 May 1994, the Commission of the European Communities brought an action under Article 169 of the EC Treaty

for a declaration that, by not completely and correctly transposing into Belgian law Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40, 'the directive'), the Kingdom of Belgium has failed to fulfil its obligations under that directive and Articles 5 and 189 of the EC Treaty.

2 Under Article 12(1) of the directive, Member States had to take the measures necessary to comply with the directive within three years of its notification. Since it was notified on 3 July 1985, this period ran out on 3 July 1988.

3 By letter dated 29 December 1989, the Commission informed the Kingdom of Belgium pursuant to Article 169 of the Treaty that it considered that it had not completely and correctly implemented the directive, and asked the Belgian Government for its observations on this point.

4 The Belgian Government reacted to that letter giving it formal notice on 25 May 1990, sending the Commission additional information on 26 July 1991.

5 Considering that the Belgian Government's response was unsatisfactory, the Commission delivered a reasoned opinion on 3 December 1991 in which it adhered to its complaints against the Kingdom of Belgium and asked it to take remedial action within two months of notification of the opinion.

6 By letters dated 9 December 1991, 3 February 1992 and 23 July 1992, the Belgian Government notified to the Commission a number of measures and proposed measures designed to implement the directive in Belgian law completely.

7 Considering, however, that the directive had not been completely and correctly transposed, the Commission brought the present proceedings.

8 By order of the President of the Court of 25 November 1994, the Federal Republic of Germany was given leave to intervene in support of the form of order sought by the Kingdom of Belgium.

9 In its application, the Commission makes four complaints alleging, respectively, that Article 2(1) and Article 4(1) of the directive, in conjunction with point 2 of Annex I, have been incorrectly transposed at national level, that the Flemish Region has incorrectly transposed Article 2(1) and Article 4(1) of the directive, in conjunction with point 6 of Annex I, that the Flemish Region has also incorrectly transposed Article 4(2) of the directive, in conjunction with Article 2(1), and, lastly, that the Region of the Capital City of Brussels has failed to transpose Articles 7 and 9 of the directive.

10 In its application the Commission also complained that Article 6(2) of the directive, in conjunction with Article 9, had been incorrectly transposed. However, in the light of explanations provided by the Belgian Government, the Commission abandoned that complaint in its reply.

The complaint alleging that Article 2(1) and Article 4(1) of the directive, in conjunction with point 2 of Annex I, were incorrectly transposed at national level

11 Article 2(1) of the directive provides as follows:

'Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.'

12 Article 4(1) states that:

'Subject to Article 2(3), projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.'

13 Point 2 of Annex I covers:

'2. Thermal power stations and other combustion installations with a heat output of 300 megawatts or more and nuclear power stations and other nuclear reactors

(except research installations for the production and conversion of fissionable and fertile materials, whose maximum power does not exceed 1 kilowatt continuous thermal load).'

14 The Commission argues that, under Article 4(1) of the directive, read together with Article 2(1), the projects listed in Annex I must be subjected to an environmental impact assessment. Consequently, Member States were not entitled to introduce any limitation in this area. In Belgium, however, there is no guarantee that a mandatory environmental impact assessment will be carried out in respect of nuclear power stations and other nuclear reactors (except research installations for the production and conversion of fissionable and fertile materials, whose standing power does not exceed 1 kilowatt continuous thermal load) or of installations used solely for the permanent storage or final disposal of radioactive waste.

15 In its rejoinder the Belgian Government states that, in that respect, the directive has been implemented in national law as a result of the amendments which the Royal Decree of 23 December 1993 (*Moniteur Belge* of 2 February 1994, p. 2142) made to the Royal Decree of 28 February 1963 laying down General Rules for the Protection of the Public and Workers against the Danger of Ionizing Radiation.

16 Whilst not contesting that the transposition carried out complies with the directive, the Commission adheres to its complaint. On the one hand, Belgium failed to implement the directive completely and correctly within the time-limit laid down by the reasoned opinion of 3 December 1991. On the other, on the date when the proceedings were brought, the Commission was unaware of the implementing measures adopted, since it was officially informed of them only by letter of 12 September 1994.

17 It should be noted in this regard that the Court has consistently held that the question whether there has been a failure to fulfil obligations must be examined on the basis of the position in which the Member State found itself at the end of the

period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (Case C-200/88 *Commission* v *Greece* [1990] ECR I-4299, paragraph 13).

18 In this case, the alleged implementing measures were adopted after the time-limit set by the reasoned opinion had expired.

19 Accordingly that complaint must be upheld.

The complaint alleging that the Flemish Region incorrectly transposed Article 2(1) and Article 4(1) of the directive, in conjunction with point 6 of Annex I

20 Point 6 of Annex I to the directive mentions 'integrated chemical installations' as being among the projects subject to assessment.

21 In the Flemish Region, the environmental impact assessment procedure was incorporated into existing consent procedures for establishments constituting a nuisance and establishments not constituting a nuisance.

22 Ps far as establishments constituting a nuisance are concerned, the consent procedures are governed by the Decree of the Flemish Council of 28 June 1985 relating to Anti-Pollution Consent (*Moniteur Belge* of 17 September 1985, p. 13304).

23 Pursuant to that decree, the Flemish Executive adopted on 23 March 1989 Order 89-928 (*Moniteur Belge* of 17 May 1989, p. 8442). Article 3(6) of that order defines integrated chemical installations as installations 'for the chemical processing of:

(a) unsaturated aliphatic hydrocarbons with less than 5 carbon atoms per molecule;

(b) cyclic unsaturated hydrocarbons including aromatics with less than 9 carbon atoms per molecule;

with a capacity of 100 000 tonnes per annum or more'.

24 The Commission maintains that the Flemish Executive interpreted the concept of 'integrated chemical installations' narrowly. Fixing quantitative criteria affords no guarantee that all integrated chemical installations will be subjected to an environmental impact assessment. Only installations for the processing of the substances mentioned under (a) and (b) of the Flemish Executive's definition and, of them, only those with a minimum processing capacity of at least 100 000 tonnes will be subjected to the assessment procedure. Yet point 6 of Annex I to the directive does not embody any quantitative limitation.

25 The Belgian Government takes the view that the concept of 'integrated chemical installations' is vague, as the Commission itself has acknowledged by providing a more precise definition of that concept in its proposal relating to the amendment

of the directive (document COM(93) 575 final, OJ 1994 C 130, p. 8). Accordingly and on grounds of legal certainty, the Flemish Government had no option other than to give a content to that concept itself. The reason why saturated hydrocarbons are not mentioned in its definition is that they are almost never used as basic chemical components owing to their low reactivity. In addition, the capacity criterion, which does not relate to production capacity expressed in terms of the quantity of finished product but to processing capacity expressed in terms of the quantity of basic components (small molecules), also does not limit the scope of the directive in real terms. Accordingly, the definition in question covers the most important chemical installations located in the territory of the Flemish Region.

26 The Court finds in this regard that point 6 of Annex I to the directive does not introduce any limitation as to the integrated chemical installations subject to assessment. On the contrary, when the Community legislature wished to limit the duty to carry out an assessment, it made express provision to that end. It did so in particular in points 1, 2, 5, 7 and 8 of that annex.

27 Besides, the crucial feature of the concept of 'integrated chemical installations' is precisely the fact that they are integrated, since other chemical installations come under point 6 of Annex II. As the Advocate General observed in points 36, 37 and 38 of his Opinion, the Flemish legislation neither specifies nor defines that concept and whether a chemical installation is integrated does not depend on its processing capacity or on the type of chemical substances processed in it but on the existence of interlinked production units constituting in terms of their operation a single production unit.

28 It follows that that complaint must also be upheld.

The complaint alleging that the Flemish Region incorrectly transposed Article 4(2) of the directive in conjunction with Article 2(1)

29 Article 4(2) of the directive provides as follows:

'Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

To this end Member States may *inter alia* specify certain types of projects as being subject to an assessment or may establish the criteria and/or thresholds necessary to determine which of the projects of the classes listed in Annex II are to be subject to an assessment in accordance with Articles 5 to 10.'

30 In the Flemish Region, Article 3 of Order 89-928 contains the list of establishments constituting a nuisance which must be subjected to assessment in accordance with the Degree of the Flemish Council of 28 June 1985 relating to Anti-Pollution Consent.

31 As regards establishments not constituting a nuisance, the Organic Law on Land-Use Planning and Town Planning of 29 March 1962 (*Moniteur Belge* of 12 April 1962, p. 3000) set up a procedure for the grant of planning permission. Pursuant to that law, the Flemish Executive adopted, among other things, Order 89-929 of 23 March 1989 (*Moniteur Belge* of 17 May 1989, p. 8450), which governs the assessment of effects on the environment of works and acts falling within the scope of the Organic Law of 29 March 1962. Article 2 of that order lists the projects having to be subjected to environmental impact assessment.

32 The Commission argues that Article 4(2) of the directive, when read in the light of Article 2(1), requires the Member States to examine the characteristics of each of the projects listed in Annex II specifically on a case-by-case basis. That examination will enable it to be decided subsequently whether, by reason of the nature, size or location of the project considered, an environmental impact assessment is necessary. The second subparagraph of Article 4(2) of the directive enables Member States to facilitate that examination by establishing criteria and/or thresholds. In contrast, it does not allow them to establish criteria and/or thresholds for exempting in advance certain projects listed in Annex II from that examination.

33 In the Commission's view, however, the legislation in force in the Flemish Region does not satisfy that requirement. The lists set out in Article 3 of Order 89-928 and Article 2 of Order 89-929 do not cover all the projects mentioned in Annex II. As a result, the projects not covered will never be examined in order to determine whether their characteristics are such as to require an environmental impact assessment.

34 The Belgian Government argues that, when it adopted the orders at issue, the Flemish Government took the view that, in the light of the state of the environment in Flanders, only some categories of projects mentioned in Annex II, which come within the thresholds and other criteria which it has established, ought, by reason of their nature, to be subjected to environmental impact assessment. It therefore considered implicitly that the characteristics of all the other projects mentioned in Annex II are such that it is unnecessary to subject them to assessment.

35 According to the Belgian Government, supported by the German Government, it does not appear from any provision of the directive that the Member States are only entitled to assess *in concreto* whether the characteristics of individual projects are such as to make it unnecessary to carry out an environmental impact assessment. Member States are also entitled to consider generally that the characteristics of certain projects listed in Annex II are such that assessment is unnecessary. The two governments refer in this connection to the wording of Article 4(2).

36 The German Government submits in particular that the wording of that provision suggests that the projects to be assessed should be determined in the abstract, since, if that were not so, it would not be the Member States, but the competent authorities in each case, which would have to determine whether a project ought to be subjected to assessment. In addition, the distinction made between 'classes' and 'projects' in the eighth and ninth recitals in the preamble to the directive and in Article 4(2) thereof shows that the choice of projects whose effects on the environment must be assessed may be carried out in the abstract.

37 The German Government further maintains that the fact that, under Article 2(3) of the directive, exemption from the requirement to make an assessment is possible only in the case of projects coming under Article 4(1) is an argument against the need for a detailed examination of projects mentioned in Annex II.

38 The Belgian Government adds that, according to the Commission's report to the European Parliament and the Council on the implementation of the directive (document COM(93) 28, Vol. 1, 2 April 1993), most Member States have interpreted Article 4(2) in the same way as the Flemish Government.

39 Lastly, the Belgian and German Governments refer, in support of their argument, to the proposal for the amendment of the directive made by the Commission to the Council (document COM(93) 575 final, cited above). In particular, the Commission proposed the adoption of a new Article 4(3), which, combined with a new Annex IIa, would require Member States to determine on a case-by-case basis whether an assessment is necessary. That proposal would be otiose if the obligation arising under it were already part of the law in force.

40 It should first be made clear that, as stated in paragraphs 33 and 34 of this judgment, the Flemish legislation excludes totally and definitively from environmental

impact assessment certain classes of projects mentioned in Annex II. The question is therefore whether such exclusion is permitted by Article 4(2) of the directive.

41 Whilst it appears from that provision that Member States may always specify certain 'types' of projects as being subject to assessment or may establish criteria and/or thresholds for determining which projects are to be subject to assessment, it must be emphasized that that power of the Member States is conferred within each of the classes listed in Annex II. This means that the Community legislature itself considered that all the classes of projects listed in Annex II may possibly have significant effects on the environment depending on the characteristics exhibited by those projects at the time when they were drawn up.

42 It follows that the criteria and/or the thresholds mentioned in Article 4(2) are designed to facilitate the examination of the actual characteristics exhibited by a given project in order to determine whether it is subject to the requirement to carry out an assessment and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II which may be envisaged on the territory of a Member State.

43 Consequently, Article 4(2) does not empower the Member States to exclude generally and definitively from possible assessment one or more classes mentioned in Annex II.

44 In view of that finding, the aforementioned arguments put forward by the Belgian and German Governments to the effect that Article 4(2) does not preclude the possibility for a Member State to determine the projects to be subjected to assessment in the abstract using criteria and/or thresholds and therefore does not require a

decision to be taken on each specific project are irrelevant to this case, irrespective as to whether they are based on a correct interpretation of Article 4(2).

45 In view of the foregoing it must be held that the Flemish legislation at issue does not correctly transpose Article 2(1) and Article 4(2) of the directive, since it impliedly excludes in advance all the classes of projects mentioned in Annex II which are not covered by that legislation from the possibility of assessment, even if it should prove that the characteristics of projects belonging to those classes are such as to require such assessment.

46 It follows that that complaint must be upheld.

The complaint alleging that the Flemish Region and the Region of the Capital City of Brussels failed to transpose Articles 7 and 9 of the Directive

47 Article 7 of the directive provides as follows:

'Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall forward the information gathered pursuant to Article 5 to the other Member State at the same time as it makes it available to its own nationals. Such information shall serve as a basis for any consultations necessary in the framework of the bilateral relations between two Member States on a reciprocal and equivalent basis.'

48 Article 9 provides for the public to be informed of the content of the final decision. The last paragraph of that article states as follows:

'If another Member State has been informed pursuant to Article 7, it will also be informed of the decision in question.'

49 The Commission asserts that the Flemish Region and the Region of the Capital City of Brussels have failed to transpose Articles 7 and 9 of the directive.

50 The Belgian Government admits that the Commission's complaint is well founded as regards the Flemish Region. It states, however, that a preliminary-draft decree exists which, when adopted, will bring the infringement complained of to an end.

51 In contrast, as far as the Region of the Capital City of Brussels is concerned, the Belgian Government considers that Articles 7 and 9 do not have to be transposed, on the ground that the geographical situation and the urban nature of that region preclude the establishment of industrial installations liable to have effects on the environment which would have consequences in other Member States.

52 That argument must be rejected.

53 The argument based on the geographical situation of the Region of the Capital City of Brussels is based on the assumption that only projects located in frontier

regions are capable of affecting the environment in another Member State. Yet, as the Commission has rightly observed, that assumption is wrong since it ignores the possibility of air-or water-borne pollution.

54 As for the argument based on the urban nature of the Region of the Capital City of Brussels, the Commission stated at the hearing, without being contradicted by the Belgian Government, that there are major chemical and petrochemical industries in that region.

55 Accordingly the Commission's complaint must be upheld.

56 Since the Kingdom of Belgium has failed to fulfil its specific obligations under the directive, no purpose is served by considering the question whether it has thereby also failed to fulfil its obligations under Article 5 of the Treaty (see Case C-374/89 *Commission* v *Belgium* [1991] ECR I-367, paragraph 13).

57 In the light of the foregoing it must be held that, by not completely and correctly transposing into Belgian law Directive 85/337, the Kingdom of Belgium has failed to fulfil its obligations under that directive and under Article 189 of the EC Treaty.

Costs

58 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium has been unsuccessful, it

must be ordered to pay the costs. In accordance with the first subparagraph of Article 69(4) of those Rules, the Federal Republic of Germany, which intervened in the proceedings, must be ordered to bear its own costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. **Declares that, by not completely and correctly transposing into Belgian law Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, the Kingdom of Belgium has failed to fulfil its obligations under that directive and under Article 189 of the EC Treaty;**

2. **Orders the Kingdom of Belgium to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

Kakouris Hirsch Mancini

Schockweiler Kapteyn

Delivered in open court in Luxembourg on 2 May 1996.

R. Grass C. N. Kakouris

Registrar President of the Sixth Chamber

JUDGMENT OF THE COURT
11 August 1995 *

In Case C-431/92,

Commission of the European Communities, represented initially by Ingolf Pernice, of the Legal Service, acting as Agent, and then by Rolf Wägenbaur, Principal Legal Adviser, acting as Agent, assisted by Alexander Böhlke, of the Brussels Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat at the Federal Ministry of Economic Affairs, Villemomblerstraße 76, D-5300 Bonn 1, acting as Agent, assisted by Dieter Sellner, Rechtsanwalt, Oxfordstraße 24, D-5300 Bonn 1,

defendant,

supported by

United Kingdom of Great Britain and Norther Ireland, represented by S. Lucinda Hudson, of the Treasury Solicitor's Department, with an address for service in Luxembourg at the embassy of the United Kingdom, 14 Boulevard Roosevelt,

* Language of the case: German.

intervener,

APPLICATION for a declaration that, by granting development consent by decision of 31 August 1989 for the construction of a new block at the Großkrotzenburg thermal power station without a preliminary environmental impact assessment, the Federal Republic of Germany has failed to comply with its obligations under Articles 5 and 189 of the EEC Treaty read in conjunction with Council Directive 85/377/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), and in particular Articles 2, 3 and 8 of that directive,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, F. A. Schockweiler and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, C. N. Kakouris (Rapporteur), J. C. Moitinho de Almeida, J. L. Murray, D. A. O. Edward and J.-P. Puissochet, Judges,

Advocate General: M. B. Elmer,
Registrar: R. Grass,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 30 November 1994 at which the Commission was represented by Rolf Wägenbaur, assisted by Alexander Böhlke, the Federal Republic of Germany by Dieter Sellner and the United Kingdom by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Derrick Wyatt, Barrister,

after hearing the Opinion of the Advocate General at the sitting on 21 February 1995,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 December 1992, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by granting development consent by decision of 31 August 1989 for the construction of a new block at the Großkrotzenburg thermal power station without a preliminary environmental impact assessment, the Federal Republic of Germany has failed to comply with its obligations under Articles 5 and 189 of the EEC Treaty read in conjunction with Council Directive 85/377/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), and in particular Articles 2, 3 and 8 of the directive.

2 The directive was adopted on the basis of Articles 100 and 235 of the Treaty. According to the first recital in the preamble, 'the ... action programmes of the European Communities on the environment ... affirm the need to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes ...' The eleventh recital states further that 'the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life'.

3 Article 1 of the directive provides:

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

2. For the purposes of this directive:

"project" means:

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

...

"development consent" means:

the decision of the competent authority or authorities which entitles the developer to proceed with the project.

3. The competent authority or authorities shall be that or those which the Member States designate as responsible for performing the duties arising from this directive.

...'

4 Article 2 provides:

'1. Member States shall adopt all measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment

by virtue *inter alia*, of their nature, size or location are made subject to an assessment with regard to their effects.

These projects are defined in Article 4.

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this directive.

...'

5 Article 3 provides:

'The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

— human beings, fauna and flora,

— soil, water, air, climate and the landscape,

— the interaction between the factors mentioned in the first and second indents,

— material assets and the cultural heritage.'

6 Article 4 provides:

'1. ... projects of the classes listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Projects of the classes listed in Annex II shall be made subject to an assessment, in accordance with Articles 5 to 10, where Member States consider that their characteristics so require.

...'

7 Paragraph 2 of Annex I refers in particular to 'Thermal power stations ... with a heat output of 300 megawatts or more'. Paragraph 12 of Annex II refers in particular to 'Modifications to development projects included in Annex I'.

8 Article 5 concerns the measures which the Member States must adopt to ensure that the developer supplies certain information specified in Annex III to the directive. Article 6 refers to the measures which the Member States must take to ensure that the national authorities likely to be concerned by the project in question are consulted and that the public concerned is informed and has the opportunity to express an opinion. Article 8 provides that 'Information gathered ... must be taken into consideration in the development consent procedure.'

9 Pursuant to Article 12(1) of the directive, the Member States were required to take the measures necessary to comply with the directive within three years of its notification. Since the directive was notified on 3 July 1985, that period expired on 3 July 1988.

10 According to the documents before the Court, in Germany the directive was belatedly transposed into national law by the Law of 12 February 1990 which came into force on 1 August 1990 (BGBl. I, p. 205).

11 Following a complaint that the Regierungspräsidium (District Office) Darmstadt as competent authority had granted consent on 31 August 1989 for the construction of a new block with a heat output of 500 megawatts at the Großkrotzenburg thermal power station without carrying out the preliminary environmental impact assessment required by the directive, the Commission on 15 May 1990 sent Germany a letter before action under Article 169 of the Treaty. In that letter it observed that the consent concerned a project for the construction of a thermal power station within the meaning of paragraph 2 of Annex I to the directive and that an assessment of its effects on the environment was therefore mandatory by virtue of Article 4(1) of the directive.

12 The Commission's reservations were not dispelled by the information given in Germany's letters in response of 16 and 17 August 1990. It therefore delivered a reasoned opinion on 25 September 1991 to which Germany replied by letter of 27 January 1992. Not content with Germany's reply, the Commission accordingly brought the present action.

Admissibility

13 Germany raises a preliminary plea that the action is inadmissible on the ground that the form of order sought in the application is too imprecise since what is sought is a declaration that the directive and 'in particular' Articles 2, 3 and 8 thereof have been infringed. Germany considers that only the infringement of the provisions of the directive expressly referred to, and not a general complaint that the directive has been breached, may be taken into account.

14 That plea cannot be accepted.

15 The express reference to Articles 2, 3 and 8 of the directive in the form of order sought in the application enabled Germany to understand unequivocally that an infringement of those specific provisions was alleged. In its context, the adverbial phrase 'in particular' was used in the sense of 'specifically' in order to designate precisely those articles of the directive which had been infringed. It could not therefore have led Germany to believe that the application also concerned infringements of other unspecified provisions of the directive and thus have given rise to uncertainty as to the scope of the proceedings.

16 Secondly, Germany submitted at the hearing before the Court that the infringement of Article 2 of the directive is not referred to in the conclusions arrived at in the reasoned opinion and was raised for the first time in the application. Since the subject-matter of the action is determined, according to settled case-law, by the pre-litigation procedure, Germany considers that the complaint concerning the infringement of that provision is inadmissible.

17 That plea must be rejected.

18 Although Article 2 of the directive is not formally referred to in the conclusions arrived at in the reasoned opinion, it is none the less mentioned in the body of the opinion among the provisions invoked by the Commission.

19 Thirdly, Germany submits that the action is inadmissible on the ground that proceedings can be initiated under Article 169 of the Treaty only in respect of failure to implement or incorrect implementation of a directive and not simply, as in this case, in respect of failure in a specific case to apply a directive which has not yet been implemented. The object of proceedings for a declaration of failure by a Member State to fulfil its obligations is to encourage the Member State concerned to put an end to existing infringements of the Treaty. Since Germany has implemented the directive in the meantime, it considers that the Commission no longer has any legal interest in bringing proceedings, particularly since the procedure which the Commission initiated simultaneously for a declaration that Germany has incorrectly implemented the directive is not yet before the Court.

20 That plea of inadmissibility must also be rejected.

21 In exercising its powers under Articles 155 and 169 of the Treaty, the Commission does not have to show that there is a specific interest in bringing an action. Article 169 is not intended to protect the Commission's own rights. The Commission's function, in the general interest of the Community, is to ensure that the Member States give effect to the Treaty and the provisions adopted by the institutions thereunder and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15, and Case C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraph 16).

22 Given its role as guardian of the Treaty, the Commission alone is therefore competent to decide whether it is appropriate to bring proceedings against a Member State for failure to fulfil its obligations and to determine the conduct

or omission attributable to the Member State concerned on the basis of which those proceedings should be brought. It may therefore ask the Court to find that, in not having achieved, in a specific case, the result intended by the directive, a Member State has failed to fulfil its obligations.

23 In this case, Germany's submissions as to the inadmissibility of the action essentially come down to the fact that at the material time it had not yet implemented the directive. A Member State may not, however, plead the fact that it has not taken the necessary measures to implement a directive in order to prevent the Court from dealing with an application for a declaration that it has failed to fulfil a specific obligation flowing from that directive.

24 Finally, Germany submits that the case-law of the Court of Justice recognizes the direct effect of the provisions of a directive only where they confer specific rights on individuals. Articles 2, 3 and 8 of the directive, however, do not confer such rights. Since the Commission itself does not argue that the contested decision granting development consent failed to take account of the legal position of individuals protected by the directive, the latter's provisions cannot have direct effect irrespective of whether they are unconditional and sufficiently precise. The German authorities were not therefore required to apply them directly before implementing the directive. In their view, the action is consequently inadmissible.

25 That argument cannot be accepted either.

26 In its application, the Commission complains that Germany has not observed, in a specific case, the obligation flowing directly from the directive to assess the environmental impact of the project concerned. The question which arises is thus whether the directive is to be construed as imposing that obligation. That question is quite separate from the question whether individuals may rely as against the

State on provisions of an unimplemented directive which are unconditional and sufficiently clear and precise, a right which has been recognized by the Court of Justice.

27 Since none of the pleas of inadmissibility has been accepted, the action must be held to be admissible.

Substance

Application of the directive in time

28 In Case C-396/92 *Bund Naturschutz in Bayern and Others* v *Freistaat Bayern* [1994] ECR I-3717, paragraphs 19 and 20, the Court of Justice ruled that, regardless of whether the directive permits a Member State to waive the obligations concerning the environmental impact assessment in respect of consent procedures already initiated before the deadline for implementation, namely 3 July 1988, the directive in any case precludes such a waiver for procedures initiated after that date.

29 In this case, the documents before the Court show that the application for consent for the project at issue was lodged with the Regierungspräsidium Darmstadt by PreußenElektra AG, the developer, on 26 July 1988, and thus after 3 July 1988. Consequently, the obligation imposed by the directive to carry out an environmental impact assessment could not in principle be waived in respect of the consent procedure for the project at issue.

30 The German Government argues, however, that the formal application for consent of 26 July 1988, accompanied by the complete file on the project, had been preceded by a preliminary stage which was a significant part of the consent procedure. During that preliminary stage, which was initiated on 18 May 1987, the competent authority was to advise the developer on the content and lodging of the application for consent. A series of meetings took place at which specialist departments were also represented. In addition the project is said to have been notified on 7 March 1988 to the competent authority in accordance with the Landesplanungsgesetz (Law of the *Land* of Hesse on planning).

31 That argument cannot be accepted.

32 Informal contacts and meetings between the competent authority and the developer, even relating to the content and proposal to lodge an application for consent for a project, cannot be treated for the purposes of applying the directive as a definite indication of the date on which the procedure was initiated. The date when the application for consent was formally lodged thus constitutes the sole criterion which may be used. Such a criterion accords with the principle of legal certainty and is designed to safeguard the effectiveness of the directive. The Court moreover followed this approach in *Bund Naturschutz*, cited above (paragraph 16).

33 The consent procedure for the project at issue must accordingly be regarded as having been initiated after the deadline of 3 July 1988, with the result that the project was required to undergo an assessment of its effects on the environment in accordance with the directive.

Categorization of the project at issue

34 Germany, supported by the United Kingdom, submits that the new block at the Großkrotzenburg thermal power station is not a project within the meaning of Article 4(1) of the directive but a modification to a project. It cannot be regarded as in any way self-contained, but at a functional level is part of the power station as a whole. The consent at issue accordingly concerns a modification to a pre-existing power station. What is at issue is a modification to a project within the meaning of paragraph 12 of Annex II to the directive, a modification which in accordance with Article 4(2) of the directive the Member States may, rather than must, make subject to an environmental impact assessment.

35 By virtue of paragraph 2 of Annex I to the directive, projects for thermal power stations with a heat output of 300 megawatts or more must undergo a systematic assessment. For the purposes of that provision, such projects must be assessed irrespective of whether they are separate constructions, are added to a pre-existing construction or even have close functional links with a pre-existing construction. Links with an existing construction do not prevent the project from being a 'thermal power station with a heat output of 300 megawatts or more' so as to bring it within the category headed 'Modifications to development projects included in Annex I', mentioned in paragraph 12 of Annex II.

36 In this case, it is common ground that the construction at issue is a block of a thermal power station with a heat output of 500 megawatts. It is therefore a project within the meaning of Article 4(1) of, and Annex I to, the directive. That project was required to undergo an assessment of its effects on the environment in accordance with the directive.

Obligation to carry out an assessment in accordance with the directive

37 Germany submits that Articles 2, 3 and 8 of the directive, which it is alleged to have infringed, are not so clear and precise as unequivocally to lay down a specific obligation and thus for their application by the national authorities to be mandatory.

38 That argument cannot be accepted.

39 Article 2 of the directive lays down an unequivocal obligation, incumbent on the competent authority in each Member State for the approval of projects, to make certain projects subject to an assessment of their effects on the environment. Article 3 prescribes the content of the assessment, lists the factors which must be taken into account in it, and leaves the competent authority a certain discretion as to the appropriate way of carrying out the assessment in the light of each individual case. Article 8 furthermore requires the competent national authorities to take into consideration in the development consent procedure the information gathered in the course of the assessment.

40 Regardless of their details, those provisions therefore unequivocally impose on the national authorities responsible for granting consent an obligation to carry out an assessment of the effects of certain projects on the environment.

The question whether there has been a failure to fulfil the obligation to carry out an assessment

41 Germany submits, finally, that an assessment of the effects of the project at issue on the environment was carried out by the competent authority on the basis of the national legislation then in force, namely the Bundesimmissionsschutzgesetz of 15 March 1974 (German Federal Law on the protection of the environment). Although that assessment was not formally based on the directive, it is said by Germany to have complied with all its requirements.

42 The Commission does not deny that there was an assessment of the effects on the environment of the project at issue. However, that assessment does not satisfy the present requirements of the directive, which are stricter than the national legislation then in force. In particular, it did not comply with the obligation to take account of the interaction between the factors referred to in the first and second indents of Article 3 of the directive (human beings, fauna, flora, soil, water, air, climate and the landscape), an obligation which requires an overall assessment of those factors.

43 According to the documents before the Court, an environmental impact assessment was carried out in the course of the procedure for the grant of consent for the project by the Regierungspräsidium Darmstadt. The developer provided in particular information on the environmental impact of the project which was considered by the Commission itself as sufficient from the point of view of the requirements of Article 5 of, and Annex III to, the directive. That information also concerned the interrelationship between the factors referred to in Article 3 of the directive. Finally, it is common ground that the infor-

mation was made available to the public concerned who had the opportunity to express an opinion. In those circumstances, the objective of making the public aware of the environmental implications of a project on the basis of specific information provided by the developer was attained.

44 It is also apparent from the disputed decision of the Regierungspräsidium Darmstadt of 31 August 1989 and its report of 11 November 1991 drawn up in response to the reasoned opinion that the authority in question integrated the information gathered and the reactions of the sectors concerned in the consent procedure, and took that into account in its decision approving the project.

45 In the light of those considerations, the Commission should have specified on what specific points the requirements of the directive were not complied with during the procedure for consent for the project at issue and should have provided appropriate evidence of non-compliance. Its application does not include such details backed by specific evidence. It must therefore be dismissed as unfounded.

Costs

46 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Germany has not asked for the Commission to be ordered to pay the costs, the two parties must be ordered to bear their own costs. The United Kingdom, as intervener, is also to bear its own costs in accordance with Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the parties, including the intervener, to bear their own costs.

Rodríguez Iglesias Schockweiler Kapteyn Mancini

Kakouris Moitinho de Almeida

Murray Edward Puissochet

Delivered in open court in Luxembourg on 11 August 1995.

R. Grass G. C. Rodríguez Iglesias

Registrar President

JUDGMENT OF THE COURT
10 March 1993 *

In Case C-186/91,

Commission of the European Communities, represented by X. Lewis, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of R. Hayder, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by J. Devadder, Adviser at the Ministry of Foreign Affairs, Foreign Trade and Cooperation with Developing Countries, with an address for service in Luxembourg at the Belgian Embassy, 4 rue des Girondins,

defendant,

APPLICATION for a declaration that, by not bringing into force the laws, regulations and administrative provisions necessary to transpose into its national law the obligation set out in Article 11 of Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide (OJ 1985 L 87, p. 1), the Kingdom of Belgium has failed to fulfil its obligations under that Article and under Article 189 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, C. N. Kakouris and G. C. Rodríguez Iglesias (Presidents of Chambers), R. Joliet, J. C. Moitinho de Almeida, F. Grévisse and D. A. O. Edward, Judges,

Advocate General: C. O. Lenz,
Registrar: L. Hewlett, Administrator,

* Language of the case: French.

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 7 October 1992,

after hearing the Opinion of the Advocate General at the sitting on 10 November 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 July 1991, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by not bringing into force the laws, regulations and administrative provisions necessary to transpose into in its national law the obligation set out in Article 11 of Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide (OJ 1985 L 87, p. 1, hereinafter 'the Directive'), the Kingdom of Belgium has failed to fulfil its obligations under that Article and under Article 189 of the EEC Treaty.

2 Article 2 of and Annexes I and II to the Directive fix the limit value and guide values for atmospheric concentrations of nitrogen dioxide.

3 Under Article 4 of the Directive, Member States may, in certain conditions, fix lower values than those laid down in Annexes I and II. A Member State intending to use that possibility in a region near the border with one or more other Member States is obliged by Article 11(1) to hold prior consultations with the Member States concerned. Article 11(2) requires those same Member States to hold

consultations, with a view to remedying the situation, if the limit value or the lower values fixed in accordance with Articles 4 and 11(1) above are exceeded or are likely to be exceeded following significant pollution which originates or may originate in another Member State. Article 11 requires that, in any event, the Commission is to be informed and may attend such consultations.

4 Under Article 15 of the Directive, Member States were required to adopt the laws, regulations and administrative provisions necessary to comply with the Directive by 1 January 1987 at the latest.

5 Accordingly, the Belgian Government enacted the Royal Decree of 1 July 1986, fixing air quality standards for nitrogen dioxide (*Moniteur Belge*, 23 September 1986, p. 12867, hereinafter 'the Royal Decree').

6 However, the Commission claims that the Belgian Government failed to transpose the provisions of Article 11 of the Directive in the Royal Decree, and thereby failed to enact into law either the obligation to consult the authorities of neighbouring Member States, in the circumstances defined in Article 11(1) and (2), or the obligation to inform the Commission so as to allow it to attend such consultations if it wished to do so.

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 The Commission argues that, without the consultations required by Article 11(1) and (2), it would be impossible to ensure either the useful effect of the values fixed under Article 4 of the Directive or the Directive's general purpose of protecting the environment and human health. It considers that Article 11 of the Directive lays down precise and detailed rules, conferring rights and obligations on individuals.

9 The Belgian Government does not deny that Article 11 has not been transposed, but argues that the omission is justified because the Belgian authorities do not intend to take measures within the scope of that Article. In particular, it argues that, if the Belgian authorities were to change their mind, the consultations in question would necessarily have to take place, since measures of the type envisaged could not attain their objective unless neighbouring States adopted similar measures. Such consultations would be arranged in accordance with the provisions of the Belgian Constitution. Finally, the Belgian Government maintains that the obligation to consult in Article 11 does not in any case oblige neighbouring States to adopt similar measures, and cannot therefore confer rights on individuals.

10 It should be observed at the outset that, as the Commission says, the obligations in Article 11 of the Directive are the corollary of the right which Article 4 confers on Member States to fix lower values than those laid down in Annexes I and II to the Directive.

11 Secondly, to ensure full and effective protection of the atmosphere against excessive nitrogen dioxide concentrations in border areas, it is essential that the Member State concerned should legislate expressly for the prior consultation required by Article 11(1) of the Directive to take place before measures affecting border areas are taken. It is also essential that such legislation should provide expressly for the consultation required by Article 11(2) of the Directive to take place in cases where

there is significant pollution originating in a neighbouring Member State, so that the Member States concerned can remedy the situation.

12 A transposition into national law of Article 4 of the Directive, which confers a discretion on Member States, therefore constitutes an incomplete transposition of the Directive if it does not at the same time transpose Article 11, which imposes an obligation relating to the exercise of that discretion.

13 With regard to the defendant's argument based on the provisions of the Belgian Constitution regarding the respective powers of national authorities, on the one hand, and regional authorities, on the other, when dealing with neighbouring States, it is enough to point out that the Belgian Constitution nowhere imposes a duty to hold consultations such as those required by Article 11 of the Directive.

14 Having regard to the above considerations, it must be held that, by not adopting, within the prescribed time-limits, all the legislative, regulatory and administrative measures necessary to comply with the provisions of Article 11 of Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide, the Kingdom of Belgium has failed to fulfil its obligations under the Treaty.

Costs

15 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Kingdom of Belgium has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that, by not adopting, within the prescribed time limits, all the legislative, regulatory and administrative measures necessary to comply with the provisions of Article 11 of Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide (OJ 1985 L 87, p. 1), the Kingdom of Belgium has failed to fulfil its obligations under the Treaty;**

2. **Orders the Kingdom of Belgium to pay the costs.**

Due Kakouris Rodríguez Iglesias

Joliet Moitinho de Almeida Grévisse Edward

Delivered in open court in Luxembourg on 10 March 1993.

J.-G. Giraud O. Due

Registrar President

JUDGMENT OF THE COURT
28 February 1991 *

In Case C-360/87,

Commission of the European Communities, represented by Guido Berardis, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at his office, Wagner Centre, Kirchberg,

applicant,

v

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, assisted by Pier Giorgio Ferri, Avvocato dello Stato, acting as Agents, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

defendant,

APPLICATION for a declaration that by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary for the full and correct implementation in its national law of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43), the Italian Republic has failed to fulfil its obligations under the EEC Treaty,

THE COURT,

composed of: O. Due, President, G. F. Mancini, J. C. Moitinho Almeida and M. Díez de Velasco (Presidents of Chambers), C. N. Kakouris, F. Grévisse and M. Zuleeg, Judges,

* Language of the case: Italian.

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

having regard to the Report for the Hearing and further to the hearing on 4 July 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 September 1990,

gives the following

Judgment

1 By an application lodged at the Court Registry on 2 December 1987 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that by failing to adopt within the prescribed period the laws, regulations and administrative provisions necessary for the full and correct implementation in its national law of Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances (OJ 1980 L 20, p. 43) (hereinafter referred to as 'the Directive'), the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

2 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the Community and national provisions at issue, the course of the procedure and the pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The subject-matter of the dispute

3 In the course of the pre-litigation procedure and the written procedure before the Court the Italian Republic stated *inter alia* that Italian water was protected against pollution by Law No 319 of 10 May 1976, entitled 'Norme per la tutela delle

acque dall'inquinamento' (the 'Legge Merli I', Official Gazette of the Italian Republic No 141 of 29 May 1976, p. 4125), by Law No 650 of 24 December 1979, entitled 'Integrazioni e modifiche delle leggi 16 aprile 1973, No 171, e 10 maggio 1976, No 319, in materia di tutela delle acque dall'inquinamento' (the 'Legge Merli II', Official Gazette of the Italian Republic No 352 of 29 December 1979, p. 10533) and by the Decision of 4 February 1977 of the Interministerial Committee for the protection of water against pollution (Official Gazette of the Italian Republic, Ordinary Supplement No 48 of 21 February 1977, p. 2). However, at the hearing the Italian Republic stated that on certain points its legislation was not entirely in conformity with the Directive and indicated that the legislative procedure intended to bring about full conformity was in progress.

4 During the pre-litigation procedure the Italian Republic maintained that according to the legislation in force in Italy all direct discharges of waste water into groundwater were prohibited. The Italian legislation thus fulfilled the requirements of the first indent of Article 4(1) and the first indent of Article 5(1) of the Directive.

5 In its application the Commission stated that it took note of the statements made by the Italian Republic concerning the prohibition of direct discharges. At the hearing it stated that it had been established that the Italian legislation provided indirectly for the prohibition of any direct discharge and it accepted that on that point the absolute prohibition of direct discharge was in conformity with the Directive.

6 Having regard to those statements of the parties' respective positions, the specific complaints made by the Commission regarding the conformity of the Italian legislation with the Directive remain to be examined.

7 It should be observed as a preliminary point that the transposition of Community legislation into national law does not necessarily require the relevant provisions to be enacted in precisely the same words in a specific express legal provision; a general legal context may be sufficient if it does ensure the full application of the Directive in a sufficiently clear and precise manner (see the judgment in Case 252/85 *Commission* v *France* [1988] ECR 2243). Each of the Commission's complaints must therefore be examined on that basis.

The distinction between the substances in list I and those in list II

8 The Commission argues first that the Italian legislation on discharges makes no distinction between substances in list I and those in list II. That distinction is important in relation to the objective of the Directive, that is to say the effective protection of groundwater against pollution, because discharges of substances in list I must be prevented whereas discharges of substances in list II must merely be limited.

9 The Italian Republic did not take any position on that complaint in its defence or in its rejoinder; in its reply to the written question addressed to it by the Court, it referred to point 1 of Annex 5 to the Decision of 4 February 1977 of the Interministerial Committee, referred to above, and stated that under that Decision the direct discharge of substances in list I is absolutely precluded and the risk of indirect discharge is practically eliminated.

10 The Italian Republic also admitted at the hearing that the Italian legislation made no distinction between direct and indirect discharges, but it submits that the Decision of 4 February 1977 ensures that discharges cannot reach groundwater since that Decision authorizes discharge on the ground only where there is natural purification and discharges in the subsoil only where the discharge is carried out in deep and impermeable strata. The Italian Republic states, however, that through the distinction it makes between substances in lists I and II the Directive authorizes a certain degree of pollution in respect of substances in list II, contrary to the legislation in force in Italy, which is more rigorous on this point.

11 As is clear from the statements of the Italian Republic, it admits that its legislation makes no distinction between the substances in lists I and II. Article 3 of the Directive treats differently discharges of substances in list I, which must always be prohibited in the case of direct discharges and are subject to authorization, after an investigation, in the case of indirect discharges, and discharges of substances in list II, which are subject to other rules. Consequently, the distinction between the two types of substances is mandatory in view of the objective of the Directive. It

follows that it must be incorporated in national legislation with the requisite precision and clarity in order to meet the requirement of certainty.

12 Legislation which leaves the persons subject to it in a state of uncertainty as to the extent to which they may rely on Community law does not fulfil the obligation to transpose a directive into national law (see the judgment in Case 116/86 *Commission* v *Italy* [1988] ECR 1323).

13 As regards the argument of the Italian Republic to the effect that its legislation in practice eliminates the risk of indirect discharge, it should be observed that, as the Court held in its judgment in Case C-339/87 *Commission* v *Netherlands* [1990] ECR I-851, at paragraph 25, in order to secure the full implementation of directives in law and not only in fact, Member States must establish a specific legal framework in the area in question.

14 Consequently, this complaint of the Commission must be upheld.

Substances omitted by the Italian legislation

15 The Commission submits that the Italian legislation omits several of the substances included in lists I and II in the Annex to the Directive.

16 With regard to list I, the Commission submits that there is no mention in the Italian legislation of 'organotin compounds' (list I, point 3) or of most substances which 'possess carcinogenic, mutagenic or teratogenic properties in or via the aquatic environment' (list I, point 4), and that among the organohalogen compounds and substances which may form such compounds in the aquatic environment and organophosphorus compounds (list I, points 1 and 2), the Italian legislation refers only to chlorine-based pesticides, chlorine-based solvents and phosphor-based pesticides.

17 With regard to substances in list II, the Commission submits that the Italian legislation does not take into account the following chemical substances: antimony, molybdenum, titanium, beryllium, uranium, vanadium, cobalt, thallium, tellurium and silver, and that it does not cover several compounds which may be classed as 'biocides and their derivatives not appearing in list I'. It refers in that regard to examples such as carbamates, dithiocarbamates, organosulphate fungicides, quaternary ammonium derivatives etc., and the group of 'toxic or persistent organic compounds of silicon, and substances which may cause the formation of such compounds in water, excluding those which are biologically harmless or are rapidly converted in water into harmless substances' (points 1, 2 and 4 of list II).

18 In reply to a question in this regard from the Court, the Italian Republic admitted that the complaint concerning all those substances was well founded, and it confirmed that admission at the hearing. It observes, however, that with regard in particular to the substances referred to in point 4 of list I, that is to say those which possess carcinogenic, mutagenic or teratogenic properties, it has experienced some difficulty as a result of the fact that the Directive does not state what these substances are and that although it has asked the Commission for clarification on that point it has received no reply.

19 It is true that the Directive does not identify the substances which possess carcinogenic, mutagenic or teratogenic properties and that, as the Commission rightly stated, its silence is due to the constant developments in scientific knowledge in that regard. However, that difficulty does not justify the absence of any general mention of those substances in national legislation.

20 Consequently, this complaint of the Commission must be upheld.

The procedure for the issue of discharge authorizations

21 The Commission submits that the Italian Republic has not transposed Article 7 of the Directive, which specifies the nature of the prior scientific investigation, or Article 8, which lays down the condition that a discharge authorization cannot be issued before it has been checked that the groundwater, and in particular its quality, will undergo the requisite surveillance.

22 The Italian Republic submits that Law No 62 of 5 March 1982 (Official Gazette of the Italian Republic No 63 of 5 March 1982, p. 1713) meets the requirements of Article 7 of the Directive inasmuch as it provides that the regions are required to identify, by means of an appropriate plan, zones suitable for discharges of waste water and sludge, in accordance with the criteria laid down in Annex 5 of the Decision of the Interministerial Committee of 4 February 1977, which establishes very detailed rules concerning prior verifications. According to the Italian Republic those rules serve to predetermine the conditions under which any discharges are carried out.

23 That argument cannot be upheld. Article 7 of the Directive requires, having regard to the specific nature of the subject-matter of the investigation, that is to say the environment into which the discharge is to be made, that the investigation should have a specific objective, that is to say the study of the hydrogeological conditions of the area concerned, the possible purifying powers of the soil and subsoil and other factors; indeed, it is for that reason that the provision gives a precise indication of the factors which must be covered by the prior investigation. It thus makes the grant of authorization subject to precise and detailed conditions which must be regarded as mandatory in order to achieve the aim of the Directive. It follows that national legislation which defines in a vague and general manner a number of criteria and technical standards for the use of water cannot be regarded as complying with the requirements of the Directive.

24 With regard to the transposition of Article 8 of the Directive, the Italian Republic submits that the surveillance of water required by that article is ensured by point 2.8 of Annex 5 to the Decision of the Interministerial Committee of 4 February 1977, under which provision must be made for all the necessary verifications in order to assess the environmental impact of the discharge system and which indicates a number of checks to be carried out.

25 That argument cannot be upheld either. Article 8 of the Directive makes the grant of authorizations provided for in Articles 4, 5 and 6 subject in mandatory terms to prior specific checks of a well-defined nature.

26 The provisions relied on by the Italian Republic provide only for vague and general measures which cannot be regarded as implementing the article in question

with the requisite precision and clarity to satisfy fully the demands of legal certainty (see the judgment in Case 291/84 *Commission* v *Netherlands* [1987] ECR 3483, at paragraph 15).

27 Consequently, this complaint on the part of the Commission must also be upheld.

The tacit 'provisional authorization'

28 The Commission also submits that the Italian Republic has not transposed Articles 9 and 10 of the Directive, which indicate the matters which must be specified in authorizations, or Article 12 of the Directive, which sets out the circumstances in which authorization must be refused or withdrawn. The Commission submits that Article 15 of Law No 319 of 10 May 1976, cited above, makes the issue of authorization subject to no condition other than the obligation for the applicant to submit an application accompanied by a precise description of the discharge. The Commission further states that in accordance with that article provisional authorization is deemed to be granted when the application for grant of authorization has not been rejected within six months. According to the Commission, that provision establishes a system of authorization on demand and a 'tacit agreement' procedure which has repercussions as regards both authorization and verification, since in the event of tacit authorization it is not certain whether any verification has taken place, and where it has not the authorization is granted without compliance with the conditions laid down in Articles 9, 10 and 12 of the Directive.

29 The Italian Republic argues that the fact that the Italian legislation provides for tacit authorization does not mean that the system is incompatible in itself with the aim of the Directive, since the Member States are entitled to choose the manner in which they implement it. According to the Italian Republic, the competent authority must in any event verify, as regards tacit authorizations, that the area chosen for the discharge falls within that previously defined by the regional authority. Consequently Italian law ensures preventive and effective monitoring in accordance with the Directive.

30 The Directive provides that the refusal, grant or withdrawal of authorizations must take place by way of an express measure in accordance with precise rules of procedure which comply with a number of necessary conditions, conditions which create rights and obligations on the part of individuals.

31 Consequently, tacit authorization cannot be considered compatible with the requirements of the Directive, since in addition, as the Commission has stated, such authorization does not make it possible to carry out prior inquiries, subsequent inquiries or checks. It follows that the national legislation does not transpose the Directive with the requisite precision and clarity to satisfy fully the requirements of legal certainty.

32 Consequently, this complaint by the Commission must also be upheld.

The duration of authorization

33 According to the Commission, the Italian legislation, in particular Article 15 of Law No 319 of 10 May 1976, cited above, provides for definitive authorization, which, even if it can be withdrawn or amended at any time, is incompatible with Article 11 of the Directive, which requires the Member States to grant authorizations for a limited period which must be reviewed at least every four years.

34 The Italian Republic did not take any position on this issue in its written pleadings, but in reply to a question from the Court it admitted that the provisions of Italian legislation in force do not regulate the duration of authorization.

35 Consequently, this complaint of the Commission must be upheld.

Monitoring of compliance with the conditions laid down in authorizations and the effects of discharges

36 The Commission submits that Article 13 of the Directive, which requires Member States to monitor compliance with the conditions laid down in each authorization and the effects of discharges on groundwater, has not been correctly transposed since the sixth paragraph of Article 15 of Law No 319 of 10 May 1976, as amended by Law No 650 of 24 December 1979, cited above, gives the Italian authorities powers of supervision and monitoring which are vague in nature and

are restricted to monitoring compliance within the limits of acceptability laid down by the legislation.

37 With regard to the complaint concerning the monitoring of compliance with the conditions laid down in the authorization, the Italian Republic, in reply to a written question from the Court, states that Article 9 of Law No 650 of 24 December 1979 meets the requirements of the Directive since municipalities and mountain local authorities are required to monitor discharges and Article 22 of Law No 319 of 10 March 1976 lays down criminal penalties for persons who fail to observe the conditions laid down in authorizations. It points out that Article 8(4) of Law No 349 of 15 July 1986 (Official Gazette of the Italian Republic No 162 of 8 July 1986) established an environmental unit of *carabinieri.* According to the Italian Republic, the fact that failure to observe the conditions laid down in authorizations constitutes a criminal offence automatically entails a duty of surveillance and monitoring on the part of the authorities responsible for investigating offences.

38 With regard to the complaint concerning the monitoring of the effects of discharges, the Italian Republic, in reply to a question from the Court, states that such monitoring is ensured by point 2.8 of the Decision of the Interministerial Committee of 4 February 1977.

39 In reply to those arguments, the Commission maintains that the Italian legislation is vague and that the criminal penalties provided for in Article 22 of Law No 319 of 10 May 1976 are insufficient to ensure compliance with the Directive, because the Law itself does not take account of the precise and detailed provisions of the Directive. Furthermore, the Commission considers that the *carabinieri* unit, composed of some 20 men, cannot ensure effective protection against all offences concerning the environment.

40 Article 13 of the Directive places on the authorities of the Member States a specific duty to monitor all the conditions laid down in authorizations which have been issued and all the effects of discharges on groundwater.

41 The Italian legislation establishes a general criminal offence intended to penalize failure to comply with the conditions laid down in authorizations which are issued, but does not require any specific monitoring of compliance with those provisions. Nor does it provide for monitoring of the effects of discharges on groundwater.

42 It follows that the measures taken by the Italian Republic are not sufficient to meet the specific requirements of the Directive as regards both the monitoring of compliance with the conditions laid down in authorizations which are issued and the monitoring of the effects of discharges on groundwater.

43 Consequently, this complaint of the Commission must also be upheld.

The obligation to keep an inventory of authorizations.

44 The Commission submits that the Italian legislation does not comply with Article 15 of the Directive, which requires Member States to keep an inventory of authorizations. At present there is no such inventory in Italy, and even if there was one it would necessarily be incomplete at least in respect of tacit authorizations.

45 The Italian Republic replies that the fact that national legislation permits tacit authorization does not preclude the possibility of drawing up the inventory required by the Directive, because every application for authorization lodged with the competent department is accompanied by documentation containing all the information on the discharge.

46 That argument cannot be upheld, because the documentation referred to does not satisfy the obligation laid down by the Directive to keep an inventory of authorizations.

47 Consequently, this complaint of the Commission must also be upheld.

48 Having regard to all the foregoing considerations, it must be held that by not adopting within the prescribed period all the measures necessary to comply with Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances the Italian Republic has failed to fulfil its obligations under the EEC Treaty.

Costs

49 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Declares that by not adopting within the prescribed period all the measures necessary to comply with Council Directive 80/68/EEC of 17 December 1979 on the protection of groundwater against pollution caused by certain dangerous substances the Italian Republic has failed to fulfil its obligations under the EEC Treaty;

(2) Orders the Italian Republic to pay the costs.

Due Mancini Moitinho de Almeida

Díez de Velasco Kakouris Grévisse Zuleeg

Delivered in open court in Luxembourg on 28 February 1991.

J.-G. Giraud
Registrar

O. Due
President

provisions of a binding nature. Mere administrative practices, which by their nature may be altered at the whim of the administration, may not be considered as constituting the proper fulfilment of the obligation deriving from the directive in question.

In Case 96/81

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Robert Caspar Fischer, acting as Agent, assisted by Auke Haagsma, a member of its Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

KINGDOM OF THE NETHERLANDS, represented by Adriaan Bos, acting as Agent, Assistant Legal Adviser at the Ministry of Foreign Affairs, with an address for service in Luxembourg at the Embassy of the Kingdom of the Netherlands, 5 Rue C. M. Spoo,

defendant,

APPLICATION for a declaration that the Kingdom of the Netherlands has failed to fulfil an obligation imposed on it by the EEC Treaty, by not adopting within the period prescribed the laws, regulations and administrative provisions needed in order to comply with Council Directive No 76/160/EEC of 8 December 1975 concerning the quality of bathing water (Official Journal 1976, L 31, p. 1),

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco and A. Touffait (Presidents of Chambers), Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans and U. Everling, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Summary of the facts

1. Council Directive No 76/160/EEC of 8 December 1975 concerning the quality of bathing water (Official Journal 1976, L 31, p. 1) provides that Member States are to take certain measures in order to reduce the pollution of bathing water and to protect such water against further deterioration. To that end, the directive lays down the physical, chemical and microbiological parameters applicable to bathing water and provides that Member States shall set, for all bathing areas or for each individual bathing area, the values applicable to bathing water as regards those parameters. Members States are obliged, by virtue of the directive, to take all necessary measures to ensure that, within a period of 10 years, the quality of bathing waters conforms with those values and to ensure that those values are observed in newly-created bathing areas. The competent authorities in the Member States are obliged to carry out sampling operations in accordance with the detailed rules laid down in the directive. Member States are obliged, four years following the notification of the directive and regular intervals thereafter, to submit a comprehensive report to the Commission on their bathing water and the most significant characteristics thereof.

Article 12 (1) of the directive provides as follows:

"Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this directive within two years of its notification. They shall forthwith inform the Commission thereof."

Notification of the directive to the Netherlands took place on 10 December 1975. Thus the period specified in Article 12 expired on 10 December 1977.

2. By letters of 24 February 1976 and 13 October 1977 the Commission requested the Netherlands Government to inform the Commission of the measures taken by the Netherlands to implement the directive.

In reply to those letters the Ministerie van Verkeer en Waterstaat [Ministry of Transport, Water Control and Construction] of the Netherlands informed the Commission, by letter of 28 March 1978, that an amendment to the Wet Verontreiniging Oppervlaktewateren [Law relating to the pollution of surface water] was in preparation. That amendment would *inter alia* enable national standards to be set concerning the discharge of certain substances and to maintain everywhere a general minimum quality level required for the various uses of surface water. That amendment therefore had great significance in connection with the implementation of the directive.

Moreover, an amendment to the Wet Hygiëne en Veiligheid Zweminrichtingen [Law relating to hygiene and safety in bathing establishments] would enable the use of surface water in bathing water to be prohibited where the former did not satisfy the requirements laid down in the directive.

Furthermore the competent authorities were in the process of taking concerted action to extend the sampling programme in order to adapt it to the provisions of the directive.

Finally, the Netherlands Government remarked that certain requirements, based on an opinion of the Gezondheidsraad [Health Council] and contained in a report entitled "Interimrapport Zwemwater" ["Interim report on bathing water"] dated 25 June 1973, had been imposed for a long time in the Netherlands on the use of surface water for recreational purposes. That report was attached to the letter.

The Ministerie van Verkeer en Waterstaat concluded its letter of 28 March 1978 by stating its willingness to supply the Commission with any further information which it might require.

3. By letter of 8 February 1979 the Commission informed the Netherlands Government that it was of the opinion that the Kingdom of the Netherlands had failed to fulfil its obligations under the directive since the Netherlands authorities had still not adopted the measures needed to give effect to the directive under its internal law and since, notwithstanding the provisions of Article 12 (1) of the directive, the Commission had not yet received any communication regarding such measures. The Commission therefore invited the Netherlands Government, pursuant to Article 169 of the EEC Treaty, to submit its observations on the matter within two months.

The Netherlands Government replied to that letter by a letter dated 23 May 1979 from its Permanent Representation to the European Communities.

In that letter the Netherlands Government supplied a number of further details concerning the content of the law relating to the pollution of surface water accompanied by certain extracts of that law. It stated that that legislation provided for a certain number of methods of controlling the quality of surface water. A prospective multiennial programme drawn up every five years for the purposes of the campaign against water pollution, and determining the policy to be pursued in practice by the authorities responsible for the quality of water contained, in the annexes thereto, the norms laid down in the directive. The programme was attached to the letter. The Netherlands Government emphasized that whilst the preamble to and the explanatory statement accompanying the draft law designed to amend the law relating to the pollution of surface water referred to the directive that did not mean that the directive was not being applied in the Netherlands in the absence of such amendment since for that purpose the present law already provided for a number of methods and laid down certain administrative provisions enabling the directive to be implemented to a considerable extent.

The Netherlands Government also forwarded to the Commission a copy of the law relating to hygiene and safety in bathing establishments, which enabled certain measures to be taken, in respect of bathing establishments, concerning the quality of bathing water. The proposed amendment to that law would have the effect of extending still further the scope of its application.

In that connection the Netherlands Government also referred to the Wet bestrijding Infectieziekten en Opsporing Ziekteoorzaken [Law to combat infectious diseases and to detect the causes of disease] which compels the mayor of any municipality to order the total or partial closure of a bathing establishment if the department responsible for the inspection of public health makes a request to that effect.

The Netherlands Government annexed to that letter a report on bathing areas in respect of 1978 and on the most significant characterisitics of their bathing water.

The Netherlands Government concluded its letter by stating that it believed it had shown by the contents of the letter that it was in practice already implementing the directive as the basis of existing legislation. It added that it was prepared to supply the Commission with any further information which it might require.

4. By letter of 27 July 1979 the Commission delivered to the Netherlands Government a reasoned opinion within the meaning of Article 169 of the EEC Treaty stating that the Kingdom of the Netherlands had failed to fulfil an obligation imposed on it by the directive by not adopting the laws, regulations and administrative provisions needed to comply with its terms.

The Commission stated in its reasoned opinion that the Kingdom of the Netherlands had not informed the Commission of the measures taken to comply with the directive and the Commission must therefore assume that the Kingdom of the Netherlands had not yet taken such measures. The provisions of the existing legislation to which the Netherlands Permanent Representation had referred in its letter of 23 May 1979 and the report on bathing areas did not constitute implementation of the directive for the purposes of Article 12. The Commission had still not been informed that the proposed amendments to that legislation had been enacted.

In its reply to that reasoned opinion, by letter of 26 November 1979 from its Permanent Representation to the European Communities, the Netherlands Government reaffirmed that existing legislation already provided mechanisms making it possible to pursue a policy aimed at meeting or continuing to observe the quality requirements which surface water intended for bathing must satisfy. Although, for the purpose of implementing the directive, it was necessary to adapt the law relating to the pollution of surface water in order to create a legal instrument by which general and binding instructions might be issued to all the authorities responsible for the quality of water, that did not mean, contrary to the belief of the Commission, that it was impossible for the Netherlands to implement the directive without such adaptation. The amendments which were being made to the legislation on the subject were considered desirable and the Netherlands Government attached great importance to them. The Netherlands was already implementing the directive by means of existing legislative instruments. In that letter, the Netherlands Government supplied further details of the existing legislation and added that it was prepared to engage in any further consultations with the Commission.

By letter of 24 March 1981 the Permanent Representation of the Kingdom of the Netherlands to the European Communities informed the Commission as to the stage reached in the legislative procedure relating to the aforementioned amendments to the relevant Netherlands legislation.

II — Conclusion and written procedure

1. By an application registered at the Court on 24 April 1981, the *Commission* brought an action against the Kingdom of the Netherlands claiming that the Court should:

Declare that the Kingdom of the Netherlands, by not adopting within the period prescribed the laws, regulations and administrative provisions needed in order to comply with the requirements of Council Directive No 76/160/EEC of 8 December 1975, has failed to fulfil an obligation imposed upon it by the Treaty;

Order the Kingdom of the Netherlands to pay the costs.

The *Government of the Kingdom of the Netherlands* contends that the Court should:

Dismiss the application as unfounded;

Order the Commission to pay the costs.

2. At the conclusion of the written procedure, which followed normal course, the Court, upon hearing the views of the Advocate General, decided to request the Commission to reply in writing to a number of questions and decided to invite the Government of the Netherlands to submit in writing its observations on those replies.

The Court, upon hearing the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry.

III — Submissions and arguments of the parties put forward during the written procedure.

1. The *Commission* contends in its *application* that the Netherlands Government did not deny, in its reply to the Commission or in its subsequent letters, that the directive required an amendment to the legislation in force in the Netherlands. It was apparent from the contents of those letters that that amendment to its legislation had still not been enacted and that therefore, contrary to Article 12 of the directive, the Netherlands still had not adopted all the laws, regulations and administrative provisions needed in order to implement the directive.

The statement, contained in the letter of 26 November 1979, that the Netherlands was implementing the directive by means of existing legilsative provisions, through administrative channels, as well as by means of guidelines at the practical level, is contradicted by certain statements also contained in that letter to the effect that it was "necessary to adapt that law for the purpose of implementing the directive". That notion also conflicts with the viewpoint expressed by the Netherlands Government in its reply of 28 March 1978.

The need for certain laws, regulations or administrative provisions also emerges clearly from a comparison of the directive with the existing legislation. It is not however necessary at this stage systematically to examine the differences between the Netherlands legislation and

the directive but the Commission expressly reserves the right to present further argument on this point if that should prove necessary during the course of the procedure.

In the Commission's view, the Netherlands Government wishes to give the impression that the quality of bathing water in the Netherlands is in fact largely the same as that prescribed by the directive without, however, denying that this situation derives only to an insufficient degree from the powers, and the mandatory statements and task-descriptions stipulated in the directive. What is important in the present case is not the practical result brought about by the policy pursued by the Government and by the various subordinate authorities in the Netherlands but the fact that the Netherlands legislation does not make provision for all the instruments prescribed in the directive.

2. In its *defence* the *Netherlands Government* points out that the Commission did not respond to the observations submitted on the reasoned opinion as to the manner in which the directive was already being implemented and that the Commission did not state which provisions of the directive had not been implemented in the Netherlands.

The Netherlands Government, by a letter of 23 May 1979 from its Permanent Representation, had already informed the Commission that its programme for sampling bathing water had been made to comply with the directive. The Commission had received reports concerning the most significant characteristics of the bathing water. In addition in an annex to its defence, the Netherlands Government gives the results of a quarterly bacteriological survey concerning the quality of bathing water.

Moreover, the Netherlands Government recalls that, according to Article 4 of the directive, it is only within a period of 10 years that the quality of bathing water must be made to conform to the limit values set in accordance with Article 3 of the directive.

The draft law amending the law relating to the pollution of surface water was considered desirable for the purpose of creating a uniform scheme in a system under which managerial responsibility for the quality of water rested with decentralized administrative authorities and under which central government did not have the power to regulate directly the management by those subordinate authorities as regards the grant of authorizations or the laying down of quality standards for surface water.

Nevertheless, the existing instruments taken, as a whole, could be used to implement the directive. The subordinate authorities, which are obliged to put into effect the terms of the directive, are aided in their management by all the instruments put at their disposal by the law relating to the pollution of surface water, in particular prohibitions, declarations of inadequacy, the provisions governing authorizations, the levying of a tax and the components of the general

improvement policy. Existing legislation confers, on every authority responsible for the quality of water, the necessary instruments for pursuing a policy aimed at ensuring that the quality of water satisfies requirements which are essential for its recognized use or function. It is not possible to conclude from the existence of a draft amendment to the law, intended to supplement the existing provisions, that the directive had not been implemented. The legislative amendment is designed to impose more stringent rules that those laid down in the directive. The instruments to be created within the framework of the law relating to the pollution of surface water are, moreover, based on Council Directive No 76/464/EEC of 4 May 1976 which is subsequent in time to the directive at issue and places that directive in a general context.

By their nature, the provisions of the directive at issue are primarily addressed to the national authorities. The Member States are free to choose the form and methods of implementing the directive. The Commission has not shown that the Netherlands did not have at its disposal the instruments needed for implementing the directive. The directive has hitherto been adequately implemented in the Netherlands.

3. In its *reply* the *Commission* maintains that the Netherlands Government fails to realize the true scope of the application and is basing itself on misconceptions as regards the nature of directives in general and of the directive at issue in particular.

The duty to inform the Commission under Article 12 (1) of the directive, on which the application is based, is for the Commission an indispensable instrument in its task of supervising the implementation of directives and constitutes a specific instance of the general duty, imposed on the Member States by Article 5 of the EEC Treaty, of facilitating the achievement of the Commission's tasks. A general communication stating that, for the purpose of its implementation the directive was the subject of a certain legislative amendment or that its implementation was already effected within the context of existing legislation, may not be considered as sufficient.

As with many other directives, under the system laid down by Article 12 (1) of the directive, the supervision by the Commission of the correct implementation of the directive is generally carried out in two stages.

During the first stage, which involves a general and formal examination, the Commission verifies whether the Member States have informed it of the provisions, whether existing or newly enacted, which they consider to be necessary for the implementation of the directive, and whether those provisions have entered into force within the prescribed period. During the second stage which involves a close and lengthy examination and a scrupulous comparison of the national provisions with the various provisions of the directive, the Commission verifies, on the basis of information supplied by the Member States pursuant to Article 12 (1) of the directive, whether the Member States have satisfactorily implemented the provisions of the directive.

The duty to supply information and the supervision, in two stages, of the implementation of the directive entails consequences as regards the procedure laid down in Article 169 of the EEC Treaty in the event of failure by a Member State to fulfil its obligations. An incomplete or delayed communication of the implementing provisions constitutes a failure to comply with the terms of the second sentence of Article 12 (1) of the directive which is sufficient of itself to justify the initiation of the procedure laid down in Article 169 of the EEC Treaty.

Failure to comply with the second sentence of Article 12 (1) of the directive also gives rise to the presumption that the Member State has not complied with its obligation to bring into force the necessary provisions as laid down in the first sentence of Article 12 (1). Where the Member State has informed the Commission of the implementing measures which it considered necessary but did not bring them into force within the prescribed period the Member State is not entitled to rebut that presumption by evidence to the contrary, thus contradicting the previous communication to the Commission.

On the basis of that presumption the Commission may also incorporate, in the default procedure which it initiates, a failure to fulfil the obligation to bring into force the provisions referred to in the first sentence of Article 12 (1), on the basis that the Member State had not brought into force within the prescribed period *all* the necessary implementing measures. There is no need for the Commission to state or demonstrate that the Member State has failed to comply with certain specific obligations laid down in the directive. Verification in regard to such matters takes place during the second stage of the procedure. In any event it is sufficient for the Commission to show that at least *one* of the provisions of the directive has not been implemented or has been implemented incorrectly.

The Commission brought this action during the first stage of its supervision of the implementation of the directive since, as it stated in its application, and that statement has not been contradicted, the Netherlands had not communicated to it, within the prescribed period, and pursuant to the second sentence of Article 12 (1), the implementing measures adopted. Both parties admit that the Netherlands has not complied with that provision of the directive. The Commission has confined the present case to the fact that the Netherlands had not brought into force, within the prescribed period, all the laws, regulations and administrative provisions necessary. On that narrow issue, the burden of proof on the Commission is clearly much less onerous and, in addition the aforementioned presumption applies.

The presumption of belated or incomplete implementation is confirmed by the letter of the Netherlands Government dated 28 March 1978 which shows that the Netherlands Government was, at that time, convinced that the implementation of the directive required the enactment of a certain number of provisions, indicated in outline. That letter therefore did not constitute the information stipulated by the second sentence of Article 12 (1). Whilst the more detailed information, contained in subsequent letters from the Netherlands Government, on the means available under existing Netherlands legislation constituted valuble material for the purpose of verifying the correct implementation of the directive during the second stage of the Commission's examination, it is of no significance in the present case which is concerned with the first stage of that examination.

The Netherlands Government stated for the first time, in its defence, explicitly and unequivocally, that adequate implementing measures had been adopted, ensuring, for the time being, the adequate implementation of the directive in the Netherlands. Such a viewpoint is unacceptable since it repudiates the earlier attitude adopted by the Netherlands and undermines the confidence with which that attitude

had inspired the Commission. The Commission continues therefore to rely on the presumption that the Netherlands has not adopted all the implementing measures and it need not reply in detail to all the arguments put forward by the Netherlands Government as regards the present state of the implementation of the directive.

In any event, the presumption that the directive has not been fully implemented has not been rebutted by the Netherlands Government even if it were accepted that that possibility is open to the Government. For that purpose, it would have had to demonstrate, in respect of each provision of the directive, that equivalent mandatory provisions already exist in Netherlands law and its defence does not contain any such demonstration.

Moreover, even supposing that no such presumption existed, the Commission has clearly shown that the Netherlands has not brought into force, within the prescribed period, all the necessary implementing provisions. Merely to bring into force some of the provisions of the directive is not sufficient to comply with Article 12 (1). It is clear that the implementation of the obligations contained in the directive requires a certain number of laws, regulations and administrative provisions and that such implementation could not be left to the discretion of the various authorities responsible for the quality of water. The Member States must adopt the implementing measures needed to incorporate in their legal system the terms of the directive and they are not at liberty to exempt themselves from the obligation to enact mandatory implementing rules by maintaining that the directive itself is directly binding on their authorities and that the practical result sought by the directive can already be achieved. The contents of the letters written by the Netherlands Government before this action was brought show sufficiently clearly that the implementation of the directive in the Netherlands was governed, at least in part, by means of non-mandatory provisions and that the existing legislation does not lay down all the measures prescribed by the directive.

4. In its *rejoinder* the *Netherlands Government* denies that it is agreed between the parties that the Netherlands is in breach of its duty in regard to the information to be given to the Commission by virtue of the second sentence of Article 12 (1) of the directive.

It is necessary to make a distinction between, on the one hand, information supplied by way of a general information procedure such as that instituted by the Council on 5 March 1973 concerning legal measures relating to the protection of the environment (Official Journal, C 9, 15. 3. 1973) under which all those measures designed for the protection and improvement of the environment were brought to the knowledge of the Commission, and, on the other hand, information concerning the implementation of the directive.

The directive is not merely binding on central government but also on the other administrative authorities responsible for ensuring the quality of water and it can in fact be implemented by those authorities. Among the rules issued by the provinces there are provisions relating to authorizations, to planning and to the

taking of samples etc., which require the approval of the State whose influence is thus ensured. The Netherlands Government has shown from the information supplied that it was not necessary, merely in order to implement the directive, to enact amending legislation.

The Netherlands Government acknowledges that the general information contained in its letter of 28 March 1978 concerning the new laws, regulations and administrative provisions, supplied in accordance with the Council Agreement of 5 March 1973, became intermingled with the information supplied concerning the implementation of the directive. However, in its letter of 23 March 1979 it supplied more detailed information relating to the system of Netherlands legislation and stressed the fact that the existing law relating to the pollution of surface water already provided the means needed for implementing the directive. The Netherlands Government considers that it has satisfied, albeit after a certain delay, its obligation in regard to the information to be given to the Commission and reserves the right to submit further observations during the course of the second stage relating to the allegation that the implementation of the directive has been inadequate.

IV — Answers to questions put by the Court

In reply to the questions put by the Court at the close of the written procedure, the *Commission* stated in particular that the legislative framework now existing in the Netherlands for the implementation of the directive was still incomplete since, as indicated in the first page of the explanatory memorandum to the draft law amending the Wet Hygiëne en Veiligheit Zweminrichtingen, no provisions yet existed determining the desired quality for bathing water by means of values for the parameters mentioned in the annex to the directive, as provided for in Article 3 of the directive or provisions prescribing the measures necessary to achieve the quality laid down for bathing water, as provided for in Article 4 (1) of the directive, measures which had to be brought into force within the period laid down in Article 12 of the directive, even though a period of 10 years was granted for achievement of the desired water quality. Moreover, the sampling and checking operations provided for in the directive were carried out only partially, the minimum frequency not always being observed, and then only on the basis of programmes and reports which could not be regarded as the "laws, regulations and administrative provisions" referred to in the directive.

The *Netherlands Government* observed that the law amending the Wet Verontreiniging Oppervlaktewateren had entered into force on 1 January 1982 and notice of that fact had been given to the Commission by letter of 14 January 1982. Therefore, in view of the present state of the Netherlands legislation, there was no reason to proceed with the action.

V — Oral procedure

At the sitting on 2 March 1982 oral argument was presented for the Commission by Auke Haagsma, a member of its Legal Department, and for the Government of the Kingdom of the

Netherlands, represented by Adriaan Bos, Assistant Legal Adviser, Ministry for Foreign Affairs.

The Advocate General delivered his opinion at the sitting on 31 March 1982.

Decision

1 By application received at the Court Registry on 24 April 1981, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by not introducing within the period prescribed the laws, regulations and administrative provisions needed to comply with Council Directive No 76/160/EEC of 8 December 1975 concerning the quality of bathing water (Official Journal 1976, L 31, p. 1) the Kingdom of the Netherlands had failed to fulfil its obligation under the Treaty.

2 By virtue of that directive, which was adopted pursuant to Articles 100 and 235 of the EEC Treaty, Member States are obliged to set, for all bathing areas or for each individual bathing area, the values applicable to bathing water for the physical, chemical and microbiological parameters laid down in the directive, to adopt the necessary measures to ensure that, within a period of 10 years, the quality of bathing water conforms with those values, to ensure that those values are observed in newly-created bathing areas, to carry out sampling operations in accordance with the detailed rules laid down in the directive and, four years following the notification of the directive, to submit a first comprehensive report to the Commission on their bathing water and the most significant characteristics thereof.

3 Article 12 (1) of the directive provides that the Member States are to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification, a period which expired on 10 December 1977, and forthwith to inform the Commission thereof.

4 The Commission considers that the Netherlands Government has failed to fulfil its obligation to provide information pursuant to the above-mentioned

provision. In view of that failure the Commission considers that it is entitled to presume, during the first phase of its verification of the implementation of the directive, which is confined to establishing in general whether the necessary implementing measures have been brought into force within the prescribed period, without any detailed examination of such measures, that the defendant has failed to fulfil the obligation to put into effect the necessary measures.

5 The subject-matter of these proceedings is not, however, failure to comply with the duty to provide information but failure to fulfil the obligation to bring into force the laws, regulations and administrative provisions needed to ensure compliance with the directive.

6 It should be emphasized that, in proceedings under Article 169 of the EEC Treaty for failure to fulfil an obligation, it is incumbent upon the Commission to prove the allegation that the obligation has not been fulfilled. It is the Commission's responsibility to place before the Court the information needed to enable the Court to establish that the obligation has not been fulfilled, and in so doing the Commission may not rely on any presumption.

7 It should nevertheless also be emphasized that the Member States are obliged, by virtue of Article 5 of the EEC Treaty, to facilitate the achievement of the Commission's tasks which, under Article 155 of the EEC Treaty, consist in particular of ensuring that the provisions of the Treaty and the measures adopted by the institutions pursuant thereto are applied. It is for those reasons that Article 12 of the directive in question, like other directives, imposes upon the Member States an obligation to provide information.

8 The information which the Member States are thus obliged to supply to the Commission must be clear and precise. It must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has effectively and completely implemented the directive. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 169 of the EEC Treaty in order to establish the failure to fulfil the obligation.

9 In view of the purpose of this action and in order to examine whether it is well founded, those provisions must be compared with the laws, regulations and administrative provisions existing in the Netherlands by means of which the Netherlands Government considers it has implemented the directive.

10 In that respect, it must be recorded that in reply to a question put by the Court at the close of the written procedure, the Commission stated that, as appears from the explanatory memorandum to the draft Netherlands law amending the Wet Hygiëne en Veiligheid Zweminrichtingen [Law relating to hygiene and safety in bathing establishments], at the present time no provisions exist in the Netherlands determining the desired quality for bathing water by means of values for the parameters mentioned in the annex to the directive, as provided for in Article 3 of the directive, nor are there any provisions prescribing the measures necessary to achieve the quality laid down for bathing water, as provided for in Article 4 (1). The Netherlands Government did not deny that fact either in its observations on the Commission's reply or during the oral procedure and it has adduced no evidence from which it might be inferred that such provisions already exist in the Netherlands.

11 The Netherlands Government referred to the fact that the supervision of the quality of water is carried out in the Netherlands within the framework of a decentralized system. The regional and local authorities are directly bound by the provisions of the directive and they implement it in the practical management of water quality, under the control of the national authorities.

12 It is true that each Member State is free to delegate powers to its domestic authorities as it considers fit and to implement the directive by means of measures adopted by regional or local authorities. That does not however release it from the obligation to give effect to the provisions of the directive by means of national provisions of a binding nature. The directive in question, adopted *inter alia* pursuant to Article 100 of the EEC Treaty, is intended to approximate the applicable laws, regulations and administrative provisions in the Member States. Mere administrative practices, which by their nature may be altered at the whim of the administration, may not be

considered as constituting the proper fulfilment of the obligation deriving from that directive.

13 None of the matters put forward by the Netherlands Government justifies the conclusion that provisions of a binding nature have actually been adopted either by the national authorities or by regional or local authorities in order to determine for all bathing areas or for each of them the values applicable to bathing water for all the parameters indicated in the annex to the directive and in order to ensure that the quality of bathing conforms with the values thus determined. In particular, the prospective multiennial programme to which the Netherlands Government referred in its correspondence with the Commission prior to the commencement of these proceedings, affirming that that programme adopted the rules contained in the directive, constituted, at that time, nothing more than a set of guidelines for those responsible for the supervision of water quality and had no legally binding force. That programme could not therefore be considered as sufficient for the purpose of implementation of the directive.

14 In its observations on the Commission's reply to the questions put by the Court before the oral procedure and also during the oral procedure, the Netherlands Government again referred to an amendment of the Wet Verontreiniging Oppervlaktewateren [Law relating to the pollution of surface water], which entered into force on 1 January 1982, claiming that by virtue of that amendment the prospective multiennial programme would enable the directive to be fully implemented. At the hearing, the Commission, whilst not departing from its views, declared that that amendment to the law would, if supplemented by certain administrative measures, make it possible for the directive to be implemented properly. In that regard it must be pointed out, without its being necessary to consider whether, merely by reason of that amendment, the failure to fulfil the obligation might have been wholly remedied, that the measures needed to ensure the full implementation of the directive were not adopted within the prescribed periods and in any case did not exist when this action was brought.

15 It follows from the foregoing that the Kingdom of the Netherlands did not adopt within the prescribed periods the provisions needed to ensure the full implementation of the directive in question and must be declared to have failed to fulfil its obligations under the Treaty.

Costs

16 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleading. As the defendant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Declares that by not bringing into force within the periods prescribed the provisions needed to ensure the full implementation of Council Directive No 76/160/EEC of 8 December 1975 concerning the quality of bathing water, the Kingdom of the Netherlands has failed to fulfil its obligations under the Treaty;**

2. **Orders the Kingdom of the Netherlands to pay the costs.**

Mertens de Wilmars Bosco Touffait

Mackenzie Stuart O'Keeffe Koopmans Everling

Delivered in open court in Luxemburg on 25 May 1982.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

JUDGMENT OF THE COURT
22 June 1989 *

In Case 103/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale amministrativo regionale per la Lombardia (Regional Administrative Tribunal for Lombardy) for a preliminary ruling in the proceedings before that court between

Fratelli Costanzo SpA, a company incorporated under Italian law, whose registered office is at Misterbianco,

and

Comune di Milano (Municipality of Milan)

on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682) and the third paragraph of Article 189 of the EEC Treaty,

THE COURT

composed of: O. Due, President, R. Joliet and F. Grévisse (Presidents of Chambers), Sir Gordon Slynn, G. F. Mancini, F. A. Schockweiler and J. C. Moitinho de Almeida, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

Fratelli Costanzo SpA, the plaintiff in the main proceedings, by L. Acquarone, M. Alì, F. P. Pugliese, M. Annoni and G. Ciampoli, avvocati, in the written procedure and by L. Acquarone in the oral procedure,

* Language of the case: Italian

the Comune di Milano, the defendant in the main proceedings, by P. Marchese, C. Lopopolo and S. Ammendola, avvocati, in the written procedure and by P. Marchese in the oral procedure,

Ing. Lodigiani SpA, the intervener in the main proceedings, by E. Zauli and G. Pericu, avvocati, in the written procedure and by G. Pericu in the oral procedure,

the Government of the Kingdom of Spain, by J. Conde de Saro and R. Silva de Lapuerta, acting as Agents, in the written procedure and by R. Silva de Lapuerta, acting as Agent, in the oral procedure,

the Government of the Italian Republic, by Professor L. Ferrari Bravo, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent, assisted by I. M. Braguglia, avvocato dello Stato,

the Commission of the European Communities, by G. Berardis, a member of its Legal Department, acting as Agent, in the written and oral procedures,

having regard to the Report for the Hearing and further to the hearing on 7 March 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 25 April 1989,

gives the following

Judgment

1 By order of 16 December 1987, which was received at the Court Registry on 30 March 1988, the Tribunale amministrativo regionale per la Lombardia referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 concerning the coordination of procedures for the

award of public works contracts (Official Journal, English Special Edition 1971 (II), p. 682) and the third paragraph of Article 189 of the EEC Treaty.

2 The questions were raised in proceedings brought by Fratelli Costanzo SpA (hereinafter referred to as 'Costanzo'), the plaintiff in the main proceedings, for the annulment of a decision of the Giunta municipale (Municipal Executive Board) of Milan eliminating the tender submitted by Costanzo from a tendering procedure for a public works contract and awarding the contract in question to Ing. Lodigiani SpA (hereinafter: 'Lodigiani').

3 Article 29(5) of Council Directive 71/305/EEC provides as follows:

'If, for a given contract, tenders are obviously abnormally low in relation to the transaction, the authority awarding contracts shall examine the details of the tenders before deciding to whom it will award the contract. The result of this examination shall be taken into account.

For this purpose it shall request the tenderer to furnish the necessary explanations and, where appropriate, it shall indicate which parts it finds unacceptable.

If the documents relating to the contract provide for its award at the lowest price tendered, the authority awarding contracts must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 the rejection of tenders which it considers to be too low.'

4 Article 29(5) of Directive 71/305 was implemented in Italy by the third paragraph of Article 24 of Law No 584 of 8 August 1977 amending the procedures for the award of public works contracts in accordance with the directives of the European Economic Community (*Gazzetta ufficiale della Repubblica italiana* (Official Journal of the Italian Republic) No 232, 26.8.1977, p. 6272). That provision is worded as follows:

'If, for a given contract, tenders are abnormally low in relation to the transaction, the authority awarding the contract shall, after requesting the tenderer to furnish the necessary explanations and after indicating, where appropriate, which parts it considers unacceptable, examine the details of the tenders and may disallow them

if it takes the view that they are not valid; in that event, if the call for tenders provides that the lowest tender price is the criterion for the award of the contract, the awarding authority is obliged to notify the rejection of the tenders, together with its reasons for doing so, to the Ministry of Public Works, which is responsible for forwarding the information to the Advisory Committee for Public Works Contracts of the European Economic Community within the period laid down by the first paragraph of Article 6 of this Law.'

5 Subsequently, in 1987, the Italian Government adopted three decree laws in succession which provisionally amended the third paragraph of Article 24 of Law No 584 (Decree Law No 206 of 25 May 1987, Gazzetta ufficiale No 120, 26.5.1987, p. 5; Decree Law No 302 of 27 July 1987, Gazzetta ufficiale No 174, 28.7.1987, p. 3; and Decree Law No 393 of 25 September 1987, Gazzetta ufficiale No 225, 26.9.1987, p. 3).

6 The three decree laws each contain an Article 4 worded in identical terms, as follows:

'In order to speed up the procedures for the award of public works contracts, for a period of two years from the date on which this decree enters into force tenders with a percentage discount greater than the average percentage divergence of the tenders admitted, increased by a percentage which must be stated in the call for tenders, shall be considered abnormal for the purposes of the third paragraph of Article 24 of Law No 584 of 8 August 1977 and shall be excluded from the tendering procedure.'

7 The decree laws lapsed because they were not converted into laws within the period prescribed by the Italian Constitution. However, a subsequent law provided that the effects of legal measures adopted pursuant to them were to remain valid (Article 1(2) of Law No 478 of 25 November 1987, Gazzetta ufficiale No 277, 26.11.1987, p. 3).

8 In preparation for the 1990 World Cup for football, to be held in Italy, the Comune di Milano issued a restricted call for tenders for alteration work on a football stadium. The criterion chosen for awarding the contract was that of the lowest price.

9 The call for tenders stated that in accordance with Article 4 of Decree Law No 206 of 25 May 1987 tenders which exceeded the basic amount fixed for the price of the work by a percentage more than 10 points below the average percentage by which the tenders admitted exceeded that amount would be considered anomalous and consequently eliminated.

10 The tenders admitted to the procedure exceeded the basic amount fixed for the price of the work by an average of 19.48%. In accordance with the call for tenders any tender which did not exceed the basic amount by at least 9.48% was to be automatically eliminated.

11 The tender submitted by Costanzo was less than the basic amount. Accordingly, on 6 October 1987 the Giunta Municipale, on the basis of Article 4 of Decree Law No 393 of 25 September 1987, which in the mean time had replaced the decree law cited in the call for tenders, decided to exclude Costanzo's bid from the tendering procedure and to award the contract to Lodigiani, which had submitted the lowest tender of those which fulfilled the condition set out in the call for tenders.

12 Costanzo challenged that decision in proceedings before the Tribunale amministrativo regionale per la Lombardia, claiming *inter alia* that it was illegal on the ground that it was based on a decree law which was itself incompatible with Article 29(5) of Council Directive 71/305.

13 The national court therefore referred the following questions to the Court of Justice for a preliminary ruling:

'A — Given that, under Article 189 of the EEC Treaty, the provisions contained in a directive may relate to the "result to be achieved" (hereinafter referred to as "provisions as to results") or else be concerned with the "form and methods" required to achieve a given result (hereinafter referred to as "provisions as to form and methods"), is the rule contained in Article 29(5) of Council Directive 71/305/EEC of 26 July 1971 (where it provides that — should a tender be obviously abnormally low — the authority must "examine the details" of the

tender and request the tenderer to furnish the necessary explanations, indicating where appropriate which parts it finds unacceptable) a "provision as to results" and therefore of such a nature that the Italian Republic was obliged to "transpose" it without any amendment of substance (as indeed it did, by the third paragraph of Article 24 of Law No 584 of 8 August 1977) or is it a "provision as to form and methods", with the result that the Italian Republic could derogate from it by providing that where a tender is abnormally low the tenderer must *automatically* be eliminated from the tendering procedure, without any "examination of the details" and without any request to the tenderer to furnish "explanations" for the "abnormal tender"?

B — If the reply to Question A is negative (in the sense that Article 29(5) of Council Directive 71/305/EEC is to be held to be a "provision as to form and methods"):

B — 1. Did the Italian Republic (after "transposing" the aforesaid provision by way of Law No 584 of 8 August 1977 without introducing any amendment of substance regarding the procedure to be followed in cases where a tender is abnormally low) retain the power to amend the domestic implementing provision? In particular, could Article 4 of Decree Law No 206 of 25 May 1987, Decree Law No 302 of 27 July 1987 and Decree Law No 393 of 25 September 1987 (whose wording is identical) amend Article 24 of Law No 584 of 8 August 1977?

B — 2. Could the (identically worded) Articles 4 of the decree laws mentioned above amend Article 29(5) of Council Directive 71/305/EEC, as implemented by Law No 584 of 8 August 1977, without stating adequate reasons therefor, regard being had to the fact that a statement of reasons — which is necessary for Community legislation (see Article 190 of the EEC Treaty) — appears also to be necessary for domestic legislation introduced to give effect to Community provisions (which is therefore "sub-primary" legislation and, in the absence of indication to the contrary, must also be subject to the rule which requires "primary" legislation to state reasons)?

C — Is there, in any event, a conflict between Article 29(5) of Council Directive 71/305/EEC and the following provisions:

(a) the third paragraph of Article 24 of Law No 584 of 8 August 1977 (which refers to "abnormally low" tenders, whereas the directive is concerned with tenders which are "obviously" abnormally low and provides for examination of the details only in cases of "obvious" abnormality);

(b) Article 4 of Decree Laws Nos 206 of 25 May 1987, 302 of 27 July 1987 and 393 of 25 September 1987 (which make no allowance for preliminary examination of the details or a request for clarification to the party concerned, contrary to Article 29(5) of the Directive; furthermore, the decree laws mentioned above do *not* refer to "obviously" abnormal tenders and to that extent appear to be invalid, as does Law No 584 of 8 August 1977)?

D — If the Court of Justice rules that the aforesaid Italian legislative provisions conflict with Article 29(5) of Council Directive 71/305/EEC, was the municipal authority empowered, or obliged, to disregard the domestic provisions which conflicted with the aforesaid Community provision (consulting the central authorities if necessary), or does that power or obligation vest solely in the national courts?'

14 Reference is made to the Report for the Hearing for a fuller account of the facts of the case before the national court, the applicable legislation, the course of the procedure, and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The second part of the third question and the first question

15 In the second part of the third question the Tribunale amministrativo regionale seeks in essence to establish whether Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the directive, giving the tenderer an opportunity to furnish explanations. In its first question it asks whether the Member States may, when implementing Council Directive 71/305, depart to any material extent from Article 29(5) thereof.

16 With regard to the second part of the third question it should be noted that Article 29(5) of Directive 71/305 requires the awarding authority to examine the details of tenders which are obviously abnormally low, and for that purpose obliges the authority to request the tenderer to furnish the necessary explanations. Article 29(5) further requires the awarding authority, where appropriate, to indicate which parts of those explanations it finds unacceptable. Finally, if the criterion adopted for the award of the contract is the lowest price tendered, the awarding authority must justify to the Advisory Committee set up by the Council Decision of 26 July 1971 (Official Journal, English Special Edition 1971 (II), p. 693) the rejection of tenders which it considers to be too low.

17 The Comune di Milano and the Italian Government maintain that it is in keeping with the aim of Article 29(5) to replace the examination procedure which it envisages, giving the tenderer an opportunity to state its views, with a mathematical criterion for exclusion. They point out that the aim of that provision is, as the Court ruled in its judgment of 10 February 1982 in Case 76/81 *Transporoute* v *Minister for Public Works* [1982] ECR 417, at p. 428, to protect tenderers against arbitrariness on the part of the authority awarding the contract. A mathematical criterion for exclusion affords an absolute safeguard. It has the further advantage of being faster in its application than the procedure laid down by the Directive.

18 That argument cannot be upheld. A mathematical criterion for exclusion deprives tenderers who have submitted exceptionally low tenders of the opportunity of demonstrating that those tenders are genuine ones. The application of such a criterion is contrary to the aim of Directive 71/305, namely to promote the development of effective competition in the field of public contracts.

19 The answer to the second part of the third question must therefore be that Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations.

20 With regard to the first question, it should be observed that it was in order to enable tenderers submitting exceptionally low tenders to demonstrate that those

tenders are genuine ones that the Council, in Article 29(5) of Directive 71/305, laid down a precise, detailed procedure for the examination of tenders which appear to be abnormally low. That aim would be jeopardized if Member States were able, when implementing Article 29(5) of the Directive, to depart from it to any material extent.

21 The answer to the first question must therefore be that when implementing Council Directive 71/305 Member States may not depart to any material extent from the provisions of Article 29(5) thereof.

The second question

22 In its second question the national court asks whether, after implementing Article 29(5) of Council Directive 71/305 without departing from it to any material extent, Member States may subsequently amend the domestic implementing provision, and if so whether they must give reasons for doing so.

23 The national court raised this question only in the event that the answer to the first question should be that Member States could, when implementing Article 29(5) of Directive 71/305, depart materially from it.

24 In the light of the answer given to the first question the second question is devoid of purpose.

The first part of the third question

25 In the first part of its third question the national court seeks to establish whether Article 29(5) of Council Directive 71/305 allows Member States to require the examination of tenders whenever they appear to be abnormally low, and not only when they are obviously abnormally low.

26 The examination procedure must be applied whenever the awarding authority is contemplating the elimination of tenders because they are abnormally low in relation to the transaction. Consequently, whatever the threshold for the commencement of that procedure may be, tenderers can be sure that they will not be disqualified from the award of the contract without first having the opportunity of furnishing explanations regarding the genuine nature of their tenders.

27 It follows that the answer to be given to the first part of the third question is that Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

The fourth question

28 In the fourth question the national court asks whether administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305 and to refrain from applying provisions of national law which conflict with them.

29 In its judgments of 19 January 1982 in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, at p. 71 and 26 February 1986 in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, at p. 748, the Court held that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where that State has failed to implement the directive in national law by the end of the period prescribed or where it has failed to implement the Directive correctly.

30 It is important to note that the reason for which an individual may, in the circumstances described above, rely on the provisions of a directive in proceedings before the national courts is that the obligations arising under those provisions are binding upon all the authorities of the Member States.

31 It would, moreover, be contradictory to rule that an individual may rely upon the provisions of a directive which fulfil the conditions defined above in proceedings before the national courts seeking an order against the administrative authorities, and yet to hold that those authorities are under no obligation to apply the provisions of the directive and refrain from applying provisions of national law which conflict with them. It follows that when the conditions under which the Court has held that individuals may rely on the provisions of a directive before the national courts are met, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply those provisions.

32 With specific regard to Article 29(5) of Directive 71/305, it is apparent from the discussion of the first question that it is unconditional and sufficiently precise to be relied upon by an individual against the State. An individual may therefore plead that provision before the national courts and, as is clear from the foregoing, all organs of the administration, including decentralized authorities such as municipalities, are obliged to apply it.

33 The answer to the fourth question must therefore be that administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.

Costs

34 The costs incurred by the Spanish Government, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunale amministrativo regionale per la Lombardia, by order of 16 December 1987, hereby rules:

(1) Article 29(5) of Council Directive 71/305 prohibits Member States from introducing provisions which require the automatic exclusion from procedures for the award of public works contracts of certain tenders determined according to a mathematical criterion, instead of obliging the awarding authority to apply the examination procedure laid down in the Directive, giving the tenderer an opportunity to furnish explanations.

(2) When implementing Council Directive 71/305/EEC, Member States may not depart to any material extent from the provisions of Article 29(5) thereof.

(3) Article 29(5) of Council Directive 71/305 allows Member States to require that tenders be examined when those tenders appear to be abnormally low, and not only when they are obviously abnormally low.

(4) Administrative authorities, including municipal authorities, are under the same obligation as a national court to apply the provisions of Article 29(5) of Council Directive 71/305/EEC and to refrain from applying provisions of national law which conflict with them.

Due Joliet Grévisse

Slynn Mancini Schockweiler Moitinho de Almeida

Delivered in open court in Luxembourg on 22 June 1989.

J.-G. Giraud
Registrar

O. Due
President

JUDGMENT OF THE COURT (Second Chamber)

16 July 2009 (*)

(Failure of a Member State to fulfil obligations – Assessment of the effects of projects on the environment – Directive 85/337/EEC – Access to justice – Directive 2003/35/EC)

In Case C-427/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 September 2007,

Commission of the European Communities, represented by D. Recchia, P. Oliver and J.-B. Laignelot, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan, acting as Agent, and M. Collins SC, and D. McGrath BL, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, K. Schiemann, J. Makarczyk (Rapporteur) and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2008,

after hearing the Opinion of the Advocate General at the sitting on 15 January 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to declare that:

– by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337 as amended by Directive 97/11'), all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11 are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of that amended directive, and

– by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 3(1) and (3) to (7) and 4(1) to (6) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156, p. 17) or, in any event, by failing to adequately notify such provisions to the Commission,

Ireland has failed to fulfil its obligations under Directive 85/337, as amended by Directive 97/11, and Article 6 of Directive 2003/35.

Legal context

Community legislation

Directive 2003/35

2 Article 1 of Directive 2003/35 provides:

'The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention [on access to information, public participation in decision-making and access to justice in environmental matters], in particular by:

(a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

(b) improving the public participation and providing for provisions on access to justice within Council Directive 85/337… and 96/61/EC.'

3 Article 6 of Directive 2003/35 states:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 25 June 2005 at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods of making such reference shall be laid down by Member States.'

Directive 85/337

4 In accordance with Article 1(2) of Directive 85/337, as amended by Article 3(1) of Directive 2003/35, for the purposes of that directive:

'…

"the public" means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

"the public concerned" means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

5 Article 2(1) and (3) of Directive 85/337, as amended by Article 3(3) of Directive 2003/35, states:

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

…

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it;

…'

6 Article 4 of Directive 85/337 as amended by Directive 97/11 provides:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

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

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

7 Article 5 of Directive 85/337 as amended by Directive 97/11 provides:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV inasmuch as:

(a) the Member States consider that the information is relevant to a given stage of the consent procedure and to the specific characteristics of a particular project or type of project and of the environmental features likely to be affected;

(b) the Member States consider that a developer may reasonably be required to compile this information having regard inter alia to current knowledge and methods of assessment.

…

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

– a description of the project comprising information on the site, design and size of the project,

– a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects,

– the data required to identify and assess the main effects which the project is likely to have on the environment,

– an outline of the main alternatives studied by the developer and an indication of the main reasons for his choice, taking into account the environmental effects,

– a non-technical summary of the information mentioned in the previous indents.

…'

8 Article 6(2) to (6) of Directive 85/337, as amended by Article 3(4) of Directive 2003/35, states as follows:

'2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information …, information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.'

9 Article 7 of Directive 85/337, as amended by Article 3(5) of Directive 2003/35, provides:

‘1. Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken,

and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.

2. If a Member State which receives information pursuant to paragraph 1 indicates that it intends to participate in the environmental decision-making procedures referred to in Article 2(2), the Member State in whose territory the project is intended to be carried out shall, if it has not already done so, send to the affected Member State the information required to be given pursuant to Article 6(2) and made available pursuant to Article 6(3)(a) and (b).

…

5. The detailed arrangements for implementing this Article may be determined by the Member States concerned and shall be such as to enable the public concerned in the territory of the affected Member State to participate effectively in the environmental decision-making procedures referred to in Article 2(2) for the project.’

10 Article 9 of Directive 85/337, as amended by Article 3(6) of Directive 2003/35, provides:

‘1. When a decision to grant or refuse development consent has been taken, the competent authority or authorities shall inform the public thereof in accordance with the appropriate procedures and shall make available to the public the following information:

– the content of the decision and any conditions attached thereto,

– having examined the concerns and opinions expressed by the public concerned, the main reasons and considerations on which the decision is based, including information about the public participation process,

– a description, where necessary, of the main measures to avoid, reduce and, if possible, offset the major adverse effects.

2. The competent authority or authorities shall inform any Member State which has been consulted pursuant to Article 7, forwarding to it the information referred to in paragraph 1 of this Article.

The consulted Member States shall ensure that that information is made available in an appropriate manner to the public concerned in their own territory.'

11 Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, states as follows:

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

(a) having a sufficient interest, or alternatively

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

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

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

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

12 Annex II to Directive 85/337 as amended by Directive 97/11 lists the projects subject to Article 4(2) of that amended directive. Under the heading 'Infrastructure projects', point 10(e) of that annex covers the construction of roads, harbours and port installations, including fishing harbours (projects not included in Annex I).

Directive 96/61/EC

13 In accordance with Article 2(13) and (14) of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26), as amended by Article 4(1) of Directive 2003/35:

'13. "the public" shall mean one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

14. "the public concerned" shall mean the public affected or likely to be affected by, or having an interest in, the taking of a decision on the issuing or the updating of a permit or of permit conditions; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.'

14 Article 15(1) and (5) of Directive 96/61, as amended by Article 4(3) of Directive 2003/35, states as follows:

'1. Member States shall ensure that the public concerned are given early and effective opportunities to participate in the procedure for:

– issuing a permit for new installations,

– issuing a permit for any substantial change in the operation of an installation,

– updating of a permit or permit conditions for an installation in accordance with Article 13, paragraph 2, first indent.

The procedure set out in Annex V shall apply for the purposes of such participation.

…

5. When a decision has been taken, the competent authority shall inform the public in accordance with the appropriate procedures and shall make available to the public the following information:

(a) the content of the decision, including a copy of the permit and of any conditions and any subsequent updates; and

(b) having examined the concerns and opinions expressed by the public concerned, the reasons and considerations on which the decision is based, including information on the public participation process.'

15 Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, provides:

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

(a) having a sufficient interest, or alternatively,

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

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

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(14) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

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

National legislation

16 According to the combined provisions of section 176 of the Planning and Development Act 2000 (No 30/2000), as amended by the Planning and Development (Strategic Infrastructure) Act 2006 (No 27/2006, S.I. No 525/2006) ('the PDA'), and Schedule 5 to the Planning and Development Regulations 2001 (S.I. No 600/2001), an environmental impact statement and an environmental impact assessment are mandatory in respect of certain projects where the thresholds specified are exceeded, but private roads development is not identified as a discrete category of project.

17 Judicial review is governed by Order 84 of the Rules of the Superior Courts. Those courts have jurisdiction to review, subject to certain conditions, the decisions of lower courts and administrative bodies.

18 Both public-law and private-law remedies are available in judicial review proceedings. The traditional public law remedies relate to review of whether those lower courts or bodies have acted in excess or abuse of jurisdiction and to supervision of the exercise of their jurisdiction.

19 Judicial review is a two-stage process. An application for leave to bring judicial review proceedings must be made to the court, accompanied by a statement of grounds identifying the relief sought and an affidavit setting out the facts relied on. If leave is granted, the applicant can bring judicial review proceedings.

20 A specific statutory procedure applies to applications for judicial review of decisions of the competent planning authorities, which is governed by sections 50 and 50A of the PDA.

21 Section 50A(3) of the PDA states:

'The Court shall not grant section 50 leave unless it is satisfied that –

(a) there are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a substantial interest in the matter which is the subject of the application, or

(ii) where the decision or act concerned relates to a development identified in or under regulations made under section 176, for the time being in force, as being development which may have significant effects on the environment, the applicant —

(I) is a body or organisation (other than a State authority, a public authority or governmental body or agency) the aims or objectives of which relate to the promotion of environmental protection,

(II) has, during the period of 12 months preceding the date of the application, pursued those aims or objectives, and

(III) satisfies such requirements (if any) as a body or organisation, if it were to make an appeal under section 37(4)(c), would have to satisfy by virtue of section 37(4)(d)(iii) (and, for this purpose, any requirement prescribed under section 37(4)(e)(iv) shall apply as if the reference in it to the class of matter into which the decision, the subject of the appeal, falls were a reference to the class of matter into which the decision or act, the subject of the application for section 50 leave, falls).'

22 Section 50A(4) of the PDA specifies that the substantial interest required is not limited to an interest in land or other financial interest.

23 Section 50A(10) and (11)(b) of the PDA require the court, in determining applications, to act as expeditiously as possible consistent with the administration of justice. Section 50A(12) of the PDA allows for additional rules to be adopted to expedite the procedure.

The pre-litigation procedure

24 The Commission has combined, in the present action, complaints raised in two pre-litigation procedures.

25 First, in 2001 the Commission registered a complaint against Ireland concerning damage to a coastal wetland at Commogue Marsh, Kinsale, County Cork caused by a private road project. On 18 October 2002, the Commission sent a letter of formal notice to Ireland, indicating that it appeared that no consent for the project in question had been granted and that no prior environmental impact assessment had been carried out despite the sensitivity of the site, contrary to the requirements of Directive 85/337 as amended by Directive 97/11.

26 Ireland replied to that letter of formal notice on 5 March 2003, pointing out that the project at issue was a part of a development for which consent had been given.

27 As the Commission was not satisfied with that reply, it issued a reasoned opinion on 11 July 2003, calling on Ireland to take the necessary measures to comply with Directive 85/337 as amended by Directive 97/11 within two months of receipt of that opinion.

28 By letter of 9 September 2003, Ireland requested an extension of the two-month time-limit for reply to the reasoned opinion. Ireland replied to the reasoned opinion by letter of 10 November 2003.

29 Secondly, the Commission sent a letter of formal notice to Ireland on 28 July 2005 concerning the transposition of Directive 2003/35, inviting Ireland to submit its observations within two months of receipt of that letter.

30 Ireland replied by letter of 7 September 2005, in which it admitted that it had only partially transposed Directive 2003/35.

31 The Commission issued a reasoned opinion on 19 December 2005, calling on Ireland to take the necessary measures to comply with that directive within two months of receipt of that opinion.

32 By letter of 14 February 2006, Ireland indicated that transposition measures were in preparation.

33 On 18 October 2006, the Commission issued an additional reasoned opinion calling on Ireland to adopt the necessary measures to comply with that opinion within two months of receipt. Ireland replied on 27 February 2007, outside the time-limit prescribed by the Commission.

34 As it was not satisfied with Ireland's replies in the course of those two pre-litigation procedures, the Commission brought the present action pursuant to the second paragraph of Article 226 EC.

The action

35 The Commission's action is based on two complaints.

The first complaint

Arguments of the parties

36 The Commission considers that the construction of a private road constitutes an infrastructure project that falls within point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11 and that, as a consequence, the Irish authorities are bound, in accordance with Article 2 of that amended directive, to ensure that, before consent is given, such projects are made subject to an assessment with regard to their effects on the environment if it is considered that they are likely to have significant effects on the environment.

37 In limiting the need to carry out an environmental impact assessment to public road projects proposed by public authorities, the Irish legislation thus fails to take account of Community requirements.

38 Ireland contends that private road construction development which, it does not dispute, falls within point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11, almost invariably forms an integral part of other developments which, for their part, are subject to the requirement of an environmental impact assessment under the combined provisions of Article 176 of the PDA and Schedule 5 to the Planning and Development Regulations 2001 if they are likely to have significant effects on the environment.

39 Ireland accepts, moreover, that Directive 85/337 as amended by Directive 97/11 makes no distinction between public and private road projects, and it indicates its intention to amend its legislation so as to include road development as a stand-alone category subject to an environmental impact assessment if the road development is likely to have significant effects on the environment.

Findings of the Court

40 Pursuant to Article 4(2) of Directive 85/337 as amended by Directive 97/11, the Member States are to determine, for projects in the classes listed in Annex II to that amended directive, through a case-by-case examination, or thresholds or criteria, whether those projects are to be made subject to an environmental impact assessment in accordance with Articles 5 to 10 of that directive. According to that same provision, the Member States may also decide to apply both procedures.

41 Although the Member States have thus been allowed a measure of discretion in specifying certain types of projects which will be subject to an assessment or to establish the criteria and/or thresholds applicable, the limits of that discretion are to be found in the obligation set out in Article 2(1) of Directive 85/337 as amended by Directive 97/11 that projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment are to be subject to an impact assessment (see Case C-72/95 *Kraaijeveld and Others*[1996] ECR I-5403, paragraph 50; Case C-2/07 *Abraham and*

Others [2008] ECR I-1197, paragraph 37; and Case C-75/08 *Mellor* [2009] ECR I-0000, paragraph 50).

42 In that regard, the Court has already held that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of that amended directive unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see *Kraaijeveld and Others*, paragraph 53, and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 38).

43 Among the projects subject to Article 4(2) of Directive 85/337 as amended by Directive 97/11, point 10(e) of Annex II to that amended directive refers to 'construction of roads'.

44 In that regard, by subjecting private road construction development to an environmental impact assessment only if that development formed part of other developments coming within the scope of Directive 85/337 as amended by Directive 97/11 and themselves subject to the assessment obligation, the Irish legislation, as applicable when the time-limit set in the reasoned opinion expired, meant that any private road construction development carried out in isolation could avoid an environmental impact assessment, even if the development was likely to have significant effects on the environment.

45 It should also be pointed out that a criterion relating to the private or public nature of the road is irrelevant as regards the applicability of point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11.

46 Therefore, the first complaint is well founded.

The second complaint

47 It is apparent from the most recent of the Commission's written pleadings that, in its view, and having regard to the withdrawal of the complaints concerning Article 4(1), (5) and (6) of Directive 2003/35, Ireland's transposition of Article 3(1) and (3) to (7) and Article 4(2) to (4) of that directive remains incomplete, as a result of which there is a failure to fulfil obligations under Article 6 of that directive.

48 In addition, the Commission takes the view that, in any event, Ireland did not communicate within the prescribed time-limit the provisions which were deemed to implement the aforementioned articles, contrary to the requirements of Article 6.

49 The second complaint, considered in its various parts, as pleaded in essence by the Commission, thus relates exclusively – as the Commission, moreover, confirmed at the hearing – to the failure to transpose certain provisions of Directive 2003/35, without any criticism of the quality of transposition, and, consequently, no such criticism may properly be raised by the Commission in the context of this case.

50 Moreover, it should be noted that the provisions of the PDA referred to in the present action are those which result from amendments introduced by the amending Act of 2006, mentioned in paragraph 16 of this judgment. Those provisions, as the Advocate General noted in point 53 of her Opinion, entered into force on 17 October 2006, that is to say, before the expiry of the time-limit laid down in the additional reasoned opinion.

The requirement to transpose the provisions of Article 3(1) of Directive 2003/35

– Arguments of the parties

51 As regards Article 3(1) of Directive 2003/35, the Commission claims that the Irish authorities must adopt measures to ensure that domestic legislation does not treat the concepts of ‘the public’ and ‘the public concerned’ more narrowly than Directive 2003/35. It points out, in particular, that the rights conferred on non-governmental organisations are not sufficiently guaranteed, as is apparent from the case-law, although that directive confers on such non-governmental organisations certain rights as being among the public concerned.

52 Ireland counters that, in the light of the general obligation to interpret national law in accordance with the provisions of Community law which applies, in particular, to the courts, it is not necessary to introduce legislative definitions of ‘the public’ and ‘the public concerned’ in order to give full effect to those definitions. It adds that the newly-created rights are already guaranteed to all of the public and that it is not, therefore, necessary to give a specific definition of ‘the public concerned’.

53 Ireland also contends that, pursuant to section 50A(3)(b)(ii) of the PDA, non-governmental organisations promoting the environment are exempted from the requirement to demonstrate that they have a substantial interest.

– Findings of the Court

54 It should be recalled that, according to settled case-law, the transposition of a directive into domestic law does not necessarily require the provisions of the directive to be enacted in precisely the same words in a specific, express

provision of national law and a general legal context may be sufficient if it actually ensures the full application of the directive in a sufficiently clear and precise manner (see, inter alia, Case C-214/98 *Commission* v *Greece*[2000] ECR I-9601, paragraph 49; Case C-38/99 *Commission* v *France* [2000] ECR I-10941, paragraph 53; and Case C-32/05 *Commission* v *Luxembourg* [2006] ECR I-11323, paragraph 34).

55 It follows from an equally consistent line of case-law that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, inter alia, Case C-197/96 *Commission* v*France* [1997] ECR I-1489, paragraph 15; Case C-207/96 *Commission* v *Italy* [1997] ECR I-6869, paragraph 26; and *Commission* v *Luxembourg*, paragraph 34).

56 In the light of the purpose of Article 3(1) of Directive 2003/35, which is to add definitions to those appearing in Article 1(2) of Directive 85/337, and in particular to indicate, for the purposes of the latter directive, what is to be meant by 'the public concerned' and, whereas, at the same time, Directive 2003/35 accords new rights to that public, it cannot be concluded from Ireland's failure to reproduce those definitions in its legislation expressly that Ireland has not fulfilled its obligation to transpose the provisions in question.

57 The scope of the new definition of 'the public concerned' thus introduced by Directive 2003/35 can be assessed, as the Advocate General stated in points 36 and 37 of her Opinion, only with regard to all of the rights which that directive accords to 'the public concerned', since those two aspects are indissociable.

58 In that regard, the Commission does not establish to what extent 'the public concerned', understood as the public affected or likely to be affected by, or having an interest in, environmental decision-making procedures, does not have the rights which it is deemed to enjoy under the amendments introduced by Directive 2003/35.

59 Lastly, it should be pointed out that the Commission's arguments relating to the construal, in the case-law, of the role of non-governmental organisations promoting the environment as belonging to 'the public concerned' deal, primarily, with possible defects in the effective implementation of the rights which those organisations may rely on, in particular in judicial review proceedings, and are, consequently, outside the scope of the complaint before the Court alleging, solely, a failure to transpose.

60 It follows from the foregoing that the second complaint, in so far as it concerns the transposition of Article 3(1) of Directive 2003/35, is unfounded.

The requirement to transpose Articles 3(3) to (6), and 4(2) and (3), of Directive 2003/35

– Arguments of the parties

61 According to the Commission, Article 3(3) to (6), and Article 4(2) and (3), have not been fully transposed.

62 As regards those provisions, Ireland contends that there has been transposition in so far as the planning consent system is concerned, but it accepts that it was still necessary, when the time-limit prescribed in the additional reasoned opinion elapsed, to transpose those provisions by adopting legislative measures in relation to other consent procedures.

63 As regards Article 4(2) and (3) of that directive, Ireland recognises that it still had to adopt and notify certain measures in relation to full transposition of those provisions when the time-limit prescribed in that reasoned opinion elapsed.

– Findings of the Court

64 It must be borne in mind that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation in that Member State as it stood at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7, and Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9).

65 It is not in dispute that, by the end of the period laid down in the additional reasoned opinion, Ireland had not adopted the laws, regulations and administrative provisions necessary to ensure full transposition of Article 3(3) to (6), and Article 4(2) and (3), of Directive 2003/35. Furthermore, and in accordance with settled case-law, any subsequent changes once the action for failure to fulfil obligations has been lodged cannot be taken into consideration by the Court (see, inter alia, Case C-211/02 *Commission* v *Luxembourg*[2003] ECR I-2429, paragraph 6).

66 In so far as it concerns the failure to transpose Article 3(3) to (6) and Article 4(2) and (3) of Directive 2003/35, the second complaint is therefore well founded.

The requirement to transpose Articles 3(7) and 4(4) of Directive 2003/35

– Arguments of the parties

67 The Commission claims that Ireland did not transpose the requirements arising out of Articles 3(7) and 4(4) of Directive 2003/35, those provisions having inserted, respectively, Article 10a into Directive 85/337 and Article 15a into Directive 96/61. The Commission puts forward five arguments in support of this part of the second complaint.

68 By its first argument, which concerns the concept of sufficient interest in Article 3(7) and Article 4(4) of Directive 2003/35, the Commission asserts that the criterion that a 'substantial interest' must be established in the context of the specific statutory procedure for applying for judicial review of decisions of competent planning authorities laid down in Section 50 of the PDA does not correspond to the 'sufficient interest' criterion in Directive 2003/35.

69 The setting of such a criterion – stricter than that used in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, – amounts, according to the Commission, to non transposition of the requirements laid down in Directive 2003/35.

70 Lastly, the Commission points out that two judgments of the Irish High Court handed down in the *Friends of the Curragh Environment Ltd* case on 14 July 2006 and 8 December 2006 show that the system of judicial review in force in Ireland cannot be regarded as implementing Directive 2003/35, since the High Court stated, in the second of those judgments, in relation to the assessment of 'substantial interest', that that directive had not yet been implemented in Irish law.

71 Ireland contests the relevance of those High Court judgments, inasmuch as they were dealing, primarily, with the issue of the direct effect of Directive 2003/35.

72 It adds that the judgment handed down by the High Court on 26 April 2007 in the*Sweetman* case established, on the contrary, that the abovementioned provisions of that directive are implemented by the judicial review procedure, supplemented by specific procedural rules laid down in certain legislation, in particular section 50 of the PDA, since the criterion of substantial interest was held by the judge to be flexible and not inconsistent with Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35.

73 By its second argument, the Commission claims that Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, have

not been transposed, on the ground that, contrary to the first paragraph in each of those articles, the requirement that an applicant must be able to challenge the substantive legality of decisions, acts or omissions subject to the public participation provisions in each of the directives has not been transposed into Irish law.

74 Ireland contends, in that regard, that those articles do not require provision to be made for an exhaustive review of the merits of a decision, but merely require that it be possible to contest the substantive legality of a decision. Such a form of review is provided for under Irish law.

75 Ireland also asserts that the requirements laid down in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, are fully implemented into Irish law by reason of the existence of the judicial review procedure available before Irish courts. The purpose of judicial review is to provide a form of review of decisions made and actions taken by courts and administrative bodies, to ensure that the functions conferred on such authorities have been carried out correctly and legally.

76 In addition, according to Ireland, a specific statutory judicial review procedure applies to challenges to decisions of the competent planning authorities, which is governed by sections 50 and 50A of the PDA.

77 The Commission claims, in its third argument, that no measure has been taken by Ireland to ensure transposition of the requirement of timeliness, laid down in Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in Article 15a of Directive 96/61, inserted by Article 4(4) Directive 2003/35.

78 In its fourth argument, the Commission raises the same failure to transpose as regards the requirement that any such procedure must not be prohibitively expensive, pointing out that, in relation to costs, there is no applicable ceiling as regards the amount that an unsuccessful applicant will have to pay, as there is no legal provision which refers to the fact that the procedure will not be prohibitively expensive.

79 According to Ireland, the existing procedures are fair, equitable and not prohibitively expensive. They enable, furthermore, the decisions referred to in Directives 83/337 and 96/61, as amended by Directive 2003/35, to be reviewed in a timely manner.

80 Lastly, by its fifth argument, the Commission criticises Ireland for not having made available to the public practical information on access to administrative and judicial review procedures, as required by the sixth

paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35.

81 Ireland takes the view that it has fulfilled that obligation, since Order 84 of the Rules of the Superior Courts, referred to in paragraph 17 of this judgment, is a statutory provision and there is, in addition, a website for the Courts Service of Ireland which describes the different courts and the limits of their jurisdiction, and allows for access to High Court judgments.

– Findings of the Court

82 As regards the first argument relating to sufficient interest, it is clear from paragraphs (a) and (b) of the first paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and from paragraphs (a) and (b) of the first paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the Member States must ensure that, in accordance with the relevant national legal system, members of the public concerned having a sufficient interest, or alternatively, maintaining the impairment of a right, where the administrative procedural law of a Member State requires this as a precondition, have access to a review procedure under the conditions specified in those provisions, and must determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice.

83 It is not in dispute that, by enabling applicants who are members of 'the public concerned' and who can claim an interest meeting the conditions laid down in section 50A(3) of the PDA to challenge certain planning measures, Ireland has adopted provisions under which the right of access to justice in that particular area depends directly on those applicants' interest, as the Advocate General points out in point 57 of her Opinion.

84 In that regard, inasmuch as, as has been stated in paragraph 49 of this judgment, the Commission disputes only the failure to transpose certain provisions – having moreover expressly stated that it did not mean to allege incorrect or incomplete transposition – there is no need to ascertain whether the criterion of substantial interest as applied and interpreted by the Irish courts corresponds to the sufficient interest referred to in Directive 2003/35, as that would lead to calling into question the quality of the transposition having regard, in particular, to the competence of the Member States recognised by that directive to determine what constitutes a sufficient interest consistently with the objective which that directive pursues.

85 Furthermore, the second judgment of the High Court in *Friends of the Curragh Environment Ltd*, to which the Commission principally refers, was

handed down under the legislation applicable prior to the amendments made to the PDA in 2006 and it is not, in any event, enough to prove the alleged failure to transpose.

86 The first argument is therefore unfounded.

87 In relation to the second argument, it is common ground that in Irish law, apart from the specific statutory procedure applicable pursuant to sections 50 and 50A of the PDA, there is judicial review governed by Order 84 of the Rules of the Superior Courts. In those review procedures applicants can ask for decisions or acts to be quashed in the context of supervision in relation to decisions and actions taken by lower courts and administrative bodies to ensure that the functions conferred on those authorities are carried out legally.

88 The various procedures thus established for judicial review are applicable to decisions, acts or omissions subject to the public participation provisions in Directives 85/337 and 96/61 as amended by Directive 2003/35, inter alia, in the specific area of planning, and may therefore be considered to constitute transposition of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, inasmuch as they require that the applicant be able to challenge the substantive or procedural legality of such acts, decisions or omissions.

89 Since the Court does not have before it a complaint alleging incorrect transposition of those provisions, it cannot examine the arguments submitted by the Commission relating to the extent of the review actually carried out in the context of judicial review, as shown, in particular, by the case-law of the High Court.

90 The second argument is therefore unfounded.

91 As regards the third argument relating to the failure to transpose Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, in so far as they require that the procedures should be timely, having regard to what was stated in paragraph 49 of this judgment and inasmuch as it follows from sections 50A(10) and (11)(b) of the PDA that the courts having jurisdiction must determine applications as expeditiously as possible consistent with the administration of justice, that argument is therefore unfounded.

92 As regards the fourth argument concerning the costs of proceedings, it is clear from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, that the procedures established in the context of

those provisions must not be prohibitively expensive. That covers only the costs arising from participation in such procedures. Such a condition does not prevent the courts from making an order for costs provided that the amount of those costs complies with that requirement.

93 Although it is common ground that the Irish courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party, that is merely a discretionary practice on the part of the courts.

94 That mere practice which cannot, by definition, be certain, in the light of the requirements laid down by the settled case-law of the Court, cited in paragraphs 54 and 55 of this judgment, cannot be regarded as valid implementation of the obligations arising from Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35.

95 The fourth argument is thus well founded.

96 As regards the fifth argument, it must be borne in mind that one of the underlying principles of Directive 2003/35 is to promote access to justice in environmental matters, along the lines of the Århus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

97 In that regard, the obligation to make available to the public practical information on access to administrative and judicial review procedures laid down in the sixth paragraph of Article 10a of Directive 85/337, inserted by Article 3(7) of Directive 2003/35, and in the sixth paragraph of Article 15a of Directive 96/61, inserted by Article 4(4) of Directive 2003/35, amounts to an obligation to obtain a precise result which the Member States must ensure is achieved.

98 In the absence of any specific statutory or regulatory provision concerning information on the rights thus offered to the public, the mere availability, through publications or on the internet, of rules concerning access to administrative and judicial review procedures and the possibility of access to court decisions cannot be regarded as ensuring, in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.

99 The fifth argument must thus be upheld.

100 It follows from the foregoing that the second complaint, in so far as it concerns the requirement to transpose Articles 3(7) and 4(4) of Directive 2003/35 is, in its fourth and fifth arguments, well founded.

Failure to comply with the first paragraph of Article 6 of Directive 2003/35, inasmuch as the obligation to inform the Commission was not fulfilled

– Arguments of the parties

101 The Commission claims that the information provided to it by Ireland in relation to the transposition of the provisions of Directive 2003/35 which introduced Article 10a of Directive 85/337 and Article 15a of Directive 96/61 is not sufficient.

102 It argues, in that regard, that Ireland did not draw to its attention the case-law establishing access for the public concerned to judicial review, or the precise legislative texts that show that the rights and obligations laid down in those provisions have been transposed, in particular as regards the requirement for a fair, equitable, timely and not prohibitively expensive judicial review procedure.

103 It adds that it was not informed of the relevant national case-law regarding, specifically, the use of review procedures in relation to Directive 2003/35, and in particular, that Ireland itself did not send it the judgments handed down by the High Court in the *Friends of the Curragh Environment Ltd* case, which were provided to the Commission by a separate source.

104 Ireland accepts that it has not fully complied with the obligation to inform the Commission laid down in Article 6 of Directive 2003/35. It nevertheless points out that, in so far as Articles 3(7) and 4(4) of that directive were already transposed by existing statutory provisions, it was not obliged to notify those provisions.

– Findings of the Court

105 It should be recalled that, while, in proceedings under Article 226 EC for failure to fulfil obligations, it is incumbent upon the Commission to prove the allegation and to place before the Court the information needed to enable the Court to establish that an obligation has not been fulfilled, in doing which the Commission may not rely on any presumption, it is also for the Member States, under Article 10 EC, to facilitate the achievement of the Commission's tasks, which consist in particular, pursuant to Article 211 EC, in ensuring that the provisions of the EC Treaty and the measures taken by the institutions pursuant thereto are applied (see, inter alia, Case C-408/97 *Commission* v *Netherlands* [2000] ECR I-6417, paragraphs 15 and

16, and Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 26).

106 For the purposes set out in that case-law, Article 6 of Directive 2003/35, like other directives, imposes upon the Member States an obligation to provide information.

107 The information which the Member States are thus obliged to supply to the Commission must be clear and precise. It must indicate unequivocally the laws, regulations and administrative provisions by means of which the Member State considers that it has satisfied the various requirements imposed on it by the directive. In the absence of such information, the Commission is not in a position to ascertain whether the Member State has genuinely implemented the directive completely. The failure of a Member State to fulfil that obligation, whether by providing no information at all or by providing insufficiently clear and precise information, may of itself justify recourse to the procedure under Article 226 EC in order to establish the failure to fulfil the obligation (see Case C-456/03 *Commission* v *Italy*, paragraph 27).

108 Moreover, although the transposition of a directive may be carried out by means of domestic legal rules already in force, the Member States are not, in that event, absolved from the formal obligation to inform the Commission of the existence of those rules so that it can be in a position to assess whether the rules comply with the directive (see, to that effect, Case C-456/03 *Commission* v *Italy*, paragraph 30).

109 In the present case, in so far as the law already in force was deemed to ensure, by itself, the implementation of the provisions of Directive 2003/35 relating to access to justice in environmental matters, it was for Ireland to inform the Commission of the laws or regulations in question, and it cannot properly argue that it had previously notified the Commission of those domestic legal rules in the context of the transposition of Directives 85/337 and 96/61 as applicable before the amendments introduced by Directive 2003/35.

110 Since it claimed that transposition had been confirmed by the case-law of its national courts, in particular, that of the High Court, it was also for Ireland to communicate to the Commission a precise summary of that case-law, thus enabling the Commission to ascertain whether Ireland had indeed implemented Directive 2003/35 solely by virtue of applying national law as it existed before that directive entered into force, and to carry out its task of supervision under the Treaty.

111 Consequently, the second complaint is well founded in so far as it concerns infringement of the obligation to inform the Commission.

112 Therefore, having regard to all of the foregoing considerations, it must be held that

– by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337 as amended by Directive 97/11, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category covered by point 10(e) of Annex II to Directive 85/337 as amended by Directive 97/11 are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of that amended directive, and

– by failing to adopt the laws, regulations and administrative provisions necessary to comply with Articles 3(3) to (7) and 4(2) to (4) of Directive 2003/35, and by failing to adequately notify such provisions to the Commission,

Ireland has failed to fulfil its obligations under Directive 85/337, as amended by Directive 97/11, and Article 6 of Directive 2003/35.

113 The remainder of the action is dismissed.

Costs

114 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Under Article 69(3) of those rules, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, the Court may order that the costs be shared or that the parties bear their own costs.

115 In the present dispute, while the Commission has requested that Ireland be ordered to pay the costs, account must be taken of the fact that a substantial number of the applicant's complaints were unsuccessful. Therefore, each of the parties will be ordered to bear its own costs.

On those grounds, the Court (Second Chamber) hereby:

1. Declares that

– by failing to adopt, in conformity with Article 2(1) and Article 4(2) to (4) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3

March 1997, all measures to ensure that, before consent is given, projects likely to have significant effects on the environment in the road construction category, covered by point 10(e) of Annex II to Directive 85/337, as amended by Directive 97/11, are made subject to a requirement for development consent and to an assessment with regard to their effects in accordance with Articles 5 to 10 of that directive, and

– **by failing to adopt the laws, regulations and administrative provisions necessary to comply with Article 3(3) to (7) and Article 4(2) to (4) of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, and by failing to adequately notify such provisions to the Commission of the European Communities,**

Ireland has failed to fulfil its obligations under Directive 85/337, as amended by Directive 97/11, and Article 6 of Directive 2003/35;

2. Dismisses the action as to the remainder;

3. Orders the Commission of the European Communities and Ireland to bear their own costs.

[Signatures]

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* Language of the case: English.

JUDGMENT OF THE COURT (Second Chamber)

10 December 2009 (*)

(Reference for a preliminary hearing – Article 234 EC – Concept of 'national court or tribunal' – Admissibility – Directive 85/337/EEC – Environmental impact assessment – Construction of overhead electrical power lines – Length of more than 15 km – Transboundary constructions – Transboundary power line – Total length exceeding the threshold – Line mainly situated in the territory of a neighbouring Member State – Length of national section below the threshold)

In Case C-205/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Umweltsenat (Austria), made by decision of 2 April 2008, received at the Court on 15 May 2008, in the proceedings

Umweltanwalt von Kärnten

v

Kärntner Landesregierung,

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting for the President of the Second Chamber, C.W.A. Timmermans, K. Schiemann, P. Kūris (Rapporteur) and L. Bay Larsen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Umweltanwalt von Kärnten, by U. Scheuch, Landesrat,

– Alpe Adria Energia SpA, by M. Mendel, Rechtsanwalt,

– the European Commission, by J.-B. Laignelot and B. Kotschy, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 June 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17, 'Directive 85/337').

2 The reference was made in the context of an action between Umweltanwalt von Kärnten (Environment ombudsman of Carinthia, 'the Umweltanwalt') and the Kärntner Landesregierung (Government of the Province of Carinthia) concerning a decision which the latter adopted on 11 October 2007 ('the contested decision') in regard to Alpe Adria Energia SpA ('Alpe Adria').

Legal context

Community legislation

3 According to the first recital in its preamble, Directive 85/337 seeks to prevent pollution and other damage to the environment by making certain public and private projects subject to prior assessment of their environmental effects.

4 As is clear from the fifth recital, to that end, the Directive introduces general principles for the assessment of environmental effects with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment.

5 The eighth and eleventh recitals in the preamble to Directive 85/337 state that certain types of projects have significant effects on the environment and must as a rule be subject to systematic assessment in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life.

6 Article 1(1) of Directive 85/337 provides as follows:

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

7 Article 2(1) of the Directive is worded as follows:

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

8 Article 4 of the Directive provides that:

‘… projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10’.

9 Article 7(1) of Directive 85/337 provides:

‘Where a Member State is aware that a project is likely to have significant effects on the environment in another Member State or where a Member State likely to be significantly affected so requests, the Member State in whose territory the project is intended to be carried out shall send to the affected Member State as soon as possible and no later than when informing its own public, inter alia:

(a) a description of the project, together with any available information on its possible transboundary impact;

(b) information on the nature of the decision which may be taken,

and shall give the other Member State a reasonable time in which to indicate whether it wishes to participate in the environmental decision-making procedures referred to in Article 2(2), and may include the information referred to in paragraph 2 of this Article.’

10 Point 20 of Annex I to the Directive refers to ‘Construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km’.

National legislation

11 Article 11(7) of the Bundesverfassungsgesetz (Federal Law on the Constitution, ‘BVG’) provides that it is for the Umweltsenat (Environment Tribunal) to take decisions concerning the assessment of the environmental effects of those projects which are likely to have significant effects on the

environment once levels of executive review in each province have been exhausted.

12 According to that article, the Umweltsenat is an independent body composed of the chairman, judges and other legally qualified members, and is instated at the competent Federal Ministry. The establishment, responsibilities and procedure of the Umweltsenat are to be regulated by federal law. Its decisions are not be open to annulment or variation on appeal; an application to the Verwaltungsgerichtshof (Higher Administrative Court) is admissible.

13 Article 20(2) of the BVG reads as follows:

‘Where, by means of Federal law or the law of a Province, a collegiate authority comprising at least one member of the judiciary is established to decide matters at last instance and it is provided by law that its decisions may not be annulled or varied by administrative procedure, the other members of the authority are also not bound by any directions in the performance of their duties.’

14 Article 133(4) of the BVG provides for an exception to the rule conferring jurisdiction in general on the Verwaltungsgerichtshof to hear appeals against decisions adopted by the various public administrations, to the effect that independent bodies may hear such appeals in specified domains. The Umweltsenat is one such body.

15 Paragraph 1 of the Bundesgesetz über den Umweltsenat 2000 (Federal Law on the Umweltsenat 2000; ‘USG 2000’) provides as follows:

‘(1) An Umweltsenat shall be set up at the Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft (Federal Ministry of Agriculture, Forestry, the Environment and Water Management).

(2) The Umweltsenat shall consist of 10 judges and a further 32 legally qualified members.

…’

16 Paragraph 2 of the USG 2000 provides that the members are to be appointed by the Federal President upon proposal of the Federal Government for a term of six years and may be re-appointed. In addition, the Federal Government is bound by certain proposals for appointment.

17 According to Paragraph 4 of the USG 2000:

‘Members of the Umweltsenat shall carry out their functions independently and are not bound by any directions.’

18 Paragraph 5 of the USG 2000 provides:

‘The Umweltsenat shall rule on appeals in matters set out in the first and second chapters of the Law on environmental impact assessments 2000 (Umweltverträglichkeitsprüfungsgesetz 2000 (BGBl No 697/1993), last amended by BGBl I 149/2006, “UVP-G 2000”) …’

19 Paragraph 6 of the USG 2000 states:

‘Decisions handed down by the Umweltsenat may not be annulled or varied by administrative action. An application to the Verwaltungsgerichtshof shall be admissible.’

20 According to Paragraph 2(2) of the UVP-G 2000, which transposed Directive 85/337 into Austrian law, a ‘project’ is defined as:

‘the construction of an installation or other intervention in the natural surroundings and landscape including all measures connected in geographical and factual terms …’.

21 Paragraph 3(1) of the UVP-G 2000 provides that:

‘The projects listed in Annex I … shall undergo an environmental impact assessment in accordance with the following provisions. The simplified procedure shall be applied to projects that are listed in columns 2 and 3 of Annex I …’

22 Paragraph 3(7) of the UVP-G 2000 provides that:

‘On application of the candidate for the project, an authority with which it is cooperating or the environment ombudsman [Umweltanwalt], the authority shall determine whether an environmental impact assessment is to be carried out for a particular project under this federal law and what objective in Annex I or Paragraph 3a(1) to (3) is attained by the project. That finding may also be made of the authority’s own motion. The decision shall be adopted by notice within six weeks, both at first and at second instance. The candidate for the project, the cooperating authority, the environment ombudsman and the municipality concerned shall be considered parties. The water planning body shall be heard before the decision is adopted. The essential content of, and grounds for, decisions shall be published by the authority in an adequate fashion or be open to consultation by the public. The municipality concerned may bring an action against the decision before the Verwaltungsgerichtshof. The environment ombudsman and the cooperating authority have no obligation to reimburse expenses.’

23 Annex I to the UVP-G 2000 sets out the projects for which an environmental impact assessment is required under Paragraph 3 thereof. They are divided into three groups (columns). Projects in the first two groups (columns) always require an environmental impact assessment if the thresholds are reached and the criteria laid down are fulfilled. Projects in the third group (column) must be assessed individually once the minimum threshold stated has been reached.

24 Point 16(a) of Annex I to the UVP-G 2000 refers, in column 1, to '[o]verhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km'.

25 Point 16(b) of Annex I to the UVP-G 2000 refers, in column 3, to '[o]verhead electrical power lines in category A [special conservation areas] or B [Alpine regions] protected areas with a voltage of 110 kV or more and a length of more than 20 km'.

The main proceedings and the question referred to the Court

26 The order for reference indicates that Alpe Adria is an Italian undertaking which is seeking to construct a 220 kV power line with a power rating of 300 MVA to connect the Italian Rete Elettrica Nazionale SpA network and the Austrian VERBUND-Austrian Power Grid AG network.

27 To that end, by letter of 12 July 2007, Alpe Adria applied to the Kärntner Landesregierung for the issue of a determination under Paragraph 3(7) of the UVP-G 2000 for the construction and operation of that project. In Austrian territory, the project comprises an overhead power line approximately 7.4 kilometres long with a switching substation to be constructed in Weidenburg extending up to the State border through the Kronhofgraben via the Kronhofer Törl. The length of the project on Italian territory is approximately 41 kilometres.

28 The Kärntner Landesregierung determined, in the contested decision, that no environmental impact assessment was required for the project at issue because the length of the Austrian part of the project did not reach the minimum 15 kilometre threshold stipulated in the UVP-G 2000.

29 It added that, if a project is likely to have significant effects on the environment in another Member State, Article 7 of Directive 85/337 requires the Member States in whose territory the project is intended to be carried out to include that other Member State in the environmental impact assessment procedure. However, that article applied only to projects situated entirely in the territory of one Member State and did not apply to transboundary projects.

30 Consequently, in the absence of any specific provision concerning transboundary projects in Directive 85/337, each Member State was required to assess, on the basis solely of its national law, whether a project was subject to Annex I of the Directive.

31 The Kärntner Landesregierung went on to state that the UVP-G 2000 did not contain any provision according to which the entire length of transboundary power line routes and other line-based projects was to be taken into consideration.

32 By application lodged at the Umweltsenat on 18 December 2007, the Environment ombudsman brought an action seeking the annulment of the contested decision.

33 It is against that background that the Umweltsenat decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

‘Is Council Directive 85/337 ... to be interpreted as meaning that a Member State must provide for an obligation to carry out an assessment in the case of types of projects listed in Annex I to the directive, in particular in point 20 (construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km), where the proposed scheme is to extend over the territory of two or more Member States, even if the threshold giving rise to the obligation to carry out an assessment (here, a length of 15 km) is not reached or exceeded by the part of the scheme situated on its national territory but is reached or exceeded by adding the parts of the scheme proposed to be situated in a neighbouring State?’

Admissibility of the question referred

The status of the Umweltsenat as a court or tribunal

34 As a preliminary point, it must be established whether the Umweltsenat is a court or tribunal for the purposes of Article 234 EC and, therefore, whether its question is admissible.

35 According to settled case-law, in order to determine whether the body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter parties, whether it applies rules of law and whether it is independent (Case 61/65 *Vaasen-Göbbels* [1966] ECR 261 at 273, and Case

C-195/06*Österreichischer Rundfunk* [2007] ECR I-8817, paragraph 19 and the case-law cited).

36 In that regard, it must be pointed out, first, that it is indisputably clear from the provisions of Articles 11(7), 20(2) and 133(4) of the BVG and of Paragraphs 1, 2, 4 and 5 of the USG 2000 that the Umweltsenat meets the criteria that it be established by law, be permanent and have compulsory jurisdiction, apply rules of law and be independent.

37 It must also be pointed out, as the Advocate General did in points 58 and 59 of his Opinion, that the procedure before the Umweltsenat ensures that the right of appeal rests with anyone who participated in the administrative proceedings and with the institutions referred to in the UVP-G 2000. The Umweltsenat may hold a hearing of its own motion or at the request of one of the parties and any party appearing may be represented by a lawyer. The Umweltsenat's decisions have the force of *res judicata*, they must state reasons and are delivered in open court.

38 It should also be noted that the provisions of the USG 2000 and the UVP-G 2000, read in combination with the provisions of Article 133(4) of the BVG, guarantee the inter parties nature of the proceedings before the Umweltsenat, which rules on the basis of the general provisions of the Law on administrative procedure (Verwaltungsverfahrensgesetz).

39 It is apparent from the foregoing that the Umweltsenat has to be considered to be a court or tribunal for the purposes of Article 234 EC and so its question is admissible.

The question referred

40 Alpe Adria argues that the questions of Community law which have been raised are purely hypothetical in the present case. They are not objectively necessary in order to settle the dispute in the main proceedings and bear no relation to the dispute before the national court.

41 In this respect, it must be recalled that, according to the settled case-law of the Court, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-545/07 *Apis-Hristovich* [2009] ECR I-0000, paragraph 28 and the case-law cited).

42 Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (*Apis-Hristovich*, paragraph 29 and the case-law cited).

43 In the present case, the Court has been asked to provide the national court with criteria for interpreting Directive 85/337 so as to permit it to assess whether, under Community law, the project at issue is subject to the procedural obligations laid down in the Directive, notwithstanding the fact that national law does not lay down such procedural obligations for that project.

44 Under those circumstances, the reference for a preliminary ruling must be regarded as admissible.

Substance

45 By its question, the national court is asking, essentially, whether Articles 2(1) and 4(1) of Directive 85/337 are to be interpreted as meaning that the authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even though the project is transboundary in nature and less than 15 km of it is located in the territory of that Member State.

46 First of all, it must be pointed out that a project which concerns the construction of a 220 kV electrical power line with a nominal power rating of 300 MVA and a length of 48.4 km is one of the projects covered by point 20 of Annex I to the Directive which are to be the subject of an obligatory environmental impact assessment pursuant to Articles 2(1) and 4(1) of the Directive.

47 Next, in order to answer the question put by the national court, it must be ascertained whether the Directive is to be interpreted as meaning that that obligation also applies to a transboundary project such as the one at issue in the main proceedings.

48 It must be borne in mind that, according to settled case-law, the terms used in a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must be given throughout the Community an autonomous and uniform interpretation, which must take into account the context of the provision and the purpose of the legislation in question (Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-290/03 *Barker* [2006] ECR I-3949, paragraph 40).

49 In that regard, Article 2(1) of Directive 85/337 imposes an obligation on the Member States to require that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are the subject of an assessment.

50 The Court has already held, in regard to the obligation to assess effects on the environment, that the wording of Directive 85/337 indicates that its scope is wide and its purpose very broad (Case C-72/95 *Kraaijeveld and Others* [1996] ECR I-5403, paragraphs 31 and 39).

51 It must also be pointed out that Directive 85/337 adopts an overall assessment of the effects of projects on the environment (Case C-142/07 *Ecologistas en Acción-CODA* [2008] ECR I-6097, paragraph 39 and the case-law cited) irrespective of whether the project might be transboundary in nature.

52 In addition, the Member States must implement Directive 85/337 in a manner which fully corresponds to its requirements, having regard to its fundamental objective which, as is clear from Article 2(1), is that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location should be the subject of an assessment with regard to their effects (see, to that effect, *Ecologistas en Acción-CODA*, paragraph 33).

53 Moreover, the Court has held that the purpose of Directive 85/337 cannot be circumvented by the splitting of projects and that the failure to take account of the cumulative effect of several projects must not mean in practice that they all cease to be covered by the obligation to carry out an assessment, when, taken together, they are likely to have 'significant effects on the environment' within the meaning of Article 2(1) of Directive 85/337 (see, to that effect, *Ecologistas en Acción-CODA*, paragraph 44).

54 It follows that projects listed in Annex I to Directive 85/337 which extend to the territory of a number of Member States cannot be exempted from the application of the Directive solely on the ground that it does not contain any express provision in regard to them.

55 Such an exemption would seriously interfere with the objective of Directive 85/337. Its effectiveness would be seriously compromised if the competent authorities of a Member State could, when deciding whether a project must be the subject of an environmental impact assessment, leave out of consideration that part of the project which is located in another Member State (see, by analogy, Case C-227/01 *Commission* v *Spain* [2004] ECR I-8253, paragraph 53).

56 As the Advocate General pointed out in point 81 of his Opinion, that finding is strengthened by the terms of Article 7 of Directive 85/337, which provide for inter-State cooperation when a project is likely to have significant effects on the environment in another Member State.

57 It must be stated that the fact that the section located in Austria has a length of less than 15 km cannot, in itself, cause the project to be exempt from the assessment procedure laid down in Directive 85/337. The Member State concerned must carry out an environmental impact assessment of the project in its own territory which takes account of the specific effects of that project.

58 In the light of the foregoing, Articles 2(1) and 4(1) of Directive 85/337 are to be interpreted as meaning that the competent authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even where the project is transboundary in nature and less than 15 km of it is situated on the territory of that Member State.

Costs

59 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Articles 2(1) and 4(1) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, are to be interpreted as meaning that the competent authorities of a Member State must make a project referred to in point 20 of Annex I to the Directive, such as the construction of overhead electrical power lines with a voltage of 220 kV or more and a length of more than 15 km, subject to the environmental impact assessment procedure even where the project is transboundary in nature and less than 15 km of it is situated on the territory of that Member State.

[Signatures]

* Language of the case: German.

JUDGMENT OF THE COURT (Second Chamber)

15 October 2009 (*)

(Directive 85/337/EEC – Public participation in environmental decision-making procedures – Right of access to a review procedure to challenge decisions authorising projects likely to have significant effects on the environment)

In Case C-263/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Högsta domstolen (Sweden), made by decision of 29 May 2008, received at the Court on 19 June 2008, in the proceedings

Djurgården-Lilla Värtans Miljöskyddsförening

v

Stockholms kommun genom dess marknämnd,

THE COURT (Second Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Fourth Chamber, acting as President of the Second Chamber, C. Toader, C.W.A. Timmermans, K. Schiemann and L. Bay Larsen, Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 7 May 2009,

after considering the observations submitted on behalf of:

– Djurgården-Lilla Värtans Miljöskyddsförening, by P. Schönning and G. Högberg Björck, jur kand,

– the Swedish Government, by A. Falk, K. Petkovska, C. Meyer-Seitz and S. Johannesson, acting as Agents,

– the Commission of the European Communities, by J.-B. Laignelot and P. Dejmek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 July 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of provisions of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 1985 L 156, p. 17) ('Directive 85/337').

2 The reference was made in the course of proceedings between the Djurgården-Lilla Värtans Miljöskyddsförening (the Djurgården-Lilla Värtans association for environmental protection) ('the Miljöskyddsförening') and Stockholms kommun genom dess marknämnd (Municipality of Stockholm).

Legal background

Community law

Directive 2003/35

3 Article 1 of Directive 2003/35 is worded as follows:

'The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention [on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1)], in particular by:

(a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

(b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.'

Directive 85/337

4 Article 1(2) of Directive 85/337 provides:

'For the purposes of this Directive:

…

“the public” means:

one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

“the public concerned” means:

the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.’

5 Under Article 2 of Directive 85/337:

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

2. The environmental impact assessment may be integrated into the existing procedures for consent to projects in the Member States, or, failing this, into other procedures or into procedures to be established to comply with the aims of this Directive.

…

3. Without prejudice to Article 7, Member States may, in exceptional cases, exempt a specific project in whole or in part from the provisions laid down in this Directive.

In this event, the Member States shall:

(a) consider whether another form of assessment would be appropriate;

(b) make available to the public concerned the information obtained under other forms of assessment referred to in point (a), the information relating to the exemption decision and the reasons for granting it.

…’

6 Article 4 of Directive 85/337 provides:

‘1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

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

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

4. Member States shall ensure that the determination made by the competent authorities under paragraph 2 is made available to the public.'

7 Point 11 in Annex I to Directive 85/337 mentions '[g]roundwater abstraction or artificial groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres'.

8 Point 10 of Annex II to the directive, entitled 'Infrastructure projects', mentions in subparagraph (l) '[g]roundwater abstraction and artificial groundwater recharge schemes not included in Annex I'.

9 Article 6 of Directive 85/337 is worded as follows:

'…

2. The public shall be informed, whether by public notices or other appropriate means such as electronic media where available, of the following matters early in the environmental decision-making procedures referred to in Article 2(2) and, at the latest, as soon as information can reasonably be provided:

(a) the request for development consent;

(b) the fact that the project is subject to an environmental impact assessment procedure and, where relevant, the fact that Article 7 applies;

(c) details of the competent authorities responsible for taking the decision, those from which relevant information can be obtained, those to which

comments or questions can be submitted, and details of the time schedule for transmitting comments or questions;

(d) the nature of possible decisions or, where there is one, the draft decision;

(e) an indication of the availability of the information gathered pursuant to Article 5;

(f) an indication of the times and places where and means by which the relevant information will be made available;

(g) details of the arrangements for public participation made pursuant to paragraph 5 of this Article.

3. Member States shall ensure that, within reasonable time-frames, the following is made available to the public concerned:

(a) any information gathered pursuant to Article 5;

(b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;

(c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information [OJ 2003 L 41, p. 26], information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.

4. The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

5. The detailed arrangements for informing the public (for example by bill posting within a certain radius or publication in local newspapers) and for consulting the public concerned (for example by written submissions or by way of a public inquiry) shall be determined by the Member States.

6. Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned

to prepare and participate effectively in environmental decision-making subject to the provisions of this Article.'

10 Article 10a of Directive 85/337 provides:

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

(a) having a sufficient interest, or alternatively,

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

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

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

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2), shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

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

National law

11 The drawing off of groundwater and supply of water to increase the amount of groundwater, and the construction of installations for that purpose, constitute water works requiring development consent under Paragraphs 2

and 9 of Chapter 11 of the Environment Act. At first instance, requests for development consent in this specific area are examined by Environmental Chambers in accordance with Paragraph 9(b) of that Act. The decisions of the Environmental Chambers may be appealed before the Environmental Appeal Chambers whose judgments may in turn be subject to appeal before the Högsta domstolen (Supreme Court), pursuant to Paragraphs 1 and 9 of Chapter 23 that act.

12 The provisions relating to environmental impact assessments appear in Chapter 6 of the Environment Act. They provide in particular that a party wishing to carry out works subject to development consent is to consult the länsstyrelsen (regional authority), the supervisory body, and individuals who may be assumed to be particularly affected. The regional authority is then required to take a position on whether the planned works are to be assumed to entail significant effects on the environment. If the regional authority decides that this is the case, works are to be assumed to entail such an effect, consultations are also to be held with other national authorities, municipalities, the public and organisations which may be assumed to be affected.

13 The right of appeal against judgments and decisions is governed by Paragraphs 12 and 13 of Chapter 16 of the Environment Act. The right of appeal for parties to an action and for certain organisations and authorities is covered in Paragraph 12 et seq. of Chapter 16. Paragraph 13 provides that a non-profit making association, on certain conditions set out in the provision, may appeal against judgments and decisions on development consent, approval and exemption under the Environment Act.

14 Paragraph 13 requires the association to fulfil three conditions, namely that the statutes of the association must state that its purpose is the protection of nature and the environment, the association must have been active in Sweden for at least three years and it must have at least 2 000 members.

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 The Municipality of Stockholm concluded a contract with an electricity company for the construction of a tunnel approximately one kilometre in length through the hills between the areas of Hjorthagen and Fisksjöäng in North Djurgården in order to house electric cables replacing overground high tension cables.

16 The implementation of that project required, first, the abstraction of groundwater leaking into the power cable tunnel and access tunnel and,

second, the construction on certain sites in the area concerned of facilities designed to drain off water and recharge it into the ground or rock in order to counteract any reduction in the amount of groundwater.

17 By decision of 27 May 2004, the länsstyrelsen i Stockholms län (Stockholm Regional Authority), giving its decision after an examination under Chapter 6 of the Environment Act, concluded, on the basis of the environmental impact assessment carried out for that project, that the works concerned were likely to have significant effects on the environment particularly with respect to groundwater.

18 By judgment of 13 December 2006, the miljödomstolen vid Stockholms tingsrätt (Environmental Chamber of the District Court of Stockholm) granted the Municipality of Stockholm development consent to carry out the works at issue, pursuant to Chapter 11 of the Environment Act.

19 The Miljöskyddsförening appealed against that decision before the Miljööverdomstolen of the Svea Hovrätt (Environmental Appeal Chamber of the Svea Court of Appeal), but that appeal was held to be inadmissible on the ground that the Miljöskyddsförening had not fulfilled the condition laid down in Paragraph 13 of Chapter 16 of the Environmental Act that it must have at least 2 000 members to be entitled to appeal against judgments and decisions covered by that act.

20 The Miljöskyddsförening brought an appeal against that decision before the Högsta domstolen.

21 Before the Högsta domstolen, the question arose as to whether the project at issue fell within the scope of Directive 85/337 as a project included in Annex II, point 10(l) thereto, as that point might, in the Swedish version of the directive, be limited to the drawing off of groundwater for a profitable purpose. Furthermore, the question also arose as to the exact scope of the right of appeal provided for by the Aarhus Convention, and whether the conditions laid down by Swedish law from that point of view, were too restrictive.

22 Accordingly, the Högsta domstolen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is point 10 of Annex II to Directive 85/337 to be interpreted as meaning that it encompasses water-related works which involve the drawing-off from a tunnel for power cables of groundwater leaking into it and infiltration (supply) of water into the ground or hill to compensate for any reduction in the groundwater, and the construction and maintenance of installations for the drawing-off and infiltration?

(2) If the answer to Question 1 is affirmative: Does the provision in Article 10a of Directive 85/337 – that under certain circumstances the public concerned is to have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of a decision – imply that there is also a requirement that the public concerned is to be entitled to challenge a decision of a court in planning consent proceedings in a case where the public concerned has had the opportunity of participating in the court's examination of the question of planning consent and of submitting its views to that court?

(3) If the answers to Questions 1 and 2 are affirmative: Are Articles 1(2), 6(4) and 10a of Directive 85/337 to be interpreted as meaning that different national requirements can be laid down with regard to the public concerned referred to in Articles 6(4) and 10a, with the result that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Article 6(4) in respect of projects which may have significant effects on the environment in the area where the association is active but do not have a right of appeal such as is referred to in Article 10a?'

The questions referred for a preliminary ruling

The first question

23 By its first question, the referring court asks essentially whether a project of the type at issue in the main proceedings must be regarded as being covered by 'groundwater abstraction and artificial groundwater recharge schemes not included in Annex I' to Directive 85/337 mentioned in point 10(l) of Annex II to that directive.

24 According to the referring court, the Swedish version of point 10(l) of Annex II may cover just projects for abstracting groundwater with a view to the subsequent use of that water.

25 It is clear from settled case-law that the need for an application, and hence a uniform interpretation, of the provisions of Community law requires that, in cases of doubt, the text of a provision must not be considered in isolation in one of its versions, but, on the contrary, should be interpreted and applied in the light of the versions existing in the other official languages (Case C-174/05 *Zuid-Hollandse Milieufederatie and Natuur en Milieu* [2006] ECR I-2443, paragraph 20, and Case C-311/06 *Consiglio Nazionale degli Ingegneri*[2009] ECR I-0000, paragraph 53).

26 Furthermore, the need for such an interpretation requires that in the case of divergence between the various language versions the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms part (see, to that effect, Case C-449/93 *Rockfon* [1995] ECR I-4291, paragraph 28).

27 As far as concerns point 10(l) of Annex II to Directive 85/337, it is clear from an examination of the various language versions and, in particular, the Dutch, English, Finnish, French, German, Italian, Polish, Portuguese and Spanish versions, that that provision covers groundwater abstraction and artificial groundwater recharge schemes not included in Annex I to that directive, irrespective of the purpose for which those works must be carried out and, in particular, of the subsequent use of the water thereby abstracted or recharged into the ground.

28 In addition, point 11 in Annex I to that directive does not mention any further criteria as regards groundwater abstraction or groundwater recharge schemes where the annual volume of water abstracted or recharged is equivalent to or exceeds 10 million cubic metres.

29 Finally, it is clear from settled case-law that the scope of Directive 85/337 is wide and its purpose very broad (see, Case C-2/07 *Abraham and Others* [2008] ECR I-1197, paragraph 32 and the case-law cited).

30 Consequently, the provisions of point 10(l) of Annex II to Directive 85/337 must be interpreted as meaning that they cover all groundwater abstraction and artificial groundwater recharge schemes not included in Annex I to that directive, irrespective of their purpose, which means that they also cover schemes which do not involve the subsequent use of that groundwater.

31 Having regard to the foregoing, the answer to the first question is that a project such as that at issue in the main proceedings, concerning abstraction of water leaking into a tunnel which houses electric cables and its recharging into the ground or rock in order to compensate for any reduction in the amount of groundwater, and the construction and maintenance of facilities for the abstraction and recharge, are covered by point 10(l) in Annex II to Directive 85/337, irrespective of the ultimate destination of the groundwater and, in particular, of whether or not it is put to a subsequent use.

The second question

32 By its second question, the referring court asks essentially whether Article 10a of Directive 85/337 implies that members of the public concerned are to have access to a review procedure to challenge a decision by which a body attached to a court of law of a Member State has given a ruling on a request

for development consent even where they had the opportunity to participate in the court's examination of the question of development consent and to express their views.

33 Article 10a of Directive 85/337, taking account of the amendments introduced by Directive 2003/35 which is intended to implement the Aarhus Convention, provides for members of the public concerned who fulfil certain conditions to have access to a review procedure before a court of law or another independent body in order to challenge the substantive or procedural legality of decisions, acts or omissions which fall within its scope.

34 Thus, according to the wording of that provision, persons who are members of the public concerned and either have sufficient interest, or if national law so requires, maintain that one of the projects covered by Directive 85/337 impairs their rights, are to have access to a review procedure.

35 It is also apparent therefrom that any non-governmental organisations which promote environmental protection and meet the conditions which may be required by national law satisfy the criteria, with respect to the public concerned who may bring an appeal, laid down in Article 1(2) of Directive 85/337 read in conjunction with Article 10a.

36 Furthermore, Article 6(4) of Directive 85/337 guarantees the public concerned effective participation in environmental decision-making procedures as regards projects likely to have significant effects on the environment.

37 The fact that development consent for housing electric cables and groundwater abstraction such as that at issue in the main proceedings, which is a decision within the meaning of Article 10a of Directive 85/337, is given by a court exercising administrative powers does not prevent an association fulfilling the conditions set out in paragraph 35 of this judgment, and in accordance with the detailed rules laid down by national law, from exercising its right of access to a review procedure in order to challenge that decision.

38 First, the right of access to a review procedure within the meaning of Article 10a of Directive 85/337 does not depend on whether the authority which adopted the decision or act at issue is an administrative body or a court of law. Second, participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.

39 Accordingly, the answer to the second question is that the members of the public concerned, within the meaning of Article 1(2) and 10a of Directive 85/337, must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.

The third question

40 By its third question, the referring court asks essentially whether, in the context of the implementation of Articles 6(4) and 10a of Directive 85/337, Member States may provide that small, locally established environmental protection associations have a right to participate in the decision-making procedures referred to in Article 2(2) of that directive but no right of access to a review procedure to challenge the decision adopted at the end of that procedure.

41 It is clear from the order for reference, the file submitted to the Court, and the arguments put forward at the hearing, that the reason for that question is the existence in the relevant national legislation of the rule that only an association with at least 2 000 members may bring an appeal against a decision adopted on an environmental matter.

42 It is clear from Directive 85/337 that it distinguishes between the public concerned by one of the projects falling within its scope in a general manner and, on the other hand, a sub-group of natural or legal persons within the public concerned who, in view of their particular position vis-à-vis the project at issue, are, in accordance with Article 10a, to be entitled to challenge the decision which authorises it.

43 The directive leaves it to national law to determine the conditions for the admissibility of the action. Those conditions may be having ‘sufficient interest’ or ‘impairment of a right’, and national laws generally use one or other of those two concepts.

44 As regards non-governmental organisations which promote environmental protection, Article 1(2) of Directive 85/337, read in conjunction with Article 10a thereof, requires that those organisations ‘meeting any requirements under national law’ are to be regarded either as having ‘sufficient interest’ or as having a right which is capable of being impaired by projects falling within the scope of that directive.

45 While it is true that Article 10a of Directive 85/337, by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the

conditions which may be required in order for a non-governmental organisation which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure 'wide access to justice' and, second, render effective the provisions of Directive 85/337 on judicial remedies. Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts.

46 From that point of view, a national law may require that such an association, which intends to challenge a project covered by Directive 85/337 through legal proceedings, has as its object the protection of nature and the environment.

47 Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope.

48 In that connection, it must be stated that, although Directive 85/337 provides that members of the public concerned who have a sufficient interest in challenging projects or have rights which may be impaired by projects are to have the right to challenge the decision which authorises it, that directive in no way permits access to review procedures to be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision-making procedure established by Article 6(4) thereof.

49 Thus, the fact relied on by the Kingdom of Sweden, that the national rules offer extensive opportunities to participate at an early stage in the procedure in drawing up the decision relating to a project is no justification for the fact that judicial remedies against the decision adopted at the end of that procedure are available only under very restrictive conditions.

50 Furthermore, Directive 85/337 does not exclusively concern projects on a regional or national scale, but also projects more limited in size which locally based associations are better placed to deal with. As the Advocate General notes, in point 78 of her Opinion, the rule of the Swedish legislation at issue is such as to deprive local associations of any judicial remedy.

51 The Swedish Government, which acknowledges that at present only two associations have at least 2 000 members and thereby satisfy the condition laid down in Paragraph 13 of Chapter 16 of the Environment Act, has in fact submitted that local associations could contact one of those two associations and ask them to bring an appeal. However, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 as, first, the associations entitled to bring an appeal might not have the same interest in projects of limited size and, second, they would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review. Finally, such a system would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the directive which, as stated in paragraph 33 of this judgment, is intended to implement the Aarhus Convention.

52 Accordingly, the answer to the third question is that Article 10a of Directive 85/337 precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2 000 members.

Costs

53 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

1. **A project such as that at issue in the main proceedings, concerning abstraction of water leaking into a tunnel which houses electric cables and its recharging into the ground or rock in order to compensate for any reduction in the amount of groundwater, and the construction and maintenance of facilities for the abstraction and recharging, are covered by point 10(l) in Annex II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, irrespective of the ultimate destination of the groundwater and, in particular, of whether or not it is put to a subsequent use.**

2. **Members of the 'public concerned' within the meaning of Article 1(2) and 10a of Directive 85/337, as amended by Directive 2003/35,**

must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request by taking part in the procedure before that body and by expressing their views.

3. **Article 10a of Directive 85/337, as amended by Directive 2003/35, precludes a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive, as amended, solely to environmental protection associations which have at least 2 000 members.**

[Signatures]

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* Language of the case: Swedish.

JUDGMENT OF THE COURT (Fourth Chamber)

12 May 2011 (*)

(Directive 85/337/EEC – Environmental impact assessment – Aarhus Convention – Directive 2003/35/EC – Access to justice – Non-governmental organisations for the protection of the environment)

In Case C-115/09,

REFERENCE for a preliminary ruling under Article 234 EC, from the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Germany), made by decision of 5 March 2009, received at the Court on 27 March 2009, in the proceedings

Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV

v

Bezirksregierung Arnsberg,

intervening party:

Trianel Kohlekraftwerk Lünen GmbH & Co. KG,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, K. Schiemann, A. Arabadjiev, L. Bay Larsen, and C. Toader, Judges,

Advocate General: E. Sharpston,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 10 June 2010,

after considering the observations submitted on behalf of:

– the Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV, by D. Teßmer, and B.W. Wegener, Rechtsanwälte,

– the Bezirksregierung Arnsberg, by D. Bremecker, acting as Agent,

– Trianel Kohlekraftwerk Lünen GmbH & Co. KG, by C. Riese, and U. Karpenstein, Rechtsanwälte,

– the German Government, by M. Lumma and B. Klein, acting as Agents,

– the Greek Government, by G. Karipsiadis, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by M. Russo, avvocato dello Stato,

– the European Commission, by J.-B. Laignelot and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 December 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337').

2 The reference has been made in proceedings between the Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV (the Nordrhein-Westfalen branch of Friends of the Earth, Germany; 'Friends of the Earth') and the Bezirksregierung Arnsberg, concerning the authorisation granted by the latter to Trianel Kohlekraftwerk GmbH & Co. KG ('Trianel') for the construction and operation of a coal-fired power station in Lünen.

Legal context

International law

3 The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, known as 'the Aarhus Convention', was signed on 25 June 1998 and approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the

Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1).

4 Article 9 of the Aarhus Convention provides:

‘…

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

(a) having a sufficient interest or, alternatively,

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

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

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair,

equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

…'[…] »

European Union ('EU') law

Directive 2003/35

5 Recital 5 in the preamble to Directive 2003/35 states that Community law should be properly aligned with the Aarhus Convention with a view to the ratification of that Convention by the Community.

6 Recital 9 to Directive 2003/35 states:

'Article 9(2) and (4) of the Aarhus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.'

7 Recital 11 to Directive 2003/35 states that Directive 85/337 should be amended to ensure that it is fully compatible with the provisions of the Aarhus Convention and, in particular, with Article 6 and Article 9(2) and (4) thereof.

8 Article 1 of Directive 2003/35 is worded as follows:

'The objective of this Directive is to contribute to the implementation of the obligations arising under the Aarhus Convention, in particular by:

…

(b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC.'

Directive 85/337

9 Article 1(1) of Directive 85/337 provides:

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

10 Article 1(2) of Directive 85/337 sets out the definitions added by Directive 2993/85 of the concepts of 'the public' and 'the public concerned':

‘For the purposes of this Directive:

…

‘the public’ means: one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups;

‘the public concerned’ means: the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Article 2(2); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.’

…’

11 Under Article 10a of Directive 85/337, also inserted by Directive 2003/35:

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

(a) having a sufficient interest, or alternatively,

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

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

…

What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of subparagraph (a) of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) of this Article.

…’

Directive 92/43/EC

12 Article 6(3) of Council Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206,

p. 7), as amended by Directive 2006/105/EC of 20 November 2006 (OJ 2006 L 363, p. 368) ('the Habitats Directive') provides as follows:

'Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.'

National law

13 Paragraph 42 of the Administrative Court Rules (Verwaltungsgerichtsordnung, BGBl. 1991 I, p. 686; 'the VwGO') lays down the following conditions for the admissibility of actions:

'1. An action can seek to have an administrative measure set aside (action for annulment) or to have the adoption of an administrative measure ordered in the event of a refusal or failure to act (action for enjoinder).

2. Except where otherwise provided by law, such an action is admissible only if the claimant asserts that his rights have been impaired by the administrative measure or by the refusal or failure to act.'

14 In addition, the first sentence of Paragraph 113(1) of the VwGO provides that:

1. 'In so far as the administrative measure is unlawful and the claimant's rights have thereby been impaired, the court shall set aside the administrative measure together with any internal appeal decision where appropriate'.

15 The first sentence of Paragraph 2(1) of the Law on environmental impact assessments (Gesetz über die Umweltverträglichkeitsprüfung, BGBl. 2005 I, p. 1757; 'the UVPG') provides that the environmental impact assessment is to form an integral part of administrative procedures aimed at reaching a decision as to whether a project can be authorised.

16 Paragraph 2(3)(1) of the UVPG provides that permits, planning approval decisions and other official decisions as to whether a project can be authorised, taken in the course of an administrative procedure, with the

exception of declarations, constitute decisions for the purposes of the first sentence of Paragraph 2(1).

17 Under Paragraph 1(1)(1)(a) of the Law on supplementary provisions governing actions in environmental matters under Directive 2003/35/EC (Umwelt-Rechtsbehelfsgesetz, BGBl. 2006 I, p. 2816; 'the UmwRG'), that law is to apply to actions which challenge decisions for the purposes of Paragraph 2(3) of the UVPG concerning projects in relation to which there may be, under the UVPG, an obligation to implement an environmental impact assessment.

18 Paragraph 2(1)(1) of the UmwRG provides that a domestic or foreign association recognised under Paragraph 3 of the UmwRG may, without being required to maintain an impairment of its own rights, bring an action in accordance with the VwGO to challenge such a decision or a failure to adopt such a decision, provided that the association asserts that the decision contravenes legislative provisions 'which seek to protect the environment, which confer individual rights and which may be relevant to the decision'.

19 Moreover, point (1) of the first sentence of Paragraph 2(5) of the UmwRG provides that such actions are to be deemed to be well founded if the decision infringes legislative provisions 'which seek to protect the environment, which confer individual rights and which are relevant to the decision' and if the infringement 'affects environmental protection concerns included in the objectives which the association, under its statutes, is committed to promote'.

20 Point (2) of the first sentence of Paragraph 5(1) of the Federal Law on protection against the harmful effects of air pollution, noise, vibrations and other types of nuisance on the environment – the Anti-Pollution Law (Bundes-Immissionsschutzgesetz, BGBl. 2002 I, p. 3830; 'the BImSchG') provides, inter alia, that for the purposes of ensuring high levels of 'environmental protection overall', installations subject to official approval are to be constructed and operated in a manner which ensures the prevention of effects harmful to the environment and other dangers, major disadvantages and major disturbances.

21 The first sentence of Paragraph 8(1) of the BImSchG provides that, on application, a permit may be granted for the construction of an installation or a part of an installation, or the construction and operation of a part of an installation, if: (i) there is a legitimate interest in the grant of a limited permit, (ii) the conditions for the grant of a permit in respect of the component for which a limited permit is sought are satisfied and (iii) a preliminary assessment indicates that no obstacles are present which are from the outset insuperable, thereby precluding the construction and operation of the installation as a whole.

22 Paragraph 9(1) of the BImSchG provides that, on application, a preliminary decision may be issued regarding specific permit conditions and regarding the installation site, provided that the effects of the planned installation can be adequately assessed and that there is a legitimate interest in the issuing of a preliminary decision.

23 Paragraph 61 of the Law on nature protection and countryside conservation (Bundesnaturschutzgesetz, BGBl. 2002 I, p. 1193) provides:

‘(1) Independently of any impairment of its own rights, a ... recognised association may bring actions in accordance with the [VwGO] challenging

1. Exemptions from prohibitions and requirements intended to protect nature conservation areas, national parks and other protected areas established under Paragraph 33(2) and

2. Planning approval decisions concerning projects which entail an encroachment on nature and the countryside, together with planning permits, where public participation is provided for

…

(2) Actions brought in accordance with subparagraph 1 are not admissible unless the association

1. claims that the adoption of one of the administrative measures mentioned in the first sentence of subparagraph 1 contravenes provisions of the present law, provisions which have been adopted or which continue to apply on the basis or within the framework of the present law, or other provisions which must be taken into account when adopting an administrative measure and whose objectives include concern for nature protection and countryside conservation;

2. is affected as regards a matter which, under its statutes, is within its ambit and in respect of which it is recognised …’

Background and questions referred

24 Trianel – the intervener in the main proceedings – intends to construct and operate a coal-fired power station in Lünen. The power station, which will deliver heat output to a maximum of 1 705 megawatts and 750 megawatts of electricity output, will enter service in 2012. Within eight kilometers of the project site, there are five areas designated as special areas of conservation within the meaning of the Habitats Directive.

25 On 6 May 2008, in the context of the environmental impact assessment of that project, the Bezirksregierung Arnsberg (Arnsberg District Administration) – the defendant in the main proceedings – issued Trianel with a preliminary decision and a partial permit for the project. The preliminary decision stated that there were no legal objections to the project.

26 On 16 June 2008, Friends of the Earth initiated proceedings for the annulment of those measures before the Oberverwaltungsgericht für das Land Nordrhein-Westfalen (Higher Administrative Court for the Nordrhein-Westfalen Land; 'the referring court'). Friends of the Earth relied, in particular, on an infringement of the provisions transposing into German law the Habitats Directive and, in particular, Article 6 thereof.

27 According to the referring court, those measures infringe Article 6(3) of the Habitats Directive inasmuch as the environmental impact assessment of the project at issue did not show that it was unlikely to have a significant effect on the special areas of conservation located nearby.

28 The referring court finds that, on the basis of domestic law, an environmental protection organisation is not entitled to rely on infringement of the law for the protection of water and nature or on the precautionary principle laid down in point (2) of the first sentence of Paragraph 5(1) of the BImSchG, as those provisions do not confer rights on individuals for the purposes of point (1) of Paragraph 2(1) and point (1) of Paragraph 2(5) of the UmwRG.

29 It states that, accordingly, the right of action accorded to non-governmental organisations is comparable with that provided for under the general rules of administrative procedural law governing actions for annulment and, in particular, under Paragraph 42(2) and the first sentence of Paragraph 113(1) of the VwGO, which provide that an action challenging an administrative measure will be admissible only if the administrative measure affects the claimant's rights, that is to say, his individual public law rights.

30 The referring court adds that the decisive criterion for establishing whether a provision of national law protects individual rights is the extent to which that provision adequately specifies and delimits the interest or right protected, envisages the way in which the right might be regarded as impaired and determines the class of persons protected.

31 The referring court finds in that regard that, in the field of anti-pollution law, point (2) of the first sentence of Paragraph 5(1) of the BImSchG – in the same way, moreover, as the law for the protection of water and nature – primarily concerns the general public and not the protection of individual rights.

32 In addition, the referring court notes that the project at issue does not come within the scope of Paragraph 61 of the Law on nature protection and countryside conservation, which permits, in certain cases, an exception to be made to that condition of admissibility for actions brought by recognised associations in the environmental field.

33 Since it considers that such a restriction on access to justice could nevertheless undermine the useful effect of Directive 85/337, the referring court wonders whether the action brought by Friends of the Earth ought not to be allowed on the basis of Article 10a of that directive.

34 In those circumstances, the Oberverwaltungsgericht für das Land Nordrhein Westfalen decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does Article 10a of Directive 85/337 … require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to argue that there has been an infringement of any environmental provision relevant to the approval of a project, including provisions which are intended to serve the interests of the general public alone rather than those which, at least in part, protect the legal interests of individuals?

(2) Unless Question 1 is answered unreservedly in the affirmative:

Does Article 10a of Directive 85/337 … require it to be possible, for non-governmental organisations wishing to bring an action before the courts of a Member State in which administrative procedural law requires an applicant to maintain the impairment of a right, to base their argument on the infringement of environmental provisions relating to the approval of a project which are derived directly from Community law or which transpose Community environmental legislation into domestic law, including provisions intended to serve the interests of the general public alone, rather than those which, at least in part, protect the legal interests of individuals?

(a) If Question 2 calls, in principle, for an affirmative response:

Must provisions of Community environmental legislation satisfy any substantive conditions in order to be capable of forming the legal basis for an action?

(b) If Question 2(a) is answered in the affirmative:

What are the relevant substantive conditions (for example, direct effect, protection objective or aim of the legislation)?

(3) If either Question 1 or Question 2 is answered in the affirmative:

Does the directive directly entitle non-governmental organisations to a right of access to the courts which exceeds that provided for under the rules laid down in national law?'

The questions referred

Questions 1 and 2

35 By its first two questions, which it is appropriate to examine together, the referring court asks essentially whether Article 10a of Directive 85/337 precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of Directive 85/337 ('environmental protection organisations'), to rely before the courts, in an action contesting a decision authorising projects likely to have 'significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule which protects only the interests of the general public and not the interests of individuals. The referring court also asks the Court whether Article 10a of Directive 85/337 precludes such legislation in general or only in so far as it does not permit an organisation of that nature to rely before the courts on particular provisions of environment law, whether of Community or purely national origin.

36 It emerges from the order for reference that the question is justified by the fact that the applicable national legislation makes the admissibility of an action such as that brought by the applicant in the main proceedings conditional upon the applicant showing that the administrative decision contested impairs an individual right which, under national law, can be categorised as an individual public-law right.

37 First of all, it should be noted that the first paragraph of Article 10a of Directive 85/337 provides that the decisions, acts or omissions referred to in that article must be actionable before a court of law through a review procedure 'to challenge [their] substantive or procedural legality', without in any way limiting the pleas that could be put forward in support of such an action.

38 With regard to the conditions for the admissibility of such actions, Article 10a of Directive 85/337 provides for two possibilities: the admissibility of an action may be conditional on 'a sufficient interest in bringing the action' or on the applicant alleging 'the impairment of a right', depending on which of those conditions is adopted in the national legislation.

39 The first sentence of the third paragraph of Article 10a of Directive 85/337 further states that what constitutes a sufficient interest and impairment of a right is to be determined by the Member States consistently with the objective of giving the public concerned 'wide access to justice'.

40 With regard to actions brought by environmental protection organisations, the second and third sentences of the third paragraph of Article 10a of Directive 85/337 add that, to that end, such organisations must be regarded as having either a sufficient interest or rights which may be impaired, depending on which of those conditions for admissibility is adopted in the national legislation.

41 Those various provisions must be interpreted in the light of, and having regard to, the objectives of the Aarhus Convention, with which – as is stated in recital 5 to Directive 2003/35 – EU law should be 'properly aligned'.

42 It follows that, whichever option a Member State chooses for the admissibility of an action, environmental protection organisations are entitled, pursuant to Article 10a of Directive 85/337, to have access to a review procedure before a court of law or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts or omissions covered by that article.

43 Lastly, it should also be recalled that where, in the absence of EU rules governing the matter, it is for the legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, those detailed rules must not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).

44 Thus, although it is for the Member States to determine, when their legal system so requires and within the limits laid down in Article 10a of Directive 85/337, what rights can give rise, when infringed, to an action concerning the environment, they cannot, when making that determination, deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of that directive of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.

45 With regard to legislation such as that at issue in the main proceedings, although the national legislature is entitled to confine to individual public-law rights the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 10a of Directive 85/337, such a limitation cannot be applied as

such to environmental protection organisations without disregarding the objectives of the last sentence of the third paragraph of Article 10a of Directive 85/337.

46 If, as is clear from that provision, those organisations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organisations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. As the dispute in the main proceedings shows, that very largely deprives those organisations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.

47 It follows first that the concept of 'impairment of a right' cannot depend on conditions which only other physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation's operation.

48 It follows more generally that the last sentence of the third paragraph of Article 10a of Directive 85/337 must be read as meaning that the 'rights capable of being impaired' which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect.

49 In that regard, in order to give the referring court the most useful answer possible, it should be pointed out that a plea raised against a contested decision which alleges infringement of the rules of national law flowing from Article 6 of the Habitats Directive must be capable of being relied on by an environmental protection organisation.

50 Consequently, the answer to Questions 1 and 2, read together, is that Article 10a of Directive 85/337 precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule flowing from EU environment law and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.

Question 3

51 By its third question, the referring court asks the Court, essentially, whether an environmental protection association can derive, from the last sentence of the third paragraph of Article 10a of Directive 85/337, the right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.

52 That question arises in the event that it would not be possible for the referring court to interpret national procedural law in a manner consistent with the requirements of EU law.

53 In that regard, it should first of all be borne in mind that the Member States' obligation under a directive to achieve the result envisaged by that directive and their duty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation are binding on all the authorities of the Member States, including, for matters within their jurisdiction, the courts (see, to that effect, Case C-555/07 *Kücükdeveci* [2010] ECR I-0000, paragraph 47 and the case-law cited).

54 The Court has held that whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State, where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Case C-138/07 *Cobelfret* [2009] ECR I-731, paragraph 58).

55 It should be noted in that regard that, taken as a whole, Article 10a of Directive 85/337 leaves the Member States a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the conditions for the admissibility of actions and the bodies before which such actions may be brought.

56 The same is not true, however, of the provisions laid down in the last two sentences of the third paragraph of Article 10a of Directive 85/337.

57 By providing that the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) of Directive 85/337 are to be deemed sufficient and that such organisations are also to be deemed to have rights capable of being impaired, those provisions lay down rules which are precise and not subject to other conditions.

58 In addition, as was stated above, the rights which environmental protection organisations may rely on in judicial proceedings pursuant to Article 10a of Directive 85/337 include the rules of EU environment law and, in particular, the rules of national law flowing from Article 6 of the Habitats Directive.

59 The answer to Question 3 is therefore that non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, can derive from the last sentence of the third paragraph of Article 10a of Directive 85/337 a right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of the rules of national law flowing from Article 6 of the Habitats Directive, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.

Costs

60 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

1. **Article 10a of Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule flowing from the environment law of the European Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.**

2. **Such a non-governmental organisation can derive, from the last sentence of the third paragraph of Article 10a of Directive 85/337, as amended by Directive 2003/35, the right to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article**

1(1) of Directive 85/337, as amended, on the infringement of the rules of national law flowing from Article 6 of Directive 92/43/EC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 2006/105/EC of 20 November 2006, even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals, national procedural law does not permit this.

[Signatures]

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*Language of the case: German.

JUDGMENT OF THE COURT (Fourth Chamber)

14 March 2013 (*)

(Environment – Directive 85/337/EEC – Assessment of the effects of certain public and private projects on the environment – Consent for such a project without an appropriate assessment – Objectives of that assessment – Conditions to which the existence of a right to compensation are subject – Whether protection of individuals against pecuniary damage is included)

In Case C-420/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 21 July 2011, received at the Court on 10 August 2011, in the proceedings

Jutta Leth

v

Republik Österreich,

***Land* Niederösterreich,**

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, (Rapporteur), President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan and A. Prechal, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 17 October 2012,

after considering the observations submitted on behalf of:

– Ms Leth, by W. Proksch, Rechtsanwalt,

– Republik Österreich, by C. Pesendorfer and P. Cede, acting as Agents,

– *Land* Niederösterreich, by C. Lind, Rechtsanwalt,

– the Czech Government, by D. Hadroušek and M. Smolek, acting as Agents,

– Ireland, by D. O'Hagan, acting as Agent, assisted by E. Fitzsimons, SC,

– the Greek Government, by G. Karipsiades, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by S. Varone, avvocato dello Stato,

– the Latvian Government, by I. Kalniņš and A. Nikolajeva, acting as Agents,

– the United Kingdom Government, by J. Beeko and L. Seeboruth, acting as Agents, assisted by E. Dixon, Barrister,

– the European Commission, by P. Oliver and G. Wilms, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 November 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 (OJ 2003 L 156, p. 17) ('Directive 85/337').

2 The request has been made in the course of proceedings between Ms Leth, on the one hand, and Republik Österreich (Republic of Austria) and *Land* Niederösterreich (State of Lower Austria), on the other, regarding her application for (i) compensation for the pecuniary damage which she claims to have sustained as a result of the decrease in the value of her home following the extension of Vienna-Schwechat airport (Austria) and (ii) a declaration that the defendants in the main proceedings will be liable for any future damage.

Legal context

European Union law

Directive 85/337

3 The first, third, sixth and eleventh recitals in the preamble to Directive 85/337 are worded as follows:

‘… the … action programmes of the European Communities on the environment … stress that the best environmental policy consists in preventing the creation of pollution or nuisances at source, rather than subsequently trying to counteract their effects; … they affirm the need to take effects on the environment into account at the earliest possible stage in all the technical-planning and decision-making processes; … to that end, they provide for the implementation of procedures to evaluate such effects;

…

… in addition, it is necessary to achieve one of the Community’s objectives in the sphere of the protection of the environment and the quality of life;

…

… general principles for the assessment of environmental effects should be introduced with a view to supplementing and coordinating development consent procedures governing public and private projects likely to have a major effect on the environment;

… development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; … this assessment must be conducted on the basis of the appropriate information supplied by the developer, which may be supplemented by the authorities and by the people who may be concerned by the project in question;

…

… the effects of a project on the environment must be assessed in order to take account of concerns to protect human health, to contribute by means of a better environment to the quality of life, to ensure maintenance of the diversity of species and to maintain the reproductive capacity of the ecosystem as a basic resource for life’.

4 Article 1 of Directive 85/337 states:

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

2. For the purposes of this Directive:

"project" means:

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

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

…'

5 Article 2(1) of Directive 85/337 provides:

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

6 Article 3 of Directive 85/337 states:

'The environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora;

– soil, water, air, climate and the landscape;

– material assets and the cultural heritage;

– the interaction between the factors mentioned in the first, second and third indents.'

7 Under Article 4, paragraphs 1 to 3, of Directive 85/337:

'1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

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

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.'

8 Article 5(1) and (3) of the Directive provides:

'1. In the case of projects which, pursuant to Article 4, must be subjected to an environmental impact assessment in accordance with Articles 5 to 10, Member States shall adopt the necessary measures to ensure that the developer supplies in an appropriate form the information specified in Annex IV …

3. The information to be provided by the developer in accordance with paragraph 1 shall include at least:

…

– the data required to identify and assess the main effects which the project is likely to have on the environment,

…'

9 Among the projects referred to in Article 4(1) of Directive 85/337 are, according to Annex I, paragraphs 7(a) and 22, the '[c]onstruction of lines for long-distance railway traffic and of airports with a basic runway length of 2 100 m or more' and '[a]ny change to or extension of projects listed in this Annex where such a change or extension in itself meets the thresholds, if any, set out in this Annex.'

10 The first indent of paragraph 13 of Annex II to Directive 85/337 includes, among the projects referred to in Article 4(2) of that directive, '[a]ny change or extension of projects listed in Annex I …, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment (change or extension not included in Annex I)'.

11 Annex IV to the directive, entitled 'Information referred to in Article 5(1)' states, in paragraphs 3 to 5:

'3. A description of the aspects of the environment likely to be significantly affected by the proposed project, including, in particular,

population, fauna, flora, soil, water, air, climatic factors, material assets, including the architectural and archaeological heritage, landscape and the inter-relationship between the above factors.

4. A description … of the likely significant effects of the proposed project on the environment resulting from:

   – the existence of the project,

   – the use of natural resources,

   – the emission of pollutants, the creation of nuisances and the elimination of waste,

   and the description by the developer of the forecasting methods used to assess the effects on the environment.

5. A description of the measures envisaged to prevent, reduce and, where possible, offset any significant adverse effects on the environment.'

Austrian law

12 Directive 85/337 was transposed into Austrian law by the Law of 1993 on the environmental impact assessment (Umweltverträglichkeitsprüfungsgesetz 1993; 'UVP-G 1993'), which was in force from 1 July 1994 until the entry into force, on 11 August 2000, of the Law of 2000 on the environmental impact assessment (Umweltverträglichkeitsprüfungsgesetz 2000), which was designed to transpose Directive 97/11.

The dispute in the main proceedings and the questions referred for a preliminary ruling

13 Since 1997, Ms Leth, the applicant in the main proceedings, has been the owner of a property situated within the security zone of Vienna-Schwechat airport. She lives in the house built on that property.

14 Since the accession of the Republic of Austria to the European Union, on 1 January 1995, the authorities of the defendants in the main proceedings have, without carrying out environmental impact assessments, consented to and completed several projects relating to the development and extension of Vienna-Schwechat airport. By decision of 21 August 2001, the Minister-President of *Land* Niederösterreich expressly stated that no environmental impact assessment procedure was necessary in relation to the continued development and certain extensions of that airport.

15 In 2009, Ms Leth brought an action before the Landesgericht für Zivilrechtssachen Wien (Regional Civil Court, Vienna) against the two defendants in the main proceedings, in which she sought payment by them of EUR 120 000 in respect of the decrease in the value of her property, in particular as a result of aircraft noise, and a declaration that the defendants will be liable for any future damage, including damage to her health, arising from the late and incomplete transposition of Directive 85/337, Directive 97/11, and Directive 2003/35, and from the failure to carry out an environmental impact assessment before giving the various consents relating to the development of Vienna-Schwechat airport. The defendants in the main proceedings have contended that their authorities acted lawfully and without negligence, and that the claim brought is time-barred.

16 The Landesgericht für Zivilrechtssachen Wien dismissed the action in its entirety on the ground that the rights relied upon were time-barred. By way of a part-judgment on the appeal, the Oberlandesgericht Wien (Higher Regional Court, Vienna) confirmed the dismissal of the claim for payment of EUR 120 000, but set aside the dismissal of the claim in relation to the application for a declaration that the defendants in the main proceedings would be liable for future damage, referring the case back to the first-instance court in order for it to rule afresh on that latter application. In that respect, the Oberlandesgericht Wien found that the claim for payment of EUR 120 000 related only to purely pecuniary damage, which did not come within the objective of protection pursued by the provisions of European Union law, in particular those of the relevant directives, and by national law. As regards the application for a declaration of liability in respect of future damage, that court found that that application was not time-barred. Subsequently, an appeal on a point of law (‘Revision’) against the dismissal of the claim for that payment and an appeal against the referral back of the application for a declaration of liability were brought before the referring court.

17 The referring court takes the view that the decision on those claims, which are in any event not time-barred in their entirety, depends on whether the duty of the competent authorities of the Member State concerned to carry out an environmental impact assessment, laid down in both European Union law and national law, is liable to protect the individuals concerned against purely pecuniary damage caused by a project in respect of which such an assessment has not been carried out.

18 It is in that context that the Oberster Gerichtshof (Supreme Court, Austria) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘Is Article 3 of Directive 85/337 …, as amended by Directive 97/11 … and by Directive 2003/35 …, to be interpreted as meaning that:

1. the term ‘material assets’ covers only their substance or also their value;

2. the environmental impact assessment serves also to protect an individual against pecuniary damage as a result of a decrease in the value of his property?’

Procedure before the Court

19 By letter of 21 December 2012, the applicant in the main proceedings requested the reopening of the oral procedure, claiming, first, that, in examining – in her Opinion delivered on 8 November 2012 – the issue of whether the environmental impact assessment under Article 3 of Directive 85/337 includes the assessment of the effects of the project under examination on the value of material assets, the Advocate General introduced a new question which had not been posed by the referring court and which had not been the subject of an exchange of views between the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union, and, as a consequence, the first question as posed by the referring court was not answered. Secondly, she claims that those interested persons did not have the opportunity to exchange views on the consequences to be drawn from the fact that the public concerned was not informed of the projects at issue and could not, therefore, participate in the decision-making process.

20 In that respect, it must be pointed out that, under Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where the case has to be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute.

21 In the present case, the Court considers that the request for a preliminary ruling does not need to be examined on the basis of an argument that has not yet been debated before it and that it has all the information necessary to deal with the request for a preliminary ruling.

22 The request by the applicant in the main proceedings that a new hearing be held and her alternative application for leave to submit additional written observations must therefore be dismissed.

The questions referred to the Court

23 By its questions, the referring court asks, in essence, whether Article 3 of Directive 85/337 must be interpreted as meaning, first, that the environmental

impact assessment, as provided for in that article, includes the assessment of the effects of the project under examination on the value of material assets and, secondly, that the fact that an environmental impact assessment has not been carried out, in breach of Directive 85/337, confers on an individual a right to compensation for pecuniary damage caused by a decrease in the value of his property resulting from the environmental effects of the project under examination.

24 As regards the term ‘material assets’ within the meaning of Article 3 of Directive 85/337, it must be recalled that, according to settled case-law, it follows from the need for a uniform application of European Union law that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question (see Case C-287/98 *Linster* [2000] ECR I-6917, paragraph 43, and Case C-497/10 PPU *Mercredi* [2010] ECR I-14309, paragraph 45).

25 Pursuant to Article 3 of Directive 85/337, it is necessary to examine the direct and indirect effects of a project on, inter alia, human beings and material assets and, in accordance with the fourth indent of that article, it is also necessary to examine such effects on the interaction between those two factors. Therefore, it is necessary to examine, in particular, the effects of a project on the use of material assets by human beings.

26 It follows that, in the assessment of projects such as those at issue in the main proceedings, which are liable to result in increased aircraft noise, it is necessary to assess the effects of the latter on the use of buildings by human beings.

27 However, as has correctly been pointed out by *Land* Niederösterreich and by several of the governments which have submitted observations to the Court, an extension of the environmental assessment to the pecuniary value of material assets cannot be inferred from the wording of Article 3 of Directive 85/337 and would also not be in accordance with the purpose of that directive.

28 It follows from Article 1(1) of, and from the first, third, fifth and sixth recitals in the preamble to, Directive 85/337 that the purpose of that directive is an assessment of the effects of public and private projects on the environment in order to attain one of the Community’s objectives in the sphere of the protection of the environment and the quality of life. The information which must be supplied by the developer in accordance with Article 5(1) of, and Annex IV to, Directive 85/337, as well as the criteria which enable Member States to determine whether small-scale projects,

meeting the characteristics laid down in Annex III to that directive, require a environmental assessment, also relate to that purpose.

29 Consequently, it is necessary to take into account only those effects on material assets which, by their very nature, are also likely to have an impact on the environment. Accordingly, pursuant to Article 3 of that directive, an environmental impact assessment carried out in accordance with that article is one which identifies, describes and assesses the direct and indirect effects of noise on human beings in the event of use of a property affected by a project such as that at issue in the main proceedings.

30 It must therefore be held that the environmental impact assessment, as provided for in Article 3 of Directive 85/337, does not include the assessment of the effects which the project under examination has on the value of material assets.

31 That finding, however, does not necessarily imply that Article 3 of Directive 85/337 must be interpreted as meaning that the fact that an environmental impact assessment has not been carried out, contrary to the requirements of that directive, in particular an assessment of the effects on one or more of the factors set out in that provision other than that of material assets, does not entitle an individual to any compensation for pecuniary damage which is attributable to a decrease in the value of his material assets.

32 It must be recalled, from the outset, that the Court has already ruled that an individual may, where appropriate, rely on the duty to carry out an environmental impact assessment under Article 2(1) of Directive 85/337, read in conjunction with Articles 1(2) and 4 thereof (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 61). That directive thus confers on the individuals concerned a right to have the environmental effects of the project under examination assessed by the competent services and to be consulted in that respect.

33 Accordingly, it is necessary to examine whether Article 3 of Directive 85/337, read in conjunction with Article 2 thereof, is intended, in the event of an omission to carry out an environmental impact assessment, to confer on individuals a right to compensation for pecuniary damage such as that invoked by Ms Leth.

34 In that respect, it follows from the third and eleventh recitals in the preamble to Directive 85/337 that the purpose of that directive is to achieve one of the European Union’s objectives in the sphere of the protection of the environment and the quality of life and that the effects of a project on the environment must be assessed in order to take account of the concerns to contribute by means of a better environment to the quality of life.

35 In circumstances where exposure to noise resulting from a project covered by Article 4 of Directive 85/337 has significant effects on individuals, in the sense that a home affected by that noise is rendered less capable of fulfilling its function and the individuals' environment, quality of life and, potentially, health are affected, a decrease in the pecuniary value of that house may indeed be a direct economic consequence of such effects on the environment, this being a matter which must be examined on a case-by-case basis.

36 It must therefore be concluded that the prevention of pecuniary damage, in so far as that damage is the direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337. As such economic damage is a direct consequence of such effects, it must be distinguished from economic damage which does not have its direct source in the environmental effects and which, therefore, is not covered by the objective of protection pursued by that directive, such as, inter alia, certain competitive disadvantages.

37 As regards a right to compensation for such pecuniary damage, it follows from the Court's settled case-law that, under the principle of sincere cooperation laid down in Article 4(3) TEU, Member States are required to nullify the unlawful consequences of a breach of European Union law. In that regard, the Court has already held that, in order to remedy the failure to carry out an environmental impact assessment of a project within the meaning of Article 2(1) of Directive 85/337, it is for the national court to determine whether it is possible under national law for a consent already granted to be revoked or suspended in order to subject the project in question to an assessment of its environmental impacts, in accordance with the requirements of Directive 85/337, or alternatively, if the individual so agrees, whether it is possible for the latter to claim compensation for the harm suffered (see *Wells*, paragraphs 66 to 69).

38 The detailed procedural rules that are applicable are a matter for the domestic legal order of each Member State, under the principle of procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (see *Wells*, paragraph 67).

39 Thus, it is on the basis of the rules of national law on liability that the Member State must make reparation for the consequences of the loss or damage caused, provided that the conditions for reparation of that loss or damage laid down by national law ensure compliance with the principles of equivalence and effectiveness recalled in the previous paragraph (see Joined

Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 67).

40 It must, however, be pointed out that European Union law confers on individuals, under certain conditions, a right to compensation for damage caused by breaches of European Union law. According to the Court's settled case-law, the principle of State liability for loss or damage caused to individuals as a result of breaches of European Union law for which the State can be held responsible is inherent in the system of the treaties on which the European Union is based (see Case C-429/09 *Fuß* [2010] ECR I-12167, paragraph 45 and the case-law cited).

41 In that respect, the Court has repeatedly held that individuals who have been harmed have a right to reparation if three conditions are met: the rule of European Union law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between that breach and the loss or damage sustained by the individuals (see, *Fuß*, paragraph 47, and Case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others* [2010] ECR I-12655, paragraph 87 and the case-law cited).

42 Those three conditions are necessary and sufficient to found a right in individuals to obtain redress on the basis of European Union law directly, although this does not mean that the Member State concerned cannot incur liability under less strict conditions on the basis of national law (see *Brasserie du Pêcheur and Factortame*, paragraph 66).

43 It is, in principle, for the national courts to apply the criteria, directly on the basis of European Union law, for establishing the liability of Member States for damage caused to individuals by breaches of European Union law, in accordance with the guidelines laid down by the Court for the application of those criteria (see Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 210 and the case-law cited).

44 In that regard, it has already been established, in paragraphs 32 and 36 of the present judgment, that Directive 85/337 confers on the individuals concerned a right to have the effects on the environment of the project under examination assessed by the competent services, and that pecuniary damage, in so far as it is a direct economic consequence of the environmental effects of a public or private project, is covered by the objective of protection pursued by Directive 85/337.

45 However, as indicated in paragraph 41 of the present judgment, the existence of a direct causal link between the breach in question and the damage sustained by the individuals is, in addition to the determination that

the breach of European Union law is sufficiently serious, an indispensable condition governing the right to compensation. The existence of that direct causal link is also a matter for the national courts to ascertain, in accordance with the guidelines laid down by the Court.

46 To that end, the nature of the rule breached must be taken into account. In the present case, that rule prescribes an assessment of the environmental impact of a public or private project, but does not lay down the substantive rules in relation to the balancing of the environmental effects with other factors or prohibit the completion of projects which are liable to have negative effects on the environment. Those characteristics suggest that the breach of Article 3 of Directive 85/337, that is to say, in the present case, the failure to carry out the assessment prescribed by that article, does not, in principle, by itself constitute the reason for the decrease in the value of a property.

47 Consequently, it appears that, in accordance with European Union law, the fact that an environmental impact assessment was not carried out, in breach of the requirements of Directive 85/337, does not, in principle, by itself confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of environmental effects. However, it is ultimately for the national court, which alone has jurisdiction to assess the facts of the dispute before it, to determine whether the requirements of European Union law applicable to the right to compensation, in particular the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied.

48 The answer to the questions referred is therefore that Article 3 of Directive 85/337 must be interpreted as meaning that the environmental impact assessment, as provided for in that article, does not include the assessment of the effects which the project under examination has on the value of material assets. However, pecuniary damage, in so far as it is the direct economic consequence of the effects on the environment of a public or private project, is covered by the objective of protection pursued by Directive 85/337. The fact that an environmental impact assessment has not been carried out, in breach of the requirements of that directive, does not, in principle, by itself, according to European Union law, and without prejudice to rules of national law which are less restrictive as regards State liability, confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of the environmental effects of that project. However, it is for the national court to determine whether the requirements of European Union law applicable to the right to compensation, including the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 3 of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997 and by Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003, must be interpreted as meaning that the environmental impact assessment, as provided for in that article, does not include the assessment of the effects which the project under examination has on the value of material assets. However, pecuniary damage, in so far as it is the direct economic consequence of the effects on the environment of a public or private project, is covered by the objective of protection pursued by Directive 85/337.

The fact that an environmental impact assessment has not been carried out, in breach of the requirements of that directive, does not, in principle, by itself, according to European Union law, and without prejudice to rules of national law which are less restrictive as regards State liability, confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of the environmental effects of that project. However, it is for the national court to determine whether the requirements of European Union law applicable to the right to compensation, including the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied.

[Signatures]

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* Language of the case: German.

JUDGMENT OF THE COURT (Fifth Chamber)

21 March 2013 (*)

(Assessment of the effects of certain projects on the environment – Directive 85/337/EEC– Articles 2(1) and 4(2) – Projects listed in Annex II – Extension works to the infrastructure of an airport – Examination on the basis of thresholds or criteria – Article 4(3) – Selection criteria – Annex III, point 2(g) – Densely populated areas)

In Case C-244/12,

REQUEST for a preliminary ruling under Article 267 TFEU, from the Verwaltungsgerichtshof (Austria), made by decision of 19 April 2012, received at the Court on 21 May 2012, in the proceedings

Salzburger Flughafen GmbH

v

Umweltsenat,

intervening parties:

Landesumweltanwaltschaft Salzburg,

Bundesministerin für Verkehr, Innovation und Technologie,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Salzburger Flughafen GmbH, by G. Lebitsch, Rechtsanwalt,

– Landesumweltanwaltschaft Salzburg, by W. Wiener, Landesumweltanwalt,

– the Austrian Government, by C. Pesendorfer, acting as Agent,

– the European Commission, by P. Oliver and D. Düsterhaus, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of the relevant provisions of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40), as amended by Council Directive 97/11/EC of 3 March 1997 (OJ 1997 L 73, p. 5) ('Directive 85/337').

2 The request has been made in proceedings between Salzburger Flughafen GmbH ('Salzburger Flughafen') and the Umweltsenat (Administrative Chamber for Environmental Matters) concerning the obligation to subject certain projects which expand the infrastructure of the airport of Salzburg (Austria) to an environmental impact assessment.

Legal context

European Union law

3 Article 1 of Directive 85/337 provides:

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

2. For the purposes of this Directive:

"project" means:

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

– other interventions in the natural surroundings and landscape including those involving the extraction of mineral resources;

…'

4 Article 2(1) of that directive provides:

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

5 Under Article 3 of that directive:

‘The environmental impact assessment will identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with the Articles 4 to 11, the direct and indirect effects of a project on the following factors:

– human beings, fauna and flora,

– soil, water, air, climate and the landscape,

– material assets and the cultural heritage,

– the interaction between the factors mentioned in the first, second and third indents.’

6 Article 4 of that directive is drafted as follows:

‘1. Subject to Article 2(3), projects listed in Annex I shall be made subject to an assessment in accordance with Articles 5 to 10.

2. Subject to Article 2(3), for projects listed in Annex II, the Member States shall determine through:

(a) a case-by-case examination,

or

(b) thresholds or criteria set by the Member State

whether the project shall be made subject to an assessment in accordance with Articles 5 to 10.

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

3. When a case-by-case examination is carried out or thresholds or criteria are set for the purpose of paragraph 2, the relevant selection criteria set out in Annex III shall be taken into account.

…’

7 Annex I to Directive 85/337 lists the projects referred to in Article 4(1) of the directive, which must undergo a compulsory environmental assessment. Point 7(a) of Annex I to the directive refers to the '[c]onstruction … of airports … with a basic runway length of 2 100 m or more'.

8 Annex II to that directive lists the projects referred to in Article 4(2) thereof, in respect of which the Member States retain their discretion, in accordance with the conditions laid down in that article, as regards carrying out an environmental assessment. Point 10(d) of that annex concerns the '[c]onstruction of airfields (projects not included in Annex I)' and the first indent of point 13 of that annex refers to '[a]ny change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment'.

9 Annex III to Directive 85/337, which refers to the selection criteria set out in Article 4(3) thereof, provides in point 2, entitled 'Location of projects':

'The environmental sensitivity of geographical areas likely to be affected by projects must be considered, having regard, in particular, to:

…

– the absorption capacity of the natural environment, paying particular attention to the following areas:

…

(g) densely populated areas;

…'

Austrian law

10 Directive 85/337 was transposed into Austrian law by the Environmental Impact Assessment Act 2000 (Umweltverträglichkeitsprüfungsgesetz 2000), in the version applicable to the facts in the main proceedings (BGBl. I, 50/2002; 'the UVPG 2000').

11 Articles 1, 3 and 3a of the UVPG 2000 contain provisions concerning the object and content of environmental impact assessments, the principle in accordance with which the projects listed in Annex I to that Law must be subject to such an assessment, the procedure and the conditions to be followed in that regard and the persons or entities authorised to request an assessment.

12 Thus, the projects which require an assessment are listed in Annex I to the UVPG 2000, in accordance with the principle stated in the provisions referred to above. Where there are changes to those projects, there must be an examination on a case-by-case basis above a certain threshold, with a view to carrying out an assessment. Column 1 of that annex, in point 14(d), refers, in that regard, to the following projects:

'Modification of airports, if this is expected to increase the number of aircraft movements (motor aircrafts, power gliders in powered flight or helicopters) by 20,000 or more per year…'

13 Operation of a civilian airport and all modifications to the extent of the operation limited by the licence require a 'civil airport licence' in accordance with Paragraph 68(1) of the Aviation Law (Luftfahrtgesetz) and an 'operating licence' under Paragraph 73(1) of that Law. In addition, the construction, use and substantial modification of civilian ground installations require a licence in accordance with Paragraph 78(1) of that Law.

The dispute in the main proceedings and the questions referred for a preliminary ruling

14 Salzburger Flughafen operates Salzburg Airport, which has a runway of over 2 100 metres in length. On 30 July 2002, it applied for a permit to construct an additional terminal, which it justified on the ground that, in the light of the requirement to ensure full checks on hold luggage, the existing passenger handling facilities were no longer capable of handling peak volumes of passengers. By decision of 2 April 2003, the Landeshauptfrau von Salzburg (Head of Government of the Province of Salzburg), the competent administrative authority, issued the construction permit. The additional terminal was built in 2003/2004. It has been operational ever since.

15 In 2004, Salzburger Flughafen made further applications for expansion of the airport. They concerned, firstly, an area of approximately 90 000 m2 in the south-western part of the present airport site for the construction of ancillary buildings, in particular warehouses, and the extension of vehicle parking areas and aircraft standing areas. Secondly, it applied to incorporate in that expansion further areas of almost 120 000 m2 to the north west of the airport primarily for general aviation, the construction of hangars and vehicle parking and aircraft standing areas. It also sought authorisation to alter taxiways. The application did not involve any changes to the runway itself.

16 The fact that the airport is sited in an urban area, with, in addition, a high level of air pollution, and the expected effects on the environment led the Landesumweltanwaltschaft Salzburg (Provincial Legal Office for the Environment), on 13 March 2006, to request the Amt der Salzburger

Landesregierung (Office of the Salzburg Federal Government; 'the Amt') to lay down a requirement for an environmental assessment covering both the additional terminal and the expansion works to the airport infrastructure. Since the Amt rejected that request, the Landesumweltanwaltschaft Salzburg appealed against that decision to the Umweltsenat (Environmental Tribunal).

17 In its decision, the Umweltsenat found that both the extension of the airport infrastructure already in existence, following the construction and putting into operation of the additional terminal, and the expansion proposed in the permit applications require an environmental impact assessment, in accordance with the relevant provisions of the UVPG 2000, read in conjunction with Directive 85/337.

18 To justify its decision, that authority noted that if, in the context of the dispute in the main proceedings, the national legislation does not require any environmental impact assessment, since the threshold established, namely an increase in the number of aircraft movements of at least 20 000 per year, is not exceeded, that legislation only imperfectly transposes Directive 85/337. The UVPG 2000 establishes too high a threshold, so that changes to the infrastructure of small or medium-sized airports ought never, in practice, to give rise to an environmental impact assessment. In addition, the Umweltsenat noted that the national legislation at issue does not list sites requiring specific protection, whereas Directive 85/337 requires, under Annex III(2)(g) thereto, that special attention be paid to densely populated areas. The airport under consideration is near to the city of Salzburg.

19 The Umweltsenat therefore took the view that it was necessary to apply Directive 85/337 directly, because of the fact that the changes to the airport infrastructure can be regarded, in particular by reason of their nature, size and characteristics, as a modification of the airport itself, likely to increase its activity and aircraft traffic.

20 An appeal has been brought against that decision by Salzburger Flughafen before the Verwaltungsgerichtshof (Supreme Administrative Court).

21 The referring court notes that, in accordance with the case-law of the Court following from Cases C-2/07 *Abraham and Others* [2008] ECR I-1197 and C-275/09 *Brussels Hoofdstedelijk Gewest and Others* [2011] ECR I-1753, the relevant provisions of Annex II to Directive 85/337, read in conjunction with those of Annex I thereto, also encompass works to change the infrastructure of an existing airport. Furthermore, in order to avoid misuse of the European Union rules by splitting projects which, taken together, are likely to have significant effects on the environment, it is necessary to take into account the cumulative effect of such projects which have an objective and chronological link between them. The Verwaltungsgerichtshof is therefore of

the opinion that the assessment of the environmental impact of the later project, namely the expansion of the airport area, must also take into account the impact of the earlier project, the construction of the additional terminal.

22 As regards the fact that the project at issue in the main proceedings, taken as a whole, appears to require an environmental impact assessment pursuant to the provisions of Directive 85/337 while the national legislation does not require such an assessment, the Verwaltungsgerichtshof observes that, in accordance with the case-law of the Court, the measure of discretion conferred on Member States by Article 4(2) of Directive 85/337 is limited by the obligation set out in Article 2(1) of the directive to make projects likely to have significant effects on the environment, by virtue, inter alia, of their nature, size or location, subject to an impact assessment. Thus, a Member State which establishes criteria or thresholds without taking into consideration the location of projects or which establishes them at a level which, in practice, means that all of a particular type of projects will be removed in advance from the obligation of carrying out an impact assessment exceeds the discretion which it has (*Abraham and Others*, paragraph 37; Case C-72/95 *Kraaijeveld and Others*[1996] ECR I-5403, paragraph 53 and Case C-435/97 *WWF and Others* [1999] ECR I-5613, paragraph 38).

23 As regards the monitoring of compliance with that discretion and the consequences if it is exceeded, the referring court points out that, in accordance with the case-law of the Court, where that discretion is exceeded by the legislative or administrative authorities of a Member State, individuals may rely on Articles 2(1) and 4(2) of Directive 85/337 before the courts of a Member State against the national authorities and thus obtain an order that the national rules or measures which are incompatible with those provisions be set aside. In such a case, it follows from the judgments in *Kraaijeveld and Others* (paragraphs 59 to 61) and *WWF and Others* (paragraph 5 of the operative part) that it is for the authorities of a Member State to adopt, according to their respective powers, to take all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment.

24 With regard to the direct effect of the relevant provisions of Directive 85/337, the referring court is of the opinion that, from the point of view of their content, those provisions are unconditional. As regards whether they are also sufficiently precise to be capable of direct application, it notes that the selection criteria laid down in Annex III to Directive 85/337 in any event state the limits of the discretion of the Member States under Article 4(2) of that directive. The rules at issue in the main proceedings do not take account of the criterion of location of the projects provided for in point 2(g) of Annex III to Directive 85/337. In addition, the threshold established in those rules

means that it is, in practice, highly unlikely that there would be an environmental assessment for medium-sized or small airports. Thus, according to the referring court, not only does the legislation at issue in the main proceedings fail fully to transpose Directive 85/337, but, in addition, it manifestly fails to take account of the clear and sufficiently precise criteria laid down in Annex III to that directive.

25 Having regard to those considerations and to the fact that it rules at final instance, the Verwaltungsgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does … Directive 85/337/EEC … preclude a national rule by which it is established that an environmental impact assessment for infrastructure works (not concerning the runway) at an airport, that is the construction of a terminal and the extension of the airport site to construct further facilities (in particular hangars, equipment buildings and parking areas), shall only be carried out if the annual number of aircraft movements is anticipated to increase by no less than 20 000?

In the event that Question 1 is answered in the affirmative:

2. In the absence of relevant national provisions, does Directive 85/337 require and allow for the direct application of its provisions to assess (taking due account of the objectives thereby pursued and the criteria set out in Annex III thereto) the environmental impact of a project – specified in Question 1 – which is covered by Annex II?’

Consideration of the questions referred

The first question

26 By its first question, the referring court asks, in essence, whether the provisions of Directive 85/337 preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to that directive subject to an environmental impact assessment only if those projects are likely to increase the number of aircraft movements by at least 20 000 per year.

27 In order to respond to that question, it is necessary to note that, as follows from the combined provisions of Article 4(2) of Directive 85/337 and the first indent of point 13 of Annex II thereto, any change or extension of projects listed in Annex I or Annex II, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment, the Member States must determine on the basis of a case-by-

case examination or of thresholds or criteria which they establish, whether such a project must be made subject to an environmental impact assessment.

28 In that regard, it must be borne in mind that, in accordance with the settled case-law of the Court, works to change the infrastructure of an existing airport, without extension of the runway, are likely to be covered by point 13 of Annex II to Directive 85/337, where they may be regarded, in particular because of their nature, extent and characteristics, as an alteration of the airport itself (see, to that effect, *Brussels Hoofdstedelijk Gewest*, paragraph 35 and the case-law cited).

29 As regards the establishment of thresholds or criteria to determine whether such a project must be made subject to an environmental impact assessment, it must be borne in mind that, indeed, Article 4(2)(b) of Directive 85/337 confers a measure of discretion on the Member States in that regard. However, that discretion is limited by the obligation set out in Article 2(1) of the directive to make projects likely, by virtue inter alia of their nature, size or location, to have significant effects on the environment subject to an impact assessment (see, to that effect, *WWF and Others*, paragraph 36 and the case-law cited).

30 Thus, the criteria and/or thresholds mentioned in Article 4(2)(b) of Directive 85/337 are designed to facilitate examination of the actual characteristics of any given project in order to determine whether it is subject to the requirement to carry out an assessment, and not to exempt in advance from that obligation certain whole classes of projects listed in Annex II to that directive which may be envisaged on the territory of a Member State (see, to that effect,*WWF and Others*, paragraph 37 and the case-law cited).

31 The Court has already held that a Member State which established criteria or thresholds at a level such that, in practice, an entire class of projects would be exempted in advance from the requirement of an impact assessment would exceed the limits of its discretion under Articles 2(1) and 4(2) of Directive 85/337 unless all projects excluded could, when viewed as a whole, be regarded as not being likely to have significant effects on the environment (see, to that effect, *WWF and Others*, paragraph 38 and the case-law cited).

32 Finally, it is apparent from Article 4(3) of Directive 85/337 that for the establishment of thresholds or criteria under Article 4(2)(b), regard must be had to the relevant selection criteria established in Annex III to the directive. Those criteria include the absorption capacity of the natural environment and, in that regard, particular attention must be paid to densely populated areas.

33 It must be noted that a threshold such as that at issue in the main proceedings is incompatible with the general obligation laid down in Article

2(1) of that directive for the purposes of correct identification of projects likely to have significant effects on the environment.

34 As the referring court points out, the establishment of such a high threshold means that changes to the infrastructure of small or medium-sized airports can never, in practice, give rise to an environmental impact assessment, despite the fact, as the observation from the European Commission pertinently states, it cannot be excluded that such works may have significant effects on the environment.

35 Furthermore, by establishing such a threshold in order to decide on the need for an environmental assessment of projects such as those at issue in the main proceedings, the national legislation concerned, despite the obligation placed on Member States by Article 4(3) of Directive 85/337, takes into consideration only the quantitative aspect of the consequences of a project, without taking account of the other selection criteria in Annex III to that directive, particularly that laid down in point 2(g) of that annex, namely the population density of the area affected by the project. It is not in dispute that the airport whose infrastructure is affected by the changes at issue in the main proceedings is located near to the city of Salzburg.

36 Moreover, the referring court observes that, in the circumstances of the main proceedings, with a view to deciding whether an environmental assessment must be carried out, it is necessary to take account of the effects on the environment of both the earlier project concerning the construction of the additional terminal and the later project concerning the expansion of the airport area.

37 In that regard, in accordance with the case-law of the Court, it can be necessary to take account of the cumulative effect of projects in order to avoid a circumvention of the objective of the European Union legislation by the splitting of projects which, taken together, are likely to have significant effects on the environment (see, to that effect, *Brussels Hoofdstedelijk Gewest and Others*, paragraph 36 and the case-law cited). It is for the referring court to examine, in the light of that case-law, whether and to what extent the effects on the environment of the projects referred to in paragraph 15 of this judgment and the projects already carried out during 2003 and 2004 must be assessed as a whole.

38 Consequently, the answer to the first question is that Articles 2(1) and 4(2)(b) and (3) of Directive 85/337 preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to that directive subject to an environmental impact assessment only if those projects are likely to increase the number of aircraft movements by at least 20 000 per year.

The second question

39 By its second question, the referring court asks, in essence, whether, when a Member State makes an incorrect transposition of Directive 85/337, that directive requires an environmental impact assessment of projects such as those at issue in the main proceedings, which fall within the scope of Annex II thereto.

40 The question referred must be understood as asking whether, when a Member State, pursuant to Article 4(2)(b) of Directive 85/337, with regard to projects falling within the scope of Annex II thereto, establishes a threshold which is incompatible with the obligations laid down in Articles 2(1) and 4(3) of that directive, the provisions of Articles 2(1) and 4(2)(a) and (3) of the directive have direct effect, which means that the competent national authorities must ensure that it is first examined whether the projects concerned are likely to have significant effects on the environment and, if so, that an assessment of those effects is then undertaken.

41 In accordance with the case-law of the Court, if the discretion conferred on Member States by Article 4(2) of Directive 85/337, read in conjunction with Article 2(1) thereof has been exceeded, it is for the authorities of the Member State to take, according to their relevant powers, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment (see, to that effect,*Kraaijeveld and Others*, paragraph 61, and *WWF and Others*, paragraphs 70 and 71).

42 The same conclusion applies to a situation such as that of the main proceedings, equivalent from the point of view of its effects to that described in the preceding paragraph of this judgment, in which the threshold established by the national legislation results in an incorrect transposition of Article 4(2)(b), read in conjunction with Articles 2(1) and 4(3) of Directive 85/337.

43 Consequently, in a situation such as that of the main proceedings, as the Commission rightly points out, when a Member State, on the basis of Article 4(2)(b) of Directive 85/337, has established a threshold which is likely to exempt in advance entire classes of projects from an environmental assessment, the national authorities are obliged to ensure, in accordance with Article 2(1) and Article 4(2)(a) and (3) of that directive, that it is determined, in each individual case, whether such an assessment must be undertaken and if so, to undertake that assessment.

44 However, the Austrian Government and Salzburger Flughafen dispute that conclusion, referring to Case C-201/02 *Wells* [2004] ECR I-723, in accordance with which the principle of legal certainty preludes an individual from relying on a directive against a Member State where it is a matter of a State obligation directly linked to the performance of another obligation falling, pursuant to that directive, on a third party.

45 That objection cannot be accepted.

46 In the case which gave rise to the *Wells* judgment, the Court held, firstly, that it had to be recognised that it is possible for an individual to rely on the provisions of Directive 85/337 and, secondly, that the owners of the land at issue had to bear the consequences of the belated performance of the obligations of the Member State concerned which follow from that directive.

47 Thus, in the main proceedings, in the event that a decision finds that an environmental study is necessary, Salzburger Flughafen, as the user of the land in question, must also bear the consequences of such a decision.

48 Accordingly, the answer to the second question is that, when a Member State, pursuant to Article 4(2)(b) of Directive 85/337, with regard to projects falling within the scope of Annex II thereto, establishes a threshold which is incompatible with the obligations laid down in Articles 2(1) and 4(3) of that directive, the provisions of Articles 2(1) and 4(2)(a) and (3) of the directive have direct effect, which means that the competent national authorities must ensure that it is first examined whether the projects concerned are likely to have significant effects on the environment and, if so, that an assessment of those effects is then undertaken.

Costs

49 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Articles 2(1) and 4(2)(b) and (3) of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC of 3 March 1997, preclude national legislation which makes projects which change the infrastructure of an airport and fall within the scope of Annex II to that directive subject to an**

environmental impact assessment only if those projects are likely to increase the number of aircraft movements by at least 20 000 per year;

2. **When a Member State, pursuant to Article 4(2)(b) of Directive 85/337, as amended by Directive 97/11, with regard to projects falling within the scope of Annex II thereto, establishes a threshold which is incompatible with the obligations laid down in Articles 2(1) and 4(3) of that directive, the provisions of Articles 2(1) and 4(2)(a) and (3) of the directive have direct effect, which means that the competent national authorities must ensure that it is first examined whether the projects concerned are likely to have significant effects on the environment and, if so, that an assessment of those effects is then undertaken.**

[Signatures]

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* Language of the case: German.

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE À DES USINES DE PÂTE À PAPIER SUR LE FLEUVE URUGUAY

(ARGENTINE c. URUGUAY)

ARRÊT DU 20 AVRIL 2010

2010

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY

(ARGENTINA *v.* URUGUAY)

JUDGMENT OF 20 APRIL 2010

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ARRÊT

USINES DE PÂTE À PAPIER SUR LE FLEUVE URUGUAY
(ARGENTINE c. URUGUAY)

PULP MILLS ON THE RIVER URUGUAY
(ARGENTINA *v.* URUGUAY)

20 APRIL 2010

JUDGMENT

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ABRÉVIATIONS ET ACRONYMES

AAP	«Autorización Ambiental Previa» (autorisation environnementale préalable)
ADCP	«Acoustic Doppler Current Profiler» (profileur de courant à effet Doppler)
AOX	«Adsorbable Organic Halogens» (composés organo-halogénés adsorbables)
BAT	«Best Available Techniques (or Technology)» (meilleures techniques disponibles)
Botnia	«Botnia S.A.» et «Botnia Fray Bentos S.A.» (deux sociétés de droit uruguayen créées par la société finlandaise Oy Metsä-Botnia AB)
CARU	«Comisión Administradora del Río Uruguay» (commission administrative du fleuve Uruguay)
CIS	«Cumulative Impact Study» (étude d'impact cumulé réalisée en septembre 2006 à la demande de la Société financière internationale)
CMB	«Celulosas de M'Bopicuá S.A.» (société de droit uruguayen créée par la société espagnole ENCE)
CMB (ENCE)	Usine de pâte à papier projetée à Fray Bentos par la société espagnole ENCE ayant créé à cette fin la société uruguayenne CMB
DINAMA	«Dirección Nacional de Medio Ambiente» (direction nationale de l'environnement du Gouvernement uruguayen)
ECF	«Elemental Chlorine-Free» (exempt de chlore élémentaire)
EIE	Evaluation de l'impact sur l'environnement
ENCE	«Empresa Nacional de Celulosas de España» (société espagnole ayant créé la société CMB de droit uruguayen)
GTAN	«Grupo Técnico de Alto Nivel» (Groupe technique de haut niveau créé en 2005 par l'Argentine et l'Uruguay pour résoudre leur litige concernant les usines CMB (ENCE) et Orion (Botnia))
IPPC-BAT	«Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry» (document de référence en matière de prévention et de réduction intégrées de la pollution sur les meilleures techniques disponibles dans l'industrie de la pâte et du papier)
MVOTMA	«Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente» (ministère uruguayen du logement, de l'aménagement du territoire et de l'environnement)
Orion (Botnia)	Usine de pâte à papier construite à Fray Bentos par la société finlandaise Oy Metsä-Botnia AB, ayant créé à cette fin les sociétés uruguayennes Botnia S.A. et Botnia Fray Bentos S.A.
OSE	«Obras Sanitarias del Estado» (organisme public uruguayen chargé de l'assainissement et de la distribution de l'eau)

ABBREVIATIONS AND ACRONYMS

AAP	"Autorización Ambiental Previa" (initial environmental authorization)
ADCP	Acoustic Doppler Current Profiler
AOX	Adsorbable Organic Halogens
BAT	Best Available Techniques (or Technology)
Botnia	"Botnia S.A." and "Botnia Fray Bentos S.A." (two companies formed under Uruguayan law by the Finnish company Oy Metsä-Botnia AB)
CARU	"Comisión Administradora del Río Uruguay" (Administrative Commission of the River Uruguay)
CIS	Cumulative Impact Study (prepared in September 2006 at the request of the International Finance Corporation)
CMB	Celulosas de M'Bopicuá S.A." (a company formed under Uruguayan law by the Spanish company ENCE)
CMB (ENCE)	Pulp mill planned at Fray Bentos by the Spanish company ENCE, which formed the Uruguayan company CMB for that purpose
DINAMA	"Dirección Nacional de Medio Ambiente" (National Directorate for the Environment of the Uruguayan Government)
ECF	Elemental Chlorine-Free
EIA	Environmental Impact Assessment
ENCE	"Empresa Nacional de Celulosas de España" (Spanish company which formed the company CMB under Uruguayan law)
ESAP	Environmental and Social Action Plan
GTAN	"Grupo Técnico de Alto Nivel" (High-Level Technical Group established in 2005 by Argentina and Uruguay to resolve their dispute over the CMB (ENCE) and Orion (Botnia) mills)
IFC	International Finance Corporation
IPPC-BAT	Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry
MVOTMA	"Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente" (Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs)
Orion (Botnia)	Pulp mill built at Fray Bentos by the Finnish company Oy Metsä-Botnia AB, which formed the Uruguayan companies Botnia S.A. and Botnia Fray Bentos S.A. for that purpose
OSE	"Obras Sanitarias del Estado" (Uruguay's State Agency for Sanitary Works)
POPs	Persistent Organic Pollutants
PROCEL	"Plan de Monitoreo de la Calidad Ambiental en el Río Uruguay en áreas de Plantas Celulósicas" (Plan for monitoring water quality in the area of the pulp mills set up under CARU)

PAES	Plan d'action environnemental et social
POP	Polluants organiques persistants
PROCEL	« Plan de Monitoreo de la Calidad Ambiental del Río Uruguay en áreas de Plantas Celulósicas » (plan de contrôle et de suivi (monitoring) de la qualité des eaux du fleuve Uruguay dans la zone des usines de pâte à papier, mis en place dans le cadre de la CARU)
PROCON	« Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay » (programme de contrôle de la qualité et de la pollution des eaux du fleuve Uruguay, mis en place dans le cadre de la CARU)
SFI	Société financière internationale

PROCON "Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay" (Water quality and pollution control programme set up under CARU)

COUR INTERNATIONALE DE JUSTICE

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AFFAIRE RELATIVE À DES USINES DE PÂTE À PAPIER SUR LE FLEUVE URUGUAY

(ARGENTINE c. URUGUAY)

Cadre juridique et faits de l'espèce.

Traité de Montevideo de 1961 — Statut du fleuve Uruguay de 1975 — Etablissement de la commission administrative du fleuve Uruguay (CARU) — Projet d'usine de pâte à papier CMB (ENCE) — Projet d'usine de pâte à papier Orion (Botnia) — Terminal portuaire de Nueva Palmira — Objet du différend.

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Etendue de la compétence de la Cour.

Clause compromissoire (article 60 du statut de 1975) — Dispositions du statut de 1975 et compétence ratione materiae *— Incompétence de la Cour pour connaître d'allégations relatives à la pollution sonore et visuelle ou aux mauvaises odeurs (article 36 du statut de 1975) — Pollution atmosphérique et atteinte à la qualité des eaux du fleuve examinées dans le cadre des obligations de fond.*

Article premier du statut de 1975 — Définition du but du statut de 1975 — Mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve — Portée de la référence aux « droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties » — Texte original espagnol — Statut adopté par les parties dans le respect de leurs engagements internationaux respectifs.

Alinéa a) *de l'article 41 du statut de 1975 — Texte original espagnol — Absence de « clause de renvoi » ayant pour effet d'incorporer dans le champ d'application du statut les obligations des parties découlant des accords internationaux et autres normes qui y sont visées — Obligation des parties d'exercer leurs pouvoirs de réglementation en conformité avec les accords internationaux applicables aux fins de la protection et de la préservation du milieu aquatique du fleuve Uruguay — Règles d'interprétation du statut de 1975 — Article 31 de la convention*

INTERNATIONAL COURT OF JUSTICE

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CASE CONCERNING PULP MILLS ON THE RIVER URUGUAY

(ARGENTINA *v.* URUGUAY)

Legal framework and facts of the case.
1961 Treaty of Montevideo — 1975 Statute of the River Uruguay — Establishment of the Administrative Commission of the River Uruguay (CARU) — CMB (ENCE) pulp mill project — Orion (Botnia) pulp mill project — Port terminal at Nueva Palmira — Subject of the dispute.

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Scope of the Court's jurisdiction.
Compromissory clause (Article 60 of the 1975 Statute) — Provisions of the 1975 Statute and jurisdiction ratione materiae *— Lack of jurisdiction for the Court to consider allegations concerning noise and visual pollution or bad odours (Article 36 of the 1975 Statute) — Air pollution and impact on the quality of the waters of the river addressed under substantive obligations.*

Article 1 of the 1975 Statute — Definition of the purpose of the 1975 Statute — Joint machinery necessary for the optimum and rational utilization of the river — Significance of the reference to the "rights and obligations arising from treaties and other international agreements in force for each of the parties" — Original Spanish text — Statute adopted by the parties in observance of their respective international commitments.
Article 41 (a) *of the 1975 Statute — Original Spanish text — Absence of a "referral clause" having the effect of incorporating within the ambit of the Statute the obligations of the parties under international agreements and other norms envisaged in the Statute — Obligation for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and preservation of the aquatic environment of the River Uruguay — Rules for interpreting the 1975 Statute — Article 31 of the Vienna*

de Vienne sur le droit des traités — Distinction entre la prise en considération d'autres règles internationales lors de l'interprétation du statut de 1975 et l'étendue de la compétence de la Cour en vertu de son article 60.

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Violation alléguée des obligations de nature procédurale.

Question des liens entre les obligations de nature procédurale et les obligations de fond — Objet et but du statut de 1975 — Utilisation rationnelle et optimale du fleuve Uruguay — Développement durable — Coopération entre les parties pour la gestion commune des risques de dommages à l'environnement — Existence d'un lien fonctionnel, relatif à la prévention, entre les obligations de nature procédurale et les obligations de fond — Responsabilité en cas de violation des unes ou des autres.

Articulation des différentes obligations de nature procédurale prévues par les articles 7 à 12 du statut de 1975 — Texte original espagnol de l'article 7 — Obligation d'informer, de notifier et de négocier comme moyen approprié de parvenir à l'objectif d'utilisation rationnelle et optimale du fleuve en tant que ressource partagée — Personnalité juridique de la CARU — Rôle central de la CARU dans la gestion commune du fleuve et l'obligation de coopérer entre les parties.

Obligation d'informer la CARU (premier alinéa de l'article 7 du statut de 1975) — Ouvrages soumis à cette obligation — Lien entre l'obligation d'informer la CARU, la coopération entre les parties et l'obligation de prévention — Détermination sommaire par la CARU d'un risque de préjudice sensible à l'autre partie — Contenu de l'information devant être transmise à la CARU — Obligation d'informer la CARU avant la délivrance de l'autorisation environnementale préalable — L'information de la CARU par des opérateurs privés ne peut tenir lieu de l'obligation d'informer prévue par le statut de 1975 — Violation par l'Uruguay de l'obligation d'informer la CARU.

Obligation de notifier les projets à l'autre partie (deuxième et troisième alinéas de l'article 7 du statut de 1975) — Nécessité de disposer d'une évaluation de l'impact sur l'environnement (EIE) complète — Notification de l'EIE à l'autre partie par l'intermédiaire de la CARU avant toute décision relative à la viabilité environnementale du projet — Violation par l'Uruguay de l'obligation de notifier les projets à l'Argentine.

Question de l'éventuelle dérogation aux obligations de nature procédurale convenue entre les Parties — « Arrangement » du 2 mars 2004 — Contenu et portée — L'Uruguay ne s'y étant pas conformé, l'« arrangement » ne peut être considéré comme ayant eu pour effet de le dispenser du respect des obligations de nature procédurale — Accord créant le Groupe technique de haut niveau (GTAN) — Saisine de la Cour sur la base de l'article 12 ou de l'article 60 du statut de 1975 : distinction sans incidence — L'accord créant le GTAN a eu pour but de permettre aux négociations prévues à l'article 12 du statut de 1975 d'avoir lieu, mais il n'a pas dérogé à d'autres obligations de nature procédurale — En acceptant la création du GTAN, l'Argentine n'a renoncé ni aux droits de nature procédurale que lui reconnaît le statut, ni à invoquer la responsabilité de l'Uruguay ; l'Argentine n'a pas davantage consenti à suspendre l'application des dispositions procédurales du statut (article 57 de la convention de Vienne sur le droit des traités) — Obligation de négocier de bonne foi — Obligation de « non-construction » durant la période de négociation — Travaux préliminaires autorisés par l'Uruguay — Violation par l'Uruguay de l'obligation de négocier prévue à l'article 12 du statut de 1975.

Convention on the Law of Treaties — Distinction between taking account of other international rules in the interpretation of the 1975 Statute and the scope of the jurisdiction of the Court under Article 60 of the latter.

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Question of links between the procedural obligations and the substantive obligations — Object and purpose of the 1975 Statute — Optimum and rational utilization of the River Uruguay — Sustainable development — Co-operation between the parties in jointly managing the risks of damage to the environment — Existence of a functional link, in regard to prevention, between the procedural obligations and the substantive obligations — Responsibility in the event of breaches of either category.

Interrelation of the various procedural obligations laid down by Articles 7 to 12 of the 1975 Statute — Original Spanish text of Article 7 — Obligation to inform, notify and negotiate as an appropriate means of achieving the objective of optimum and rational utilization of the river as a shared resource — Legal personality of CARU — Central role of CARU in the joint management of the river and obligation of the parties to co-operate.

Obligation to inform CARU (Article 7, first paragraph, of the 1975 Statute) — Works subject to this obligation — Link between the obligation to inform CARU, co-operation between the parties and the obligation of prevention — Determination by CARU on a preliminary basis of whether there is a risk of significant damage to the other party — Content of the information to be transmitted to CARU — Obligation to inform CARU before issuing of the initial environmental authorization — Provision of information to CARU by private operators cannot substitute for the obligation to inform laid down by the 1975 Statute — Breach by Uruguay of the obligation to inform CARU.

Obligation to notify the plans to the other party (Article 7, second and third paragraphs, of the 1975 Statute) — Need for a full environmental impact assessment (EIA) — Notification of the EIA to the other party, through CARU, before any decision on the environmental viability of the plan — Breach by Uruguay of the obligation to notify the plans to Argentina.

Question of whether the Parties agreed to derogate from the procedural obligations — "Understanding" of 2 March 2004 — Content and scope — Since Uruguay did not comply with it, the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations — Agreement setting up the High-Level Technical Group (GTAN) — Referral to the Court on the basis of Article 12 or Article 60 of the 1975 Statute: no practical distinction — The agreement to set up the GTAN had the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute to take place, but did not derogate from other procedural obligations — In accepting the creation of the GTAN, Argentina did not give up the procedural rights belonging to it by virtue of the Statute, nor the possibility of invoking Uruguay's responsibility; nor did Argentina consent to suspending the operation of the procedural provisions of the Statute (Article 57 of the Vienna Convention on the Law of Treaties) — Obligation to negotiate in good faith — "No construction obligation" during the negotiation period — Preliminary work approved by Uruguay — Breach by Uruguay of the obligation to negotiate laid down by Article 12 of the 1975 Statute.

Obligations de l'Uruguay après l'expiration de la période de négociation — Portée de l'article 12 du statut de 1975 — Absence d'obligation de « non-construction » après l'expiration de la période de négociation et pendant la phase de règlement judiciaire.

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Utilisation rationnelle et optimale du fleuve Uruguay — Définissant le but du statut de 1975, l'article premier ne crée pas de droits ou obligations spécifiques — Obligation de se conformer aux obligations prescrites par le statut aux fins de la protection de l'environnement et de la gestion conjointe du fleuve — Fonction réglementaire de la CARU — Lien étroit entre l'utilisation équitable et raisonnable du fleuve comme ressource partagée et la nécessité, qui est au cœur du développement durable, de concilier le développement économique et la protection de l'environnement (article 27 du statut de 1975).

Obligation de veiller à ce que la gestion du sol et des forêts ne cause pas un préjudice au régime du fleuve ou à la qualité de ses eaux (article 35 du statut de 1975) — Allégations de l'Argentine non établies.

Obligation de coordonner les mesures propres à éviter une modification de l'équilibre écologique (article 36 du statut de 1975) — Exigence d'une action individuelle de chaque partie et d'une action concertée par l'intermédiaire de la CARU — Obligation de diligence requise (« due diligence ») — L'Argentine n'a pas démontré de manière convaincante que l'Uruguay a refusé de prendre part aux efforts de coordination prévus par l'article 36 du statut de 1975.

Obligation d'empêcher la pollution et de préserver le milieu aquatique — Contenu normatif de l'article 41 du statut de 1975 — Obligation pour chaque partie d'adopter des normes et mesures destinées à protéger et préserver le milieu aquatique et, en particulier, à empêcher la pollution — Les normes et mesures adoptées par chaque partie doivent être conformes aux accords internationaux applicables et, le cas échéant, en harmonie avec les directives et recommandations des organismes techniques internationaux — Obligation de diligence requise (« due diligence ») d'adopter des normes et mesures et de les mettre en œuvre — Définition de la pollution selon l'article 40 du statut de 1975 — Activité réglementaire de la CARU (article 56 du statut de 1975), complémentaire à celle de chaque partie — Digeste de la CARU — Règles à l'aune desquelles l'existence d'effets nocifs doit s'apprécier : statut de 1975, digeste de la CARU, droit interne de chacune des parties dans la mesure exigée par le statut de 1975.

Evaluation de l'impact sur l'environnement (EIE) — Obligation de procéder à une EIE — Portée et contenu de l'EIE — Renvoi au droit interne — Question du choix du site des usines comme élément de l'EIE — La Cour n'est pas convaincue par l'argument de l'Argentine selon lequel une évaluation des différents sites possibles n'a pas eu lieu — Capacité de réception des eaux du fleuve à Fray Bentos et inversions de courant — Les normes de la CARU relatives à la qualité des eaux tiennent compte des caractéristiques géomorphologiques et

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Obligation to co-ordinate measures to avoid changes to the ecological balance (Article 36 of the 1975 Statute) — Requirement of individual action by each party and co-ordination through CARU — Obligation of due diligence — Argentina has not convincingly demonstrated that Uruguay has refused to engage in the co-ordination envisaged by Article 36 of the 1975 Statute.

Obligation to prevent pollution and preserve the aquatic environment — Normative content of Article 41 of the 1975 Statute — Obligation for each party to adopt rules and measures to protect and preserve the aquatic environment and, in particular, to prevent pollution — The rules and measures prescribed by each party must be in accordance with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies — Due diligence obligation to prescribe rules and measures and to apply them — Definition of pollution given in Article 40 of the 1975 Statute — Regulatory action of CARU (Article 56 of the 1975 Statute), complementing that of each party — CARU Digest — Rules by which the existence of any harmful effects is to be determined: 1975 Statute, CARU Digest, domestic law of each party within the limits prescribed by the 1975 Statute.

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Techniques de production utilisées à l'usine Orion (Botnia) — Aucun élément ne vient à l'appui de la prétention de l'Argentine selon laquelle l'usine Orion (Botnia) n'appliquerait pas les meilleures techniques disponibles en matière de rejets d'effluents par tonne de pâte à papier produite — Il ne ressort pas des données réunies après la mise en service de l'usine Orion (Botnia) que ses rejets ont excédé les limites autorisées.

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Demande de l'Uruguay visant à confirmer son droit de poursuivre l'exploitation de l'usine Orion (Botnia) — Absence de portée utile.

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Obligation des Parties de coopérer entre elles selon les modalités prévues par le statut de 1975 afin d'assurer la réalisation de son objet et de son but — Action conjointe des Parties au sein de la CARU et établissement d'une réelle communauté d'intérêts et de droits dans la gestion du fleuve Uruguay et dans la protection de son environnement.

of consultation of the affected populations as part of the EIA — No legal obligation to consult the affected populations arises from the instruments invoked by Argentina — Consultation by Uruguay of the affected populations did indeed take place.

Production technology used in the Orion (Botnia) mill — No evidence to support Argentina's claim that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced — From the data collected after the start-up of the Orion (Botnia) mill, it does not appear that the discharges from it have exceeded the prescribed limits.

Impact of the discharges on the quality of the waters of the river — Post-operational monitoring — Dissolved oxygen — Phosphorus — Algal blooms — Phenolic substances — Presence of nonylphenols in the river environment — Dioxins and furans — Alleged breaches not established.

Effects on biodiversity — Insufficient evidence to conclude that Uruguay breached the obligation to protect the aquatic environment, including its fauna and flora.

Air pollution — Indirect pollution from deposits into the aquatic environment — Insufficient evidence.

On the basis of the evidence submitted, no breach by Uruguay of Article 41 of the 1975 Statute.

Continuing obligations: monitoring — Obligation of the Parties to enable CARU to exercise on a continuous basis the powers conferred on it by the 1975 Statute — Obligation of Uruguay to continue monitoring the operation of the Orion (Botnia) plant — Obligation of the Parties to continue their co-operation through CARU.

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Claims made by the Parties in their final submissions.

Claims of Argentina — Breach of procedural obligations — Finding of wrongful conduct and satisfaction — Forms of reparation other than compensation not excluded by the 1975 Statute — Restitution as a form of reparation for injury — Definition — Limits — Form of reparation appropriate to the injury suffered, taking into account the nature of the wrongful act — Restitution in the form of the dismantling of the Orion (Botnia) mill not appropriate where only breaches of procedural obligations have occurred — No breach of substantive obligations and rejection of Argentina's other claims — No special circumstances requiring the ordering of assurances and guarantees of non-repetition.

Uruguay's request for confirmation of its right to continue operating the Orion (Botnia) plant — No practical significance.

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Obligation of the Parties to co-operate with each other, on the terms set out in the 1975 Statute, to ensure the achievement of its object and purpose — Joint action of the Parties through CARU and establishment of a real community of interests and rights in the management of the River Uruguay and in the protection of its environment.

ARRÊT

Présents : M. TOMKA, *vice-président, faisant fonction de président en l'affaire* ; MM. KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD, *juges* ; MM. TORRES BERNÁRDEZ, VINUESA, *juges* ad hoc ; M. COUVREUR, *greffier*.

En l'affaire relative à des usines de pâte à papier sur le fleuve Uruguay,

entre

la République argentine,

représentée par

S. Exc. Mme Susana Ruiz Cerutti, ambassadeur, conseiller juridique du ministère des relations extérieures, du commerce international et du culte,

comme agent ;

S. Exc. M. Horacio A. Basabe, ambassadeur, directeur général de l'Institut du service extérieur de la nation, ancien conseiller juridique du ministère des relations extérieures, du commerce international et du culte, membre de la Cour permanente d'arbitrage,

S. Exc. M. Santos Goñi Marenco, ambassadeur de la République argentine auprès du Royaume des Pays-Bas,

comme coagents ;

M. Alain Pellet, professeur à l'Université de Paris Ouest, Nanterre-La Défense, membre et ancien président de la Commission du droit international, membre associé de l'Institut de droit international,

M. Philippe Sands, Q.C., professeur de droit international à l'University College de Londres, avocat, Matrix Chambers (Londres),

M. Marcelo Kohen, professeur de droit international à l'Institut de hautes études internationales et du développement de Genève, membre associé de l'Institut de droit international,

Mme Laurence Boisson de Chazournes, professeur de droit international à l'Université de Genève,

M. Alan Béraud, ministre à l'ambassade de la République argentine auprès de l'Union européenne, ancien conseiller juridique du ministère des relations extérieures, du commerce international et du culte,

M. Daniel Müller, chercheur au Centre de droit international de Nanterre (CEDIN), Université de Paris Ouest, Nanterre-La Défense,

comme conseils et avocats ;

M. Homero Bibiloni, secrétaire d'Etat à l'environnement et au développement durable,

comme autorité gouvernementale ;

M. Esteban Lyons, directeur national du contrôle environnemental du secrétariat à l'environnement et au développement durable,

M. Howard Wheater, docteur en hydrologie de l'Université de Bristol, professeur d'hydrologie à l'Imperial College de Londres, directeur de l'Imperial College Environment Forum,

JUDGMENT

Present: *Vice-President* TOMKA, *Acting President*; *Judges* KOROMA, AL-KHASAWNEH, SIMMA, ABRAHAM, KEITH, SEPÚLVEDA-AMOR, BENNOUNA, SKOTNIKOV, CANÇADO TRINDADE, YUSUF, GREENWOOD; *Judges* ad hoc TORRES BERNÁRDEZ, VINUESA; *Registrar* COUVREUR.

In the case concerning pulp mills on the River Uruguay,

between

the Argentine Republic,

represented by

H.E. Ms Susana Ruiz Cerutti, Ambassador, Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

as Agent;

H.E. Mr. Horacio A. Basabe, Ambassador, Director of the Argentine Institute for Foreign Service, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship, Member of the Permanent Court of Arbitration,

H.E. Mr. Santos Goñi Marenco, Ambassador of the Argentine Republic to the Kingdom of the Netherlands,

as Co-Agents;

Mr. Alain Pellet, Professor at the University of Paris Ouest, Nanterre-La Défense, member and former Chairman of the International Law Commission, associate member of the Institut de droit international,

Mr. Philippe Sands, Q.C., Professor of International Law at University College London, Barrister at Matrix Chambers, London,

Mr. Marcelo Kohen, Professor of International Law at the Graduate Institute of International and Development Studies, Geneva, associate member of the Institut de droit international,

Ms Laurence Boisson de Chazournes, Professor of International Law at the University of Geneva,

Mr. Alan Béraud, Minister at the Embassy of the Argentine Republic to the European Union, former Legal Adviser to the Ministry of Foreign Affairs, International Trade and Worship,

Mr. Daniel Müller, Researcher at the Centre de droit international de Nanterre (CEDIN), University of Paris Ouest, Nanterre-La Défense,

as Counsel and Advocates;

Mr. Homero Bibiloni, Federal Secretary for the Environment and Sustainable Development,

as Governmental Authority;

Mr. Esteban Lyons, National Director of Environmental Control, Secretariat of the Environment and Sustainable Development,

Mr. Howard Wheater, Ph.D. in Hydrology from Bristol University, Professor of Hydrology at Imperial College and Director of the Imperial College Environment Forum,

M. Juan Carlos Colombo, docteur en océanographie de l'Université de Québec, professeur à la faculté des sciences et au musée de l'Université nationale de La Plata, directeur du laboratoire de chimie environnementale et de biogéochimie de l'Université nationale de La Plata,
M. Neil McIntyre, docteur en ingénierie environnementale, maître de conférences à l'Imperial College de Londres,
Mme Inés Camilloni, docteur en sciences atmosphériques, professeur de sciences atmosphériques à la faculté des sciences de l'Université de Buenos Aires, maître de recherche au conseil national de la recherche (CONICET),
M. Gabriel Raggio, docteur en sciences techniques de l'Ecole polytechnique fédérale de Zurich (ETHZ) (Suisse), consultant indépendant,

comme conseillers scientifiques et experts;

M. Holger Martinsen, ministre au bureau du conseiller juridique du ministère des relations extérieures, du commerce international et du culte,
M. Mario Oyarzábal, conseiller d'ambassade, membre du bureau du conseiller juridique du ministère des relations extérieures, du commerce international et du culte,
M. Fernando Marani, deuxième secrétaire à l'ambassade de la République argentine au Royaume des Pays-Bas,
M. Gabriel Herrera, secrétaire d'ambassade, membre du bureau du conseiller juridique du ministère des relations extérieures, du commerce international et du culte,
Mme Cynthia Mulville, secrétaire d'ambassade, membre du bureau du conseiller juridique du ministère des relations extérieures, du commerce international et du culte,
Mme Kate Cook, avocat, Matrix Chambers (Londres), spécialisée en droit de l'environnement et en droit du développement,
Mme Mara Tignino, docteur en droit, chercheur à l'Université de Genève,
M. Magnus Jesko Langer, assistant d'enseignement et de recherche à l'Institut de hautes études internationales et du développement de Genève,

comme conseillers juridiques,

et

la République orientale de l'Uruguay,

représentée par

S. Exc. M. Carlos Gianelli, ambassadeur de la République orientale de l'Uruguay auprès des Etats-Unis d'Amérique,

comme agent;

S. Exc. M. Carlos Mora Medero, ambassadeur de la République orientale de l'Uruguay auprès du Royaume des Pays-Bas,

comme coagent;

M. Alan Boyle, professeur de droit international à l'Université d'Edimbourg, membre du barreau d'Angleterre,
M. Luigi Condorelli, professeur à la faculté de droit de l'Université de Florence,

Mr. Juan Carlos Colombo, Ph.D. in Oceanography from the University of Quebec, Professor at the Faculty of Sciences and Museum of the National University of La Plata, Director of the Laboratory of Environmental Chemistry and Biogeochemistry at the National University of La Plata,
Mr. Neil McIntyre, Ph.D. in Environmental Engineering, Senior Lecturer in Hydrology at Imperial College London,
Ms Inés Camilloni, Ph.D. in Atmospheric Sciences, Professor of Atmospheric Sciences in the Faculty of Sciences of the University of Buenos Aires, Senior Researcher at the National Research Council (CONICET),

Mr. Gabriel Raggio, Doctor in Technical Sciences of the Swiss Federal Institute of Technology Zurich (ETHZ) (Switzerland), Independent Consultant,

as Scientific Advisers and Experts;

Mr. Holger Martinsen, Minister at the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
Mr. Mario Oyarzábal, Embassy Counsellor, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,
Mr. Fernando Marani, Second Secretary, Embassy of the Argentine Republic in the Kingdom of the Netherlands,
Mr. Gabriel Herrera, Embassy Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Cynthia Mulville, Embassy Secretary, member of the Office of the Legal Adviser, Ministry of Foreign Affairs, International Trade and Worship,

Ms Kate Cook, Barrister at Matrix Chambers, London, specializing in environmental law and law relating to development,
Ms Mara Tignino, Ph.D. in Law, Researcher at the University of Geneva,
Mr. Magnus Jesko Langer, teaching and research assistant, Graduate Institute of International and Development Studies, Geneva,

as Legal Advisers,

and

the Eastern Republic of Uruguay,

represented by

H.E. Mr. Carlos Gianelli, Ambassador of the Eastern Republic of Uruguay to the United States of America,

as Agent;

H.E. Mr. Carlos Mora Medero, Ambassador of the Eastern Republic of Uruguay to the Kingdom of the Netherlands,

as Co-Agent;

Mr. Alan Boyle, Professor of International Law at the University of Edinburgh, Member of the English Bar,
Mr. Luigi Condorelli, Professor at the Faculty of Law, University of Florence,

M. Lawrence H. Martin, cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique, du district de Columbia et du Commonwealth du Massachusetts,
M. Stephen C. McCaffrey, professeur à la McGeorge School of Law de l'Université du Pacifique (Californie), ancien président de la Commission du droit international et rapporteur spécial aux fins des travaux de la Commission sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation,
M. Alberto Pérez Pérez, professeur à la faculté de droit de l'Université de la République (Montevideo),
M. Paul S. Reichler, cabinet Foley Hoag LLP, membre des barreaux de la Cour suprême des Etats-Unis d'Amérique et du district de Columbia,

comme conseils et avocats ;

M. Marcelo Cousillas, conseiller juridique à la direction nationale de l'environnement, ministère du logement, de l'aménagement du territoire et de l'environnement,
M. César Rodriguez Zavalla, chef de cabinet au ministère des affaires étrangères,
M. Carlos Mata, directeur adjoint des affaires juridiques au ministère des affaires étrangères,
M. Marcelo Gerona, conseiller à l'ambassade de la République orientale de l'Uruguay au Royaume des Pays-Bas,
M. Eduardo Jiménez de Aréchaga, avocat, admis au barreau de la République orientale de l'Uruguay et membre du barreau de New York,
M. Adam Kahn, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,
M. Andrew Loewenstein, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,
Mme Analia Gonzalez, LL.M., cabinet Foley Hoag LLP, admise au barreau de la République orientale de l'Uruguay,
Mme Clara E. Brillembourg, cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et de New York,
Mme Cicely Parseghian, cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,
M. Pierre Harcourt, doctorant à l'Université d'Edimbourg,
M. Paolo Palchetti, professeur associé à la faculté de droit de l'Université de Macerata,
Mme Maria E. Milanes-Murcia, M.A., LL.M., J.S.D. Candidate à la McGeorge School of Law de l'Université du Pacifique (Californie), doctorante à l'Université de Murcie, admise au barreau d'Espagne,

comme conseils adjoints ;

Mme Alicia Torres, directrice nationale de l'environnement au ministère du logement, de l'aménagement du territoire et de l'environnement,
M. Eugenio Lorenzo, conseiller technique à la direction nationale de l'environnement du ministère du logement, de l'aménagement du territoire et de l'environnement,
M. Cyro Croce, consultant technique à la direction nationale de l'environnement du ministère du logement, de l'aménagement du territoire et de l'environnement,

Mr. Lawrence H. Martin, Foley Hoag LLP, Member of the Bars of the United States Supreme Court, the District of Columbia and the Commonwealth of Massachusetts,
Mr. Stephen C. McCaffrey, Professor at the McGeorge School of Law, University of the Pacific, California, former Chairman of the International Law Commission and Special Rapporteur for the Commission's work on the law of non-navigational uses of international watercourses,

Mr. Alberto Pérez Pérez, Professor in the Faculty of Law, University of the Republic, Montevideo,
Mr. Paul S. Reichler, Foley Hoag LLP, Member of the Bars of the United States Supreme Court and the District of Columbia,

as Counsel and Advocates;

Mr. Marcelo Cousillas, Legal Counsel at the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. César Rodriguez Zavalla, Chief of Cabinet, Ministry of Foreign Affairs,

Mr. Carlos Mata, Deputy Director of Legal Affairs, Ministry of Foreign Affairs,
Mr. Marcelo Gerona, Counsellor at the Embassy of the Eastern Republic of Uruguay in the Kingdom of the Netherlands,
Mr. Eduardo Jiménez de Aréchaga, Attorney at Law, admitted to the Bar of the Eastern Republic of Uruguay and Member of the Bar of New York,
Mr. Adam Kahn, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Mr. Andrew Loewenstein, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Ms Analia Gonzalez, LL.M., Foley Hoag LLP, admitted to the Bar of the Eastern Republic of Uruguay,
Ms Clara E. Brillembourg, Foley Hoag LLP, Member of the Bars of the District of Columbia and New York,
Ms Cicely Parseghian, Foley Hoag LLP, Member of the Bar of the Commonwealth of Massachusetts,
Mr. Pierre Harcourt, Ph.D. candidate, University of Edinburgh,
Mr. Paolo Palchetti, Associate Professor at the School of Law, University of Macerata,
Ms Maria E. Milanes-Murcia, M.A., LL.M., J.S.D. Candidate at the McGeorge School of Law, University of the Pacific, California, Ph.D. Candidate, University of Murcia, admitted to the Bar of Spain,

as Assistant Counsel;

Ms Alicia Torres, National Director for the Environment at the Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. Eugenio Lorenzo, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,
Mr. Cyro Croce, Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,

Mme Raquel Piaggio, organisme public chargé de l'assainissement et de la distribution de l'eau (OSE), consultante technique à la direction nationale de l'environnement du ministère du logement, de l'aménagement du territoire et de l'environnement,
M. Charles A. Menzie, Ph.D., Principal Scientist et directeur d'EcoSciences Practice chez Exponent, Inc., à Alexandria (Virginie),
M. Neil McCubbin, Eng., B.sc. (Eng.), 1st Class Honours (Glasgow), Associate au Royal College of Science and Technology de Glasgow,

comme conseillers scientifiques et experts,

LA COUR,

ainsi composée,

après délibéré en chambre du conseil,

rend l'arrêt suivant :

1. Le 4 mai 2006, la République argentine (ci-après dénommée l'« Argentine ») a déposé au Greffe de la Cour une requête introduisant une instance contre la République orientale de l'Uruguay (ci-après dénommée l'« Uruguay ») au sujet d'un différend relatif à la violation, qu'aurait commise l'Uruguay, d'obligations découlant du statut du fleuve Uruguay (*Recueil des traités des Nations Unies (RTNU)*, vol. 1295, n° I-21425, p. 348), traité signé par l'Argentine et l'Uruguay à Salto (Uruguay) le 26 février 1975 et entré en vigueur le 18 septembre 1976 (ci-après le « statut de 1975 »); selon la requête, cette violation résulte de « l'autorisation de construction, [de] la construction et [de] l'éventuelle mise en service de deux usines de pâte à papier sur le fleuve Uruguay », l'Argentine invoquant plus particulièrement les « effets desdites activités sur la qualité des eaux du fleuve Uruguay et sa zone d'influence ».

Dans sa requête, l'Argentine, se référant au paragraphe 1 de l'article 36 du Statut de la Cour, entend fonder la compétence de celle-ci sur le premier paragraphe de l'article 60 du statut de 1975.

2. Conformément au paragraphe 2 de l'article 40 du Statut de la Cour, la requête a été immédiatement communiquée au Gouvernement uruguayen par le greffier. Conformément au paragraphe 3 de cet article, le Secrétaire général de l'Organisation des Nations Unies a été informé du dépôt de ladite requête.

3. Le 4 mai 2006, immédiatement après le dépôt de sa requête, l'Argentine a en outre présenté une demande en indication de mesures conservatoires sur la base de l'article 41 du Statut de la Cour et de l'article 73 de son Règlement. Conformément au paragraphe 2 de l'article 73 du Règlement, le greffier a immédiatement transmis au Gouvernement uruguayen une copie certifiée conforme de cette demande.

4. Le 2 juin 2006, l'Uruguay a fait tenir à la Cour un CD-ROM contenant la version électronique de deux volumes de documents relatifs à la demande en indication de mesures conservatoires présentée par l'Argentine, intitulés « Observations de l'Uruguay » (dont des exemplaires sous forme papier ont ensuite été reçus); copie de ces documents a immédiatement été transmise à l'Argentine.

5. Le 2 juin 2006, l'Argentine a fait parvenir à la Cour divers documents, dont un enregistrement vidéo, et, le 6 juin 2006, elle lui en a fait parvenir de nouveaux; copie de chaque série de documents a immédiatement été transmise à l'Uruguay.

6. Les 6 et 7 juin 2006, diverses communications ont été reçues des Parties,

Ms Raquel Piaggio, State Agency for Sanitary Works (OSE), Technical Consultant for the National Directorate for the Environment, Ministry of Housing, Land Use Planning and Environmental Affairs,

Mr. Charles A. Menzie, Ph.D., Principal Scientist and Director of the Eco-Sciences Practice at Exponent, Inc., Alexandria, Virginia,
Mr. Neil McCubbin, Eng., B.Sc. (Eng.), 1st Class Honours, Glasgow, Associate of the Royal College of Science and Technology, Glasgow,

as Scientific Advisers and Experts,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 4 May 2006, the Argentine Republic (hereinafter "Argentina") filed in the Registry of the Court an Application instituting proceedings against the Eastern Republic of Uruguay (hereinafter "Uruguay") in respect of a dispute concerning the breach, allegedly committed by Uruguay, of obligations under the Statute of the River Uruguay (United Nations, *Treaty Series (UNTS)*, Vol. 1295, No. I-21425, p. 340), a treaty signed by Argentina and Uruguay at Salto (Uruguay) on 26 February 1975 and having entered into force on 18 September 1976 (hereinafter the "1975 Statute"); in the Application, Argentina stated that this breach arose out of "the authorization, construction and future commissioning of two pulp mills on the River Uruguay", with reference in particular to "the effects of such activities on the quality of the waters of the River Uruguay and on the areas affected by the river".

In its Application, Argentina, referring to Article 36, paragraph 1, of the Statute of the Court, seeks to found the jurisdiction of the Court on Article 60, paragraph 1, of the 1975 Statute.

2. Pursuant to Article 40, paragraph 2, of the Statute of the Court, the Registrar communicated the Application forthwith to the Government of Uruguay. In accordance with paragraph 3 of that Article, the Secretary-General of the United Nations was notified of the filing of the Application.

3. On 4 May 2006, immediately after the filing of the Application, Argentina also submitted a request for the indication of provisional measures based on Article 41 of the Statute and Article 73 of the Rules of Court. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Government of Uruguay.

4. On 2 June 2006, Uruguay transmitted to the Court a CD-ROM containing the electronic version of two volumes of documents relating to the Argentine request for the indication of provisional measures, entitled "Observations of Uruguay" (of which paper copies were subsequently received); a copy of these documents was immediately sent to Argentina.

5. On 2 June 2006, Argentina transmitted to the Court various documents, including a video recording, and, on 6 June 2006, it transmitted further documents; copies of each series of documents were immediately sent to Uruguay.

6. On 6 and 7 June 2006, various communications were received from the

par lesquelles chacune a présenté à la Cour certaines observations sur les documents déposés par l'autre. L'Uruguay a fait objection à la présentation de l'enregistrement vidéo déposé par l'Argentine. La Cour a décidé de ne pas autoriser la présentation de cet enregistrement à l'audience.

7. La Cour ne comptant sur le siège aucun juge de la nationalité des Parties, chacune d'elles s'est prévalue du droit que lui confère le paragraphe 3 de l'article 31 du Statut de procéder à la désignation d'un juge *ad hoc* pour siéger en l'affaire. L'Argentine a désigné M. Raúl Emilio Vinuesa, et l'Uruguay M. Santiago Torres Bernárdez.

8. Par ordonnance du 13 juillet 2006, la Cour, après avoir entendu les Parties, a conclu «que les circonstances, telles qu'elles se présent[ai]ent [alors] à [elle], n['étaient] pas de nature à exiger l'exercice de son pouvoir d'indiquer des mesures conservatoires en vertu de l'article 41 du Statut».

9. Par une autre ordonnance du même jour, la Cour, compte tenu des vues des Parties, a fixé au 15 janvier 2007 et au 20 juillet 2007, respectivement, les dates d'expiration des délais pour le dépôt d'un mémoire de l'Argentine et d'un contre-mémoire de l'Uruguay; ces pièces ont été dûment déposées dans les délais ainsi prescrits.

10. Le 29 novembre 2006, l'Uruguay, invoquant l'article 41 du Statut et l'article 73 du Règlement, a présenté à son tour une demande en indication de mesures conservatoires. Conformément au paragraphe 2 de l'article 73 du Règlement, le greffier a immédiatement fait tenir au Gouvernement argentin une copie certifiée conforme de cette demande.

11. Le 14 décembre 2006, l'Uruguay a fait parvenir à la Cour un volume de documents relatifs à la demande en indication de mesures conservatoires, intitulé «Observations de l'Uruguay»; copie de ces documents a immédiatement été transmise à l'Argentine.

12. Le 18 décembre 2006, avant l'ouverture de la procédure orale, l'Argentine a fait parvenir à la Cour un volume de documents relatifs à la demande en indication de mesures conservatoires présentée par l'Uruguay; le greffier a immédiatement transmis au Gouvernement uruguayen une copie de ces documents.

13. Par ordonnance du 23 janvier 2007, la Cour, après avoir entendu les Parties, a conclu «que les circonstances, telles qu'elles se présent[ai]ent [alors] à [elle], n['étaient] pas de nature à exiger l'exercice de son pouvoir d'indiquer des mesures conservatoires en vertu de l'article 41 du Statut».

14. Par ordonnance du 14 septembre 2007, la Cour, compte tenu de l'accord des Parties et des circonstances de l'espèce, a autorisé la présentation d'une réplique par l'Argentine et d'une duplique par l'Uruguay, et fixé respectivement au 29 janvier 2008 et au 29 juillet 2008 les dates d'expiration des délais pour le dépôt de ces pièces. La réplique de l'Argentine et la duplique de l'Uruguay ont été dûment déposées dans les délais ainsi prescrits.

15. Par lettres datées respectivement du 16 juin 2009 et du 17 juin 2009, les Gouvernements de l'Uruguay et de l'Argentine ont fait connaître à la Cour qu'ils étaient parvenus à un accord à l'effet de produire des documents nouveaux en application de l'article 56 du Règlement. Par lettres du 23 juin 2009, le greffier a informé les Parties que la Cour avait décidé de les autoriser à procéder comme elles en étaient convenues. Ces nouveaux documents ont été dûment déposés dans le délai convenu.

16. Le 15 juillet 2009, chacune des Parties a, conformément à l'accord intervenu entre elles et avec l'autorisation de la Cour, présenté certaines observations sur les documents nouveaux déposés par la Partie adverse. Chaque Partie a également déposé certains documents à l'appui desdites observations.

Parties, whereby each Party presented the Court with certain observations on the documents submitted by the other Party. Uruguay objected to the production of the video recording submitted by Argentina. The Court decided not to authorize the production of that recording at the hearings.

7. Since the Court included upon the Bench no judge of the nationality of the Parties, each of them exercised its right under Article 31, paragraph 3, of the Statute to choose a judge *ad hoc* to sit in the case. Argentina chose Mr. Raúl Emilio Vinuesa, and Uruguay chose Mr. Santiago Torres Bernárdez.

8. By an Order of 13 July 2006, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

9. By another Order of the same date, the Court, taking account of the views of the Parties, fixed 15 January 2007 and 20 July 2007, respectively, as the time-limits for the filing of a Memorial by Argentina and a Counter-Memorial by Uruguay; those pleadings were duly filed within the time-limits so prescribed.

10. On 29 November 2006, Uruguay, invoking Article 41 of the Statute and Article 73 of the Rules of Court, in turn submitted a request for the indication of provisional measures. In accordance with Article 73, paragraph 2, of the Rules of Court, the Registrar transmitted a certified copy of this request forthwith to the Argentine Government.

11. On 14 December 2006, Uruguay transmitted to the Court a volume of documents concerning the request for the indication of provisional measures, entitled "Observations of Uruguay"; a copy of these documents was immediately sent to Argentina.

12. On 18 December 2006, before the opening of the oral proceedings, Argentina transmitted to the Court a volume of documents concerning Uruguay's request for the indication of provisional measures; the Registrar immediately sent a copy of these documents to the Government of Uruguay.

13. By an Order of 23 January 2007, the Court, having heard the Parties, found "that the circumstances, as they [then] present[ed] themselves to [it], [we]re not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures".

14. By an Order of 14 September 2007, the Court, taking account of the agreement of the Parties and of the circumstances of the case, authorized the submission of a Reply by Argentina and a Rejoinder by Uruguay, and fixed 29 January 2008 and 29 July 2008 as the respective time-limits for the filing of those pleadings. The Reply of Argentina and the Rejoinder of Uruguay were duly filed within the time-limits so prescribed.

15. By letters dated 16 June 2009 and 17 June 2009 respectively, the Governments of Uruguay and Argentina notified the Court that they had come to an agreement for the purpose of producing new documents pursuant to Article 56 of the Rules of Court. By letters of 23 June 2009, the Registrar informed the Parties that the Court had decided to authorize them to proceed as they had agreed. The new documents were duly filed within the agreed time-limit.

16. On 15 July 2009, each of the Parties, as provided for in the agreement between them and with the authorization of the Court, submitted comments on the new documents produced by the other Party. Each Party also filed documents in support of these comments.

17. Conformément au paragraphe 2 de l'article 53 de son Règlement, la Cour, après s'être renseignée auprès des Parties, a décidé que des exemplaires des pièces de procédure et des documents annexés seraient rendus accessibles au public à l'ouverture de la procédure orale.

18. Par lettre du 15 septembre 2009, l'Uruguay, se référant au paragraphe 4 de l'article 56 du Règlement et à l'Instruction de procédure IX *bis*, a communiqué à la Cour des documents faisant partie de publications facilement accessibles sur lesquels il entendait s'appuyer au cours de la procédure orale. L'Argentine n'a formulé aucune objection au sujet de ces documents.

19. Par lettre du 25 septembre 2009, le Gouvernement argentin, se référant à l'article 56 du Règlement et au paragraphe 2 de l'Instruction de procédure IX, a adressé au Greffe des documents nouveaux qu'il souhaitait produire. Par lettre du 28 septembre 2009, le Gouvernement uruguayen a informé la Cour qu'il s'opposait à la production desdits documents. Il a indiqué en outre que si, néanmoins, la Cour autorisait que les documents en question soient versés au dossier de l'affaire, il présenterait des observations à leur sujet et soumettrait certains documents à l'appui de ces observations. Par lettres en date du 28 septembre 2009, le greffier a porté à la connaissance des Parties que la Cour n'avait pas estimé que la production des documents nouveaux présentés par le Gouvernement argentin était nécessaire, au sens du paragraphe 2 de l'article 56 du Règlement, et qu'elle n'avait par ailleurs pas identifié de circonstance exceptionnelle (Instruction de procédure IX, paragraphe 3) qui eût justifié leur production à ce stade de la procédure.

20. Des audiences publiques ont été tenues entre le 14 septembre 2009 et le 2 octobre 2009, au cours desquelles ont été entendus en leurs plaidoiries et réponses:

Pour l'Argentine: S. Exc. Mme Susana Ruiz Cerutti,
M. Alain Pellet,
M. Philippe Sands,
M. Howard Wheater,
Mme Laurence Boisson de Chazournes,
M. Marcelo Kohen,
M. Alan Béraud,
M. Juan Carlos Colombo,
M. Daniel Müller.

Pour l'Uruguay: S. Exc. M. Carlos Gianelli,
M. Alan Boyle,
M. Paul S. Reichler,
M. Neil McCubbin,
M. Stephen C. McCaffrey,
M. Lawrence H. Martin,
M. Luigi Condorelli.

21. A l'audience, des questions ont été posées aux Parties par des membres de la Cour, auxquelles il a été répondu oralement et par écrit conformément au paragraphe 4 de l'article 61 du Règlement. Conformément à l'article 72 du Règlement, l'une des Parties a présenté des observations écrites sur une réponse fournie par écrit par l'autre Partie et reçue après la clôture de la procédure orale.

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17. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after ascertaining the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

18. By letter of 15 September 2009, Uruguay, referring to Article 56, paragraph 4, of the Rules of Court and to Practice Direction IX*bis*, communicated documents to the Court, forming part of publications readily available, on which it intended to rely during the oral proceedings. Argentina made no objection with regard to these documents.

19. By letter of 25 September 2009, the Argentine Government, referring to Article 56 of the Rules of Court and to Practice Direction IX, paragraph 2, sent new documents to the Registry which it wished to produce. By letter of 28 September 2009, the Government of Uruguay informed the Court that it was opposed to the production of these documents. It further indicated that if, nevertheless, the Court decided to admit the documents in question into the record of the case, it would present comments on them and submit documents in support of those comments. By letters dated 28 September 2009, the Registrar informed the Parties that the Court did not consider the production of the new documents submitted by the Argentine Government to be necessary within the meaning of Article 56, paragraph 2, of the Rules of Court, and that it had not moreover identified any exceptional circumstance (Practice Direction IX, paragraph 3) which justified their production at that stage of the proceedings.

20. Public hearings were held between 14 September 2009 and 2 October 2009, at which the Court heard the oral arguments and replies of:

For Argentina: H.E. Ms Susana Ruiz Cerutti,
Mr. Alain Pellet,
Mr. Philippe Sands,
Mr. Howard Wheater,
Ms Laurence Boisson de Chazournes,
Mr. Marcelo Kohen,
Mr. Alan Béraud,
Mr. Juan Carlos Colombo,
Mr. Daniel Müller.

For Uruguay: H.E. Mr. Carlos Gianelli,
Mr. Alan Boyle,
Mr. Paul S. Reichler,
Mr. Neil McCubbin,
Mr. Stephen C. McCaffrey,
Mr. Lawrence H. Martin,
Mr. Luigi Condorelli.

21. At the hearings, Members of the Court put questions to the Parties, to which replies were given orally and in writing, in accordance with Article 61, paragraph 4, of the Rules of Court. Pursuant to Article 72 of the Rules of Court, one of the Parties submitted written comments on a written reply provided by the other and received after the closure of the oral proceedings.

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22. Dans la requête, les demandes ci-après ont été formulées par l'Argentine :

« Sur la base de l'exposé des faits et des moyens juridiques qui précèdent, l'Argentine, tout en se réservant le droit de compléter, d'amender ou de modifier la présente requête pendant la suite de la procédure, prie la Cour de dire et juger :

1. que l'Uruguay a manqué aux obligations lui incombant en vertu du statut de 1975 et des autres règles de droit international auxquelles ce statut renvoie, y compris mais pas exclusivement :
   a) l'obligation de prendre toute mesure nécessaire à l'utilisation rationnelle et optimale du fleuve Uruguay ;
   b) l'obligation d'informer préalablement la CARU et l'Argentine ;
   c) l'obligation de se conformer aux procédures prévues par le chapitre II du statut de 1975 ;
   d) l'obligation de prendre toutes mesures nécessaires pour préserver le milieu aquatique et d'empêcher la pollution et l'obligation de protéger la biodiversité et les pêcheries, y compris l'obligation de procéder à une étude d'impact sur l'environnement, complète et objective ;
   e) les obligations de coopération en matière de prévention de la pollution et de la protection de la biodiversité et des pêcheries ; et
2. que, par son comportement, l'Uruguay a engagé sa responsabilité internationale à l'égard de l'Argentine ;
3. que l'Uruguay est tenu de cesser son comportement illicite et de respecter scrupuleusement à l'avenir les obligations lui incombant ; et
4. que l'Uruguay est tenu de réparer intégralement le préjudice causé par le non-respect des obligations lui incombant.

L'Argentine se réserve le droit de préciser ou modifier les présentes demandes dans une étape ultérieure de la procédure. »

23. Au cours de la procédure écrite, les conclusions ci-après ont été présentées par les Parties :

Au nom du Gouvernement de l'Argentine,

dans le mémoire :

« Pour l'ensemble des raisons exposées dans le présent mémoire, la République argentine prie la Cour internationale de Justice de bien vouloir :

1. constater que, en autorisant unilatéralement la construction des usines de pâte à papier CMB et Orion et les installations annexes de celle-ci sur la rive gauche du fleuve Uruguay en violation des obligations découlant du statut du 26 février 1975, la République orientale de l'Uruguay a commis les faits internationalement illicites énumérés aux chapitres IV et V du présent mémoire, qui engagent sa responsabilité internationale ;
2. dire et juger que, en conséquence, la République orientale de l'Uruguay doit :
   i) immédiatement cesser les faits internationalement illicites mentionnés ci-dessus ;
   ii) reprendre une stricte application de ses obligations découlant du statut du fleuve Uruguay de 1975 ;

22. In its Application, the following claims were made by Argentina:

"On the basis of the foregoing statement of facts and law, Argentina, while reserving the right to supplement, amend or modify the present Application in the course of the subsequent procedure, requests the Court to adjudge and declare:

1. that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that instrument refers, including but not limited to:
   (a) the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;
   (b) the obligation of prior notification to CARU and to Argentina;
   (c) the obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;
   (d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;
   (e) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries; and
2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;
3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and
4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it.

Argentina reserves the right to amplify or amend these requests at a subsequent stage of the proceedings."

23. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Argentina,

in the Memorial:

"For all the reasons described in this Memorial, the Argentine Republic requests the International Court of Justice:

1. to find that by unilaterally authorizing the construction of the CMB and Orion pulp mills and the facilities associated with the latter on the left bank of the River Uruguay, in breach of the obligations resulting from the Statute of 26 February 1975, the Eastern Republic of Uruguay has committed the internationally wrongful acts set out in Chapters IV and V of this Memorial, which entail its international responsibility;
2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
   (i) cease immediately the internationally wrongful acts referred to above;
   (ii) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

iii) rétablir sur le terrain et au plan juridique la situation qui existait avant la perpétration des faits internationalement illicites mentionnés ci-dessus;

iv) verser à la République argentine une indemnité pour les dommages occasionnés par ces faits internationalement illicites qui ne seraient pas réparés par cette remise en état, dont le montant sera déterminé par la Cour dans une phase ultérieure de la présente instance;

v) donner des garanties adéquates qu'elle s'abstiendra à l'avenir d'empêcher l'application du statut du fleuve Uruguay de 1975 et, en particulier, du mécanisme de consultation institué par le chapitre II de ce traité.

La République argentine se réserve la possibilité de compléter et amender le cas échéant les présentes conclusions, notamment en fonction de l'évolution de la situation. Il en irait ainsi tout spécialement si l'Uruguay aggravait le différend[1], notamment si l'usine Orion devait être mise en service avant la fin de la présente procédure.

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[1] Voir l'ordonnance de la Cour du 13 juillet 2006 sur la demande en indication de mesures conservatoires de l'Argentine, par. 82.»

dans la réplique:

«Pour l'ensemble des raisons exposées dans son mémoire, qu'elle maintient intégralement, et dans la présente réplique, la République argentine prie la Cour internationale de Justice de bien vouloir:

1) constater qu'en autorisant

— la construction de l'usine CMB,
— la construction et la mise en service de l'usine Orion et de ses installations connexes sur la rive gauche du fleuve Uruguay,

la République orientale de l'Uruguay a violé les obligations lui incombant en vertu du statut du fleuve Uruguay du 26 février 1975 et engagé sa responsabilité internationale;

2) dire et juger que, en conséquence, la République orientale de l'Uruguay doit:

i) reprendre une stricte application de ses obligations découlant du statut du fleuve Uruguay de 1975;
ii) immédiatement cesser les faits internationalement illicites par lesquels elle a engagé sa responsabilité;
iii) rétablir sur le terrain et au plan juridique la situation qui existait avant la perpétration de ces faits internationalement illicites;
iv) verser à la République argentine une indemnité pour les dommages occasionnés par ces faits internationalement illicites qui ne seraient pas réparés par cette remise en état, dont le montant sera déterminé par la Cour dans une phase ultérieure de la présente instance;

v) donner des garanties adéquates qu'elle s'abstiendra à l'avenir d'empêcher l'application du statut du fleuve Uruguay de 1975 et, en particulier, du mécanisme de consultation institué par le chapitre II de ce traité.

(iii) re-establish on the ground and in legal terms the situation that existed before the internationally wrongful acts referred to above were committed;

(iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

(v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.

The Argentine Republic reserves the right to supplement or amend these submissions should the need arise, in the light of the development of the situation. This would in particular apply if Uruguay were to aggravate the dispute[1], for example if the Orion mill were to be commissioned before the end of these proceedings.

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[1] See the Order of the Court of 13 July 2006 on Argentina's request for the indication of provisional measures, para. 82."

in the Reply:

"For all the reasons described in its Memorial, which it fully stands by, and in the present Reply, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing

   — the construction of the CMB mill;
   — the construction and commissioning of the Orion mill and its associated facilities on the left bank of the River Uruguay,

   the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;

2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:

   (i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;

   (ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;

   (iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;

   (iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;

   (v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty.

La République argentine se réserve la possibilité de compléter et amender le cas échéant les présentes conclusions au vu des développements ultérieurs de l'affaire.»

Au nom du Gouvernement de l'Uruguay,

dans le contre-mémoire:

«Sur la base des faits et arguments exposés ci-dessus, et se réservant le droit de compléter ou de modifier les présentes conclusions, l'Uruguay prie la Cour de rejeter les demandes de l'Argentine.»

dans la duplique:

«Compte tenu de tout ce qui précède, il y a lieu de conclure que:

a) l'Argentine n'a établi l'existence, pour le fleuve ou son écosystème, d'aucun préjudice, ou risque de préjudice, qui résulterait des violations qu'aurait commises l'Uruguay des obligations de fond lui incombant en vertu du statut de 1975 et suffirait à justifier le démantèlement de l'usine Botnia;

b) un tel démantèlement causerait à l'économie uruguayenne un préjudice considérable sous forme de pertes d'emplois et de revenus;

c) à la lumière des points *a)* et *b)*, le remède consistant à démolir l'usine se traduirait donc par des coûts disproportionnellement élevés et ne doit pas être accordé;

d) si la Cour estime, nonobstant toutes les preuves contraires, que l'Uruguay a violé les obligations procédurales lui incombant envers l'Argentine, elle peut rendre un jugement déclaratoire à cet effet, qui constituerait une forme de satisfaction adéquate;

e) si la Cour estime, nonobstant toutes les preuves contraires, que l'usine ne satisfait pas pleinement à l'obligation incombant à l'Uruguay de protéger le fleuve ou son milieu aquatique, elle peut ordonner à l'Uruguay de prendre toute autre mesure de protection nécessaire pour faire en sorte que l'usine réponde aux obligations de fond imposées par le statut;

f) si la Cour estime, nonobstant toutes les preuves contraires, que l'Uruguay a effectivement causé un dommage au fleuve ou à l'Argentine, elle peut condamner l'Uruguay à indemniser cette dernière au titre des articles 42 et 43 du statut; et

g) la Cour doit faire une déclaration énonçant clairement que les Parties sont tenues de veiller au plein respect de tous les droits en litige en l'espèce, y compris celui de l'Uruguay de continuer à exploiter l'usine Botnia conformément aux dispositions du statut de 1975.

Conclusions

Sur la base des faits et arguments exposés ci-dessus, et se réservant le droit de compléter ou de modifier les présentes conclusions, l'Uruguay prie la Cour de rejeter les demandes de l'Argentine et de lui reconnaître le droit de continuer à exploiter l'usine Botnia conformément aux dispositions du statut de 1975.»

24. Au cours de la procédure orale, les conclusions finales ci-après ont été présentées par les Parties:

The Argentine Republic reserves the right to supplement or amend these submissions should the need arise, in the light of subsequent developments in the case."

On behalf of the Government of Uruguay,

in the Counter-Memorial:

"On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected."

In the Rejoinder:

"Based on all the above, it can be concluded that:

(a) Argentina has not demonstrated any harm, or risk of harm, to the river or its ecosystem resulting from Uruguay's alleged violations of its substantive obligations under the 1975 Statute that would be sufficient to warrant the dismantling of the Botnia plant;

(b) the harm to the Uruguayan economy in terms of lost jobs and revenue would be substantial;

(c) in light of points *(a)* and *(b)*, the remedy of tearing the plant down would therefore be disproportionately onerous, and should not be granted;

(d) if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has violated its procedural obligations to Argentina, it can issue a declaratory judgment to that effect, which would constitute an adequate form of satisfaction;

(e) if the Court finds, notwithstanding all the evidence to the contrary, that the plant is not in complete compliance with Uruguay's obligation to protect the river or its aquatic environment, the Court can order Uruguay to take whatever additional protective measures are necessary to ensure that the plant conforms to the Statute's substantive requirements;

(f) if the Court finds, notwithstanding all the evidence to the contrary, that Uruguay has actually caused damage to the river or to Argentina, it can order Uruguay to pay Argentina monetary compensation under Articles 42 and 43 of the Statute; and

(g) the Court should issue a declaration making clear the Parties are obligated to ensure full respect for all the rights in dispute in this case, including Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute.

Submissions

On the basis of the facts and arguments set out above, and reserving its right to supplement or amend these Submissions, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

24. At the oral proceedings, the following final submissions were presented by the Parties:

Au nom du Gouvernement de l'Argentine,

à l'audience du 29 septembre 2009 :

« Pour l'ensemble des raisons exposées dans son mémoire, dans sa réplique et lors de la procédure orale, qu'elle maintient intégralement, la République argentine prie la Cour internationale de Justice de bien vouloir :

1) constater qu'en autorisant

— la construction de l'usine ENCE,
— la construction et la mise en service de l'usine Botnia et de ses installations connexes sur la rive gauche du fleuve Uruguay,

la République orientale de l'Uruguay a violé les obligations lui incombant en vertu du statut du fleuve Uruguay du 26 février 1975 et engagé sa responsabilité internationale ;

2) dire et juger que, en conséquence, la République orientale de l'Uruguay doit :

i) reprendre une stricte application de ses obligations découlant du statut du fleuve Uruguay de 1975 ;
ii) immédiatement cesser les faits internationalement illicites par lesquels elle a engagé sa responsabilité ;
iii) rétablir sur le terrain et au plan juridique la situation qui existait avant la perpétration de ces faits internationalement illicites ;
iv) verser à la République argentine une indemnité pour les dommages occasionnés par ces faits internationalement illicites qui ne seraient pas réparés par cette remise en état, dont le montant sera déterminé par la Cour dans une phase ultérieure de la présente instance ;

v) donner des garanties adéquates qu'elle s'abstiendra à l'avenir d'empêcher l'application du statut du fleuve Uruguay de 1975 et, en particulier, du mécanisme de consultation institué par le chapitre II de ce traité. »

Au nom du Gouvernement de l'Uruguay,

à l'audience du 2 octobre 2009 :

« Sur la base des faits et arguments exposés dans le contre-mémoire de l'Uruguay, dans sa duplique et au cours de la procédure orale, l'Uruguay prie la Cour de rejeter les demandes de l'Argentine et de confirmer le droit de l'Uruguay de poursuivre l'exploitation de l'usine Botnia conformément aux dispositions du statut de 1975. »

* * *

I. Cadre juridique et faits de l'espèce

25. Le différend soumis à la Cour se rapporte au projet de construction, autorisé par l'Uruguay, d'une usine de pâte à papier, ainsi qu'à la construction et à la mise en service, également autorisées par

On behalf of the Government of Argentina,

at the hearing of 29 September 2009:

"For all the reasons described in its Memorial, in its Reply and in the oral proceedings, which it fully stands by, the Argentine Republic requests the International Court of Justice:

1. to find that by authorizing
   — the construction of the ENCE mill;
   — the construction and commissioning of the Botnia mill and its associated facilities on the left bank of the River Uruguay,

   the Eastern Republic of Uruguay has violated the obligations incumbent on it under the Statute of the River Uruguay of 26 February 1975 and has engaged its international responsibility;
2. to adjudge and declare that, as a result, the Eastern Republic of Uruguay must:
   (i) resume strict compliance with its obligations under the Statute of the River Uruguay of 1975;
   (ii) cease immediately the internationally wrongful acts by which it has engaged its responsibility;
   (iii) re-establish on the ground and in legal terms the situation that existed before these internationally wrongful acts were committed;
   (iv) pay compensation to the Argentine Republic for the damage caused by these internationally wrongful acts that would not be remedied by that situation being restored, of an amount to be determined by the Court at a subsequent stage of these proceedings;
   (v) provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty."

On behalf of the Government of Uruguay,

at the hearing of 2 October 2009:

"On the basis of the facts and arguments set out in Uruguay's Counter-Memorial, Rejoinder and during the oral proceedings, Uruguay requests that the Court adjudge and declare that the claims of Argentina are rejected, and Uruguay's right to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute is affirmed."

* * *

I. Legal Framework and Facts of the Case

25. The dispute before the Court has arisen in connection with the planned construction authorized by Uruguay of one pulp mill and the construction and commissioning of another, also authorized by Uruguay,

l'Uruguay, d'une autre usine de pâte à papier, le long du fleuve Uruguay (voir croquis n° 1, p. 33, pour le contexte géographique général). Après avoir présenté les instruments juridiques relatifs au fleuve Uruguay qui lient les Parties, la Cour rappellera les principaux faits de l'espèce.

A. Cadre juridique

26. La frontière entre l'Argentine et l'Uruguay sur le fleuve Uruguay est définie par le traité bilatéral conclu à cet effet à Montevideo le 7 avril 1961 (*RTNU*, vol. 635, n° 9074, p. 99). Les articles premier à 4 de ce traité délimitent la frontière des Etats contractants sur le fleuve et leur attribuent certains îles et îlots qui occupent son lit. Les articles 5 et 6 sont relatifs au régime de navigation sur le fleuve. L'article 7 envisage la conclusion par les parties d'un «code de l'utilisation du fleuve» portant sur différents éléments, dont la conservation des ressources biologiques et la prévention de la pollution des eaux du fleuve. Les articles 8 à 10 prévoient certaines obligations relatives aux îles et îlots ainsi qu'à leurs habitants.

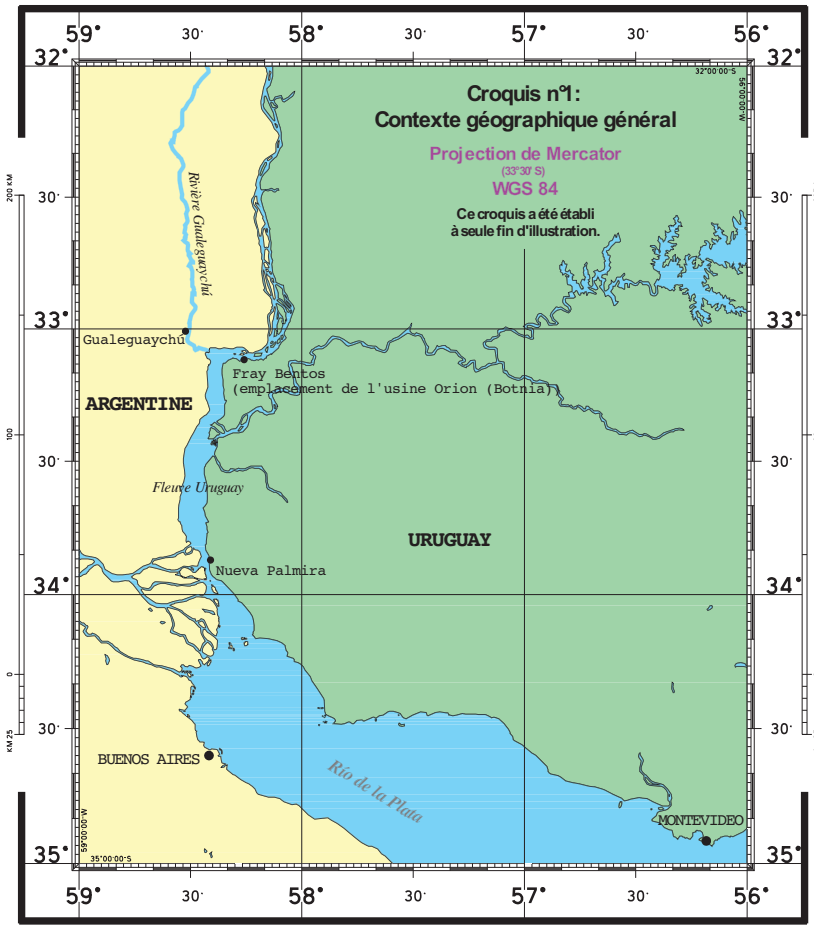
27. Le «code de l'utilisation du fleuve» envisagé par l'article 7 du traité de 1961 a été institué par le statut de 1975 (voir paragraphe 1 ci-dessus). L'article premier du statut de 1975 précise que les parties l'adoptent «à l'effet d'établir les mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve Uruguay, dans le strict respect des droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties». Après avoir ainsi défini son but (article premier) et aussi précisé la portée de certains de ses termes (article 2), le statut de 1975 énonce des règles relatives à la navigation et aux ouvrages sur le fleuve (chapitre II, articles 3 à 13), au pilotage (chapitre III, articles 14 à 16), aux facilités portuaires, au chargement et au déchargement de marchandises (chapitre IV, articles 17 et 18), au sauvetage de la vie humaine (chapitre V, articles 19 à 23) et de biens matériels (chapitre VI, articles 24 à 26), à l'utilisation des eaux du fleuve (chapitre VII, articles 27 à 29), aux ressources du lit et du sous-sol (chapitre VIII, articles 30 à 34), à la conservation, l'utilisation et l'exploitation d'autres ressources naturelles (chapitre IX, articles 35 à 39), à la pollution (chapitre X, articles 40 à 43), à la recherche scientifique (chapitre XI, articles 44 et 45), ainsi qu'aux différentes compétences des parties sur le fleuve et sur les navires l'empruntant (chapitre XII, articles 46 à 48). Le statut de 1975 institue la commission administrative du fleuve Uruguay (ci-après la «CARU», selon l'acronyme espagnol de «Comisión Administradora del Río Uruguay») (chapitre XIII, articles 49 à 57), avant de prévoir une procédure de conciliation (chapitre XIV, articles 58 et 59) et de règlement judiciaire des différends (chapitre XV, article 60). Le statut de 1975 contient enfin des dispositions transitoires (chapitre XVI, articles 61 et 62) et finales (chapitre XVII, article 63).

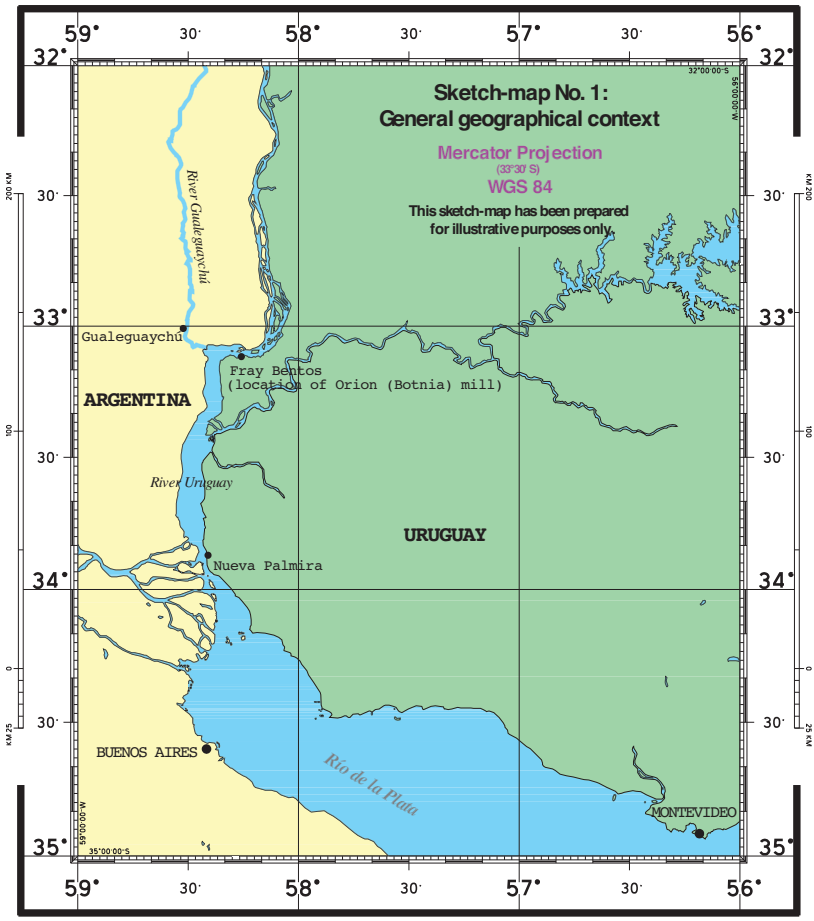
on the River Uruguay (see sketch-map No. 1 on p. 33 for the general geographical context). After identifying the legal instruments concerning the River Uruguay by which the Parties are bound, the Court will set out the main facts of the case.

A. Legal Framework

26. The boundary between Argentina and Uruguay in the River Uruguay is defined by the bilateral Treaty entered into for that purpose at Montevideo on 7 April 1961 (*UNTS*, Vol. 635, No. 9074, p. 98). Articles 1 to 4 of the Treaty delimit the boundary between the Contracting States in the river and attribute certain islands and islets in it to them. Articles 5 and 6 concern the régime for navigation on the river. Article 7 provides for the establishment by the parties of a "régime for the use of the river" covering various subjects, including the conservation of living resources and the prevention of water pollution of the river. Articles 8 to 10 lay down certain obligations concerning the islands and islets and their inhabitants.

27. The "régime for the use of the river" contemplated in Article 7 of the 1961 Treaty was established through the 1975 Statute (see paragraph 1 above). Article 1 of the 1975 Statute states that the parties adopted it "in order to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties". After having thus defined its purpose (Article 1) and having also made clear the meaning of certain terms used therein (Article 2), the 1975 Statute lays down rules governing navigation and works on the river (Chapter II, Articles 3 to 13), pilotage (Chapter III, Articles 14 to 16), port facilities, unloading and additional loading (Chapter IV, Articles 17 to 18), the safeguarding of human life (Chapter V, Articles 19 to 23) and the salvaging of property (Chapter VI, Articles 24 to 26), use of the waters of the river (Chapter VII, Articles 27 to 29), resources of the bed and subsoil (Chapter VIII, Articles 30 to 34), the conservation, utilization and development of other natural resources (Chapter IX, Articles 35 to 39), pollution (Chapter X, Articles 40 to 43), scientific research (Chapter XI, Articles 44 to 45), and various powers of the parties over the river and vessels sailing on it (Chapter XII, Articles 46 to 48). The 1975 Statute sets up the Administrative Commission of the River Uruguay (hereinafter "CARU", from the Spanish acronym for "Comisión Administradora del Río Uruguay") (Chapter XIII, Articles 49 to 57), and then establishes procedures for conciliation (Chapter XIV, Articles 58 to 59) and judicial settlement of disputes (Chapter XV, Article 60). Lastly, the 1975 Statute contains transitional (Chapter XVI, Articles 61 to 62) and final (Chapter XVII, Article 63) provisions.


Croquis n°1:
Contexte géographique général
Projection de Mercator
(33°30' S)
WGS 84
Ce croquis a été établi
à seule fin d'illustration.
Rivière Gualeguaychú
Gualeguaychú
Fray Bentos
(emplacement de l'usine Orion (Botnia))
ARGENTINE
Fleuve Uruguay
URUGUAY
Nueva Palmira
BUENOS AIRES
Río de la Plata
MONTEVIDEO
59°
58°
57°
56°
32°
33°
34°
35°
30'


Sketch-map No. 1:
General geographical context
Mercator Projection
(33°30' S)
WGS 84
This sketch-map has been prepared
for illustrative purposes only.
River Gualeguaychú
Gualeguaychú
Fray Bentos
(location of Orion (Botnia) mill)
ARGENTINA
River Uruguay
URUGUAY
Nueva Palmira
BUENOS AIRES
Río de la Plata
MONTEVIDEO
59°
30'
58°
57°
56°
32°
33°
34°
35°

B. Le projet CMB (ENCE)

28. La première usine de pâte à papier à l'origine du différend a été projetée par la société « Celulosas de M'Bopicuá S.A. » (ci-après « CMB »), créée à l'initiative de la société espagnole ENCE (acronyme espagnol de « Empresa Nacional de Celulosas de España », ci-après « ENCE »). Cette usine, ci-après l'usine « CMB (ENCE) », devait être construite sur la rive gauche du fleuve Uruguay, dans le département uruguayen de Río Negro, en face de la région argentine de Gualeguaychú, plus précisément à l'est de la ville de Fray Bentos, près du pont international « General San Martín » (voir croquis n° 2, p. 35).

29. Le 22 juillet 2002, les promoteurs de ce projet industriel entreprirent des démarches auprès des autorités uruguayennes et présentèrent à la direction nationale de l'environnement de l'Uruguay (ci-après la « DINAMA », selon l'acronyme espagnol de « Dirección Nacional de Medio Ambiente ») une évaluation de l'impact sur l'environnement (« EIE », selon l'abréviation utilisée par les Parties) s'y rapportant. A la même époque, les représentants de CMB, société spécialement créée afin de construire l'usine CMB (ENCE), informèrent le président de la CARU de ce projet. Le président de la CARU écrivit le 17 octobre 2002 au ministre uruguayen de l'environnement afin d'obtenir copie de l'évaluation de l'impact sur l'environnement concernant le projet CMB (ENCE) soumise par les promoteurs de ce projet industriel. Cette demande fut réitérée le 21 avril 2003. Le 14 mai 2003, l'Uruguay remit à la CARU un document intitulé « Etude de l'impact sur l'environnement, Celulosas de M'Bopicuá. Résumé de diffusion ». Un mois plus tard, la sous-commission de la CARU chargée de la qualité des eaux et de la prévention de la pollution prit connaissance du document transmis par l'Uruguay et suggéra d'en remettre copie à ses conseillers techniques en sollicitant leur opinion. Des copies furent également remises aux délégations des Parties.

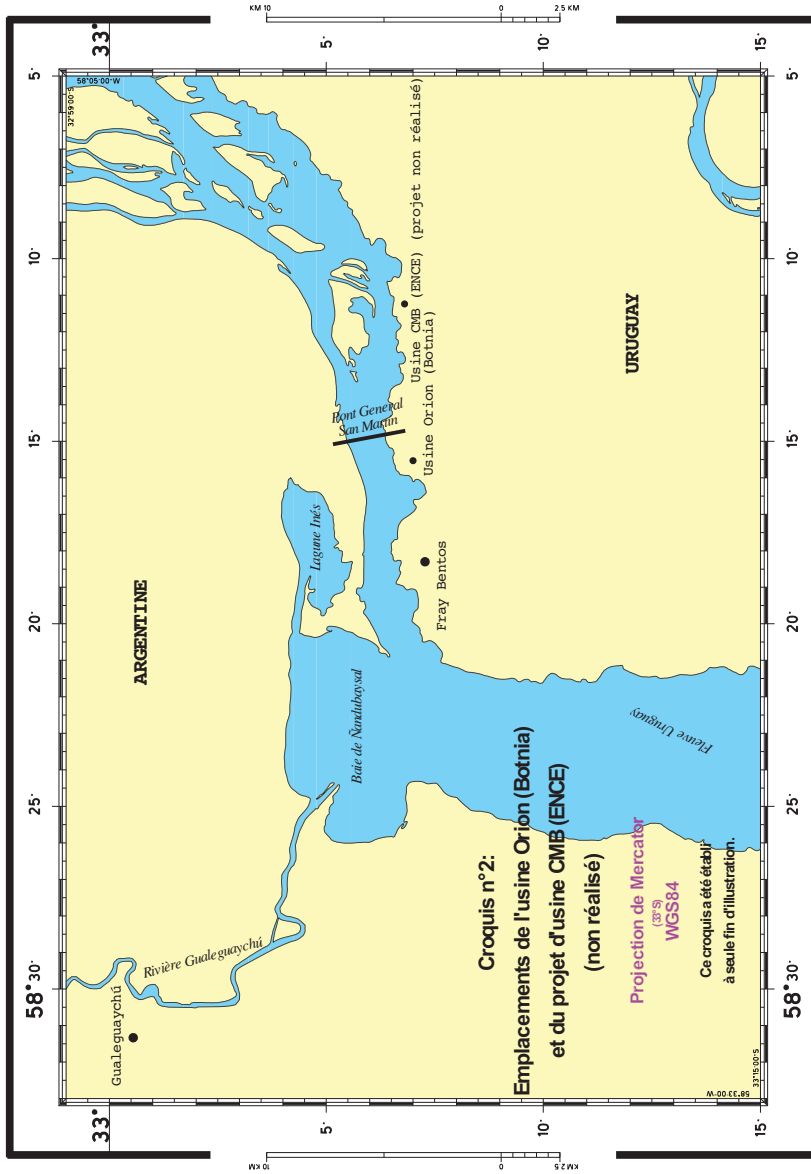
30. Une séance publique de discussion relative à la demande d'autorisation environnementale présentée par CMB eut lieu le 21 juillet 2003 dans la ville de Fray Bentos, en présence du conseiller juridique et du secrétaire technique de la CARU. Le 15 août 2003, la CARU pria l'Uruguay de lui transmettre des informations complémentaires sur différents points au sujet de l'usine CMB (ENCE) en projet. Cette demande fut réitérée le 12 septembre 2003. Le 2 octobre 2003, la DINAMA soumit son rapport d'évaluation au ministère uruguayen du logement, de l'aménagement du territoire et de l'environnement (ci-après le « MVOTMA », selon l'abréviation espagnole de « Ministerio de Vivienda, Ordenamiento Territorial y Medio Ambiente »), et lui recommanda d'accorder à CMB l'autorisation environnementale préalable (« AAP », selon l'abréviation espagnole d'« Autorización Ambiental Previa »), sous certaines conditions. Le 8 octobre 2003, la CARU fut informée par la délégation uruguayenne que la DINAMA devait incessamment lui adresser un rapport sur le projet CMB (ENCE).

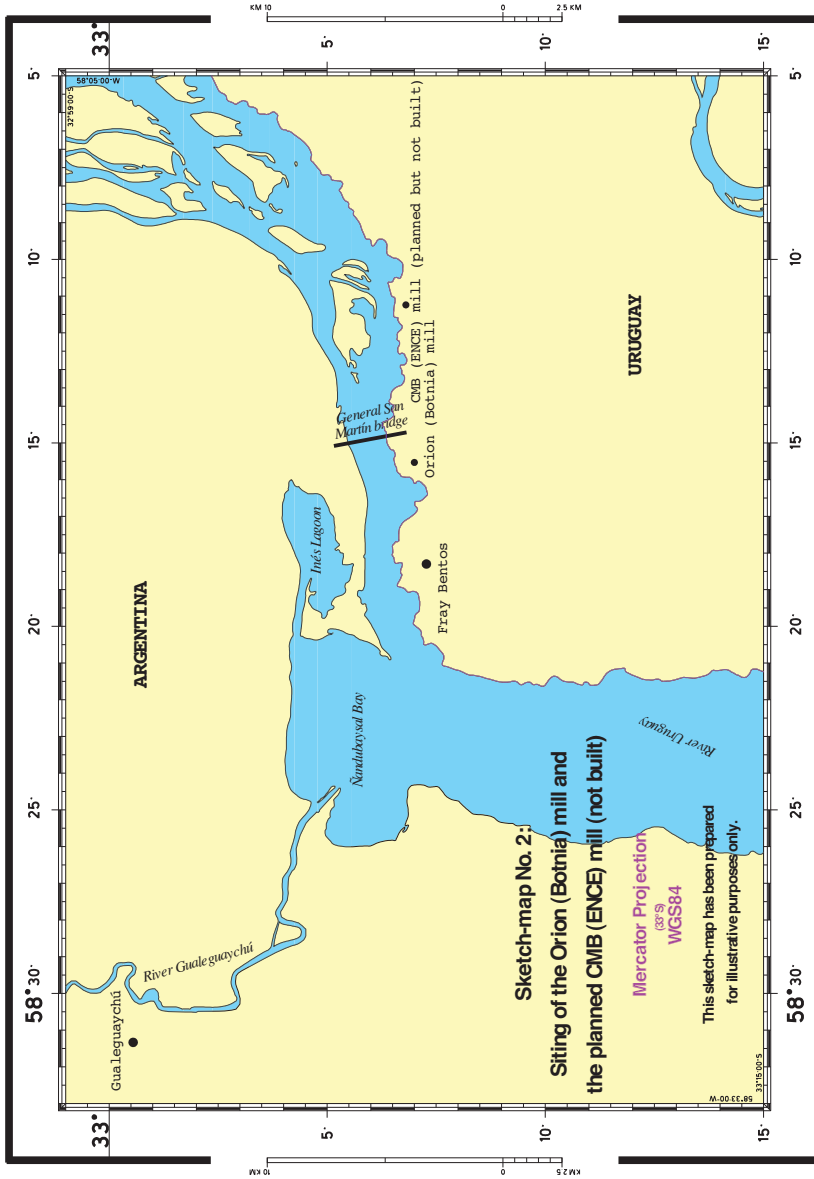
B. CMB (ENCE) Project

28. The first pulp mill at the root of the dispute was planned by "Celulosas de M'Bopicuá S.A." (hereinafter "CMB"), a company formed by the Spanish company ENCE (from the Spanish acronym for "Empresa Nacional de Celulosas de España", hereinafter "ENCE"). This mill, hereinafter referred to as the "CMB (ENCE)" mill, was to have been built on the left bank of the River Uruguay in the Uruguayan department of Río Negro opposite the Argentine region of Gualeguaychú, more specifically to the east of the city of Fray Bentos, near the "General San Martín" international bridge (see sketch-map No. 2 on p. 35).

29. On 22 July 2002, the promoters of this industrial project approached the Uruguayan authorities and submitted an environmental impact assessment ("EIA" according to the abbreviation used by the Parties) of the plan to Uruguay's National Directorate for the Environment (hereinafter "DINAMA", from the Spanish acronym for "Dirección Nacional de Medio Ambiente"). During the same period, representatives of CMB, which had been specially formed to build the CMB (ENCE) mill, informed the President of CARU of the project. The President of CARU wrote to the Uruguayan Minister of the Environment on 17 October 2002 seeking a copy of the environmental impact assessment of the CMB (ENCE) project submitted by the promoters of this industrial project. This request was reiterated on 21 April 2003. On 14 May 2003, Uruguay submitted to CARU a document entitled "Environmental Impact Study, Celulosas de M'Bopicuá. Summary for public release". One month later, the CARU Subcommittee on Water Quality and Pollution Control took notice of the document transmitted by Uruguay and suggested that a copy thereof be sent to its technical advisers for their opinions. Copies were also provided to the Parties' delegations.

30. A public hearing, attended by CARU's Legal Adviser and its technical secretary, was held on 21 July 2003 in the city of Fray Bentos concerning CMB's application for an environmental authorization. On 15 August 2003, CARU asked Uruguay for further information on various points concerning the planned CMB (ENCE) mill. This request was reiterated on 12 September 2003. On 2 October 2003, DINAMA submitted its assessment report to the Uruguayan Ministry of Housing, Land Use Planning and Environmental Affairs (hereinafter "MVOTMA", from the Spanish abbreviation for "Ministerio de Vivienda Ordenamiento Territorial y Medio Ambiente"), recommending that CMB be granted an initial environmental authorization ("AAP" according to the Spanish abbreviation for "Autorización Ambiental Previa") subject to certain conditions. On 8 October 2003, CARU was informed by the Uruguayan delegation that DINAMA would very shortly send CARU a report on the CMB (ENCE) project.


KM 10
0
2.5 KM
58°05'00"W
32°59'00"S
33°
5'
10'
15'
20'
25'
58°30'
ARGENTINE
URUGUAY
Usine CMB (ENCE) (projet non réalisé)
Usine Orion (Botnia)
Pont General San Martin
Laguna Inés
Fray Bentos
Baie de Nueludoysal
Fleuve Uruguay
Rivière Gualeguaychú
Gualeguaychú
Croquis n°2:
Emplacements de l'usine Orion (Botnia)
et du projet d'usine CMB (ENCE)
(non réalisé)
Projection de Mercator
(33°S)
WGS84
Ce croquis a été établi
à seule fin d'illustration.
58°33'00"W
33°15'00"S
10 KM
0
KM 2.5


ARGENTINA
URUGUAY
Gualeguaychú
River Gualeguaychú
Ñanduboysá Bay
Inés Lagoon
General San Martín bridge
CMB (ENCE) mill (planned but not built)
Orion (Botnia) mill
Fray Bentos
River Uruguay
Sketch-map No. 2:
Siting of the Orion (Botnia) mill and
the planned CMB (ENCE) mill (not built)
Mercator Projection
(33°S)
WGS84
This sketch-map has been prepared
for illustrative purposes only.
58°30'
33°
KM 10
0
2.5 KM

31. Le 9 octobre 2003, le MVOTMA délivra une autorisation environnementale préalable à CMB en vue de la construction de l'usine CMB (ENCE). Le même jour, les présidents de l'Argentine et de l'Uruguay se rencontrèrent à Anchorena (Colonia, Uruguay). L'Argentine soutient que le président de l'Uruguay, M. Jorge Battle, aurait à cette occasion promis à son homologue argentin, M. Néstor Kirchner, qu'aucune autorisation ne serait délivrée tant qu'il n'aurait pas été répondu aux préoccupations environnementales de l'Argentine. L'Uruguay conteste cette présentation des faits et affirme qu'à l'occasion de cette réunion les Parties seraient convenues de traiter du projet CMB (ENCE) en dehors de la procédure prévue aux articles 7 à 12 du statut de 1975, tandis que l'Argentine aurait indiqué ne pas s'opposer au projet en lui-même. L'Argentine conteste ces affirmations.

32. Le lendemain de la rencontre entre les chefs d'Etat de l'Argentine et de l'Uruguay, la CARU se déclara prête à reprendre les analyses techniques relatives au projet CMB (ENCE) dès que l'Uruguay aurait transmis les documents en attente. Le 17 octobre 2003, la CARU tint une séance plénière extraordinaire à la demande de l'Argentine; celle-ci s'y plaignit de la délivrance par l'Uruguay, le 9 octobre 2003, de l'autorisation environnementale préalable. A la suite de cette réunion extraordinaire, la CARU suspendit ses activités durant plus de six mois, faute d'accord entre les Parties sur la mise en œuvre du mécanisme de consultation prévu par le statut de 1975.

33. Le 27 octobre 2003, l'Uruguay transmit à l'Argentine des copies de l'évaluation de l'impact sur l'environnement déposée par ENCE le 22 juillet 2002, du rapport final d'évaluation de la DINAMA du 2 octobre 2003 et de l'autorisation environnementale préalable du 9 octobre 2003. L'Argentine réagit à cet envoi en indiquant que, selon elle, l'article 7 du statut de 1975 n'avait pas été respecté et que les documents transmis semblaient être insuffisants pour pouvoir émettre un avis technique sur l'impact sur l'environnement du projet. Le 7 novembre 2003, comme suite à une demande du ministère des relations extérieures de l'Argentine, l'Uruguay communiqua à l'Argentine une copie de l'ensemble du dossier du ministère uruguayen de l'environnement relatif au projet CMB (ENCE). Le 23 février 2004, l'Argentine transmit l'ensemble de ces documents uruguayens à la CARU.

34. Le 2 mars 2004, les ministres des affaires étrangères des deux Parties se rencontrèrent à Buenos Aires. Le 15 mai 2004, la CARU reprit ses travaux à l'occasion d'une séance plénière extraordinaire au cours de laquelle elle prit acte de l'«arrangement» ministériel intervenu le 2 mars 2004. Les Parties divergent toutefois quant au contenu de cet «arrangement». La Cour ne manquera pas d'y revenir lorsqu'elle se penchera sur les allégations de l'Argentine concernant la méconnaissance par l'Uruguay de ses obligations de nature procédurale aux termes du statut de 1975 (voir paragraphes 67 à 158).

35. Donnant suite à la réunion extraordinaire de la CARU du 15 mai 2004, sa sous-commission en charge de la qualité des eaux et de la

31. On 9 October 2003, MVOTMA issued an initial environmental authorization to CMB for the construction of the CMB (ENCE) mill. On the same date the Presidents of Argentina and Uruguay met at Anchorena (Colonia, Uruguay). Argentina maintains that the President of Uruguay, Jorge Battle, then promised his Argentine counterpart, Néstor Kirchner, that no authorization would be issued before Argentina's environmental concerns had been addressed. Uruguay challenges this version of the facts and contends that the Parties agreed at that meeting to deal with the CMB (ENCE) project otherwise than through the procedure under Articles 7 to 12 of the 1975 Statute and that Argentina let it be known that it was not opposed to the project per se. Argentina disputes these assertions.

32. The day after the meeting between the Heads of State of Argentina and Uruguay, CARU declared its willingness to resume the technical analyses of the CMB (ENCE) project as soon as Uruguay transmitted the awaited documents. On 17 October 2003, CARU held an extraordinary plenary meeting at the request of Argentina, at which Argentina complained of Uruguay's granting on 9 October 2003 of the initial environmental authorization. Following the extraordinary meeting CARU suspended work for more than six months, as the Parties could not agree on how to implement the consultation mechanism established by the 1975 Statute.

33. On 27 October 2003, Uruguay transmitted to Argentina copies of the environmental impact assessment submitted by ENCE on 22 July 2002, of DINAMA's final assessment report dated 2 October 2003 and of the initial environmental authorization of 9 October 2003. Argentina reacted by expressing its view that Article 7 of the 1975 Statute had not been observed and that the transmitted documents did not appear adequate to allow for a technical opinion to be expressed on the environmental impact of the project. On 7 November 2003, further to a request from the Ministry of Foreign Affairs of Argentina, Uruguay provided Argentina with a copy of the Uruguayan Ministry of the Environment's entire file on the CMB (ENCE) project. On 23 February 2004, Argentina forwarded all of this documentation received from Uruguay to CARU.

34. On 2 March 2004, the Parties' Ministers for Foreign Affairs met in Buenos Aires. On 15 May 2004, CARU resumed its work at an extraordinary plenary meeting during which it took note of the ministerial "understanding" which was reached on 2 March 2004. The Parties are at odds over the content of this "understanding". The Court will return to this when it considers Argentina's claims as to Uruguay's breach of its procedural obligations under the 1975 Statute (see paragraphs 67 to 158).

35. Following up on CARU's extraordinary meeting of 15 May 2004, the CARU Subcommittee on Water Quality and Pollution Control pre-

prévention de la pollution prépara un plan de contrôle et de suivi (monitoring) de la qualité des eaux dans la zone des usines de pâte à papier (ci-après plan «PROCEL», selon l'acronyme espagnol de «Plan de Monitoreo de la Calidad Ambiental del Río Uruguay en Areas de Plantas Celulósicas»). Ce plan fut approuvé par la CARU le 12 novembre 2004.

36. Le 28 novembre 2005, l'Uruguay autorisa le commencement des travaux préparatoires en vue de la construction de l'usine CMB (ENCE) (nivellement du terrain). Le 28 mars 2006, les promoteurs de ce projet industriel décidèrent de suspendre ces travaux durant quatre-vingt-dix jours. Ils annoncèrent, le 21 septembre 2006, leur intention de ne pas construire l'usine projetée à l'emplacement envisagé sur la rive du fleuve Uruguay.

C. L'usine Orion (Botnia)

37. Le deuxième projet industriel à l'origine du différend porté devant la Cour est dû à l'initiative des sociétés de droit uruguayen «Botnia S.A.» et «Botnia Fray Bentos S.A.» (ci-après «Botnia»), lesquelles ont été spécialement créées à cette fin dès 2003 par la société finlandaise Oy Metsä-Botnia AB. Dénommée «Orion», cette seconde usine de pâte à papier (ci-après l'usine «Orion (Botnia)») a été construite sur la rive gauche du fleuve Uruguay, à quelques kilomètres en aval de l'emplacement prévu pour l'usine CMB (ENCE), également à proximité de la ville de Fray Bentos (voir croquis n° 2, p. 35). Elle est exploitée et en fonctionnement depuis le 9 novembre 2007.

38. Ayant, à la fin de l'année 2003, informé les autorités uruguayennes de leur projet industriel, les promoteurs les saisirent, le 31 mars 2004, d'une demande d'autorisation environnementale préalable, qu'ils complétèrent le 7 avril 2004. Quelques semaines plus tard, les 29 et 30 avril 2004, une rencontre officieuse eut lieu entre des membres de la CARU et des représentants de la société Botnia. A la suite de cette réunion, la sous-commission chargée de la qualité des eaux et de la prévention de la pollution de la CARU suggéra, le 18 juin 2004, que Botnia complète les informations fournies lors de cette réunion. Le 19 octobre 2004, lors d'une autre réunion avec les représentants de Botnia, la CARU jugea à nouveau nécessaire d'obtenir un complément d'information au sujet de la demande d'autorisation environnementale préalable déposée par Botnia auprès de la DINAMA. Le 12 novembre 2004, en même temps que d'approuver le plan de contrôle et de suivi de la qualité des eaux proposé par sa sous-commission en charge de la qualité des eaux et de la prévention de la pollution (voir paragraphe 35 ci-dessus), la CARU décida, sur proposition de la même sous-commission, de demander à l'Uruguay un complément d'information sur la demande d'autorisation environnementale préalable. Cette demande d'information complémentaire fut transmise à l'Uruguay par une note de la CARU en date du 16 novembre 2004.

39. La DINAMA organisa le 21 décembre 2004 une séance publique

pared a plan for monitoring water quality in the area of the pulp mills (hereinafter the "PROCEL" plan from the Spanish acronym for "Plan de Monitoreo de la Calidad Ambiental del Río Uruguay en Areas de Plantas Celulósicas"). CARU approved the plan on 12 November 2004.

36. On 28 November 2005, Uruguay authorized preparatory work to begin for the construction of the CMB (ENCE) mill (ground clearing). On 28 March 2006, the project's promoters decided to halt the work for 90 days. On 21 September 2006, they announced their intention not to build the mill at the planned site on the bank of the River Uruguay.

C. Orion (Botnia) Mill

37. The second industrial project at the root of the dispute before the Court was undertaken by "Botnia S.A." and "Botnia Fray Bentos S.A." (hereinafter "Botnia"), companies formed under Uruguayan law in 2003 specially for the purpose by Oy Metsä-Botnia AB, a Finnish company. This second pulp mill, called "Orion" (hereinafter the "Orion (Botnia)" mill), has been built on the left bank of the River Uruguay, a few kilometres downstream of the site planned for the CMB (ENCE) mill, and also near the city of Fray Bentos (see sketch-map No. 2 on p. 35). It has been operational and functioning since 9 November 2007.

38. After informing the Uruguayan authorities of this industrial project in late 2003, the project promoters submitted an application to them for an initial environmental authorization on 31 March 2004 and supplemented it on 7 April 2004. Several weeks later, on 29 and 30 April 2004, CARU members and Botnia representatives met informally. Following that meeting, CARU's Subcommittee on Water Quality and Pollution Control suggested on 18 June 2004 that Botnia expand on the information provided at the meeting. On 19 October 2004, CARU held another meeting with Botnia representatives and again expressed the need for further information on Botnia's application to DINAMA for an initial environmental authorization. On 12 November 2004, when approving the water quality monitoring plan put forward by the CARU Subcommittee on Water Quality and Pollution Control (see paragraph 35 above), CARU decided, on the proposal of that subcommittee, to ask Uruguay to provide further information on the application for an initial environmental authorization. CARU transmitted this request for further information to Uruguay by note dated 16 November 2004.

39. On 21 December 2004 DINAMA held a public hearing, attended

de discussion à Fray Bentos sur le projet Orion (Botnia), en présence d'un conseiller de la CARU. Le 11 février 2005, la DINAMA adopta son évaluation de l'impact sur l'environnement relative à l'usine Orion (Botnia) en projet et recommanda l'octroi de l'autorisation environnementale préalable, moyennant certaines conditions. Cette autorisation préalable fut délivrée à la société Botnia le 14 février 2005 par le MVOTMA, en vue de la construction de l'usine Orion (Botnia) et d'un terminal portuaire adjacent. Le 11 mars 2005, lors d'une réunion de la CARU, l'Argentine contesta le bien-fondé de la délivrance de l'autorisation environnementale préalable au regard des obligations de nature procédurale prévues par le statut de 1975. L'Argentine réitéra cette position lors de la réunion de la CARU du 6 mai 2005. Le 12 avril 2005, l'Uruguay avait entre-temps autorisé le défrichement du futur site de l'usine et le nivellement de ce terrain.

40. Le 31 mai 2005, donnant suite à un accord intervenu le 5 mai 2005 entre les présidents des deux Parties, les ministres des affaires étrangères des deux Etats procédèrent à la création d'un groupe technique de haut niveau (ci-après le «GTAN», selon l'abréviation espagnole de «Grupo Técnico de Alto Nivel»). Ce groupe fut chargé de résoudre les différends relatifs aux usines CMB (ENCE) et Orion (Botnia) dans un délai de cent quatre-vingts jours. Le GTAN tint douze réunions entre le 3 août 2005 et le 30 janvier 2006, les Parties s'échangeant différents documents dans le cadre de ce processus bilatéral. Le 31 janvier 2006, l'Uruguay constata l'échec des négociations entreprises dans le cadre du GTAN; l'Argentine fit de même le 3 février 2006. La Cour reviendra plus loin sur la portée de ce processus convenu entre les Parties (voir paragraphes 132 à 149).

41. Le 26 juin 2005, l'Argentine s'adressa au président de la Banque internationale pour la reconstruction et le développement pour lui exprimer sa préoccupation face à la possibilité de voir la Société financière internationale (ci-après la «SFI») contribuer au financement des usines de pâte à papier en projet. La SFI décida néanmoins d'apporter son soutien financier à l'usine Orion (Botnia), non sans avoir chargé la société EcoMetrix, spécialisée en expertises environnementales et industrielles, de lui présenter différents rapports techniques sur l'usine en projet et l'évaluation de son impact sur l'environnement. EcoMetrix fut également chargée par la SFI d'assurer pour son compte le suivi environnemental de l'usine dès sa mise en service.

42. Le 5 juillet 2005, l'Uruguay autorisa la société Botnia à construire un port adjacent à l'usine Orion (Botnia). Cette autorisation fut transmise à la CARU le 15 août 2005. Le 22 août 2005, l'Uruguay autorisa la construction d'une cheminée et des fondations en béton de l'usine Orion (Botnia). D'autres autorisations furent accordées à mesure de l'avancement de la construction de cette usine, notamment en ce qui concerne les installations de traitement des déchets. Le 13 octobre 2005, l'Uruguay transmit à la CARU des documents complémentaires au sujet du terminal portuaire adjacent à l'usine Orion (Botnia).

by a CARU adviser, on the Orion (Botnia) project in Fray Bentos. DINAMA adopted its environmental impact study of the planned Orion (Botnia) mill on 11 February 2005 and recommended that the initial environmental authorization be granted, subject to certain conditions. MVOTMA issued the initial authorization to Botnia on 14 February 2005 for the construction of the Orion (Botnia) mill and an adjacent port terminal. At a CARU meeting on 11 March 2005, Argentina questioned whether the granting of the initial environmental authorization was well-founded in view of the procedural obligations laid down in the 1975 Statute. Argentina reiterated this position at the CARU meeting on 6 May 2005. On 12 April 2005, Uruguay had in the meantime authorized the clearance of the future mill site and the associated groundworks.

40. On 31 May 2005, in pursuance of an agreement made on 5 May 2005 by the Presidents of the two Parties, their Ministers for Foreign Affairs created a High-Level Technical Group (hereinafter the "GTAN", from the Spanish abbreviation for "Grupo Técnico de Alto Nivel"), which was given responsibility for resolving the disputes over the CMB (ENCE) and Orion (Botnia) mills within 180 days. The GTAN held twelve meetings between 3 August 2005 and 30 January 2006, with the Parties exchanging various documents in the context of this bilateral process. On 31 January 2006, Uruguay determined that the negotiations undertaken within the GTAN had failed; Argentina did likewise on 3 February 2006. The Court will return later to the significance of this process agreed on by the Parties (see paragraphs 132 to 149).

41. On 26 June 2005, Argentina wrote to the President of the International Bank for Reconstruction and Development to express its concern at the possibility of the International Finance Corporation (hereinafter the "IFC") contributing to the financing of the planned pulp mills. The IFC nevertheless decided to provide financial support for the Orion (Botnia) mill, but did commission EcoMetrix, a consultancy specializing in environmental and industrial matters, to prepare various technical reports on the planned mill and an environmental impact assessment of it. EcoMetrix was also engaged by the IFC to carry out environmental monitoring on the IFC's behalf of the plant once it had been placed in service.

42. On 5 July 2005, Uruguay authorized Botnia to build a port adjacent to the Orion (Botnia) mill. This authorization was transmitted to CARU on 15 August 2005. On 22 August 2005, Uruguay authorized the construction of a chimney and concrete foundations for the Orion (Botnia) mill. Further authorizations were granted as the construction of this mill proceeded, for example in respect of the waste treatment installations. On 13 October 2005, Uruguay transmitted additional documentation to CARU concerning the port terminal adjacent to the Orion (Botnia) mill.

A plusieurs reprises, et notamment lors de réunions de la CARU, l'Argentine demanda la suspension des premiers travaux relatifs à l'usine Orion (Botnia), ainsi que de ceux relatifs à l'usine CMB (ENCE). A l'occasion d'une rencontre entre les chefs d'Etat des Parties à Santiago du Chili le 11 mars 2006, le président uruguayen demanda aux sociétés ENCE et Botnia de suspendre la construction des usines. ENCE suspendit les travaux durant quatre-vingt-dix jours (voir paragraphe 36 ci-dessus); Botnia, durant dix jours.

43. L'Argentine a saisi la Cour du présent différend par une requête en date du 4 mai 2006. Le 24 août 2006, l'Uruguay autorisa la mise en service du terminal portuaire adjacent à l'usine Orion (Botnia), ce dont il informa la CARU le 4 septembre 2006. Le 12 septembre 2006, l'Uruguay autorisa la société Botnia à prélever et utiliser les eaux du fleuve à des fins industrielles et notifia officiellement cette autorisation à la CARU le 17 octobre 2006. En novembre 2006, à l'occasion du sommet des chefs d'Etat et de gouvernement des pays ibéro-américains qui se tint à Montevideo, le roi d'Espagne fut sollicité afin de tenter de rapprocher les positions des Parties; une issue négociée au différend ne put toutefois être trouvée dans ce cadre. Le 8 novembre 2007, l'Uruguay autorisa la mise en service de l'usine Orion (Botnia), qui devint opérationnelle le lendemain. En décembre 2009, la société Oy Metsä-Botnia AB transféra à une autre société finlandaise, UPM, sa participation dans l'usine Orion (Botnia).

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44. L'Uruguay a par ailleurs autorisé la société Ontur International S.A. à construire et à exploiter un terminal portuaire à Nueva Palmira. Celui-ci a été inauguré en août 2007, l'Uruguay ayant transmis à la CARU, le 16 novembre 2007, la copie de l'autorisation de mise en service du terminal portuaire.

45. Dans leurs écritures, les Parties se sont opposées au sujet de la régularité de la délivrance des autorisations uruguayennes relatives à ce terminal portuaire au regard des obligations de nature procédurale prévues par le statut de 1975. La Cour n'estime toutefois pas nécessaire de retracer précisément les faits ayant conduit à la construction du terminal de Nueva Palmira, considérant que ce complexe portuaire ne fait pas partie de l'objet du différend porté devant elle. L'Argentine n'a en effet à aucun moment visé explicitement le terminal portuaire de Nueva Palmira dans les demandes formulées dans sa requête, ni dans les conclusions de son mémoire ou de sa réplique (voir paragraphes 22 et 23 ci-dessus). Dans ses conclusions finales présentées à l'audience du 29 septembre 2009, l'Argentine a à nouveau limité l'objet de ses demandes à l'autorisation de construction de l'usine CMB (ENCE), ainsi qu'aux autorisations de construction et de mise en service de «l'usine Botnia et ... ses installations connexes sur la rive gauche du fleuve Uruguay». La Cour ne saurait considérer le terminal portuaire de Nueva Palmira, situé à une centaine

Argentina repeatedly asked, including at CARU meetings, that the initial work connected with the Orion (Botnia) mill and the CMB (ENCE) mill should be suspended. At a meeting between the Heads of State of the Parties at Santiago de Chile on 11 March 2006, Uruguay's President asked ENCE and Botnia to suspend construction of the mills. ENCE suspended work for 90 days (see paragraph 36 above), Botnia for ten.

43. Argentina referred the present dispute to the Court by Application dated 4 May 2006. On 24 August 2006, Uruguay authorized the commissioning of the port terminal adjacent to the Orion (Botnia) mill and gave CARU notice of this on 4 September 2006. On 12 September 2006, Uruguay authorized Botnia to extract and use water from the river for industrial purposes and formally notified CARU of its authorization on 17 October 2006. At the summit of Heads of State and Government of the Ibero-American countries held in Montevideo in November 2006, the King of Spain was asked to endeavour to reconcile the positions of the Parties; a negotiated resolution of the dispute did not however result. On 8 November 2007, Uruguay authorized the commissioning of the Orion (Botnia) mill and it began operating the next day. In December 2009, Oy Metsä-Botnia AB transferred its interest in the Orion (Botnia) mill to UPM, another Finnish company.

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44. In addition, Uruguay authorized Ontur International S.A. to build and operate a port terminal at Nueva Palmira. The terminal was inaugurated in August 2007 and, on 16 November 2007, Uruguay transmitted to CARU a copy of the authorization for its commissioning.

45. In their written pleadings the Parties have debated whether, in light of the procedural obligations laid down in the 1975 Statute, the authorizations for the port terminal were properly issued by Uruguay. The Court deems it unnecessary to review the detailed facts leading up to the construction of the Nueva Palmira terminal, being of the view that these port facilities do not fall within the scope of the subject of the dispute before it. Indeed, nowhere in the claims asserted in its Application or in the submissions in its Memorial or Reply (see paragraphs 22 and 23 above) did Argentina explicitly refer to the port terminal at Nueva Palmira. In its final submissions presented at the hearing on 29 September 2009, Argentina again limited the subject-matter of its claims to the authorization of the construction of the CMB (ENCE) mill and the authorization of the construction and commissioning of "the Botnia mill and its associated facilities on the left bank of the River Uruguay". The Court does not consider the port terminal at Nueva Palmira, which lies some 100 km south of Fray Bentos, downstream of the Orion (Botnia)

de kilomètres au sud de Fray Bentos, en aval de l'usine Orion (Botnia) (voir croquis n° 1, p. 33), et également utilisé par d'autres opérateurs économiques, comme constituant une installation «connexe» à cette dernière.

46. Le différend soumis à la Cour concerne l'interprétation et l'application du statut de 1975. Il porte, en particulier, sur la question de savoir, d'une part, si l'Uruguay s'est conformé aux obligations de nature procédurale qui sont les siennes en vertu du statut de 1975 en accordant des autorisations en vue de la construction de l'usine CMB (ENCE) ainsi que de la construction et de la mise en service de l'usine Orion (Botnia) et du port qui lui est adjacent, et, d'autre part, si l'Uruguay s'est acquitté des obligations de fond lui incombant en vertu du statut de 1975 depuis la mise en service de l'usine Orion (Botnia) au mois de novembre 2007.

* *

47. Ayant ainsi rappelé le contexte dans lequel s'inscrit le différend entre les Parties, la Cour se penchera sur le fondement et l'étendue de sa compétence, y compris sur les questions relatives au droit applicable au présent différend (voir paragraphes 48 à 66). Elle examinera ensuite les allégations de l'Argentine relatives à la violation par l'Uruguay des obligations de nature procédurale (voir paragraphes 67 à 158) et de fond (voir paragraphes 159 à 266) prévues par le statut de 1975. La Cour répondra enfin aux demandes présentées par les Parties dans leurs conclusions finales (voir paragraphes 267 à 280).

* *

II. Étendue de la compétence de la Cour

48. Les Parties s'accordent pour fonder la compétence de la Cour sur le paragraphe 1 de l'article 36 du Statut de la Cour et sur le premier paragraphe de l'article 60 du statut du fleuve Uruguay de 1975. Celui-ci se lit comme suit: «Tout différend concernant l'interprétation ou l'application du traité[1] et du statut qui ne pourrait être réglé par négociation directe peut être soumis par l'une ou l'autre des parties à la Cour internationale de Justice.» Elles divergent sur la question de savoir si toutes les demandes de l'Argentine entrent dans les prévisions de cette clause.

49. L'Uruguay reconnaît que la compétence de la Cour au titre de la clause compromissoire s'étend aux demandes concernant toute pollution ou tout type de dommage causé, en violation du statut de 1975, au fleuve Uruguay ou aux organismes qu'il abrite. L'Uruguay reconnaît également que les demandes relatives à l'effet allégué de l'exploitation de l'usine de

[1] Il s'agit du traité de Montevideo relatif à la frontière sur l'Uruguay du 7 avril 1961 (*RTNU*, vol. 635, n° 9074, p. 99; note de bas de page ajoutée).

mill (see sketch-map No. 1 on p. 33), and is used by other economic operators as well, to be a facility "associated" with the mill.

46. The dispute submitted to the Court concerns the interpretation and application of the 1975 Statute, namely, on the one hand whether Uruguay complied with its procedural obligations under the 1975 Statute in issuing authorizations for the construction of the CMB (ENCE) mill as well as for the construction and the commissioning of the Orion (Botnia) mill and its adjacent port; and on the other hand whether Uruguay has complied with its substantive obligations under the 1975 Statute since the commissioning of the Orion (Botnia) mill in November 2007.

* *

47. Having thus related the circumstances surrounding the dispute between the Parties, the Court will consider the basis and scope of its jurisdiction, including questions relating to the law applicable to the present dispute (see paragraphs 48 to 66). It will then examine Argentina's allegations of breaches by Uruguay of procedural obligations (see paragraphs 67 to 158) and substantive obligations (see paragraphs 159 to 266) laid down in the 1975 Statute. Lastly, the Court will respond to the claims presented by the Parties in their final submissions (see paragraphs 267 to 280).

* *

II. Scope of the Court's Jurisdiction

48. The Parties are in agreement that the Court's jurisdiction is based on Article 36, paragraph 1, of the Statute of the Court and Article 60, paragraph 1, of the 1975 Statute. The latter reads: "Any dispute concerning the interpretation or application of the Treaty[1] and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice." The Parties differ as to whether all the claims advanced by Argentina fall within the ambit of the compromissory clause.

49. Uruguay acknowledges that the Court's jurisdiction under the compromissory clause extends to claims concerning any pollution or type of harm caused to the River Uruguay, or to organisms living there, in violation of the 1975 Statute. Uruguay also acknowledges that claims concerning the alleged impact of the operation of the pulp mill on the

[1] The Montevideo Treaty of 7 April 1961, concerning the boundary constituted by the River Uruguay (*UNTS*, Vol. 635, No. 9074, p. 98; footnote added).

pâte à papier sur la qualité des eaux du fleuve sont couvertes par la clause compromissoire. Il estime en revanche que cette clause ne permet pas à l'Argentine de présenter des demandes portant sur tout type de dommage environnemental. L'Uruguay affirme en outre que les allégations argentines visant la pollution atmosphérique, les nuisances sonores, visuelles et autres prétendument causées par l'usine Orion (Botnia), ainsi que les effets spécifiques que celle-ci aurait eus sur le secteur du tourisme, ne concernent pas l'interprétation ou l'application du statut de 1975, la Cour étant dès lors sans compétence pour en connaître.

L'Uruguay concède néanmoins qu'une pollution atmosphérique qui aurait des effets préjudiciables sur la qualité des eaux du fleuve ou sur le milieu aquatique entrerait dans le champ de compétence de la Cour.

50. L'Argentine soutient que la position de l'Uruguay quant à l'étendue de la compétence de la Cour est trop restrictive. Elle affirme que le statut de 1975 a été conclu pour protéger non seulement la qualité des eaux du fleuve, mais plus généralement le «régime» et les zones d'influence de celui-ci. Se fondant sur l'article 36 du statut de 1975, qui fait obligation aux parties de coordonner les mesures propres à éviter une modification de l'équilibre écologique et contenir les facteurs nocifs sur le fleuve et dans ses zones d'influence, l'Argentine argue que la Cour est également compétente pour connaître de demandes relatives à la pollution atmosphérique, et même à la pollution sonore et «visuelle». Elle prétend en outre que les mauvaises odeurs produites par l'usine Orion (Botnia) ont un impact sur les utilisations récréatives du fleuve, en particulier à la station balnéaire de Gualeguaychú, située sur sa rive. Cette demande, selon l'Argentine, relève également de la compétence de la Cour.

51. La Cour, lorsqu'elle examinera les différentes allégations ou demandes avancées par l'Argentine, devra déterminer si celles-ci concernent «l'interprétation ou l'application» du statut de 1975, sa compétence couvrant, aux termes de l'article 60 dudit statut, «[t]out différend concernant l'interprétation ou l'application du traité [de 1961] et du statut [de 1975]» et l'Argentine n'ayant, par ailleurs, pas prétendu que l'Uruguay ait violé des obligations découlant du traité de 1961.

52. Pour déterminer si l'Uruguay a violé les obligations lui incombant en vertu du statut de 1975, comme le soutient l'Argentine, la Cour devra interpréter les dispositions de ce statut et en déterminer le champ d'application *ratione materiae*.

Seules les demandes que l'Argentine a formulées en se fondant sur les dispositions du statut de 1975 relèvent de la compétence de la Cour *ratione materiae* en vertu de la clause compromissoire contenue à l'article 60. Bien que l'Argentine, à l'appui de ses demandes relatives à la pollution sonore et «visuelle» qu'aurait causée l'usine de pâte à papier, ait invoqué la disposition contenue à l'article 36 du statut de 1975, la Cour ne voit rien dans celle-ci qui puisse venir fonder lesdites demandes. Le libellé clair de l'article 36, qui prévoit que «[l]es parties coordonnent, par l'intermédiaire de la commission, les mesures propres à éviter une modification de l'équilibre écologique et à contenir les fléaux et autres facteurs

quality of the waters of the river fall within the compromissory clause. On the other hand, Uruguay takes the position that Argentina cannot rely on the compromissory clause to submit claims regarding every type of environmental damage. Uruguay further argues that Argentina's contentions concerning air pollution, noise, visual and general nuisance, as well as the specific impact on the tourism sector, allegedly caused by the Orion (Botnia) mill, do not concern the interpretation or the application of the 1975 Statute, and the Court therefore lacks jurisdiction over them.

Uruguay nevertheless does concede that air pollution which has harmful effects on the quality of the waters of the river or on the aquatic environment would fall within the jurisdiction of the Court.

50. Argentina maintains that Uruguay's position on the scope of the Court's jurisdiction is too narrow. It contends that the 1975 Statute was entered into with a view to protect not only the quality of the waters of the river but more generally its "régime" and the areas affected by it. Relying on Article 36 of the 1975 Statute, which lays out the obligation of the parties to co-ordinate measures to avoid any change in the ecological balance and to control harmful factors in the river and the areas affected by it, Argentina asserts that the Court has jurisdiction also with respect to claims concerning air pollution and even noise and "visual" pollution. Moreover, Argentina contends that bad odours caused by the Orion (Botnia) mill negatively affect the use of the river for recreational purposes, particularly in the Gualeguaychú resort on its bank of the river. This claim, according to Argentina, also falls within the Court's jurisdiction.

51. The Court, when addressing various allegations or claims advanced by Argentina, will have to determine whether they concern "the interpretation or application" of the 1975 Statute, as its jurisdiction under Article 60 thereof covers "[a]ny dispute concerning the interpretation or application of the [1961] Treaty and the [1975] Statute". Argentina has made no claim to the effect that Uruguay violated obligations under the 1961 Treaty.

52. In order to determine whether Uruguay has breached its obligations under the 1975 Statute, as alleged by Argentina, the Court will have to interpret its provisions and to determine their scope *ratione materiae*.

Only those claims advanced by Argentina which are based on the provisions of the 1975 Statute fall within the Court's jurisdiction *ratione materiae* under the compromissory clause contained in Article 60. Although Argentina, when making claims concerning noise and "visual" pollution allegedly caused by the pulp mill, invokes the provision of Article 36 of the 1975 Statute, the Court sees no basis in it for such claims. The plain language of Article 36, which provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it", leaves no doubt

nocifs sur le fleuve et dans ses zones d'influence», ne laisse aucun doute sur le fait que, contrairement à ce qu'affirme l'Argentine, cette pollution sonore et visuelle n'est pas couverte par la disposition. La Cour ne voit en outre dans le statut aucune autre disposition qui puisse venir fonder de telles demandes; dès lors, les demandes relatives à la pollution sonore et visuelle ne relèvent manifestement pas de la compétence que lui confère l'article 60.

De même, aucune disposition du statut de 1975 ne traite de la question des «mauvaises odeurs» dont tire grief l'Argentine. En conséquence, et pour les mêmes raisons, la demande relative à l'impact qu'auraient ces odeurs sur le tourisme en Argentine échappe également à la compétence de la Cour. Celle-ci note que, quand bien même de telles odeurs entreraient dans le cadre de la pollution atmosphérique, qu'elle examinera aux paragraphes 263 et 264 ci-dessous, l'Argentine n'a fourni aucun élément de preuve quant à la relation qui existerait entre les mauvaises odeurs alléguées et le milieu aquatique du fleuve.

53. Qualifiant les articles premier et 41 du statut de 1975 de «clauses de renvoi», l'Argentine estime que de telles clauses ont pour effet d'incorporer dans cet instrument les obligations que les Parties tiennent du droit international général et d'un certain nombre de conventions multilatérales relatives à la protection de l'environnement. Dès lors, estime-t-elle, la Cour a compétence pour déterminer si l'Uruguay s'est conformé aux obligations lui incombant en vertu de certaines conventions internationales.

54. La Cour se penchera donc maintenant sur la question de savoir si la compétence que lui confère l'article 60 du statut de 1975 couvre également les obligations des Parties découlant d'accords internationaux et du droit international général invoqués par l'Argentine, et sur le rôle de ces accords et du droit international général dans le contexte de la présente affaire.

55. L'Argentine affirme que le droit applicable au différend dont la Cour est saisie est le statut de 1975, complété pour son application et son interprétation par divers principes coutumiers et traités en vigueur entre les Parties, auxquels le statut renvoie. Se fondant sur la règle d'interprétation des traités énoncée à l'article 31, paragraphe 3, alinéa *c)*, de la convention de Vienne sur le droit des traités, l'Argentine soutient notamment que le statut de 1975 doit être interprété à la lumière des principes qui règlent le droit des cours d'eau internationaux et des principes du droit international assurant la protection de l'environnement. Elle affirme que l'interprétation du statut de 1975 doit tenir compte de toute «règle pertinente» de droit international applicable dans les relations entre les Parties, pour rester d'actualité et refléter l'évolution des normes environnementales. L'Argentine mentionne à ce titre les principes de l'utilisation équitable, raisonnable et non dommageable des cours d'eau internationaux, les principes de développement durable, de prévention et de précaution, et la nécessité de conduire une évaluation de l'impact sur l'environnement. Elle soutient que ces règles et principes servent à l'interpréta-

that it does not address the alleged noise and visual pollution as claimed by Argentina. Nor does the Court see any other basis in the 1975 Statute for such claims; therefore, the claims relating to noise and visual pollution are manifestly outside the jurisdiction of the Court conferred upon it under Article 60.

Similarly, no provision of the 1975 Statute addresses the issue of "bad odours" complained of by Argentina. Consequently, for the same reason, the claim regarding the impact of bad odours on tourism in Argentina also falls outside the Court's jurisdiction. Even if bad odours were to be subsumed under the issue of air pollution, which will be addressed in paragraphs 263 and 264 below, the Court notes that Argentina has submitted no evidence as to any relationship between the alleged bad odours and the aquatic environment of the river.

53. Characterizing the provisions of Articles 1 and 41 of the 1975 Statute as "referral clauses", Argentina ascribes to them the effect of incorporating into the Statute the obligations of the Parties under general international law and a number of multilateral conventions pertaining to the protection of the environment. Consequently, in the view of Argentina, the Court has jurisdiction to determine whether Uruguay has complied with its obligations under certain international conventions.

54. The Court now therefore turns its attention to the issue whether its jurisdiction under Article 60 of the 1975 Statute also encompasses obligations of the Parties under international agreements and general international law invoked by Argentina and to the role of such agreements and general international law in the context of the present case.

55. Argentina asserts that the 1975 Statute constitutes the law applicable to the dispute before the Court, as supplemented so far as its application and interpretation are concerned, by various customary principles and treaties in force between the Parties and referred to in the Statute. Relying on the rule of treaty interpretation set out in Article 31, paragraph 3 *(c)* of the Vienna Convention on the Law of Treaties, Argentina contends notably that the 1975 Statute must be interpreted in the light of principles governing the law of international watercourses and principles of international law ensuring protection of the environment. It asserts that the 1975 Statute must be interpreted so as to take account of all "relevant rules" of international law applicable in the relations between the Parties, so that the Statute's interpretation remains current and evolves in accordance with changes in environmental standards. In this connection Argentina refers to the principles of equitable, reasonable and non-injurious use of international watercourses, the principles of sustainable development, prevention, precaution and the need to carry out an environmental impact assessment. It contends that these rules and principles

tion dynamique du statut de 1975, bien qu'ils ne viennent pas se substituer à celui-ci ni en amoindrir la portée.

56. L'Argentine considère de plus que la Cour doit faire respecter les obligations conventionnelles liant les Parties auxquelles renvoient les articles premier et 41, alinéa *a)*, du statut de 1975. Elle soutient que les «clauses de renvoi» contenues dans ces articles permettent l'incorporation et l'application d'obligations découlant d'autres traités et engagements internationaux liant les Parties. A cet effet, l'Argentine mentionne la convention de 1973 sur le commerce international des espèces de faune et de flore sauvages menacées d'extinction (ci-après dénommée la «convention CITES»), la convention de Ramsar de 1971 sur les zones humides d'importance internationale (ci-après dénommée la «convention de Ramsar»), la convention des Nations Unies de 1992 sur la diversité biologique (ci-après dénommée la «convention sur la diversité biologique») et la convention de Stockholm de 2001 sur les polluants organiques persistants (ci-après dénommée la «convention POP»). Selon elle, ces obligations conventionnelles s'ajoutent aux droits et obligations découlant du statut de 1975, et il convient, lors de l'examen de l'application de celui-ci, de s'assurer qu'elles ont bien été respectées. L'Argentine soutient que ce n'est qu'en cas de «dispositions plus précises du statut [de 1975] *(lex specialis)*» y dérogeant que les instruments auxquels le statut renvoie ne devraient pas être appliqués.

57. L'Uruguay considère de même que l'interprétation du statut de 1975 doit se faire à la lumière du droit international général, et constate l'accord des Parties à cet égard. Il soutient toutefois que l'interprétation qu'il développe est conforme aux différents principes généraux du droit des cours d'eau internationaux et du droit de l'environnement, même s'il a de ces principes une compréhension qui n'est pas tout à fait la même que celle de l'Argentine. L'Uruguay estime que la question de savoir si les articles premier et 41, alinéa *a)*, du statut de 1975 peuvent être compris comme renvoyant à d'autres traités en vigueur entre les Parties est dépourvue de pertinence en l'espèce, soit que les conventions invoquées par l'Argentine seraient sans pertinence, soit qu'aucune violation d'autres obligations conventionnelles ne pourrait lui être reprochée. En tout état de cause, la Cour serait sans compétence pour statuer sur des allégations de violations d'obligations internationales non prévues par le statut de 1975.

58. La Cour examinera d'abord la question de savoir si les articles premier et 41, alinéa *a)*, peuvent être interprétés comme incorporant dans le statut de 1975 les obligations incombant aux Parties en vertu des différents traités multilatéraux sur lesquels l'Argentine fait fond.

59. L'article premier du statut de 1975 se lit comme suit:

> «Les parties adoptent le présent statut, conformément aux dispositions de l'article 7 du traité relatif à la frontière sur l'Uruguay du 7 avril 1961, à l'effet d'établir les mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve Uruguay, dans le strict

are applicable in giving the 1975 Statute a dynamic interpretation, although they neither replace it nor restrict its scope.

56. Argentina further considers that the Court must require compliance with the Parties' treaty obligations referred to in Articles 1 and 41 *(a)* of the 1975 Statute. Argentina maintains that the "referral clauses" contained in these articles make it possible to incorporate and apply obligations arising from other treaties and international agreements binding on the Parties. To this end, Argentina refers to the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (hereinafter the "CITES Convention"), the 1971 Ramsar Convention on Wetlands of International Importance (hereinafter the "Ramsar Convention"), the 1992 United Nations Convention on Biological Diversity (hereinafter the "Biodiversity Convention"), and the 2001 Stockholm Convention on Persistent Organic Pollutants (hereinafter the "POPs Convention"). It asserts that these conventional obligations are in addition to the obligations arising under the 1975 Statute, and observance of them should be ensured when application of the Statute is being considered. Argentina maintains that it is only where "more specific rules of the [1975] Statute *(lex specialis)*" derogate from them that the instruments to which the Statute refers should not be applied.

57. Uruguay likewise considers that the 1975 Statute must be interpreted in the light of general international law and it observes that the Parties concur on this point. It maintains however that its interpretation of the 1975 Statute accords with the various general principles of the law of international watercourses and of international environmental law, even if its understanding of these principles does not entirely correspond to that of Argentina. Uruguay considers that whether Articles 1 and 41 *(a)* of the 1975 Statute can be read as a referral to other treaties in force between the Parties has no bearing in the present case, because conventions relied on by Argentina are either irrelevant, or Uruguay cannot be found to have violated any other conventional obligations. In any event, the Court would lack jurisdiction to rule on alleged breaches of international obligations which are not contained in the 1975 Statute.

58. The Court will first address the issue whether Articles 1 and 41 *(a)* can be read as incorporating into the 1975 Statute the obligations of the Parties under the various multilateral conventions relied upon by Argentina.

59. Article 1 of the 1975 Statute reads as follows:

> "The parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay of 7 April 1961, in order to establish the joint machinery necessary for the optimum and rational utilization

> respect des droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties.» (*RTNU*, vol. 1295, nº I-21425, p. 348; note de bas de page omise.)

L'article premier définit le but du statut de 1975: les Parties l'ont conclu à l'effet d'établir les mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve Uruguay. L'article contient certes une référence aux «droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties», mais l'on ne saurait en déduire que les Parties cherchaient à faire du respect des obligations qu'elles tenaient d'autres traités l'un des devoirs leur incombant en vertu du statut de 1975; la référence à d'autres traités met plutôt l'accent sur le fait que l'adoption du statut intervient conformément aux dispositions de l'article 7 du traité de 1961 *et* «*dans le strict respect* des droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties» (les italiques sont de la Cour). Si la conjonction «et» n'apparaît pas dans les traductions anglaise et française du statut de 1975, telles que publiées dans le *Recueil des traités des Nations Unies* (*ibid.*, p. 340 et 348), elle figure dans la version espagnole, qui est celle faisant foi. Le texte espagnol se lit comme suit:

> «Las partes acuerdan el presente Estatuto, en cumplimiento de lo dispuesto en el Artículo 7 del Tratado de Límites en el Río Uruguay, de 7 de Abril de 1961 con el fin de establecer los mecanismos comunes necesarios para el óptimo y racional aprovechamiento del Río Uruguay, *y* en estricta observancia de los derechos y obligaciones emergentes de los tratados y demás compromisos internacionales vigentes para cualquiera de las partes.» (*Ibid.*, p. 332; les italiques sont de la Cour.)

La présence de la conjonction dans le texte espagnol donne à penser que la clause relative au «strict respect des droits et obligations découlant des traités et autres engagements internationaux en vigueur à l'égard de l'une ou l'autre des parties» est liée, et doit être rattachée, à la première partie de l'article premier («[l]es parties adoptent le présent statut, conformément aux dispositions de l'article 7 du traité relatif à la frontière sur l'Uruguay»).

60. Une autre observation s'impose en ce qui concerne le texte de l'article premier du statut de 1975. Celui-ci mentionne les «traités et autres engagements internationaux en vigueur à l'égard de *l'une ou l'autre* des parties» («tratados y demás compromisos internacionales vigentes para *cualquiera* de las partes» dans l'original espagnol; les italiques sont de la Cour). Dans sa traduction anglaise, ce passage se lit «treaties and other international agreements in force for *each* of the parties» (les italiques sont de la Cour).

Le fait que l'article premier n'exige pas que les «traités et autres enga-

> of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties." (*UNTS*, Vol. 1295, No. I-21425, p. 340; footnote omitted.)

Article 1 sets out the purpose of the 1975 Statute. The Parties concluded it in order to establish the joint machinery necessary for the rational and optimum utilization of the River Uruguay. It is true that this article contains a reference to "the rights and obligations arising from treaties and other international agreements in force for each of the parties". This reference, however, does not suggest that the Parties sought to make compliance with their obligations under other treaties one of their duties under the 1975 Statute; rather, the reference to other treaties emphasizes that the agreement of the Parties on the Statute is reached in implementation of the provisions of Article 7 of the 1961 Treaty *and* "*in strict observance* of the rights and obligations arising from treaties and other international agreements in force for each of the parties" (emphasis added). While the conjunction "and" is missing from the English and French translations of the 1975 Statute, as published in the *United Nations Treaty Series* (*ibid.*, p. 340 and p. 348), it is contained in the Spanish text of the Statute, which is the authentic text and reads as follows:

> "Las partes acuerdan el presente Estatuto, en cumplimiento de lo dispuesto en el Artículo 7 del Tratado de Límites en el Río Uruguay, de 7 de Abril de 1961 con el fin de establecer los mecanismos comunes necesarios para el óptimo y racional aprovechamiento del Río Uruguay, *y* en estricta observancia de los derechos y obligaciones emergentes de los tratados y demás compromisos internacionales vigentes para cualquiera de las partes." (*Ibid.*, p. 332; emphasis added.)

The presence of the conjunction in the Spanish text suggests that the clause "in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties" is linked to and is to be read with the first part of Article 1, i.e., "[t]he parties agree on this Statute, in implementation of the provisions of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay".

60. There is one additional element in the language of Article 1 of the 1975 Statute which should be noted. It mentions "treaties and other international agreements in force for *each* of the parties" (in Spanish original "tratados y demás compromisos internacionales vigentes para *cualquiera* de las partes"; emphasis added). In the French translation, this part of Article 1 reads "traités et autres engagements internationaux en vigueur à l'égard de *l'une ou l'autre* des parties" (emphasis added).

The fact that Article 1 does not require that the "treaties and other

gements internationaux» soient en vigueur entre les *deux* parties indique ainsi clairement que le statut de 1975 tient compte des engagements antérieurs pertinents de chacune des parties.

61. L'article 41 du statut de 1975, dont l'alinéa *a)* constitue, pour l'Argentine, une autre «clause de renvoi» incorporant dans le statut les obligations découlant d'engagements internationaux, se lit comme suit:

> «Sans préjudice des fonctions assignées à la commission en la matière, les parties s'obligent:
>
> *a)* à protéger et à préserver le milieu aquatique et, en particulier, à en empêcher la pollution *en établissant [l]es normes et en adoptant les mesures appropriées, conformément* aux accords internationaux applicables et, le cas échéant, en harmonie avec les directives et les recommandations des organismes techniques internationaux;
>
> *b)* à ne pas abaisser, dans leurs systèmes juridiques respectifs:
>
> 1) les normes techniques en vigueur pour prévenir la pollution des eaux, et
> 2) les pénalités établies pour les infractions;
>
> *c)* à s'informer mutuellement des normes qu'elles se proposent d'établir en matière de pollution des eaux, en vue d'établir des normes équivalentes dans leurs systèmes juridiques respectifs.» (Les italiques sont de la Cour.)

62. La Cour fait observer que les mots «adoptant ... appropriées» [«adopting appropriate»] ne figurent pas dans la version anglaise, alors qu'ils sont présents dans le texte original espagnol («dictando las normas y adoptando las medidas apropiadas»). Pour la Cour, qui s'appuie sur le texte original espagnol, il est difficile de voir comment cette disposition pourrait être interprétée comme une clause de renvoi ayant pour effet d'incorporer dans le champ d'application du statut de 1975 les obligations des parties découlant des accords internationaux et autres normes visées.

La clause figurant à l'alinéa *a)* de l'article 41 a pour but la protection et la préservation du milieu aquatique, chacune des parties devant à cet effet édicter des normes et adopter des mesures appropriées. L'alinéa *a)* de l'article 41 distingue entre les accords internationaux applicables, d'une part, et les directives et recommandations des organismes techniques internationaux, d'autre part. Les premiers sont juridiquement contraignants et, par conséquent, les normes et réglementations édictées en droit interne et les mesures adoptées par les Etats doivent leur être conformes; les secondes, qui ne lient pas formellement les Etats, doivent être prises en compte par ces derniers, pour autant qu'elles sont pertinentes, de manière que les mesures, les normes et les réglementations internes adoptées soient compatibles («con adecuación») avec ces directives et recommandations. L'article 41, toutefois, n'incorpore pas dans le statut de 1975 les accords internationaux en tant que tels, mais impose aux

international agreements" should be in force between the *two* parties thus clearly indicates that the 1975 Statute takes account of the prior commitments of each of the parties which have a bearing on it.

61. Article 41 of the 1975 Statute, paragraph *(a)* of which Argentina considers as constituting another "referral clause" incorporating the obligations under international agreements into the Statute, reads as follows:

> "Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:
>
> *(a)* to protect and preserve the aquatic environment and, in particular, to prevent its pollution, *by prescribing appropriate rules and [adopting appropriate] measures in accordance* with applicable international agreements and in keeping, where relevant, with the guidelines and recommendations of international technical bodies;
>
> *(b)* not to reduce in their respective legal systems:
>
> 1) the technical requirements in force for preventing water pollution, and
> 2) the severity of the penalties established for violations;
>
> *(c)* to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems." (Emphasis added.)

62. The Court observes that the words "adopting appropriate" do not appear in the English translation while they appear in the original Spanish text ("dictando las normas y adoptando las medidas apropiadas"). Basing itself on the original Spanish text, it is difficult for the Court to see how this provision could be construed as a "referral clause" having the effect of incorporating the obligations of the parties under international agreements and other norms envisaged within the ambit of the 1975 Statute.

The purpose of the provision in Article 41 *(a)* is to protect and preserve the aquatic environment by requiring each of the parties to enact rules and to adopt appropriate measures. Article 41 *(a)* distinguishes between applicable international agreements and the guidelines and recommendations of international technical bodies. While the former are legally binding and therefore the domestic rules and regulations enacted and the measures adopted by the State have to comply with them, the latter, not being formally binding, are, to the extent they are relevant, to be taken into account by the State so that the domestic rules and regulations and the measures it adopts are compatible ("con adecuación") with those guidelines and recommendations. However, Article 41 does not incorporate international agreements as such into the 1975 Statute but rather sets obligations for the parties to exercise their regulatory powers, in conformity with applicable international agreements, for the protection and

parties l'obligation d'exercer leurs pouvoirs de réglementation, en conformité avec les accords internationaux applicables, aux fins de la protection et de la préservation du milieu aquatique du fleuve Uruguay. Aux termes de l'alinéa *b)* de l'article 41, les normes mises en place pour prévenir la pollution des eaux et la sévérité des «pénalités» ne doivent pas être abaissées. Enfin, l'alinéa *c)* de l'article 41 concerne l'obligation faite à chacune des parties d'informer l'autre des normes qu'elle se propose d'établir en matière de pollution des eaux.

63. La Cour en conclut que rien, dans le texte de l'article 41 du statut de 1975, ne vient étayer la thèse selon laquelle cet article constituerait une «clause de renvoi». En conséquence, les différentes conventions multilatérales invoquées par l'Argentine ne sont pas, comme telles, incorporées dans le statut de 1975. Pour cette raison, elles ne relèvent pas de la clause compromissoire et la Cour n'a pas compétence pour trancher la question de savoir si l'Uruguay a rempli les obligations lui incombant en vertu de ces instruments.

64. La Cour examinera ensuite brièvement comment le statut de 1975 doit être interprété. Si les vues des Parties concordent en ce qui concerne l'origine du statut et le contexte historique dans lequel il s'insère, elles divergent quant à sa nature et à son économie générale ainsi que quant aux obligations de nature procédurale et de fond qu'il énonce.

Les Parties conviennent cependant que le statut de 1975 doit être interprété conformément aux règles de droit international coutumier relatives à l'interprétation des traités, telles que codifiées à l'article 31 de la convention de Vienne sur le droit des traités.

65. La Cour s'est référée à ces règles lorsqu'elle a été appelée à interpréter les dispositions de traités et d'accords internationaux conclus avant l'entrée en vigueur de la convention de Vienne en 1980 (voir, par exemple, les affaires du *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 21, par. 41, et de l'*Ile de Kasikili/Sedudu (Botswana/Namibie), arrêt, C.I.J. Recueil 1999 (II)*, p. 1059, par. 18).

Le statut de 1975 est lui aussi un traité antérieur à l'entrée en vigueur de la convention de Vienne sur le droit des traités. Pour en interpréter les termes, la Cour se référera aux règles coutumières d'interprétation des traités telles qu'elles ressortent de l'article 31 de la convention de Vienne. Le statut de 1975 doit donc être «interprété de bonne foi suivant le sens ordinaire à attribuer [à ses] termes ... dans leur contexte et à la lumière de son objet et de son but». L'interprétation prendra aussi en compte, outre le contexte, «toute règle pertinente de droit international applicable dans les relations entre les parties».

66. La prise en considération, aux fins de l'interprétation du statut de 1975, des règles pertinentes de droit international applicables dans les relations entre les Parties, qu'il s'agisse de règles de droit international général ou de règles contenues dans les conventions multilatérales auxquelles les deux Etats sont parties, est toutefois sans incidence sur l'éten-

preservation of the aquatic environment of the River Uruguay. Under Article 41 *(b)* the existing requirements for preventing water pollution and the severity of the penalties are not to be reduced. Finally, paragraph *(c)* of Article 41 concerns the obligation to inform the other party of plans to prescribe rules on water pollution.

63. The Court concludes that there is no basis in the text of Article 41 of the 1975 Statute for the contention that it constitutes a "referral clause". Consequently, the various multilateral conventions relied on by Argentina are not, as such, incorporated in the 1975 Statute. For that reason, they do not fall within the scope of the compromissory clause and therefore the Court has no jurisdiction to rule whether Uruguay has complied with its obligations thereunder.

64. The Court next briefly turns to the issue of how the 1975 Statute is to be interpreted. The Parties concur as to the 1975 Statute's origin and historical context, although they differ as to the nature and general tenor of the Statute and the procedural and substantive obligations therein.

The Parties nevertheless are in agreement that the 1975 Statute is to be interpreted in accordance with rules of customary international law on treaty interpretation, as codified in Article 31 of the Vienna Convention on the Law of Treaties.

65. The Court has had recourse to these rules when it has had to interpret the provisions of treaties and international agreements concluded before the entry into force of the Vienna Convention on the Law of Treaties in 1980 (see, e.g., *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, I.C.J. Reports 1994*, p. 21, para. 41; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment, I.C.J. Reports 1999 (II)*, p. 1059, para. 18).

The 1975 Statute is also a treaty which predates the entry into force of the Vienna Convention on the Law of Treaties. In interpreting the terms of the 1975 Statute, the Court will have recourse to the customary rules on treaty interpretation as reflected in Article 31 of the Vienna Convention. Accordingly the 1975 Statute is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the [Statute] in their context and in light of its object and purpose". That interpretation will also take into account, together with the context, "any relevant rules of international law applicable in the relations between the parties".

66. In the interpretation of the 1975 Statute, taking account of relevant rules of international law applicable in the relations between the Parties, whether these are rules of general international law or contained in multilateral conventions to which the two States are parties, nevertheless has no bearing on the scope of the jurisdiction conferred on the

due de la compétence conférée à la Cour en vertu de l'article 60 du statut de 1975, qui demeure circonscrite aux différends concernant l'interprétation ou l'application du statut.

* *

III. La violation alléguée des obligations de nature procédurale

67. La requête déposée par l'Argentine le 4 mai 2006 porte sur la violation alléguée par l'Uruguay des obligations tant de nature procédurale que de fond prévues par le statut de 1975. La Cour commencera par examiner la violation alléguée des obligations de nature procédurale prévues par les articles 7 à 12 du statut de 1975 au sujet des projets relatifs aux usines CMB (ENCE) et Orion (Botnia), ainsi qu'aux installations connexes de cette dernière, sur la rive gauche du fleuve Uruguay, près de la ville de Fray Bentos.

68. L'Argentine considère que les obligations de nature procédurale sont intrinsèquement liées aux obligations de fond prévues par le statut de 1975, et qu'un manquement aux premières entraîne un manquement aux secondes.

S'agissant des obligations de nature procédurale, elles constitueraient, selon l'Argentine, un ensemble intégré et indissociable, au sein duquel la CARU jouerait, en tant qu'organisation, un rôle essentiel.

Il en découlerait, selon l'Argentine, que l'Uruguay ne pourrait invoquer d'autres arrangements procéduraux pour déroger aux obligations de nature procédurale prévues par le statut de 1975, en dehors du consentement des deux Parties.

69. A l'issue du mécanisme procédural prévu par ce statut, et faute d'accord entre les Parties, celles-ci n'auraient, selon l'Argentine, d'autre choix que de saisir la Cour, aux termes des articles 12 et 60 du statut, l'Uruguay ne pouvant procéder à la construction des usines projetées tant que la Cour n'aurait pas rendu son arrêt.

70. Dans le fil de l'argumentation avancée par le demandeur, la Cour examinera successivement les quatre points suivants : les liens entre les obligations de nature procédurale et les obligations de fond (A), les obligations de nature procédurale et leur articulation (B), la question de savoir si les Parties sont convenues de déroger aux obligations de nature procédurale prévues par le statut de 1975 (C) et les obligations de l'Uruguay au terme de la période de négociation (D).

A. Les liens entre les obligations de nature procédurale et les obligations de fond

71. L'Argentine soutient que les dispositions de nature procédurale, prévues aux articles 7 à 12 du statut de 1975, ont pour objectif d'assurer

Court under Article 60 of the 1975 Statute, which remains confined to disputes concerning the interpretation or application of the Statute.

* *

III. The Alleged Breach of Procedural Obligations

67. The Application filed by Argentina on 4 May 2006 concerns the alleged breach by Uruguay of both procedural and substantive obligations laid down in the 1975 Statute. The Court will start by considering the alleged breach of procedural obligations under Articles 7 to 12 of the 1975 Statute, in relation to the (CMB) ENCE and Orion (Botnia) mill projects and the facilities associated with the latter, on the left bank of the River Uruguay near the city of Fray Bentos.

68. Argentina takes the view that the procedural obligations were intrinsically linked to the substantive obligations laid down by the 1975 Statute, and that a breach of the former entailed a breach of the latter.

With regard to the procedural obligations, these are said by Argentina to constitute an integrated and indivisible whole in which CARU, as an organization, plays an essential role.

Consequently, according to Argentina, Uruguay could not invoke other procedural arrangements so as to derogate from the procedural obligations laid down by the 1975 Statute, except by mutual consent.

69. Argentina argues that, at the end of the procedural mechanism provided for by the 1975 Statute, and in the absence of agreement between the Parties, the latter have no choice but to submit the matter to the Court under the terms of Articles 12 and 60 of the Statute, with Uruguay being unable to proceed with the construction of the planned mills until the Court has delivered its Judgment.

70. Following the lines of the argument put forward by the Applicant, the Court will examine in turn the following four points: the links between the procedural obligations and the substantive obligations (A); the procedural obligations and their interrelation with each other (B); whether the Parties agreed to derogate from the procedural obligations set out in the 1975 Statute (C); and Uruguay's obligations at the end of the negotiation period (D).

A. The Links between the Procedural Obligations and the Substantive Obligations

71. Argentina maintains that the procedural provisions laid down in Articles 7 to 12 of the 1975 Statute are aimed at ensuring "the optimum

«l'utilisation rationnelle et optimale du fleuve» (article premier), au même titre que les dispositions relatives à l'utilisation des eaux, à la conservation, à l'utilisation et à l'exploitation d'autres ressources naturelles, à la pollution et à la recherche. L'objectif serait également d'empêcher que les Parties ne puissent agir unilatéralement et sans égard aux utilisations antérieures ou actuelles du fleuve. Toute méconnaissance de ces mécanismes entraînerait dès lors, selon l'Argentine, une atteinte à l'objet et au but du statut de 1975; en effet, «l'utilisation rationnelle et optimale du fleuve» ne serait pas assurée, car celle-ci ne pourrait se réaliser que conformément aux procédures établies par le statut.

72. Il s'ensuivrait, selon l'Argentine, qu'une violation des obligations de nature procédurale entraînerait automatiquement celle des obligations de fond, dans la mesure où les deux catégories d'obligations sont indivisibles. Une telle position trouverait un appui dans l'ordonnance de la Cour du 13 juillet 2006, selon laquelle le statut de 1975 a créé «un régime complet».

73. L'Uruguay considère également que les obligations de nature procédurale sont destinées à faciliter la mise en œuvre des obligations de fond car les premières constituent un moyen et non une fin. Il souligne, de même, que l'article premier du statut de 1975 définit l'objet et le but de celui-ci.

74. Mais l'Uruguay rejette, comme artificielle, l'argumentation de l'Argentine, en ce qu'elle tend à confondre les questions de procédure et de fond dans le but de faire croire que la violation des obligations de nature procédurale se traduirait nécessairement par celle des obligations de fond. Il appartiendrait à la Cour, selon l'Uruguay, d'apprécier la violation, en elle-même, de chacune de ces catégories d'obligations et d'en tirer les conséquences qui s'imposent dans chaque cas en matière de responsabilité et de réparation.

75. La Cour relève que l'objet et le but du statut de 1975, inscrits à l'article premier, consistent, pour les Parties, à parvenir à «l'utilisation rationnelle et optimale du fleuve Uruguay» au moyen des «mécanismes communs» de coopération, constitués aussi bien par la CARU que par les dispositions de nature procédurale des articles 7 à 12 du statut.

La Cour a souligné à ce propos, dans son ordonnance du 13 juillet 2006, qu'une telle utilisation devrait permettre un développement durable qui tienne compte «de la nécessité de garantir la protection continue de l'environnement du fleuve ainsi que le droit au développement économique des Etats riverains» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 133, par. 80).

76. Dans l'affaire *Gabčíkovo-Nagymaros*, la Cour, après avoir rappelé que «[l]e concept de développement durable traduit bien cette nécessité de concilier développement économique et protection de l'environnement», a ajouté que «[c]e sont les Parties elles-mêmes qui doivent trouver d'un commun accord une solution qui tienne compte des objectifs du

and rational utilization of the [r]iver" (Article 1), just as are the provisions concerning use of water, the conservation, utilization and development of other natural resources, pollution and research. The aim is also said to be to prevent the Parties from acting unilaterally and without regard for earlier or current uses of the river. According to Argentina, any disregarding of this machinery would therefore undermine the object and purpose of the 1975 Statute; indeed the "optimum and rational utilization of the [r]iver" would not be ensured, as this could only be achieved in accordance with the procedures laid down under the Statute.

72. It follows, according to Argentina, that a breach of the procedural obligations automatically entails a breach of the substantive obligations, since the two categories of obligations are indivisible. Such a position is said to be supported by the Order of the Court of 13 July 2006, according to which the 1975 Statute created "a comprehensive régime".

73. Uruguay similarly takes the view that the procedural obligations are intended to facilitate the performance of the substantive obligations, the former being a means rather than an end. It too points out that Article 1 of the 1975 Statute defines its object and purpose.

74. However, Uruguay rejects Argentina's argument as artificial, since it appears to mix procedural and substantive questions with the aim of creating the belief that the breach of procedural obligations necessarily entails the breach of substantive ones. According to Uruguay, it is for the Court to determine the breach, in itself, of each of these categories of obligations, and to draw the necessary conclusions in each case in terms of responsibility and reparation.

75. The Court notes that the object and purpose of the 1975 Statute, set forth in Article 1, is for the Parties to achieve "the optimum and rational utilization of the River Uruguay" by means of the "joint machinery" for co-operation, which consists of both CARU and the procedural provisions contained in Articles 7 to 12 of the Statute.

The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 80).

76. In the *Gabčikovo-Nagymaros* case, the Court, after recalling that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development", added that "[i]t is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty" (*Gabčíkovo-*

traité» (*Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 78, par. 140 et 141).

77. La Cour estime que c'est en coopérant que les Etats concernés peuvent gérer en commun les risques de dommages à l'environnement qui pourraient être générés par les projets initiés par l'un ou l'autre d'entre eux, de manière à prévenir les dommages en question, à travers la mise en œuvre des obligations tant de nature procédurale que de fond prévues par le statut de 1975. Cependant, alors que les obligations de fond sont libellées le plus souvent en termes généraux, les obligations de nature procédurale sont plus circonscrites et précises afin de faciliter la mise en œuvre du statut à travers une concertation permanente entre les parties concernées. La Cour a qualifié le régime institué par le statut de 1975 de «régime complet et novateur» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 133, par. 81), dans la mesure où les deux catégories d'obligations susmentionnées se complètent parfaitement, afin que les parties puissent réaliser l'objet du statut tel qu'elles l'ont fixé en son article premier.

78. La Cour note que le statut de 1975 a créé la CARU et mis en place des procédures en liaison avec cette institution, afin que les parties puissent s'acquitter de leurs obligations de fond. Mais le statut n'indique nulle part qu'une partie pourrait s'acquitter de ses obligations de fond en respectant seulement ses obligations de nature procédurale, ni qu'une violation des obligations de nature procédurale emporterait automatiquement celle des obligations de fond.

De même, ce n'est pas parce que les parties auraient respecté leurs obligations de fond qu'elles seraient censées avoir respecté *ipso facto* leurs obligations de nature procédurale, ou qu'elles seraient dispensées de le faire. D'ailleurs, le lien entre ces deux catégories d'obligations peut être rompu, dans les faits, lorsqu'une partie qui n'aurait pas respecté ses obligations de nature procédurale renoncerait ensuite à la réalisation de l'activité projetée.

79. La Cour considère, en conséquence de ce qui précède, qu'il existe certes un lien fonctionnel, relatif à la prévention, entre les deux catégories d'obligations prévues par le statut de 1975, mais que ce lien n'empêche pas que les Etats parties soient appelés à répondre séparément des unes et des autres, selon leur contenu propre, et à assumer, s'il y a lieu, la responsabilité qui découlerait, selon le cas, de leur violation.

B. Les obligations de nature procédurale et leur articulation

80. Le statut de 1975 prévoit à la charge de la partie qui projette certaines activités, énumérées au premier alinéa de l'article 7, des obligations de nature procédurale dont le contenu, l'articulation et les délais sont précisés aux articles 7 à 12 comme suit :

Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, p. 78, paras. 140-141).

77. The Court observes that it is by co-operating that the States concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or other of them, so as to prevent the damage in question, through the performance of both the procedural and the substantive obligations laid down by the 1975 Statute. However, whereas the substantive obligations are frequently worded in broad terms, the procedural obligations are narrower and more specific, so as to facilitate the implementation of the 1975 Statute through a process of continuous consultation between the parties concerned. The Court has described the régime put in place by the 1975 Statute as a "comprehensive and progressive régime" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 81), since the two categories of obligations mentioned above complement one another perfectly, enabling the parties to achieve the object of the Statute which they set themselves in Article 1.

78. The Court notes that the 1975 Statute created CARU and established procedures in connection with that institution, so as to enable the parties to fulfil their substantive obligations. However, nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones.

Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied *ipso facto* with their procedural obligations, or are excused from doing so. Moreover, the link between these two categories of obligations can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity.

79. The Court considers, as a result of the above, that there is indeed a functional link, in regard to prevention, between the two categories of obligations laid down by the 1975 Statute, but that link does not prevent the States parties from being required to answer for those obligations separately, according to their specific content, and to assume, if necessary, the responsibility resulting from the breach of them, according to the circumstances.

B. The Procedural Obligations and Their Interrelation

80. The 1975 Statute imposes on a party which is planning certain activities, set out in Article 7, first paragraph, procedural obligations whose content, interrelation and time-limits are specified as follows in Articles 7 to 12:

« *Article 7*

La partie qui projette de construire de nouveaux chenaux, de modifier ou d'altérer de manière significative les chenaux existants ou de réaliser tous autres ouvrages suffisamment importants pour affecter la navigation, le régime du fleuve ou la qualité de ses eaux, en informe la commission administrative, laquelle détermine sommairement, dans un délai maximum de 30 jours, si le projet peut causer un préjudice sensible à l'autre partie.

S'il en est ainsi décidé ou si une décision n'intervient pas à cet égard, la partie intéressée notifie le projet à l'autre partie par l'intermédiaire de la commission.

La notification énonce les aspects essentiels de l'ouvrage et, le cas échéant, son mode de fonctionnement et les autres données techniques permettant à la partie à laquelle la notification est adressée d'évaluer l'effet probable que l'ouvrage aura sur la navigation, sur le régime du fleuve ou sur la qualité de ses eaux.

Article 8

La partie notifiée dispose d'un délai de 180 jours pour se prononcer sur le projet, à compter du jour où sa délégation à la commission a reçu la notification.

Au cas où la notification mentionnée à l'article 7 serait incomplète, la partie notifiée disposera de 30 jours pour le faire savoir, par l'intermédiaire de la commission, à la partie qui projette de construire l'ouvrage.

Le délai de 180 jours susmentionné commence à courir à partir du jour où la délégation de la partie notifiée a reçu la documentation complète.

Ce délai peut être prorogé de façon raisonnable par la commission si la complexité du projet l'exige.

Article 9

Si la partie notifiée ne formule pas d'objections ou ne répond pas dans le délai prévu à l'article 8, l'autre partie peut construire ou autoriser la construction de l'ouvrage projeté.

Article 10

La partie notifiée a le droit d'inspecter les ouvrages en construction pour vérifier s'ils sont conformes au projet présenté.

Article 11

Si la partie notifiée aboutit à la conclusion que l'exécution de l'ouvrage ou le programme d'opérations peut causer un préjudice sensible à la navigation, au régime du fleuve ou à la qualité de ses eaux, elle en informe l'autre partie par l'intermédiaire de la commission dans le délai de 180 jours fixé à l'article 8.

La communication précise quels sont les aspects de l'ouvrage ou

"*Article 7*

If one party plans to construct new channels, substantially modify or alter existing ones or carry out any other works which are liable to affect navigation, the régime of the river or the quality of its waters, it shall notify the Commission, which shall determine on a preliminary basis and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

If the Commission finds this to be the case or if a decision cannot be reached in that regard, the party concerned shall notify the other party of the plan through the said Commission.

Such notification shall describe the main aspects of the work and, where appropriate, how it is to be carried out and shall include any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters.

Article 8

The notified party shall have a period of 180 days in which to respond in connection with the plan, starting from the date on which its delegation to the Commission receives the notification.

Should the documentation referred to in Article 7 be incomplete, the notified party shall have 30 days in which to so inform, through the Commission, the party which plans to carry out the work.

The period of 180 days mentioned above shall begin on the date on which the delegation of the notified party receives the full documentation.

This period may be extended at the discretion of the Commission if the complexity of the plan so requires.

Article 9

If the notified party raises no objections or does not respond within the period established in Article 8, the other party may carry out or authorize the work planned.

Article 10

The notified party shall have the right to inspect the works being carried out in order to determine whether they conform to the plan submitted.

Article 11

Should the notified party come to the conclusion that the execution of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, it shall so notify the other party, through the Commission, within the period of 180 days established in Article 8.

Such notification shall specify which aspects of the work or the

du programme d'opérations qui peuvent causer un préjudice sensible à la navigation, au régime du fleuve ou à la qualité de ses eaux, les raisons techniques qui permettent d'arriver à cette conclusion et les modifications qu'elle suggère d'apporter au projet ou au programme d'opérations.

Article 12

Si les parties n'aboutissent pas à un accord dans un délai de 180 jours à compter de la communication visée à l'article 11, la procédure indiquée au chapitre XV est applicable.»

81. L'original espagnol de l'article 7 du statut de 1975 se lit ainsi:

«La parte que proyecte la construcción de nuevos canales, la modificación o alteración significativa de los ya existentes o la realización de cualesquiera otras obras de entidad suficiente para afectar la navegación, el régimen del Río o la calidad de sus aguas, deberá comunicarlo a la Comisión, la cual determinará sumariamente, y en un plazo máximo de treinta días, si el proyecto puede producir perjuicio sensible a la otra parte.

Si así se resolviere o no se llegare a una decisión al respecto, la parte interesada deberá notificar el proyecto a la otra parte a través de la misma Comisión.

En la notificación deberán figurar los aspectos esenciales de la obra y, si fuere el caso, el modo de su operación y los demás datos técnicos que permitan a la parte notificada hacer una evaluación del efecto probable que la obra ocasionará a la navegación, al régimen del Río o a la calidad de sus aguas.»

La Cour relève que, comme l'original espagnol, la traduction française de cet article (voir paragraphe 80 ci-dessus) distingue l'obligation d'informer («comunicar») la CARU au sujet des projets entrant dans son champ d'application (premier alinéa) de celle de les notifier («notificar») à l'autre partie (deuxième alinéa). En revanche, la traduction anglaise utilise indistinctement le verbe «notify» au sujet de ces deux obligations. Afin de se conformer au texte original espagnol, la Cour utilisera dans les deux versions linguistiques du présent arrêt le verbe «informer» pour l'obligation prescrite par le premier alinéa de l'article 7 et le verbe «notifier» pour celle des deuxième et troisième alinéas.

La Cour considère que les obligations d'informer, de notifier et de négocier constituent un moyen approprié, accepté par les Parties, de parvenir à l'objectif qu'elles se sont fixé à l'article premier du statut de 1975. Ces obligations s'avèrent d'autant plus indispensables lorsqu'il s'agit, comme dans le cas du fleuve Uruguay, d'une ressource partagée qui ne peut être protégée que par le biais d'une coopération étroite et continue entre les riverains.

82. Selon l'Argentine, en ne respectant pas la première obligation (premier alinéa de l'article 7 du statut) de saisine de la CARU, l'Uruguay a

programme of operations might significantly impair navigation, the régime of the river or the quality of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations.

Article 12

Should the parties fail to reach agreement within 180 days following the notification referred to in Article 11, the procedure indicated in Chapter XV shall be followed."

81. The original Spanish text of Article 7 of the 1975 Statute reads as follows:

"La parte que proyecte la construcción de nuevos canales, la modificación o alteración significativa de los ya existentes o la realización de cualesquiera otras obras de entidad suficiente para afectar la navegación, el régimen del Río o la calidad de sus aguas, deberá comunicarlo a la Comisión, la cual determinará sumariamente, y en un plazo máximo de treinta días, si el proyecto puede producir perjuicio sensible a la otra parte.

Si así se resolviere o no se llegare a una decisión al respecto, la parte interesada deberá notificar el proyecto a la otra parte a través de la misma Comisión.

En la notificación deberán figurar los aspectos esenciales de la obra y, si fuere el caso, el modo de su operación y los demás datos técnicos que permitan a la parte notificada hacer una evaluación del efecto probable que la obra ocasionará a la navegación, al régimen del Río o a la calidad de sus aguas."

The Court notes that, just as the original Spanish text, the French translation of this Article (see paragraph 80 above) distinguishes between the obligation to inform ("comunicar") CARU of any plan falling within its purview (first paragraph) and the obligation to notify ("notificar") the other party (second paragraph). By contrast, the English translation uses the same verb "notify" in respect of both obligations. In order to conform to the original Spanish text, the Court will use in both linguistic versions of this Judgment the verb "inform" for the obligation set out in the first paragraph of Article 7 and the verb "notify" for the obligation set out in the second and third paragraphs.

The Court considers that the procedural obligations of informing, notifying and negotiating constitute an appropriate means, accepted by the Parties, of achieving the objective which they set themselves in Article 1 of the 1975 Statute. These obligations are all the more vital when a shared resource is at issue, as in the case of the River Uruguay, which can only be protected through close and continuous co-operation between the riparian States.

82. According to Argentina, by failing to comply with the initial obligation (Article 7, first paragraph, of the 1975 Statute) to refer the matter

mis en échec l'ensemble des procédures prévues aux articles 7 à 12 du statut. Par ailleurs, en ne lui notifiant pas les projets des usines CMB (ENCE) et Orion (Botnia), par l'intermédiaire de la CARU, avec toute la documentation nécessaire, l'Uruguay n'aurait pas respecté les deuxième et troisième alinéas de l'article 7. L'Argentine ajoute que des contacts informels qu'elle-même ou la CARU ont pu avoir avec les sociétés concernées ne peuvent tenir lieu de saisine de la CARU et de notification des projets par l'intermédiaire de cette commission. L'Argentine en conclut que l'Uruguay a violé l'ensemble des obligations de nature procédurale lui incombant en vertu des articles 7 à 12 du statut.

L'Uruguay, de son côté, considère que la saisine de la CARU n'est pas aussi contraignante que le soutient l'Argentine et que les parties peuvent convenir, d'un commun accord, d'emprunter d'autres voies, en recourant à d'autres arrangements de nature procédurale, pour engager la coopération entre elles. Il en déduit qu'il n'a pas enfreint les obligations de nature procédurale prévues par le statut, même s'il s'en est acquitté sans suivre à la lettre le processus formel qui y est décrit.

83. La Cour examinera d'abord la nature et le rôle de la CARU, puis se penchera sur la question de savoir si l'Uruguay a respecté son obligation d'informer la CARU de ses projets et celle de les notifier à l'Argentine.

1. La nature et le rôle de la CARU

84. L'Uruguay estime que la CARU, au même titre que les autres commissions fluviales, n'est pas un organisme doté d'une volonté autonome, mais plutôt un mécanisme établi pour faciliter la coopération entre les Parties. Il ajoute que les Etats qui ont créé ces commissions fluviales sont libres de s'écarter du mécanisme commun, lorsque cela sert leurs objectifs, et qu'ils le font souvent. Selon l'Uruguay, dès lors que la CARU n'est pas habilitée à agir en dehors de la volonté des Parties, celles-ci sont libres de faire directement ce qu'elles avaient décidé de faire par l'intermédiaire de cette commission, et elles peuvent convenir notamment de ne pas l'informer ainsi que cela est prévu à l'article 7 du statut de 1975. L'Uruguay affirme que c'est précisément ce qui s'est passé dans le cas d'espèce : les deux Etats se sont entendus pour se dispenser de l'examen sommaire de la CARU et passer immédiatement à des entretiens directs.

85. Pour l'Argentine, en revanche, le statut de 1975 n'est pas un simple traité bilatéral imposant des obligations synallagmatiques aux parties ; il institutionnalise une coopération permanente et étroite, dont la CARU est l'élément central et incontournable. La CARU constitue, de l'avis de l'Argentine, l'organe clef de coordination entre les parties dans à peu près tous les domaines couverts par le statut. En ne s'acquittant pas de ses obligations à cet égard, l'Uruguay remettrait profondément en question le statut de 1975.

86. La Cour rappelle qu'elle a déjà qualifié la CARU de

to CARU, Uruguay frustrated all the procedures laid down in Articles 7 to 12 of the Statute. In addition, by failing to notify Argentina of the plans for the CMB (ENCE) and Orion (Botnia) mills, through CARU, with all the necessary documentation, Uruguay is said not to have complied with Article 7, second and third paragraphs. Argentina adds that informal contacts which it or CARU may have had with the companies in question cannot serve as a substitute for Uruguay referring the matter to CARU and notifying Argentina of the projects through the Commission. Argentina concludes that Uruguay has breached all of its procedural obligations under the terms of Articles 7 to 12 of the 1975 Statute.

Uruguay, for its part, considers that referring the matter to CARU does not impose so great a constraint as Argentina contends and that the parties may agree, by mutual consent, to use different channels by employing other procedural arrangements in order to engage in co-operation. It concludes from this that it has not breached the procedural obligations laid down by the 1975 Statute, even if it has performed them without following to the letter the formal process set out therein.

83. The Court will first examine the nature and role of CARU, and then consider whether Uruguay has complied with its obligations to inform CARU and to notify Argentina of its plans.

1. The nature and role of CARU

84. Uruguay takes the view that CARU, like other river commissions, is not a body with autonomous powers, but rather a mechanism established to facilitate co-operation between the Parties. It adds that the States which have created these river commissions are free to go outside the joint mechanism when it suits their purposes, and that they often do so. According to Uruguay, since CARU is not empowered to act outside the will of the Parties, the latter are free to do directly what they have decided to do through the Commission, and in particular may agree not to inform it in the manner provided for in Article 7 of the 1975 Statute. Uruguay maintains that that is precisely what happened in the present case: the two States agreed to dispense with the preliminary review by CARU and to proceed immediately to direct negotiations.

85. For Argentina, on the other hand, the 1975 Statute is not merely a bilateral treaty imposing reciprocal obligations on the parties; it establishes an institutional framework for close and ongoing co-operation, the core and essence of which is CARU. For Argentina, CARU is the key body for co-ordination between the Parties in virtually all areas covered by the 1975 Statute. By failing to fulfil its obligations in this respect, Uruguay is said to be calling the 1975 Statute fundamentally into question.

86. The Court recalls that it has already described CARU as

> «mécanisme commun doté de fonctions réglementaires, administratives, techniques, de gestion et de conciliation…, à laquelle a été confiée la bonne application des dispositions du statut de 1975 régissant la gestion des ressources fluviales partagées, ... mécanisme ... [qui] occupe une place très importante dans le régime de ce traité» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 133-134, par. 81).

87. La Cour relève tout d'abord que, conformément à l'article 50 du statut de 1975, la CARU «jouit de la personnalité juridique dans l'accomplissement de son mandat» et que les parties audit statut se sont engagées à lui attribuer «les ressources nécessaires, ainsi que tous les éléments et facilités indispensables à son fonctionnement». Il en découle que, loin d'être une simple courroie de transmission entre les parties, la CARU a une existence propre et permanente; elle exerce des droits et est tenue à des devoirs pour s'acquitter des fonctions qui lui sont conférées par le statut de 1975.

88. Certes, les décisions de la commission doivent être adoptées d'un commun accord par les deux riverains (article 55), mais leur préparation et leur mise en œuvre relèvent d'un secrétariat dont les fonctionnaires jouissent de privilèges et d'immunités. D'autre part, la CARU peut décentraliser ses différentes fonctions en créant les organes subsidiaires qui lui sont nécessaires (article 52).

89. La Cour observe que, comme toute organisation internationale dotée de la personnalité juridique, la CARU est habilitée à exercer les compétences qui lui sont reconnues par le statut de 1975 et qui sont nécessaires à la réalisation de l'objet et du but de celui-ci, soit «l'utilisation rationnelle et optimale du fleuve» (article premier). Ainsi que la Cour l'a souligné,

> «[l]es organisations internationales sont régies par «le principe de spécialité», c'est-à-dire dotées par les Etats qui les créent de compétences d'attribution dont les limites sont fonction des intérêts communs que ceux-ci leur donnent pour mission de promouvoir» (*Licéité de l'utilisation des armes nucléaires par un Etat dans un conflit armé, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 78, par. 25).

Cela est naturellement vrai aussi pour les organisations qui, comme la CARU, ne comportent que deux Etats membres.

90. La CARU servant de cadre de concertation entre les parties, notamment pour les projets d'ouvrages envisagés au premier alinéa de l'article 7 du statut de 1975, aucune d'entre elles ne peut sortir unilatéralement et au moment qu'elle juge opportun de ce cadre et lui substituer d'autres canaux de communication. En créant la CARU et en la dotant de tous les moyens nécessaires à son fonctionnement, les parties ont entendu donner les meilleures garanties de stabilité, de continuité et

> "a joint mechanism with regulatory, executive, administrative, technical and conciliatory functions, entrusted with the proper implementation of the rules contained in the 1975 Statute governing the management of the shared river resource; . . . [a] mechanism [which] constitutes a very important part of that treaty régime" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, pp. 133-134, para. 81).

87. The Court notes, first, that CARU, in accordance with Article 50 of the 1975 Statute, was endowed with legal personality "in order to perform its functions" and that the parties to the 1975 Statute undertook to provide it with "the necessary resources and all the information and facilities essential to its operations". Consequently, far from being merely a transmission mechanism between the parties, CARU has a permanent existence of its own; it exercises rights and also bears duties in carrying out the functions attributed to it by the 1975 Statute.

88. While the decisions of the Commission must be adopted by common accord between the riparian States (Article 55), these are prepared and implemented by a secretariat whose staff enjoy privileges and immunities. Moreover, CARU is able to decentralize its various functions by setting up whatever subsidiary bodies it deems necessary (Article 52).

89. The Court observes that, like any international organization with legal personality, CARU is entitled to exercise the powers assigned to it by the 1975 Statute and which are necessary to achieve the object and purpose of the latter, namely, "the optimum and rational utilization of the River Uruguay" (Article 1). As the Court has pointed out,

> "[i]nternational organizations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those States entrust to them" (*Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 78, para. 25).

This also applies of course to organizations, which like CARU, only have two member States.

90. Since CARU serves as a framework for consultation between the parties, particularly in the case of the planned works contemplated in Article 7, first paragraph, of the 1975 Statute, neither of them may depart from that framework unilaterally, as they see fit, and put other channels of communication in its place. By creating CARU and investing it with all the resources necessary for its operation, the parties have sought to provide the best possible guarantees of stability, continuity and effective-

d'efficacité à leur volonté de coopérer à «l'utilisation rationnelle et optimale du fleuve».

91. C'est pour cette raison que la CARU joue un rôle central dans le statut de 1975 et ne peut être réduite à un simple mécanisme facultatif mis à la disposition des parties que chacune d'entre elles pourrait utiliser à sa guise. La CARU intervient à tous les niveaux de l'utilisation du fleuve, qu'il s'agisse de la prévention des dommages transfrontières susceptibles de découler des activités projetées; de l'utilisation des eaux, au sujet de laquelle elle reçoit les rapports des parties et vérifie si la somme des utilisations ne cause pas un préjudice sensible (articles 27 et 28); de la prévention de la modification de l'équilibre écologique (article 36); des études et des recherches de caractère scientifique effectuées par une partie dans la juridiction de l'autre (article 44); de l'exercice du droit de police (article 46) et du droit de navigation (article 48).

92. Par ailleurs, la CARU a reçu comme fonction d'édicter des normes réglementaires dans un grand nombre de domaines liés à la gestion commune du fleuve et énumérés à l'article 56 du statut de 1975. Enfin, la commission peut servir d'instance de conciliation pour tout litige né entre les parties, sur proposition de l'une d'entre elles (article 58).

93. Dès lors, la Cour considère que, de par l'ampleur et la diversité des fonctions qu'elles ont confiées à la CARU, les Parties ont entendu faire de cette organisation internationale un élément central dans l'accomplissement de leurs obligations de coopérer édictées par le statut de 1975.

2. L'obligation de l'Uruguay d'informer la CARU

94. La Cour note que l'obligation de l'Etat d'origine de l'activité projetée d'informer la CARU constitue la première étape de l'ensemble du mécanisme procédural qui permet aux deux parties de réaliser l'objet du statut de 1975, à savoir «l'utilisation rationnelle et optimale du fleuve Uruguay». Cette étape, prévue au premier alinéa de l'article 7, consiste, pour l'Etat d'origine de l'activité projetée, à en informer la CARU pour que celle-ci puisse déterminer «sommairement», dans un délai maximum de trente jours, si le projet peut causer un préjudice sensible à l'autre partie.

95. Pour que le reste de la procédure puisse se poursuivre, les deux parties ont posé comme conditions alternatives, dans le statut de 1975, que l'activité projetée par l'une soit susceptible, selon la CARU, de causer un préjudice sensible à l'autre, faisant naître à la charge de la première une obligation de prévention, afin d'éliminer ou de réduire au minimum le risque, en consultation avec la seconde; ou que la CARU, dûment informée, ne prenne pas de décision à ce sujet dans le délai prescrit.

96. La Cour constate que les deux Parties s'accordent à considérer que les deux usines projetées étaient des ouvrages suffisamment importants pour entrer dans le champ d'application de l'article 7 du statut de 1975

ness for their desire to co-operate in ensuring "the optimum and rational utilization of the River Uruguay".

91. That is why CARU plays a central role in the 1975 Statute and cannot be reduced to merely an optional mechanism available to the parties which each may use or not, as it pleases. CARU operates at all levels of utilization of the river, whether concerning the prevention of transboundary harm that may result from planned activities; the use of water, on which it receives reports from the parties and verifies whether the developments taken together are liable to cause significant damage (Articles 27 and 28); the avoidance of any change in the ecological balance (Article 36); scientific studies and research carried out by one party within the jurisdiction of the other (Article 44); the exercise of the right of law enforcement (Article 46); or the right of navigation (Article 48).

92. Furthermore, CARU has been given the function of drawing up rules in many areas associated with the joint management of the river and listed in Article 56 of the 1975 Statute. Lastly, at the proposal of either party, the Commission can act as a conciliation body in any dispute which may arise between the parties (Article 58).

93. Consequently, the Court considers that, because of the scale and diversity of the functions they have assigned to CARU, the Parties intended to make that international organization a central component in the fulfilment of their obligations to co-operate as laid down by the 1975 Statute.

2. Uruguay's obligation to inform CARU

94. The Court notes that the obligation of the State initiating the planned activity to inform CARU constitutes the first stage in the procedural mechanism as a whole which allows the two parties to achieve the object of the 1975 Statute, namely, the optimum and rational utilization of the River Uruguay". This stage, provided for in Article 7, first paragraph, involves the State which is initiating the planned activity informing CARU thereof, so that the latter can determine "on a preliminary basis" and within a maximum period of 30 days whether the plan might cause significant damage to the other party.

95. To enable the remainder of the procedure to take its course, the parties have included alternative conditions in the 1975 Statute: either that the activity planned by one party should be liable, in CARU's opinion, to cause significant damage to the other, creating an obligation of prevention for the first party to eliminate or minimize the risk, in consultation with the other party; or that CARU, having been duly informed, should not have reached a decision in that regard within the prescribed period.

96. The Court notes that the Parties are agreed in considering that the two planned mills were works of sufficient importance to fall within the scope of Article 7 of the 1975 Statute, and thus for CARU to have been

et, partant, pour que la CARU dût en être informée. Il en est de même pour le projet de construction du terminal portuaire de Fray Bentos à l'usage exclusif de l'usine Orion (Botnia), qui incluait des opérations de dragage et d'utilisation du lit du fleuve.

97. La Cour relève cependant que les Parties sont en désaccord sur l'existence d'une obligation d'informer la CARU au sujet du prélèvement et de l'utilisation, par l'usine Orion (Botnia), de l'eau du fleuve à des fins industrielles. L'Argentine estime que l'autorisation octroyée par le ministère du transport et des travaux publics uruguayen, le 12 septembre 2006, concerne une activité suffisamment importante («entidad suficiente») pour affecter le régime du fleuve ou la qualité de ses eaux, et que l'Uruguay aurait dû suivre, à ce sujet, la procédure prévue aux articles 7 à 12 du statut de 1975. Pour sa part, l'Uruguay soutient que cette activité fait partie intégrante de l'ensemble du projet de l'usine Orion (Botnia) et que le statut n'exige pas d'informer la CARU à chaque étape de l'avancement de l'ouvrage projeté.

98. La Cour relève que, si les Parties s'accordent pour reconnaître que la CARU devait être informée des deux projets d'usines et du projet de construction du terminal portuaire de Fray Bentos, elles s'opposent néanmoins quant au contenu de l'information qui devait être adressée à la CARU et quant au moment auquel elle devait avoir lieu.

99. L'Argentine a soutenu que le contenu de l'obligation d'information doit être déterminé à la lumière de l'objectif de celle-ci, soit la prévention des atteintes à la navigation, au régime du fleuve ou à la qualité des eaux. Le projet dont la CARU doit être informée peut, selon l'Argentine, n'être pas très avancé car il s'agit seulement de permettre à la commission de «déterminer sommairement» dans un délai très bref de trente jours si ce projet «peut causer un préjudice sensible à l'autre partie». Ce serait seulement dans la phase procédurale suivante que l'obligation d'informer serait plus complète. L'information de la CARU doit cependant, de l'avis de l'Argentine, intervenir préalablement à l'autorisation et à la construction d'un projet sur le fleuve Uruguay.

100. Reprenant les termes du premier alinéa de l'article 7 du statut de 1975, l'Uruguay en donne une autre interprétation, estimant que l'information prévue par cette disposition ne peut être transmise à la CARU aux tout premiers stades de la planification, car la commission ne pourrait disposer des éléments suffisants pour déterminer si le projet est susceptible ou non de causer un préjudice sensible à l'autre Etat. Pour cela, il faudrait, selon l'Uruguay, que le projet ait atteint un stade où l'on dispose à son sujet de toutes les informations techniques. L'Uruguay tend, comme la Cour y reviendra plus loin, à lier le contenu de l'information au moment où elle devrait être fournie, soit même après l'octroi par l'Etat concerné de l'autorisation environnementale préalable.

101. La Cour observe que le principe de prévention, en tant que règle coutumière, trouve son origine dans la diligence requise («due diligence») de l'Etat sur son territoire. Il s'agit de «l'obligation, pour tout Etat, de ne pas laisser utiliser son territoire aux fins d'actes contraires aux droits

informed of them. The same applies to the plan to construct a port terminal at Fray Bentos for the exclusive use of the Orion (Botnia) mill, which included dredging work and use of the river bed.

97. However, the Court observes that the Parties disagree on whether there is an obligation to inform CARU in respect of the extraction and use of water from the river for industrial purposes by the Orion (Botnia) mill. Argentina takes the view that the authorization granted by the Uruguayan Ministry of Transport and Public Works on 12 September 2006 concerns an activity of sufficient importance ("entidad suficiente") to affect the régime of the river or the quality of its waters and that, in this matter, Uruguay should have followed the procedure laid down in Articles 7 to 12 of the 1975 Statute. For its part, Uruguay maintains that this activity forms an integral part of the Orion (Botnia) mill project as a whole, and that the 1975 Statute does not require CARU to be informed of each step in furtherance of the planned works.

98. The Court points out that while the Parties are agreed in recognizing that CARU should have been informed of the two planned mills and the plan to construct the port terminal at Fray Bentos, they nonetheless differ as regards the content of the information which should be provided to CARU and as to when this should take place.

99. Argentina has argued that the content of the obligation to inform must be determined in the light of its objective, which is to prevent threats to navigation, the régime of the river or the quality of the waters. According to Argentina, the plan which CARU must be informed of may be at a very early stage, since it is simply a matter of allowing the Commission to "determine on a preliminary basis", within a very short period of 30 days, whether the plan "might cause significant damage to the other party". It is only in the following phase of the procedure that the substance of the obligation to inform is said to become more extensive. In Argentina's view, however, CARU must be informed prior to the authorization or implementation of a project on the River Uruguay.

100. Citing the terms of Article 7, first paragraph, of the 1975 Statute, Uruguay gives a different interpretation of it, taking the view that the requirement to inform CARU specified by this provision cannot occur in the very early stages of planning, because there could not be sufficient information available to the Commission for it to determine whether or not the plan might cause significant damage to the other State. For that, according to Uruguay, the project would have to have reached a stage where all the technical data on it are available. As the Court will consider further below, Uruguay seeks to link the content of the information to the time when it should be provided, which may even be after the State concerned has granted an initial environmental authorization.

101. The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States" (*Corfu*

d'autres Etats» (*Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 22). En effet, l'Etat est tenu de mettre en œuvre tous les moyens à sa disposition pour éviter que les activités qui se déroulent sur son territoire, ou sur tout espace relevant de sa juridiction, ne causent un préjudice sensible à l'environnement d'un autre Etat. La Cour a établi que cette obligation «fait maintenant partie du corps de règles du droit international de l'environnement» (*Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 242, par. 29).

102. L'obligation d'informer la CARU permet, selon la Cour, de déclencher la coopération entre les Parties, nécessaire pour la mise en œuvre de l'obligation de prévention. Cette première étape procédurale a pour conséquence de soustraire à l'application du statut de 1975 les activités qui apparaîtraient ne causer un dommage qu'à l'Etat sur le territoire duquel elles s'exercent.

103. La Cour observe qu'en ce qui concerne le fleuve Uruguay, qui constitue une ressource partagée, le «préjudice sensible à l'autre partie» (premier alinéa de l'article 7 du statut de 1975) peut résulter d'une atteinte à la navigation, au régime du fleuve ou à la qualité de ses eaux. D'ailleurs, l'article 27 du statut de 1975 souligne que

> «[l]e droit de chaque partie d'utiliser les eaux du fleuve, à l'intérieur de sa juridiction, à des fins ménagères, sanitaires, industrielles et agricoles, s'exerce sans préjudice de l'application de la procédure prévue aux articles 7 à 12 lorsque cette utilisation est suffisamment importante pour affecter le régime du fleuve ou la qualité de ses eaux».

104. La Cour note que, conformément aux termes du premier alinéa de l'article 7 du statut de 1975, l'information qui doit être adressée à la CARU, à ce premier stade de la procédure, doit lui permettre de déterminer sommairement et rapidement si le projet peut causer un préjudice sensible à l'autre partie. Il s'agit à ce stade, pour la CARU, de décider si le projet relève ou non de la procédure de coopération prévue par le statut et non de se prononcer sur son impact réel sur le fleuve et la qualité des eaux. C'est ce qui explique, de l'avis de la Cour, la différence entre la terminologie du premier alinéa de l'article 7, relative à l'obligation d'informer la CARU, et celle du troisième alinéa de cet article, qui concerne le contenu de la notification qui doit être adressée à un stade ultérieur à l'autre partie et est destinée à «évaluer l'effet probable que l'ouvrage aura sur la navigation, sur le régime du fleuve ou sur la qualité de ses eaux».

105. La Cour considère que l'Etat qui projette les activités visées à l'article 7 du statut est tenu d'en informer la CARU dès qu'il est en possession d'un projet suffisamment élaboré pour permettre à la commission de déterminer sommairement, en application du premier alinéa de cette disposition, si cette activité risque de causer un préjudice sensible à l'autre partie. A ce stade, l'information fournie ne consistera pas nécessairement

Channel (United Kingdom v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 22). A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment" (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 29).

102. In the view of the Court, the obligation to inform CARU allows for the initiation of co-operation between the Parties which is necessary in order to fulfil the obligation of prevention. This first procedural stage results in the 1975 Statute not being applied to activities which would appear to cause damage only to the State in whose territory they are carried out.

103. The Court observes that with regard to the River Uruguay, which constitutes a shared resource, "significant damage to the other party" (Article 7, first paragraph, of the 1975 Statute) may result from impairment of navigation, the régime of the river or the quality of its waters. Moreover, Article 27 of the 1975 Statute stipulates that:

> "[t]he right of each party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes shall be exercised without prejudice to the application of the procedure laid down in Articles 7 to 12 when the use is liable to affect the régime of the river or the quality of its waters".

104. The Court notes that, in accordance with the terms of Article 7, first paragraph, the information which must be provided to CARU, at this initial stage of the procedure, has to enable it to determine swiftly and on a preliminary basis whether the plan might cause significant damage to the other party. For CARU, at this stage, it is a question of deciding whether or not the plan falls under the co-operation procedure laid down by the 1975 Statute, and not of pronouncing on its actual impact on the river and the quality of its waters. This explains, in the opinion of the Court, the difference between the terminology of the first paragraph of Article 7, concerning the requirement to inform CARU, and that of the third paragraph, concerning the content of the notification to be addressed to the other party at a later stage, enabling it "to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

105. The Court considers that the State planning activities referred to in Article 7 of the Statute is required to inform CARU as soon as it is in possession of a plan which is sufficiently developed to enable CARU to make the preliminary assessment (required by paragraph 1 of that provision) of whether the proposed works might cause significant damage to the other party. At that stage, the information provided will not neces-

en une évaluation complète de l'impact sur l'environnement du projet, qui exige souvent davantage de temps et de moyens. Cela étant, si une information plus complète est disponible, elle doit bien entendu être transmise à la CARU, afin que celle-ci puisse procéder dans les meilleures conditions à son examen sommaire. En tout état de cause, l'obligation d'informer la CARU intervient à un stade où l'autorité compétente a été saisie du projet en vue de la délivrance de l'autorisation environnementale préalable, et avant la délivrance de ladite autorisation.

106. La Cour relève que, dans le cas d'espèce, l'Uruguay n'a pas transmis à la CARU l'information requise par le premier alinéa de l'article 7, concernant les usines CMB (ENCE) et Orion (Botnia), malgré les demandes qui lui avaient été adressées à plusieurs reprises par la commission, en particulier les 17 octobre 2002 et 21 avril 2003, au sujet de l'usine CMB (ENCE), et le 16 novembre 2004, au sujet de l'usine Orion (Botnia). L'Uruguay s'est contenté d'adresser à la CARU, le 14 mai 2003, un résumé de diffusion de l'évaluation de l'impact sur l'environnement concernant l'usine CMB (ENCE). La CARU a estimé ce document insuffisant et a demandé à nouveau à l'Uruguay, les 15 août 2003 et 12 septembre 2003, un complément d'information. Par ailleurs, aucun document n'a été transmis à la CARU par l'Uruguay au sujet de l'usine Orion (Botnia). Ainsi, les autorisations environnementales préalables ont été délivrées par l'Uruguay le 9 octobre 2003 à CMB et le 14 février 2005 à Botnia, sans respecter la procédure prévue au premier alinéa de l'article 7. L'Uruguay s'est donc prononcé sur l'impact sur l'environnement des projets sans associer la CARU, se limitant ainsi à donner effet au troisième alinéa de l'article 17 du décret uruguayen n° 435/994, du 21 septembre 1994, portant règlement d'évaluation de l'impact sur l'environnement, selon lequel le ministère du logement, de l'aménagement du territoire et de l'environnement peut accorder l'autorisation environnementale préalable pour autant que les impacts négatifs du projet sur l'environnement restent dans des limites acceptables.

107. La Cour relève en outre que l'Uruguay a accordé, le 12 avril 2005, une autorisation à la société Botnia pour la première phase de construction du projet d'usine Orion et, le 5 juillet 2005, un permis pour construire un port à son usage exclusif et utiliser le lit du fleuve à des fins industrielles, sans avoir préalablement informé la CARU de ces projets.

108. En ce qui concerne le prélèvement et l'utilisation de l'eau du fleuve qui auraient dû, selon l'Argentine, donner lieu à une information préalable de la CARU, la Cour estime qu'il s'agit là d'une activité qui fait partie intégrante de la mise en service de l'usine Orion (Botnia), et qui ne nécessitait donc pas une saisine distincte de la CARU.

109. L'Uruguay soutient cependant que la CARU avait parfaitement connaissance des projets d'usines avant la délivrance des autorisations environnementales préalables, par le biais des représentants d'ENCE, le 8 juillet 2002, et au plus tard le 29 avril 2004, par ceux de Botnia. L'Argentine estime, pour sa part, que ces prétendus agissements privés,

sarily consist of a full assessment of the environmental impact of the project, which will often require further time and resources, although, where more complete information is available, this should, of course, be transmitted to CARU to give it the best possible basis on which to make its preliminary assessment. In any event, the duty to inform CARU will become applicable at the stage when the relevant authority has had the project referred to it with the aim of obtaining initial environmental authorization and before the granting of that authorization.

106. The Court observes that, in the present case, Uruguay did not transmit to CARU the information required by Article 7, first paragraph, in respect of the CMB (ENCE) and Orion (Botnia) mills, despite the requests made to it by the Commission to that effect on several occasions, in particular on 17 October 2002 and 21 April 2003 with regard to the CMB (ENCE) mill, and on 16 November 2004 with regard to the Orion (Botnia) mill. Uruguay merely sent CARU, on 14 May 2003, a summary for public release of the environmental impact assessment for the CMB (ENCE) mill. CARU considered this document to be inadequate and again requested further information from Uruguay on 15 August 2003 and 12 September 2003. Moreover, Uruguay did not transmit any document to CARU regarding the Orion (Botnia) mill. Consequently, Uruguay issued the initial environmental authorizations to CMB on 9 October 2003 and to Botnia on 14 February 2005 without complying with the procedure laid down in Article 7, first paragraph. Uruguay therefore came to a decision on the environmental impact of the projects without involving CARU, thereby simply giving effect to Article 17, third paragraph, of Uruguayan Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation, according to which the Ministry of Housing, Land Use Planning and Environmental Affairs may grant the initial environmental authorization provided that the adverse environmental impacts of the project remain within acceptable limits.

107. The Court further notes that on 12 April 2005 Uruguay granted an authorization to Botnia for the first phase of the construction of the Orion (Botnia) mill and, on 5 July 2005, an authorization to construct a port terminal for its exclusive use and to utilize the river bed for industrial purposes, without informing CARU of these projects in advance.

108. With regard to the extraction and use of water from the river, of which CARU should have first been informed, according to Argentina, the Court takes the view that this is an activity which forms an integral part of the commissioning of the Orion (Botnia) mill and therefore did not require a separate referral to CARU.

109. However, Uruguay maintains that CARU was made aware of the plans for the mills by representatives of ENCE on 8 July 2002, and no later than 29 April 2004 by representatives of Botnia, before the initial environmental authorizations were issued. Argentina, for its part, considers that these so-called private dealings, whatever form they may have

quels qu'ils soient, ne constituent pas l'exécution de l'obligation imposée aux Parties par le premier alinéa de l'article 7.

110. La Cour considère que les informations sur les projets d'usines parvenues à la CARU de la part des entreprises concernées ou d'autres sources non gouvernementales ne peuvent tenir lieu de l'obligation d'informer, prévue au premier alinéa de l'article 7 du statut de 1975, qui est à la charge de la partie qui projette de construire les ouvrages visés par cette disposition. De la même manière, dans l'affaire relative à *Certaines questions concernant l'entraide judiciaire en matière pénale (Djibouti c. France)*, la Cour a observé que

> «[s]i Djibouti a certes pu disposer en fin de compte de certaines informations à travers la presse, un tel mode de diffusion d'informations ne saurait être pris en compte aux fins de l'application de l'article 17 [de la convention d'entraide judiciaire entre les deux pays prévoyant que «tout refus d'entraide judiciaire sera motivé»]» (*arrêt, C.I.J. Recueil 2008*, p. 231, par. 150).

111. En conséquence, la Cour conclut de ce qui précède que l'Uruguay, en n'informant pas la CARU des travaux projetés avant la délivrance de l'autorisation environnementale préalable pour chacune des usines et pour le terminal portuaire adjacent à l'usine Orion (Botnia), n'a pas respecté l'obligation que lui impose le premier alinéa de l'article 7 du statut de 1975.

3. L'obligation de l'Uruguay de notifier les projets à l'autre partie

112. La Cour note qu'aux termes du deuxième alinéa de l'article 7 du statut de 1975, au cas où la CARU décide que le projet peut causer un préjudice sensible à l'autre partie ou si une décision n'intervient pas à cet égard, «la partie intéressée notifie le projet à l'autre partie par l'intermédiaire de la commission».

Le troisième alinéa de l'article 7 du statut détaille le contenu de cette notification qui

> «énonce les aspects essentiels de l'ouvrage et ... les autres données techniques permettant à la partie à laquelle la notification est adressée d'évaluer l'effet probable que l'ouvrage aura sur la navigation, sur le régime du fleuve ou sur la qualité de ses eaux».

113. L'obligation de notifier est destinée, selon la Cour, à créer les conditions d'une coopération fructueuse entre les parties leur permettant, sur la base d'une information aussi complète que possible, d'évaluer l'impact du projet sur le fleuve et, s'il y a lieu, de négocier les aménagements nécessaires pour prévenir les préjudices éventuels qu'il pourrait causer.

114. L'article 8 prévoit un délai de cent quatre-vingts jours, qui peut être prorogé par la commission, pour que la partie qui a reçu la notifica-

taken, do not constitute performance of the obligation imposed on the Parties by Article 7, first paragraph.

110. The Court considers that the information on the plans for the mills which reached CARU via the companies concerned or from other non-governmental sources cannot substitute for the obligation to inform laid down in Article 7, first paragraph, of the 1975 Statute, which is borne by the party planning to construct the works referred to in that provision. Similarly, in the case concerning *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France)*, the Court observed that

> "[i]f the information eventually came to Djibouti through the press, the information disseminated in this way could not be taken into account for the purposes of the application of Article 17 [of the Convention on Mutual Assistance in Criminal Matters between the two countries, providing that '[r]easons shall be given for any refusal of mutual assistance']" (*Judgment, I.C.J. Reports 2008*, p. 231, para. 150).

111. Consequently, the Court concludes from the above that Uruguay, by not informing CARU of the planned works before the issuing of the initial environmental authorizations for each of the mills and for the port terminal adjacent to the Orion (Botnia) mill, has failed to comply with the obligation imposed on it by Article 7, first paragraph, of the 1975 Statute.

3. Uruguay's obligation to notify the plans to the other party

112. The Court notes that, under the terms of Article 7, second paragraph, of the 1975 Statute, if CARU decides that the plan might cause significant damage to the other party or if a decision cannot be reached in that regard, "the party concerned shall notify the other party of this plan through the said Commission".

Article 7, third paragraph, of the 1975 Statute sets out in detail the content of this notification, which

> "shall describe the main aspects of the work and . . . any other technical data that will enable the notified party to assess the probable impact of such works on navigation, the régime of the river or the quality of its waters".

113. In the opinion of the Court, the obligation to notify is intended to create the conditions for successful co-operation between the parties, enabling them to assess the plan's impact on the river on the basis of the fullest possible information and, if necessary, to negotiate the adjustments needed to avoid the potential damage that it might cause.

114. Article 8 stipulates a period of 180 days, which may be extended by the Commission, for the notified party to respond in connection with

tion puisse se prononcer sur le projet, à charge pour elle de demander à l'autre partie, par l'intermédiaire de la commission, de compléter au besoin la documentation qu'elle lui a adressée.

Faute d'objection de la part de la partie destinataire de la notification, l'autre partie peut procéder à la construction de l'ouvrage ou l'autoriser (article 9). Dans le cas contraire, la première informe la seconde des aspects de l'ouvrage qui peuvent lui causer préjudice et des modifications qu'elle suggère (article 11), ouvrant ainsi une période de négociation, avec un nouveau délai de cent quatre-vingts jours pour parvenir à un accord (article 12).

115. L'obligation de notifier est donc essentielle dans le processus qui doit mener les parties à se concerter pour évaluer les risques du projet et négocier les modifications éventuelles susceptibles de les éliminer ou d'en limiter au minimum les effets.

116. Les Parties conviennent de la nécessité de disposer d'une évaluation de l'impact sur l'environnement complète pour apprécier le préjudice sensible qui pourrait être causé par un projet.

117. L'Uruguay considère que de telles évaluations sont intervenues conformément à sa législation (décret n° 435/994, du 21 septembre 1994, portant règlement d'évaluation de l'impact sur l'environnement), qu'elles ont été soumises à l'appréciation de la DINAMA et qu'elles ont été transmises à l'Argentine le 7 novembre 2003 pour le projet CMB (ENCE) et le 19 août 2005 pour le projet Orion (Botnia). Selon l'Uruguay, la DINAMA a demandé aux entreprises concernées tous les suppléments d'information nécessaires pour compléter les évaluations de l'impact sur l'environnement initiales qui lui ont été soumises, et ce n'est que quand elle a été satisfaite qu'elle a proposé au ministère de l'environnement de délivrer les autorisations environnementales préalables demandées, qui l'ont été à CMB le 9 octobre 2003 et à Botnia le 14 février 2005.

L'Uruguay soutient qu'il n'était pas tenu de transmettre à l'Argentine les évaluations de l'impact sur l'environnement avant de délivrer aux entreprises les autorisations environnementales préalables, celles-ci ayant été établies sur la base de sa législation en la matière.

118. L'Argentine, pour sa part, souligne tout d'abord que les évaluations de l'impact sur l'environnement qui lui ont été transmises par l'Uruguay étaient incomplètes, notamment en ce qu'elles ne prévoyaient pas de sites alternatifs pour l'implantation des usines et qu'elles ne contenaient pas de consultation des populations concernées. La Cour reviendra plus loin sur les conditions de fond auxquelles doivent satisfaire les évaluations de l'impact sur l'environnement (voir paragraphes 203 à 219).

D'autre part, sur le plan procédural, l'Argentine estime que les autorisations environnementales préalables n'auraient pas dû être accordées aux entreprises avant qu'elle n'ait reçu les évaluations de l'impact sur l'environnement complètes et qu'elle n'ait pu exercer les droits qui lui sont reconnus à ce sujet par les articles 7 à 11 du statut de 1975.

119. La Cour relève que les évaluations de l'impact sur l'environnement, nécessaires pour se prononcer sur tout projet susceptible de causer

the plan, subject to it requesting the other party, through the Commission, to supplement as necessary the documentation it has provided.

If the notified party raises no objections, the other party may carry out or authorize the work (Article 9). Otherwise, the former must notify the latter of those aspects of the work which may cause it damage and of the suggested changes (Article 11), thereby opening a further 180-day period of negotiation in which to reach an agreement (Article 12).

115. The obligation to notify is therefore an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects.

116. The Parties agree on the need for a full environmental impact assessment in order to assess any significant damage which might be caused by a plan.

117. Uruguay takes the view that such assessments were carried out in accordance with its legislation (Decree No. 435/994 of 21 September 1994, Environmental Impact Assessment Regulation), submitted to DINAMA for consideration and transmitted to Argentina on 7 November 2003 in the case of the CMB (ENCE) project and on 19 August 2005 for the Orion (Botnia) project. According to Uruguay, DINAMA asked the companies concerned for all the additional information that was required to supplement the original environmental impact assessments submitted to it, and only when it was satisfied did it propose to the Ministry of the Environment that the initial environmental authorizations requested should be issued, which they were to CMB on 9 October 2003 and to Botnia on 14 February 2005.

Uruguay maintains that it was not required to transmit the environmental impact assessments to Argentina before issuing the initial environmental authorizations to the companies, these authorizations having been adopted on the basis of its legislation on the subject.

118. Argentina, for its part, first points out that the environmental impact assessments transmitted to it by Uruguay were incomplete, particularly in that they made no provision for alternative sites for the mills and failed to include any consultation of the affected populations. The Court will return later in the Judgment to the substantive conditions which must be met by environmental impact assessments (see paragraphs 203 to 219).

Furthermore, in procedural terms, Argentina considers that the initial environmental authorizations should not have been granted to the companies before it had received the complete environmental impact assessments, and that it was unable to exercise its rights in this context under Articles 7 to 11 of the 1975 Statute.

119. The Court notes that the environmental impact assessments which are necessary to reach a decision on any plan that is liable to cause sig-

des préjudices sensibles transfrontières à un autre Etat, doivent être notifiées, selon les deuxième et troisième alinéas de l'article 7 du statut de 1975, par la partie concernée à l'autre partie, par l'intermédiaire de la CARU. Cette notification est destinée à permettre à la partie qui en est le destinataire de participer au processus visant à s'assurer que l'évaluation est complète, pour qu'elle puisse ensuite apprécier, en toute connaissance de cause, le projet et ses effets (article 8 du statut de 1975).

120. La Cour observe que cette notification doit intervenir avant que l'Etat intéressé ne décide de la viabilité environnementale du projet, compte dûment tenu de l'évaluation de l'impact sur l'environnement qui lui a été présentée.

121. Dans le cas d'espèce, la Cour relève que les notifications à l'Argentine des évaluations de l'impact sur l'environnement relatives aux usines CMB (ENCE) et Orion (Botnia) n'ont pas eu lieu par l'intermédiaire de la CARU, et que l'Uruguay n'a transmis à l'Argentine ces évaluations qu'après avoir délivré les autorisations environnementales préalables pour les deux usines concernées. Ainsi, en ce qui concerne l'usine CMB (ENCE), la notification du dossier à l'Argentine est intervenue les 27 octobre et 7 novembre 2003, alors que l'autorisation environnementale préalable avait déjà été délivrée le 9 octobre 2003. En ce qui concerne l'usine Orion (Botnia), le dossier a été transmis à l'Argentine entre août 2005 et janvier 2006, alors que l'autorisation environnementale préalable avait été octroyée le 14 février 2005. L'Uruguay n'aurait pas dû, avant la notification, délivrer les autorisations environnementales préalables et les permis de construction sur la base des évaluations de l'impact sur l'environnement présentées à la DINAMA. En effet, ce faisant, l'Uruguay a donné la priorité à sa propre législation sur les obligations de nature procédurale qu'il tenait du statut de 1975 et a méconnu la règle coutumière bien établie, reflétée à l'article 27 de la convention de Vienne sur le droit des traités, aux termes duquel «[u]ne partie ne peut invoquer les dispositions de son droit interne comme justifiant la non-exécution d'un traité».

122. La Cour conclut de ce qui précède que l'Uruguay n'a pas respecté l'obligation de notifier les projets à l'Argentine au travers de la CARU, prévue aux deuxième et troisième alinéas de l'article 7 du statut de 1975.

C. Les Parties sont-elles convenues de déroger aux obligations de nature procédurale prévues dans le statut de 1975?

123. Ayant ainsi examiné les obligations de nature procédurale établies par le statut de 1975, la Cour se penchera à présent sur le point de savoir si les Parties sont convenues, par accord entre elles, d'y déroger, comme le prétend l'Uruguay.

124. Les Parties se réfèrent à cet égard aux deux «accords» intervenus le 2 mars 2004 et le 5 mai 2005. Elles développent cependant des positions divergentes quant à leur contenu et à leur portée.

nificant transboundary harm to another State must be notified by the party concerned to the other party, through CARU, pursuant to Article 7, second and third paragraphs, of the 1975 Statute. This notification is intended to enable the notified party to participate in the process of ensuring that the assessment is complete, so that it can then consider the plan and its effects with a full knowledge of the facts (Article 8 of the 1975 Statute).

120. The Court observes that this notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it.

121. In the present case, the Court observes that the notification to Argentina of the environmental impact assessments for the CMB (ENCE) and Orion (Botnia) mills did not take place through CARU, and that Uruguay only transmitted those assessments to Argentina after having issued the initial environmental authorizations for the two mills in question. Thus in the case of CMB (ENCE), the matter was notified to Argentina on 27 October and 7 November 2003, whereas the initial environmental authorization had already been issued on 9 October 2003. In the case of Orion (Botnia), the file was transmitted to Argentina between August 2005 and January 2006, whereas the initial environmental authorization had been granted on 14 February 2005. Uruguay ought not, prior to notification, to have issued the initial environmental authorizations and the authorizations for construction on the basis of the environmental impact assessments submitted to DINAMA. Indeed by doing so, Uruguay gave priority to its own legislation over its procedural obligations under the 1975 Statute and disregarded the well-established customary rule reflected in Article 27 of the Vienna Convention on the Law of Treaties, according to which "[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

122. The Court concludes from the above that Uruguay failed to comply with its obligation to notify the plans to Argentina through CARU under Article 7, second and third paragraphs, of the 1975 Statute.

C. Whether the Parties Agreed to Derogate from the Procedural Obligations Set Out in the 1975 Statute

123. Having thus examined the procedural obligations laid down by the 1975 Statute, the Court now turns to the question of whether the Parties agreed, by mutual consent, to derogate from them, as alleged by Uruguay.

124. In this respect the Parties refer to two "agreements" reached on 2 March 2004 and 5 May 2005; however, they hold divergent views regarding their scope and content.

1. L'« arrangement » du 2 mars 2004 entre l'Argentine et l'Uruguay

125. La Cour rappelle que, à la suite de la délivrance par l'Uruguay de l'autorisation environnementale préalable à CMB, sans que la CARU ait pu exercer, à cet égard, les fonctions qui lui sont attribuées par le statut de 1975, les ministres des affaires étrangères des Parties se sont mis d'accord, le 2 mars 2004, sur la procédure à suivre, ainsi que cela est reflété dans le procès-verbal de la séance extraordinaire de la CARU en date du 15 mai 2004. L'extrait pertinent de ce procès-verbal se lit comme suit en espagnol :

> «II) En fecha 2 de marzo de 2004 los Cancilleres de Argentina y Uruguay llegaron a un entendimiento con relación al curso de acción que se dará al tema, esto es, facilitar por parte del gobierno uruguayo, la información relativa a la construcción de la planta y, en relación a la fase operativa, proceder a realizar el monitoreo, por parte de CARU, de la calidad de las aguas conforme a su Estatuto.
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> I) Ambas delegaciones reafirmaron el compromiso de los Ministros de Relaciones Exteriores de la República Argentina y de la República Oriental del Uruguay de fecha 2 de marzo de 2004 por el cual el Uruguay comunicará la información relativa a la construcción de la planta incluyendo el Plan de Gestión Ambiental. En tal sentido, *la CARU recibirá* los Planes de Gestión Ambiental para la construcción y operación de la planta que presente la empresa al gobierno uruguayo una vez que le sean remitidos por la delegación uruguaya.» (Les italiques sont dans l'original.)

L'Argentine et l'Uruguay ont respectivement fourni à la Cour une traduction française et une traduction anglaise de ce procès-verbal. Compte tenu des divergences existant entre ces deux traductions, la Cour utilisera la traduction suivante :

> «II) Le 2 mars 2004, les ministres des affaires étrangères de l'Argentine et de l'Uruguay se sont entendus quant à la façon de procéder en la matière, à savoir que le Gouvernement uruguayen fournira l'information relative à la construction de l'usine et que, s'agissant de la phase opérationnelle, la CARU procédera au suivi de la qualité des eaux conformément à son statut.
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> I) Les deux délégations ont réaffirmé l'arrangement auquel étaient parvenus les ministres des affaires étrangères de la République argentine et de la République orientale de l'Uruguay le 2 mars 2004, en vertu duquel l'Uruguay communiquera les informations relatives à la construction de l'usine, parmi lesquelles le plan de gestion environnementale. Il s'ensuit que *la CARU recevra* les plans de gestion envi-

1. The "understanding" of 2 March 2004 between Argentina and Uruguay

125. The Court recalls that, after the issuing of the initial environmental authorization to CMB by Uruguay, without CARU having been able to carry out the functions assigned to it in this context by the 1975 Statute, the Foreign Ministers of the Parties agreed on 2 March 2004 on the procedure to be followed, as described in the minutes of the extraordinary meeting of CARU of 15 May 2004. The relevant extract from those minutes reads as follows in Spanish:

> "II) En fecha 2 de marzo de 2004 los Cancilleres de Argentina y Uruguay llegaron a un entendimiento con relación al curso de acción que se dará al tema, esto es, facilitar por parte del gobierno uruguayo, la información relativa a la construcción de la planta y, en relación a la fase operativa, proceder a realizar el monitoreo, por parte de CARU, de la calidad de las aguas conforme a su Estatuto.
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> I) Ambas delegaciones reafirmaron el compromiso de los Ministros de Relaciones Exteriores de la República Argentina y de la República Oriental del Uruguay de fecha 2 de marzo de 2004 por el cual el Uruguay comunicará la información relativa a la construcción de la planta incluyendo el Plan de Gestión Ambiental. En tal sentido, *la CARU recibirá* los Planes de Gestión Ambiental para la construcción y operación de la planta que presente la empresa al gobierno uruguayo una vez que le sean remitidos por la delegación uruguaya." (Emphasis in the original.)

Argentina and Uruguay have provided the Court, respectively, with French and English translations of these minutes. In view of the discrepancies between those two translations, the Court will use the following translation:

> "(II) On 2 March 2004, the Foreign Ministers of Argentina and Uruguay reached an understanding on how to proceed in the matter, namely, that the Uruguayan Government would provide information on the construction of the mill and that, in terms of the operational phase, CARU would carry out monitoring of water quality in accordance with its Statute.
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> . . . . . .
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> (I) Both delegations reaffirmed the arrangement which had been come to by the Foreign Ministers of the Republic of Argentina and the Eastern Republic of Uruguay on 2 March 2004, whereby Uruguay would communicate information on the construction of the mill, including the environmental management plan. As a result, *CARU would receive* the environmental management plans for the

ronnementale relatifs à la construction et à l'exploitation de l'usine soumis par l'entreprise au Gouvernement uruguayen, une fois qu'ils auront été transmis à la CARU par la délégation uruguayenne.» (Les italiques sont dans l'original.) *[Traduction de la Cour.]*

126. L'Uruguay considère que, en vertu de cet «arrangement», les Parties sont convenues de la marche à suivre, concernant le projet CMB (ENCE), en dehors de la CARU, et que rien, que ce soit d'un point de vue juridique ou logique, ne les empêchait de déroger, dans le cadre d'un accord bilatéral approprié, aux procédures énoncées par le statut de 1975.

Un tel «arrangement», selon l'Uruguay, se limitait à la transmission à la CARU des plans de gestion environnementale relatifs à la construction et à l'exploitation de l'usine CMB (ENCE). Il aurait mis un terme, de la sorte, à tout différend avec l'Argentine concernant la procédure prévue à l'article 7 du statut de 1975. Enfin, l'Uruguay soutient que l'«arrangement» du 2 mars 2004 sur le projet CMB (ENCE) a été par la suite étendu au projet Orion (Botnia) dans la mesure où le plan PROCEL, établi par la sous-commission chargée de la qualité des eaux de la CARU et mettant en œuvre cet accord, était relatif à l'activité des «deux usines», CMB (ENCE) et Orion (Botnia), le pluriel étant utilisé dans le titre du rapport de la sous-commission et dans son texte.

127. L'Argentine, de son côté, soutient que l'«arrangement» intervenu entre les deux ministres, le 2 mars 2004, était destiné à faire respecter la procédure prévue par le statut de 1975 et à réintroduire ainsi le projet CMB (ENCE) au sein de la CARU, mettant fin au différend relatif à la compétence de la CARU pour connaître du projet. L'Argentine aurait réitéré devant les instances de la CARU n'avoir pas renoncé aux droits qu'elle tenait de l'article 7, même si elle a accepté que le différend qui l'opposait à ce sujet à l'Uruguay aurait pu s'éteindre si la procédure envisagée dans l'«arrangement» du 2 mars 2004 avait été menée à son terme.

Or, selon l'Argentine, l'Uruguay n'a jamais transmis à la CARU les informations requises, comme il s'y était engagé dans l'«arrangement» du 2 mars 2004. Elle a rejeté par ailleurs l'extension de l'«arrangement» du 2 mars 2004 à l'usine Orion (Botnia); la mention des deux futures usines par le plan PROCEL ne signifierait nullement, selon elle, la renonciation au respect de la procédure prévue par le statut de 1975.

128. La Cour relève tout d'abord que, si l'existence de l'«arrangement» du 2 mars 2004, consigné au procès-verbal de la CARU, n'a pas été contestée par les Parties, celles-ci s'opposent, en revanche, sur son contenu et sa portée. Quels que soient sa dénomination particulière et l'instrument dans lequel il est consigné (le procès-verbal de la commission), cet «arrangement» liait les Parties dans la mesure où elles y avaient consenti, et elles devaient s'y conformer de bonne foi. Celles-ci étaient habilitées à s'écarter des procédures prévues par le statut de 1975, à l'occasion d'un projet donné, par l'effet d'un accord bilatéral approprié.

construction and operation of the mill provided by the company to the Uruguayan Government, when these were forwarded to it by the Uruguayan delegation." (Emphasis in the original.) *[Translation by the Court.]*

126. Uruguay considers that, under the terms of this "understanding", the Parties agreed on the approach to be followed in respect of the CMB (ENCE) project, outside CARU, and that there was no reason in law or logic to prevent them derogating from the procedures outlined in the 1975 Statute pursuant to an appropriate bilateral agreement.

The said "understanding", according to Uruguay, only covered the transmission to CARU of the Environmental Management Plans for the construction and operation of the (CMB) ENCE mill. It supposedly thereby puts an end to any dispute with Argentina regarding the procedure laid down in Article 7 of the 1975 Statute. Lastly, Uruguay maintains that the "understanding" of 2 March 2004 on the (CMB) ENCE project was later extended to include the Orion (Botnia) project, since the PROCEL water quality monitoring plan put in place by CARU's Subcommittee on Water Quality to implement that "understanding" related to the activity of "both plants", the CMB (ENCE) and Orion (Botnia) mills, the plural having been used in the title and text of the Subcommittee's report.

127. Argentina, for its part, maintains that the "understanding" between the two Ministers of 2 March 2004 was intended to ensure compliance with the procedure laid down by the 1975 Statute and thus to reintroduce the CMB (ENCE) project within CARU, ending the dispute on CARU's jurisdiction to deal with the project. Argentina claims that it reiterated to the organs within CARU that it had not given up its rights under Article 7, although it accepted that the dispute between itself and Uruguay in this respect could have been resolved if the procedure contemplated in the "understanding" of 2 March 2004 had been brought to a conclusion.

According to Argentina, however, Uruguay never transmitted the required information to CARU as it undertook to do in the "understanding" of 2 March 2004. Argentina also denies that the "understanding" of 2 March 2004 was extended to the Orion (Botnia) mill; the reference to both future plants in the PROCEL plan does not in any way signify, in its view, the renunciation of the procedure laid down by the 1975 Statute.

128. The Court first notes that while the existence of the "understanding" of 2 March 2004, as minuted by CARU, has not been contested by the Parties, they differ as to its content and scope. Whatever its specific designation and in whatever instrument it may have been recorded (the CARU minutes), this "understanding" is binding on the Parties, to the extent that they have consented to it and must be observed by them in good faith. They are entitled to depart from the procedures laid down by the 1975 Statute, in respect of a given project pursuant to an appropriate bilateral agreement. The Court recalls that the Parties disagree on whether

La Cour rappelle que les Parties divergent sur la question de savoir si la procédure pour la communication de l'information prévue par l'«arrangement» devait, si elle était appliquée, se substituer à celle prévue par le statut de 1975. Quoi qu'il en soit, une telle substitution était conditionnée par le respect, de la part de l'Uruguay, de la nouvelle procédure prévue par l'«arrangement».

129. La Cour constate que l'information que l'Uruguay avait accepté de communiquer à la CARU dans l'«arrangement» du 2 mars 2004 ne l'a jamais été. Par conséquent, la Cour ne saurait accueillir la prétention de l'Uruguay selon laquelle l'«arrangement» aurait mis un terme au différend relatif à l'usine CMB (ENCE) qui l'opposait à l'Argentine, concernant la mise en œuvre de la procédure prévue à l'article 7 du statut de 1975.

130. Par ailleurs, la Cour observe que, lorsque cet «arrangement» est intervenu, il n'était question que du projet CMB (ENCE) et que, dès lors, il ne peut s'étendre, comme l'a prétendu l'Uruguay, au projet Orion (Botnia). Les deux usines n'ont été mentionnées qu'à partir de juillet 2004, dans le cadre du plan PROCEL. Or, ce plan ne concerne que les mesures de suivi et de contrôle de la qualité environnementale des eaux du fleuve dans les zones des usines de pâte à papier, mais non les procédures de l'article 7 du statut de 1975.

131. La Cour conclut que l'«arrangement» du 2 mars 2004 n'aurait eu pour effet d'exonérer l'Uruguay des obligations lui incombant en vertu de l'article 7 du statut de 1975, si tel était l'objectif de cet «arrangement», que si l'Uruguay s'y était conformé. De l'avis de la Cour, tel n'a pas été le cas. En conséquence, cet «arrangement» ne peut être considéré comme ayant eu pour effet de dispenser l'Uruguay du respect des obligations de nature procédurale prévues par le statut de 1975.

2. L'accord créant le Groupe technique de haut niveau (GTAN)

132. La Cour note que, donnant suite à l'accord intervenu le 5 mai 2005 entre les présidents de l'Argentine et de l'Uruguay (voir paragraphe 40 ci-dessus), les ministères des affaires étrangères des deux Etats ont publié le 31 mai 2005 un communiqué de presse annonçant la création du Groupe technique de haut niveau, que les Parties désignent sous l'abréviation «GTAN». Aux termes de ce communiqué:

> «Suivant ce qui a été convenu entre MM. les Présidents de la République argentine et de la République orientale de l'Uruguay, les ministères des affaires étrangères des deux pays constituent, sous leur supervision, un groupe de techniciens, pour complément d'études et d'analyses, d'échanges d'information et de suivi des conséquences qu'aura, sur l'écosystème du fleuve qu'ils partagent, le fonctionnement des usines de pâte à papier que l'on construit dans la République orientale de l'Uruguay.

the procedure for communicating information provided for by the "understanding" would, if applied, replace that provided for by the 1975 Statute. Be that as it may, such replacement was dependent on Uruguay complying with the procedure laid down in the "understanding".

129. The Court finds that the information which Uruguay agreed to transmit to CARU in the "understanding" of 2 March 2004 was never transmitted. Consequently, the Court cannot accept Uruguay's contention that the "understanding" put an end to its dispute with Argentina in respect of the CMB (ENCE) mill, concerning implementation of the procedure laid down by Article 7 of the 1975 Statute.

130. Further, the Court observes that, when this "understanding" was reached, only the CMB (ENCE) project was in question, and that it therefore cannot be extended to the Orion (Botnia) project, as Uruguay claims. The reference to both mills is made only as from July 2004, in the context of the PROCEL plan. However, this plan only concerns the measures to monitor and control the environmental quality of the river waters in the areas of the pulp mills, and not the procedures under Article 7 of the 1975 Statute.

131. The Court concludes that the "understanding" of 2 March 2004 would have had the effect of relieving Uruguay of its obligations under Article 7 of the 1975 Statute, if that was the purpose of the "understanding", only if Uruguay had complied with the terms of the "understanding". In the view of the Court, it did not do so. Therefore the "understanding" cannot be regarded as having had the effect of exempting Uruguay from compliance with the procedural obligations laid down by the 1975 Statute.

2. The agreement setting up the High-Level Technical Group (the GTAN)

132. The Court notes that, in furtherance of the agreement reached on 5 May 2005 between the Presidents of Argentina and Uruguay (see paragraph 40 above), the Foreign Ministries of the two States issued a press release on 31 May 2005 announcing the creation of the High-Level Technical Group, referred to by the Parties as the GTAN. According to this communiqué:

> "In conformity with what was agreed to by the Presidents of Argentina and Uruguay, the Foreign Ministries of both of our countries constitute, under their supervision, a Group of Technical Experts for complementary studies and analysis, exchange of information and follow-up on the effects that the operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay will have on the ecosystem of the shared Uruguay River.

Le Groupe mentionné ... doit produire un premier rapport dans un délai de 180 jours.»

133. L'Uruguay considère ce communiqué de presse comme un accord liant les deux Etats, par lequel ils ont décidé de faire du GTAN l'organe au sein duquel se tiendraient les négociations directes entre les Parties, prévues par l'article 12 du statut de 1975, puisqu'il est destiné à l'analyse des effets sur l'environnement du «fonctionnement des usines de pâte à papier que l'on construit dans la République orientale de l'Uruguay». L'Uruguay en déduit que les Parties étaient d'accord sur la construction des usines et qu'elles avaient circonscrit le litige, entre elles, aux risques environnementaux engendrés par leur fonctionnement. L'Uruguay en veut pour preuve la saisine de la Cour sur la base de l'article 12 du statut, qui permet à chacune des Parties de s'adresser à la Cour au cas où les négociations, au terme du délai de cent quatre-vingts jours, n'aboutissent pas.

Ainsi, selon l'Uruguay, l'accord contenu dans le communiqué de presse du 31 mai 2005, en ouvrant la voie aux négociations directes prévues à l'article 12, a couvert toutes les irrégularités éventuelles de procédure relatives aux articles 7 et suivants du statut de 1975. L'Uruguay rappelle qu'il a communiqué à l'Argentine, au cours des douze réunions que le GTAN a tenues, toutes les informations nécessaires, et qu'il a transmis le projet portuaire d'Orion (Botnia) à la CARU, comme convenu par les Parties lors de la première réunion du GTAN.

134. L'Uruguay fait observer, par ailleurs, que le statut de 1975 est silencieux sur le point de savoir si l'Etat d'origine du projet peut ou non le mettre en œuvre alors que les négociations sont en cours. Il admet qu'en vertu du droit international l'Etat d'origine doit s'abstenir de le faire au cours de cette période de négociation, mais il estime que cela ne concerne pas tous les travaux et qu'en particulier les travaux préparatoires sont autorisés. L'Uruguay admet avoir procédé à de tels travaux, notamment à la construction des fondations de l'usine Orion (Botnia), mais il ne s'agirait pas, selon lui, de faits accomplis empêchant les négociations d'aboutir. L'Uruguay considère, au demeurant, qu'il n'avait aucune obligation juridique de suspendre ne serait-ce qu'une partie des travaux du port.

135. L'Argentine estime qu'il ne peut être déduit des termes du communiqué de presse du 31 mai 2005 une quelconque acceptation, de sa part, de la construction des usines litigieuses. Elle affirme qu'en créant le GTAN les Parties n'ont pas décidé de le substituer à la CARU, mais l'ont conçu comme une enceinte de négociation coexistant avec celle-ci.

Contrairement à l'Uruguay, l'Argentine soutient que la Cour est saisie en cette affaire sur la base de l'article 60 et non de l'article 12 du statut de 1975, parce que l'Uruguay, par son comportement, a empêché qu'elle puisse l'être sur ce dernier fondement, dans la mesure où il aurait ignoré toute la procédure du chapitre II du statut. Il appartiendrait ainsi à la

This Group . . . is to produce an initial report within a period of 180 days."

133. Uruguay regards this press release as an agreement that binds the two States, whereby they decided to make the GTAN the body within which the direct negotiations between the Parties provided for by Article 12 of the 1975 Statute would take place, since its purpose was to analyse the effects on the environment of the "operation of the cellulose plants that are being constructed in the Eastern Republic of Uruguay". Uruguay infers from this that the Parties were agreed on the construction of the mills and that they had limited the extent of the dispute between them to the environmental risks caused by their operation. Uruguay sees proof of this in the referral to the Court on the basis of Article 12 of the 1975 Statute, which allows either Party to apply to the Court in the event of the negotiations failing to produce an agreement within the period of 180 days.

According to Uruguay, therefore, the agreement contained in the press release of 31 May 2005, by paving the way for the direct negotiations provided for in Article 12, covered any possible procedural irregularities in relation to Articles 7 *et seq.* of the 1975 Statute. Uruguay points out that it communicated all the necessary information to Argentina during the 12 meetings held by the GTAN and that it transmitted the Orion (Botnia) port project to CARU, as agreed by the Parties at the first meeting of the GTAN.

134. Uruguay further notes that the 1975 Statute is silent as to whether the notifying State may or may not implement a project while negotiations are ongoing. It acknowledges that, under international law, the initiating State must refrain from doing so during the period of negotiation, but takes the view that this does not apply to all work and, in particular, that preparatory work is permitted. Uruguay acknowledges that it carried out such work, for example construction of the foundations for the Orion (Botnia) mill, but in its view this did not involve faits accomplis which prevented the negotiations from reaching a conclusion. Uruguay also considers that it had no legal obligation to suspend any and all work on the port.

135. Argentina considers that no acceptance on its part of the construction of the disputed mills can be inferred from the terms of the press release of 31 May 2005. It submits that in creating the GTAN, the Parties did not decide to substitute it for CARU, but regarded it as a means of negotiation that would co-exist with the latter.

Contrary to Uruguay, Argentina takes the view that this matter has been submitted to the Court on the basis of Article 60 of the 1975 Statute and not of Article 12, since Uruguay, by its conduct, has prevented the latter from being used as a basis, having allegedly disregarded the entire procedure laid down in Chapter II of the Statute. Argentina therefore

Cour, selon l'Argentine, de se prononcer sur l'ensemble des violations du statut de 1975, y compris, mais pas seulement, sur l'autorisation de construction des usines litigieuses.

136. L'Argentine soutient que l'Uruguay, par son comportement, a fait avorter les procédures prévues aux articles 7 à 9 du statut de 1975 et qu'il a, au cours de la période de négociation ouverte au sein du GTAN, poursuivi les travaux de construction de l'usine Orion (Botnia) et commencé la construction du terminal portuaire. Pendant le même temps, l'Argentine réitérait, au sein de la CARU, la nécessité pour l'Uruguay de s'acquitter des obligations de nature procédurale lui incombant en vertu des articles 7 à 12 du statut, et de suspendre les travaux.

L'Argentine rejette enfin l'allégation de l'Uruguay selon laquelle les travaux sur les fondations de l'usine Orion (Botnia), la cheminée et le port n'auraient eu qu'un caractère préliminaire et ne pouvaient être considérés comme étant le commencement des travaux de construction au sens propre. Pour l'Argentine, une telle distinction n'a pas lieu d'être et ne peut être justifiée par la nature des travaux entrepris.

137. La Cour souligne tout d'abord qu'il n'y a pas lieu de distinguer, comme l'ont fait respectivement l'Uruguay et l'Argentine pour les besoins de leur cause, entre sa saisine sur la base de l'article 12 et sa saisine sur la base de l'article 60 du statut de 1975. Certes, l'article 12 prévoit le recours à la procédure prévue au chapitre XV au cas où les négociations n'aboutissent pas dans le délai de cent quatre-vingts jours, mais sa fonction s'arrête là. L'article 60 prend ensuite le relais, en particulier son premier alinéa, qui permet à l'une ou l'autre Partie de soumettre à la Cour tout différend concernant l'interprétation ou l'application du statut qui ne pourrait être réglé par la négociation directe. Cette formulation couvre aussi bien un différend portant sur l'application et l'interprétation de l'article 12 que sur toute autre disposition du statut de 1975.

138. La Cour note que le communiqué de presse du 31 mai 2005 est l'expression d'un accord entre les deux Etats pour créer un cadre de négociation, le GTAN, afin d'étudier, analyser et échanger les informations sur les effets que le fonctionnement des usines de pâte à papier que l'on construisait dans la République orientale de l'Uruguay pouvait avoir sur l'écosystème du fleuve partagé, «le groupe [devant] produire un premier rapport dans un délai de 180 jours».

139. La Cour admet que le GTAN a été créé dans le but de permettre aux négociations prévues, également pour une durée de cent quatre-vingts jours, à l'article 12 du statut de 1975 d'avoir lieu. Ces négociations entre les parties, pour parvenir à un accord, interviennent une fois que la partie destinataire de la notification a adressé, conformément à l'article 11, une communication à l'autre partie, par l'intermédiaire de la commission, précisant

> «quels sont les aspects de l'ouvrage ou du programme d'opérations qui peuvent causer un préjudice sensible à la navigation, au régime

sees it as for the Court to pronounce on all the breaches of the 1975 Statute, including and not limited to the authorization for the construction of the disputed mills.

136. Argentina submits that Uruguay, by its conduct, frustrated the procedures laid down in Articles 7 to 9 of the 1975 Statute and that, during the period of negotiation within the GTAN, Uruguay continued the construction work on the Orion (Botnia) mill and began building the port terminal. During that same period, Argentina reiterated, within CARU, the need for Uruguay to comply with its procedural obligations under Articles 7 to 12 of the 1975 Statute and to suspend the works.

Lastly, Argentina rejects Uruguay's claim that the work on the foundations of the Orion (Botnia) mill, its chimney and the port was merely preliminary in nature and cannot be regarded as the beginning of construction work as such. For Argentina, such a distinction is groundless and cannot be justified by the nature of the work carried out.

137. The Court first points out that there is no reason to distinguish, as Uruguay and Argentina have both done for the purpose of their respective cases, between referral on the basis of Article 12 and of Article 60 of the 1975 Statute. While it is true that Article 12 provides for recourse to the procedure indicated in Chapter XV, should the negotiations fail to produce an agreement within the 180-day period, its purpose ends there. Article 60 then takes over, in particular its first paragraph, which enables either Party to submit to the Court any dispute concerning the interpretation or application of the Statute which cannot be settled by direct negotiations. This wording also covers a dispute relating to the interpretation or application of Article 12, like any other provision of the 1975 Statute.

138. The Court notes that the press release of 31 May 2005 sets out an agreement between the two States to create a negotiating framework, the GTAN, in order to study, analyse and exchange information on the effects that the operation of the cellulose plants that were being constructed in the Eastern Republic of Uruguay could have on the ecosystem of the shared Uruguay River, with "the group [having] to produce an initial report within a period of 180 days".

139. The Court recognizes that the GTAN was created with the aim of enabling the negotiations provided for in Article 12 of the 1975 Statute, also for a 180-day period, to take place. Under Article 11, these negotiations between the parties with a view to reaching an agreement are to be held once the notified party has sent a communication to the other party, through the Commission, specifying

> "which aspects of the work or the programme of operations might significantly impair navigation, the régime of the river or the quality

du fleuve ou à la qualité de ses eaux, les raisons techniques qui permettent d'arriver à cette conclusion et les modifications qu'elle suggère d'apporter au projet ou au programme d'opérations».

La Cour est consciente de ce que la négociation prévue à l'article 12 du statut de 1975 s'intègre dans l'ensemble de la procédure prévue aux articles 7 à 12, qui est articulée de telle manière que les parties, en relation avec la CARU, soient en mesure, au terme du processus, de s'acquitter de leur obligation de prévenir tout préjudice sensible transfrontière susceptible d'être généré par des activités potentiellement nocives projetées par l'une d'elles.

140. La Cour considère, en conséquence, que l'accord créant le GTAN, s'il établit effectivement une instance de négociation à même de permettre aux Parties de poursuivre le même objectif que celui prévu à l'article 12 du statut de 1975, ne peut être interprété comme exprimant l'accord des Parties pour déroger à d'autres obligations de nature procédurale prévues par le statut.

141. Dès lors, selon la Cour, l'Argentine, en acceptant la création du GTAN, n'a pas renoncé, comme le prétend l'Uruguay, aux autres droits de nature procédurale que lui reconnaît le statut de 1975, ni à invoquer la responsabilité de l'Uruguay du fait de leur violation éventuelle. En effet, l'Argentine n'a pas renoncé, dans l'accord créant le GTAN, aux droits qu'elle tient du statut, «de manière claire et non équivoque» (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 247, par. 13). Elle n'a pas non plus consenti à suspendre l'application des dispositions procédurales du statut. En effet, selon l'article 57 de la convention de Vienne du 23 mai 1969 sur le droit des traités, relatif à la «suspension de l'application d'un traité», y compris, selon le commentaire de la Commission du droit international, «la suspension de l'application de certaines de ses dispositions» (*Annuaire de la Commission du droit international*, 1966, vol. II, p. 274), la suspension n'est possible que «conformément à une disposition du traité» ou «par consentement des parties».

142. La Cour observe, d'autre part, que l'accord créant le GTAN, en se référant aux «usines de pâte à papier que l'on construit dans la République orientale de l'Uruguay», constate un simple fait et ne peut être interprété, ainsi que le prétend l'Uruguay, comme une acceptation de cette construction par l'Argentine.

143. La Cour considère que l'Uruguay n'avait le droit, pendant toute la période de consultation et de négociation prévue aux articles 7 à 12 du statut de 1975, ni d'autoriser la construction ni de construire les usines projetées et le terminal portuaire. En effet, il serait contraire à l'objet et au but du statut de 1975 de procéder aux activités litigieuses avant d'avoir appliqué les procédures prévues par les «mécanismes communs nécessaires à l'utilisation rationnelle et optimale du fleuve» (article premier). L'article 9 prévoit cependant que, «[s]i la partie notifiée ne formule pas d'objections ou ne répond pas dans le délai prévu à l'article 8

of its waters, the technical reasons on which this conclusion is based and the changes suggested to the plan or programme of operations".

The Court is aware that the negotiation provided for in Article 12 of the 1975 Statute forms part of the overall procedure laid down in Articles 7 to 12, which is structured in such a way that the parties, in association with CARU, are able, at the end of the process, to fulfil their obligation to prevent any significant transboundary harm which might be caused by potentially harmful activities planned by either one of them.

140. The Court therefore considers that the agreement to set up the GTAN, while indeed creating a negotiating body capable of enabling the Parties to pursue the same objective as that laid down in Article 12 of the 1975 Statute, cannot be interpreted as expressing the agreement of the Parties to derogate from other procedural obligations laid down by the Statute.

141. Consequently, the Court finds that Argentina, in accepting the creation of the GTAN, did not give up, as Uruguay claims, the other procedural rights belonging to it by virtue of the 1975 Statute, nor the possibility of invoking Uruguay's responsibility for any breach of those rights. Argentina did not, in the agreement to set up the GTAN, "effect a clear and unequivocal waiver" of its rights under the 1975 Statute (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 247, para. 13). Nor did it consent to suspending the operation of the procedural provisions of the 1975 Statute. Indeed, under Article 57 of the Vienna Convention on the Law of Treaties of 23 May 1969, concerning "[s]uspension of the operation of a treaty", including, according to the International Law Commission's commentary, suspension of "the operation of . . . some of its provisions" (*Yearbook of the International Law Commission*, 1966, Vol. II, p. 251), suspension is only possible "in conformity with the provisions of the treaty" or "by consent of all the parties".

142. The Court further observes that the agreement to set up the GTAN, in referring to "the cellulose plants that are being constructed in the Eastern Republic of Uruguay", is stating a simple fact and cannot be interpreted, as Uruguay claims, as an acceptance of their construction by Argentina.

143. The Court finds that Uruguay was not entitled, for the duration of the period of consultation and negotiation provided for in Articles 7 to 12 of the 1975 Statute, either to construct or to authorize the construction of the planned mills and the port terminal. It would be contrary to the object and purpose of the 1975 Statute to embark on disputed activities before having applied the procedures laid down by the "joint machinery necessary for the optimum and rational utilization of the [r]iver" (Article 1). However, Article 9 provides that: "[i]f the notified party raises no objections or does not respond within the period established in Arti-

[cent quatre-vingts jours], l'autre partie peut construire ou autoriser la construction de l'ouvrage projeté».

144. Il en découle, selon la Cour, que, tant que se déroule le mécanisme de coopération entre les parties pour prévenir un préjudice sensible au détriment de l'une d'elles, l'Etat d'origine de l'activité projetée est tenu de ne pas autoriser sa construction et *a fortiori* de ne pas y procéder.

145. La Cour relève, en outre, que le statut de 1975 s'inscrit parfaitement dans le cadre des exigences du droit international en la matière, dès lors que le mécanisme de coopération entre Etats est régi par le principe de la bonne foi. En effet, selon le droit international coutumier, reflété à l'article 26 de la convention de Vienne de 1969 sur le droit des traités, «[t]out traité en vigueur lie les parties et doit être exécuté par elles de bonne foi». Cela s'applique à toutes les obligations établies par un traité, y compris les obligations de nature procédurale, essentielles à la coopération entre Etats. La Cour a rappelé, dans les affaires des *Essais nucléaires (Australie c. France) (Nouvelle-Zélande c. France)*, ce qui suit:

> «L'un des principes de base qui président à la création et à l'exécution d'obligations juridiques, quelle qu'en soit la source, est celui de la bonne foi. La confiance réciproque est une condition inhérente de la coopération internationale...» (*Arrêts, C.I.J. Recueil 1974*, p. 268, par. 46, et p. 473, par. 49; voir également *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras), compétence et recevabilité, arrêt, C.I.J. Recueil 1988*, p. 105, par. 94.)

146. La Cour a par ailleurs eu l'occasion de mettre l'accent sur les caractéristiques de l'obligation de négocier et sur le comportement qu'elle prescrit aux Etats concernés: «les parties ont l'obligation de se comporter de telle manière que la négociation ait un sens» (*Plateau continental de la mer du Nord (République fédérale d'Allemagne/Danemark; République fédérale d'Allemagne/Pays-Bas), arrêt, C.I.J. Recueil 1969*, p. 47, par. 85).

147. Le mécanisme de coopération prévu par les articles 7 à 12 du statut de 1975 n'aurait pas de sens, de l'avis de la Cour, si la partie d'origine de l'activité projetée autorisait celle-ci ou la mettait en œuvre sans attendre que ce mécanisme soit mené à son terme. En effet, si tel était le cas, les négociations entre les parties n'auraient plus d'objet.

148. A cet égard, les travaux préliminaires des usines de pâte à papier sur des sites approuvés uniquement par l'Uruguay ne font pas exception, contrairement à ce que prétend cet Etat. Ces travaux font en effet partie intégrante de la construction des usines projetées (voir paragraphes 39 et 42 ci-dessus).

149. La Cour conclut de ce qui précède que l'accord créant le GTAN n'a pas permis à l'Uruguay de déroger à ses obligations d'informer et de notifier, conformément à l'article 7 du statut de 1975, et que, en autorisant la construction des usines ainsi que du terminal portuaire de

cle 8 [180 days], the other party may carry out or authorize the work planned".

144. Consequently, in the opinion of the Court, as long as the procedural mechanism for co-operation between the parties to prevent significant damage to one of them is taking its course, the State initiating the planned activity is obliged not to authorize such work and, *a fortiori*, not to carry it out.

145. The Court notes, moreover, that the 1975 Statute is perfectly in keeping with the requirements of international law on the subject, since the mechanism for co-operation between States is governed by the principle of good faith. Indeed, according to customary international law, as reflected in Article 26 of the 1969 Vienna Convention on the Law of Treaties, "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith". That applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States. The Court recalled in the cases concerning *Nuclear Tests (Australia* v. *France) (New Zealand* v. *France)*:

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation . . ." (*Judgments, I.C.J. Reports 1974*, p. 268, para. 46, and p. 473, para. 49; see also *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94.)

146. The Court has also had occasion to draw attention to the characteristics of the obligation to negotiate and to the conduct which this imposes on the States concerned: "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful" (*North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969*, p. 47, para. 85).

147. In the view of the Court, there would be no point to the co-operation mechanism provided for by Articles 7 to 12 of the 1975 Statute if the party initiating the planned activity were to authorize or implement it without waiting for that mechanism to be brought to a conclusion. Indeed, if that were the case, the negotiations between the parties would no longer have any purpose.

148. In this respect, contrary to what Uruguay claims, the preliminary work on the pulp mills on sites approved by Uruguay alone does not constitute an exception. This work does in fact form an integral part of the construction of the planned mills (see paragraphs 39 and 42 above).

149. The Court concludes from the above that the agreement to set up the GTAN did not permit Uruguay to derogate from its obligations of information and notification under Article 7 of the 1975 Statute, and that by authorizing the construction of the mills and the port terminal at

Fray Bentos avant la fin de la période de négociation, l'Uruguay n'a pas respecté l'obligation de négocier prévue à l'article 12 du statut. Il en résulte que l'Uruguay a méconnu l'ensemble du mécanisme de coopération prévu par les articles 7 à 12 du statut de 1975.

150. Etant donné que «l'engagement de négocier n'implique pas celui de s'entendre» (*Trafic ferroviaire entre la Lithuanie et la Pologne, avis consultatif, 1931, C.P.J.I. série A/B n° 42*, p. 116), il reste à la Cour à examiner si l'Etat d'origine du projet est tenu à certaines obligations après l'expiration de la période de négociation prévue à l'article 12.

D. Les obligations de l'Uruguay après l'expiration de la période de négociation

151. L'article 12 renvoie les Parties, dans l'hypothèse où elles n'aboutissent pas à un accord dans un délai de cent quatre-vingts jours, à l'application de la procédure indiquée au chapitre XV.

Le chapitre XV comporte un article unique, l'article 60, selon lequel:

> «Tout différend concernant l'interprétation ou l'application du traité et du statut qui ne pourrait être réglé par négociation directe peut être soumis par l'une ou l'autre des parties à la Cour internationale de Justice.
>
> Dans les cas visés aux articles 58 et 59, l'une ou l'autre des parties peut soumettre tout différend sur l'interprétation ou l'application du traité et du statut à la Cour internationale de Justice lorsque ledit différend n'a pas pu être réglé dans un délai de 180 jours à compter de la notification prévue à l'article 59.»

152. Le statut de 1975, selon l'Uruguay, ne reconnaît pas à l'une des parties un «droit de veto» sur les projets initiés par l'autre. L'Uruguay estime qu'il n'existe aucune «obligation de non-construction» qui pèserait sur l'Etat d'origine des projets jusqu'à ce que la Cour, une fois saisie, se soit prononcée. L'existence d'une telle obligation, souligne l'Uruguay, permettrait à une partie de bloquer un projet vital pour le développement durable de l'autre partie, ce qui serait incompatible avec «l'utilisation rationnelle et optimale du fleuve». Au contraire, pour l'Uruguay, en l'absence de disposition particulière dans le statut, il convient d'en revenir au droit international général, que refléterait le projet d'articles de la Commission du droit international de 2001 sur la prévention des dommages transfrontières résultant d'activités dangereuses (*Annuaire de la Commission du droit international*, 2001, vol. II, deuxième partie), en particulier l'alinéa 3 de l'article 9 de ce projet, relatif aux «consultations sur les mesures préventives», selon lequel «si les consultations ... ne permettent pas d'aboutir à une solution concertée, l'Etat d'origine tient néanmoins compte des intérêts de l'Etat susceptible d'être affecté s'il décide d'autoriser la poursuite de l'activité...».

Fray Bentos before the expiration of the period of negotiation, Uruguay failed to comply with the obligation to negotiate laid down by Article 12 of the Statute. Consequently, Uruguay disregarded the whole of the co-operation mechanism provided for in Articles 7 to 12 of the 1975 Statute.

150. Given that "an obligation to negotiate does not imply an obligation to reach an agreement" (*Railway Traffic between Lithuania and Poland, Advisory Opinion, 1931, P.C.I.J., Series A/B, No. 42*, p. 116), it remains for the Court to examine whether the State initiating the plan is under certain obligations following the end of the negotiation period provided for in Article 12.

D. Uruguay's Obligations Following the End of the Negotiation Period

151. Article 12 refers the Parties, should they fail to reach an agreement within 180 days, to the procedure indicated in Chapter XV.

Chapter XV contains a single article, Article 60, according to which:

> "Any dispute concerning the interpretation or application of the Treaty and the Statute which cannot be settled by direct negotiations may be submitted by either party to the International Court of Justice.
>
> In the cases referred to in Articles 58 and 59, either party may submit any dispute concerning the interpretation or application of the Treaty and the Statute to the International Court of Justice, when it has not been possible to settle the dispute within 180 days following the notification referred to in Article 59."

152. According to Uruguay, the 1975 Statute does not give one party a "right of veto" over the projects initiated by the other. It does not consider there to be a "no construction obligation" borne by the State initiating the projects until such time as the Court has ruled on the dispute. Uruguay points out that the existence of such an obligation would enable one party to block a project that was essential for the sustainable development of the other, something that would be incompatible with the "optimum and rational utilization of the [r]iver". On the contrary, for Uruguay, in the absence of any specific provision in the 1975 Statute, reference should be made to general international law, as reflected in the 2001 draft Articles of the International Law Commission on Prevention of Transboundary Harm from Hazardous Activities (*Yearbook of the International Law Commission*, 2001, Vol. II, Part Two); in particular, draft Article 9, paragraph 3, concerning "Consultations on preventive measures", states that "[i]f the consultations . . . fail to produce an agreed solution, the State of origin shall nevertheless take into account the interests of the State likely to be affected in case it decides to authorize the activity to be pursued . . .".

153. L'Argentine, au contraire, soutient que l'article 12 du statut de 1975 fait de la Cour le décideur final lorsque les parties n'aboutissent pas à un accord dans le délai de cent quatre-vingts jours à compter de la communication visée à l'article 11. Il résulterait de l'article 9 du statut, interprété à la lumière des articles 11 et 12, et compte tenu de son objet et de son but, que, si la partie à laquelle la notification est adressée formule une objection, l'autre partie ne pourrait ni construire l'ouvrage en question ni autoriser sa construction, aussi longtemps que la procédure prévue aux articles 7 à 12 n'aurait pas été achevée et que la Cour ne se serait pas prononcée sur le projet. L'Argentine considère ainsi que, pendant la procédure de règlement du différend devant la Cour, l'Etat qui projette de construire l'ouvrage ne peut mettre l'autre Partie devant le fait accompli de sa construction.

En ce qui concerne la question du «veto», elle serait, selon l'Argentine, mal posée par l'Uruguay, car ni l'une ni l'autre des parties ne pourrait imposer sa position sur la construction et il reviendrait en définitive à la Cour de trancher, en cas de désaccord, par une décision revêtue de l'autorité de la chose jugée. En quelque sorte, l'Uruguay n'aurait d'autre choix, selon l'Argentine, que de parvenir à un accord avec elle ou d'attendre le règlement du différend. En poursuivant la construction et la mise en service de l'usine et du port d'Orion (Botnia), l'Uruguay commet, selon l'Argentine, une violation continue des obligations de nature procédurale résultant du chapitre II du statut de 1975.

154. La Cour observe que la prétendue «obligation de non-construction», qui pèserait sur l'Uruguay entre la fin de la période de négociation et la décision de la Cour, ne figure pas expressément dans le statut de 1975 et ne découle pas davantage de ses dispositions. L'article 9 ne prévoit une telle obligation que pendant la mise en œuvre de la procédure prévue aux articles 7 à 12 du statut.

En outre, le statut ne prévoit pas que, en cas de désaccord persistant entre les parties sur l'activité projetée au terme de la période de négociation, il reviendrait à la Cour, saisie par l'Etat concerné, comme le prétend l'Argentine, d'autoriser ou non l'activité en question. La Cour souligne que, si le statut de 1975 lui confère compétence pour le règlement de tout différend relatif à son application et à son interprétation, il ne l'investit pas pour autant de la fonction d'autoriser ou non en dernier ressort les activités projetées. Par conséquent, l'Etat d'origine du projet peut, à la fin de la période de négociation, procéder à la construction à ses propres risques.

La Cour ne peut retenir l'interprétation de l'article 9 selon laquelle toute construction serait interdite jusqu'à ce qu'elle se soit prononcée en vertu des articles 12 et 60.

155. L'article 12 ne met pas à la charge des parties une obligation de saisir la Cour mais leur donne plutôt la possibilité de le faire, après l'expiration de la période de négociation. Ainsi, l'article 12 n'est pas susceptible de modifier les droits et obligations de la partie intéressée, tant que la Cour n'a pas statué définitivement à leur sujet. Selon la Cour, parmi ces

153. Argentina, on the other hand, maintains that Article 12 of the 1975 Statute makes the Court the final decision-maker where the parties have failed to reach agreement within 180 days following the notification referred to in Article 11. It is said to follow from Article 9 of the Statute, interpreted in the light of Articles 11 and 12 and taking account of its object and purpose, that if the notified party raises an objection, the other party may neither carry out nor authorize the work in question until the procedure laid down in Articles 7 to 12 has been completed and the Court has ruled on the project. Argentina therefore considers that, during the dispute settlement proceedings before the Court, the State which is envisaging carrying out the work cannot confront the other Party with the fait accompli of having carried it out.

Argentina argues that the question of the "veto" raised by Uruguay is inappropriate, since neither of the parties can impose its position in respect of the construction works and it will ultimately be for the Court to settle the dispute, if the parties disagree, by a decision that will have the force of *res judicata*. It could be said, according to Argentina, that Uruguay has no choice but to come to an agreement with it or to await the settlement of the dispute. Argentina contends that, by pursuing the construction and commissioning of the Orion (Botnia) mill and port, Uruguay has committed a continuing violation of the procedural obligations under Chapter II of the 1975 Statute.

154. The Court observes that the "no construction obligation", said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, is not expressly laid down by the 1975 Statute and does not follow from its provisions. Article 9 only provides for such an obligation during the performance of the procedure laid down in Articles 7 to 12 of the Statute.

Furthermore, in the event of disagreement between the parties on the planned activity persisting at the end of the negotiation period, the Statute does not provide for the Court, to which the matter would be submitted by the State concerned, according to Argentina, to decide whether or not to authorize the activity in question. The Court points out that, while the 1975 Statute gives it jurisdiction to settle any dispute concerning its interpretation or application, it does not however confer on it the role of deciding in the last resort whether or not to authorize the planned activities. Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.

The Court cannot uphold the interpretation of Article 9 according to which any construction is prohibited until the Court has given its ruling pursuant to Articles 12 and 60.

155. Article 12 does not impose an obligation on the parties to submit a matter to the Court, but gives them the possibility of doing so, following the end of the negotiation period. Consequently, Article 12 can do nothing to alter the rights and obligations of the party concerned as long as the Court has not ruled finally on them. The Court considers that

droits figure celui de mettre en œuvre le projet, sous la seule responsabilité de cette partie, dans la mesure où la période de négociation a expiré.

156. La Cour avait considéré, dans son ordonnance du 13 juillet 2006, que «la construction des usines sur le site actuel ne p[ouvait] être réputée constituer un fait accompli» (*Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay), mesures conservatoires, ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 133, par. 78). Ainsi, en statuant au fond sur le différend qui oppose les deux Parties, la Cour est l'ultime garant du respect par celles-ci du statut de 1975.

157. La Cour conclut de ce qui précède qu'aucune «obligation de non-construction» ne pesait sur l'Uruguay après que la période de négociation prévue par l'article 12 a expiré, soit le 3 février 2006, les Parties ayant constaté à cette date l'échec des négociations entreprises dans le cadre du GTAN (voir paragraphe 40). En conséquence, le comportement illicite de l'Uruguay (constaté au paragraphe 149 ci-dessus) ne pouvait s'étendre au-delà de cette date.

158. La Cour ayant établi que l'Uruguay a violé ses obligations de nature procédurale d'informer, de notifier et de négocier dans la mesure et pour les raisons exposées ci-dessus, elle se penchera à présent sur la question du respect par cet Etat des obligations de fond prescrites par le statut de 1975.

* *

IV. Les obligations de fond

159. Avant d'examiner les violations alléguées des obligations de fond découlant du statut de 1975, la Cour traitera de deux questions préliminaires, à savoir la charge de la preuve et la preuve par expertise.

A. La charge de la preuve et la preuve par expertise

160. L'Argentine soutient que l'approche de précaution adoptée dans le statut de 1975 a pour effet de «transfér[er] la charge de la preuve à l'Uruguay, [de telle sorte que ce serait à lui de démontrer] que l'usine de pâte à papier Orion (Botnia) ne cause pas de dommages significatifs à l'environnement». Elle affirme également que la charge de la preuve ne devrait pas peser sur elle seule, en tant qu'Etat demandeur, car, selon elle, le statut de 1975 impose aux deux Parties une obligation égale de convaincre — l'une, de l'innocuité du projet, l'autre, de sa nocivité.

161. L'Uruguay estime au contraire que, conformément à la jurisprudence bien établie de la Cour, c'est à l'Argentine, Etat demandeur, qu'incombe la charge de la preuve, mais que, quand bien même la position argentine relative au transfert de la charge de la preuve serait fondée en droit, cela ne changerait rien, étant donné la faiblesse manifeste de

those rights include that of implementing the project, on the sole responsibility of that party, since the period for negotiation has expired.

156. In its Order of 13 July 2006, the Court took the view that the "construction [of the mills] at the current site cannot be deemed to create a fait accompli" (*Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Provisional Measures, Order of 13 July 2006, I.C.J. Reports 2006*, p. 133, para. 78). Thus, in pronouncing on the merits in the dispute between the Parties, the Court is the ultimate guarantor of their compliance with the 1975 Statute.

157. The Court concludes from the above that Uruguay did not bear any "no construction obligation" after the negotiation period provided for in Article 12 expired on 3 February 2006, the Parties having determined at that date that the negotiations undertaken within the GTAN had failed (see paragraph 40). Consequently the wrongful conduct of Uruguay (established in paragraph 149 above) could not extend beyond that period.

158. Having established that Uruguay breached its procedural obligations to inform, notify and negotiate to the extent and for the reasons given above, the Court will now turn to the question of the compliance of that State with the substantive obligations laid down by the 1975 Statute.

* *

IV. Substantive Obligations

159. Before taking up the examination of the alleged violations of substantive obligations under the 1975 Statute, the Court will address two preliminary issues, namely, the burden of proof and expert evidence.

A. Burden of Proof and Expert Evidence

160. Argentina contends that the 1975 Statute adopts an approach in terms of precaution whereby "the burden of proof will be placed on Uruguay for it to establish that the Orion (Botnia) mill will not cause significant damage to the environment". It also argues that the burden of proof should not be placed on Argentina alone as the Applicant, because, in its view, the 1975 Statute imposes an equal onus to persuade — for the one that the plant is innocuous and for the other that it is harmful.

161. Uruguay, on the other hand, asserts that the burden of proof is on Argentina, as the Applicant, in accordance with the Court's long-standing case law, although it considers that, even if the Argentine position about transferring the burden of proof to Uruguay were correct, it would make no difference given the manifest weakness of Argentina's

l'argumentation de l'Argentine sur le fond et le nombre d'éléments de preuve émanant de sources indépendantes que l'Uruguay a soumis à la Cour. Il conteste également avec force l'argument de l'Argentine selon lequel l'approche de précaution adoptée dans le statut de 1975 aurait pour effet de transférer la charge de la preuve, invoquant l'absence de toute disposition conventionnelle expresse en ce sens, et rejette de même l'idée avancée par l'Argentine selon laquelle le statut ferait peser la charge de la preuve à égalité sur les deux Parties.

162. Tout d'abord, la Cour considère que, selon le principe bien établi *onus probandi incumbit actori*, c'est à la partie qui avance certains faits d'en démontrer l'existence. Ce principe, confirmé par la Cour à maintes reprises (*Délimitation maritime en mer Noire (Roumanie c. Ukraine), arrêt, C.I.J. Recueil 2009*, p. 86, par. 68; *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008*, p. 31, par. 45; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 128, par. 204; *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 437, par. 101), s'applique aux faits avancés aussi bien par le demandeur que par le défendeur.

163. Le demandeur doit naturellement commencer par soumettre les éléments de preuve pertinents pour étayer sa thèse. Cela ne signifie pas pour autant que le défendeur ne devrait pas coopérer en produisant tout élément de preuve en sa possession susceptible d'aider la Cour à régler le différend dont elle est saisie.

164. Quant aux arguments avancés par l'Argentine concernant le renversement de la charge de la preuve et l'existence, à l'égard de chaque Partie, d'une obligation égale de convaincre au titre du statut de 1975, la Cour considère qu'une approche de précaution, si elle peut se révéler pertinente pour interpréter et appliquer les dispositions du statut, n'a toutefois pas pour effet d'opérer un renversement de la charge de la preuve; elle considère également que rien dans le statut de 1975 lui-même ne permet de conclure que celui-ci ferait peser la charge de la preuve de façon égale sur les deux Parties.

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165. La Cour examinera à présent la question de la preuve par expertise. L'Argentine et l'Uruguay ont tous deux soumis à la Cour une grande quantité d'informations factuelles et scientifiques à l'appui de leurs prétentions respectives. Ils ont également produit des rapports et des études établis par les experts et les consultants qu'ils ont engagés, ainsi que par ceux engagés par la Société financière internationale en sa qualité de bailleur de fonds du projet. Certains de ces experts se sont également pré-

case and the extensive independent evidence put before the Court by Uruguay. Uruguay also strongly contests Argentina's argument that the precautionary approach of the 1975 Statute would imply a reversal of the burden of proof, in the absence of an explicit treaty provision prescribing it as well as Argentina's proposition that the Statute places the burden of proof equally on both Parties.

162. To begin with, the Court considers that, in accordance with the well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts. This principle which has been consistently upheld by the Court (*Maritime Delimitation in the Black Sea (Romania* v. *Ukraine), Judgment, I.C.J. Reports 2009*, p. 86, para. 68; *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 31, para. 45; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 128, para. 204; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101) applies to the assertions of fact both by the Applicant and the Respondent.

163. It is of course to be expected that the Applicant should, in the first instance, submit the relevant evidence to substantiate its claims. This does not, however, mean that the Respondent should not co-operate in the provision of such evidence as may be in its possession that could assist the Court in resolving the dispute submitted to it.

164. Regarding the arguments put forward by Argentina on the reversal of the burden of proof and on the existence, vis-à-vis each Party, of an equal onus to prove under the 1975 Statute, the Court considers that while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof. The Court is also of the view that there is nothing in the 1975 Statute itself to indicate that it places the burden of proof equally on both Parties.

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165. The Court now turns to the issue of expert evidence. Both Argentina and Uruguay have placed before the Court a vast amount of factual and scientific material in support of their respective claims. They have also submitted reports and studies prepared by the experts and consultants commissioned by each of them, as well as others commissioned by the International Finance Corporation in its quality as lender to the project. Some of these experts have also appeared

sentés devant la Cour comme conseils de l'une ou l'autre Partie pour fournir des éléments de preuve.

166. Les Parties sont néanmoins divisées sur l'autorité et la fiabilité des études et rapports versés au dossier, qui ont été établis par leurs experts et consultants respectifs, d'une part, et par ceux de la SFI, d'autre part, et qui contiennent bien souvent des affirmations et des conclusions contradictoires. Répondant à une question posée par un juge, l'Argentine a affirmé que le poids à leur accorder devait être déterminé en fonction non seulement de l'«indépendance» de l'auteur, qui devait n'avoir aucun intérêt personnel à ce que l'affaire fût tranchée dans un sens ou un autre et ne devait pas être fonctionnaire du gouvernement, mais aussi des caractéristiques du document lui-même, en particulier du soin avec lequel l'analyse avait été réalisée, de son exhaustivité, de l'exactitude des données utilisées, et de la clarté et de la cohérence des conclusions tirées de celles-ci. Dans sa réponse à la même question, l'Uruguay a soutenu que les rapports élaborés par des experts engagés aux fins de l'instance et versés au dossier ne devaient pas être considérés comme établis de façon indépendante et devaient être traités avec circonspection, contrairement aux déclarations et analyses d'experts publiées par une organisation internationale compétente telle la SFI ou celles publiées par les consultants engagés par ladite organisation, qui, elles, devaient être considérées comme émanant d'une source indépendante et se voir accorder un «poids spécial».

167. La Cour a prêté la plus grande attention aux éléments qui lui ont été soumis par les Parties, ainsi qu'il ressortira de son examen des éléments de preuve ci-après relatifs aux violations alléguées des obligations de fond. S'agissant des experts qui sont intervenus à l'audience en qualité de conseils, la Cour aurait trouvé plus utile que les Parties, au lieu de les inclure à ce titre dans leurs délégations respectives, les présentent en tant que témoins-experts en vertu des articles 57 et 64 du Règlement de la Cour. Elle considère en effet que les personnes déposant devant elle sur la base de leurs connaissances scientifiques ou techniques et de leur expérience personnelle devraient le faire en qualité d'experts ou de témoins, voire, dans certains cas, à ces deux titres à la fois, mais non comme conseils, afin de pouvoir répondre aux questions de la partie adverse ainsi qu'à celles de la Cour elle-même.

168. Quant à l'indépendance de ces experts, la Cour n'estime pas nécessaire, pour statuer en l'espèce, de s'engager dans un débat général sur la valeur, la fiabilité et l'autorité relatives des documents et études élaborés par les experts et les consultants des Parties. Elle doit seulement garder à l'esprit que, si volumineuses et complexes que soient les informations factuelles qui lui ont été soumises, il lui incombe, au terme d'un examen attentif de l'ensemble des éléments soumis par les Parties, de déterminer quels faits sont à prendre en considération, d'en apprécier la force probante et d'en tirer les conclusions appropriées. Ainsi, fidèle à sa pratique, la Cour se prononcera sur les faits, en se fondant sur les éléments de preuve qui lui ont été pré-

before the Court as counsel for one or the other of the Parties to provide evidence.

166. The Parties, however, disagree on the authority and reliability of the studies and reports submitted as part of the record and prepared, on the one hand, by their respective experts and consultants, and on the other, by the experts of the IFC, which contain, in many instances, conflicting claims and conclusions. In reply to a question put by a judge, Argentina stated that the weight to be given to such documents should be determined by reference not only to the "independence" of the author, who must have no personal interest in the outcome of the dispute and must not be an employee of the government, but also by reference to the characteristics of the report itself, in particular the care with which its analysis was conducted, its completeness, the accuracy of the data used, and the clarity and coherence of the conclusions drawn from such data. In its reply to the same question, Uruguay suggested that reports prepared by retained experts for the purposes of the proceedings and submitted as part of the record should not be regarded as independent and should be treated with caution; while expert statements and evaluations issued by a competent international organization, such as the IFC, or those issued by the consultants engaged by that organization should be regarded as independent and given "special weight".

167. The Court has given most careful attention to the material submitted to it by the Parties, as will be shown in its consideration of the evidence below with respect to alleged violations of substantive obligations. Regarding those experts who appeared before it as counsel at the hearings, the Court would have found it more useful had they been presented by the Parties as expert witnesses under Articles 57 and 64 of the Rules of Court, instead of being included as counsel in their respective delegations. The Court indeed considers that those persons who provide evidence before the Court based on their scientific or technical knowledge and on their personal experience should testify before the Court as experts, witnesses or in some cases in both capacities, rather than counsel, so that they may be submitted to questioning by the other party as well as by the Court.

168. As for the independence of such experts, the Court does not find it necessary in order to adjudicate the present case to enter into a general discussion on the relative merits, reliability and authority of the documents and studies prepared by the experts and consultants of the Parties. It needs only to be mindful of the fact that, despite the volume and complexity of the factual information submitted to it, it is the responsibility of the Court, after having given careful consideration to all the evidence placed before it by the Parties, to determine which facts must be considered relevant, to assess their probative value, and to draw conclusions from them as appropriate. Thus, in keeping with its practice, the Court will make its own determination of the facts, on the basis of the evidence

sentés, puis appliquera les règles pertinentes du droit international à ceux qu'elle aura jugés avérés.

B. Les violations alléguées des obligations de fond

169. La Cour examinera maintenant les violations alléguées des obligations de fond découlant du statut de 1975 commises par l'Uruguay en autorisant la construction et la mise en service de l'usine Orion (Botnia). En particulier, l'Argentine affirme que l'Uruguay a violé les obligations que lui imposent les articles premier, 27, 35, 36 et 41, alinéa *a)*, du statut de 1975 ainsi que d'«autres obligations découlant du droit international général, conventionnel et coutumier, ... nécessaires à l'application [de ce] statut...». L'Uruguay rejette ces allégations. Il considère par ailleurs que l'article 27 du statut de 1975 autorise les parties à utiliser les eaux du fleuve à des fins ménagères, sanitaires, industrielles et agricoles.

1. L'obligation de contribuer à l'utilisation rationnelle et optimale du fleuve (article premier)

170. Selon l'Argentine, l'Uruguay a violé son obligation de contribuer à l'«utilisation rationnelle et optimale du fleuve» en manquant de la consulter sur les actions propres à éviter une modification de l'équilibre écologique, et de prendre les mesures nécessaires pour empêcher une pollution. L'Argentine fait également valoir que, pour interpréter le statut de 1975 (en particulier ses articles 27, 35 et 36) selon le principe de l'utilisation équitable et raisonnable, il faut tenir compte de toutes les utilisations préalables et légitimes du fleuve, y compris son utilisation à des fins récréatives et touristiques.

171. Pour l'Uruguay, l'objet et le but du statut de 1975 sont d'organiser la coopération entre les Parties par l'intermédiaire de la CARU au service de leur objectif commun, celui d'assurer une utilisation équitable et durable des eaux et des ressources biologiques du fleuve. L'Uruguay estime, d'une part, n'avoir contrevenu en rien au principe de l'utilisation équitable et raisonnable du fleuve et, d'autre part, que ce principe ne peut être invoqué pour privilégier des utilisations préalables du fleuve, liées par exemple au tourisme ou à la pêche, par rapport à de nouvelles utilisations.

172. Les Parties sont également en désaccord sur la portée et les implications de l'article 27 du statut de 1975 concernant le droit de chacune d'elles d'utiliser les eaux du fleuve, à l'intérieur de sa juridiction, à des fins ménagères, sanitaires, industrielles et agricoles.

173. La Cour fait observer que, comme l'indique le titre de son chapitre I, le statut de 1975 expose, en son article premier, le but de cet instrument. En tant que tel, l'article premier éclaire l'interprétation des obligations de fond mais ne confère pas, en lui-même, de droits ou d'obligations spécifiques aux parties. Celles-ci sont tenues de garantir l'utilisation rationnelle et optimale du fleuve Uruguay en se conformant aux obliga-

presented to it, and then it will apply the relevant rules of international law to those facts which it has found to have existed.

B. Alleged Violations of Substantive Obligations

169. The Court now turns to the examination of the alleged violations by Uruguay of its substantive obligations under the 1975 Statute by authorizing the construction and operation of the Orion (Botnia) mill. In particular, Argentina contends that Uruguay has breached its obligations under Articles 1, 27, 35, 36 and 41 *(a)* of the 1975 Statute and "other obligations deriving from . . . general, conventional and customary international law which are necessary for the application of the 1975 Statute". Uruguay rejects these allegations. Uruguay considers furthermore that Article 27 of the 1975 Statute allows the parties to use the waters of the river for domestic, sanitary, industrial and agricultural purposes.

1. The obligation to contribute to the optimum and rational utilization of the river (Article 1)

170. According to Argentina, Uruguay has breached its obligation to contribute to the "optimum and rational utilization of the river" by failing to co-ordinate with Argentina on measures necessary to avoid ecological change, and by failing to take the measures necessary to prevent pollution. Argentina also maintains that, in interpreting the 1975 Statute (in particular Articles 27, 35, and 36 thereof) according to the principle of equitable and reasonable use, account must be taken of all pre-existing legitimate uses of the river, including in particular its use for recreational and tourist purposes.

171. For Uruguay, the object and purpose of the 1975 Statute is to establish a structure for co-operation between the Parties through CARU in pursuit of the shared goal of equitable and sustainable use of the water and biological resources of the river. Uruguay contends that it has in no way breached the principle of equitable and reasonable use of the river and that this principle provides no basis for favouring pre-existing uses of the river, such as tourism or fishing, over other, new uses.

172. The Parties also disagree on the scope and implications of Article 27 of the 1975 Statute on the right of each Party to use the waters of the river, within its jurisdiction, for domestic, sanitary, industrial and agricultural purposes.

173. The Court observes that Article 1, as stated in the title to Chapter I of the 1975 Statute, sets out the purpose of the Statute. As such, it informs the interpretation of the substantive obligations, but does not by itself lay down specific rights and obligations for the parties. Optimum and rational utilization is to be achieved through compliance with the obligations prescribed by the 1975 Statute for the protection of the envi-

tions prescrites par le statut aux fins de la protection de l'environnement et de la gestion conjointe de cette ressource partagée. Cet objectif doit aussi être poursuivi par le biais de la CARU, qui constitue le «mécanisme commun» nécessaire à sa réalisation, ainsi que par le biais des règles adoptées par cette commission et des normes et mesures adoptées par les Parties.

174. La Cour rappellera que les Parties ont conclu le traité contenant le statut de 1975 en application de l'article 7 du traité de 1961, qui leur faisait obligation d'établir conjointement un code de l'utilisation du fleuve comprenant, entre autres, des dispositions visant à prévenir la pollution et à protéger et préserver le milieu aquatique. Ainsi, l'utilisation rationnelle et optimale des eaux du fleuve peut être considérée comme la pierre angulaire du système de coopération institué par le statut de 1975 et du mécanisme commun destiné à assurer cette coopération.

175. La Cour considère que, pour parvenir à une utilisation rationnelle et optimale, un équilibre doit être trouvé entre, d'une part, les droits et les besoins des Parties concernant l'utilisation du fleuve à des fins économiques et commerciales et, d'autre part, l'obligation de protéger celui-ci de tout dommage à l'environnement susceptible d'être causé par de telles activités. Cette nécessité d'assurer un tel équilibre ressort de plusieurs dispositions du statut de 1975 établissant les droits et obligations des Parties, telles que les articles 27, 36 et 41. La Cour appréciera donc le comportement de l'Uruguay en ce qui concerne l'autorisation de la construction et de la mise en service de l'usine Orion (Botnia) à la lumière de ces dispositions du statut, et des droits et obligations énoncés dans celles-ci.

176. La Cour a déjà examiné aux paragraphes 84 à 93 ci-dessus le rôle de la CARU par rapport aux obligations de nature procédurale établies dans le statut de 1975. En plus de son rôle à cet égard, les fonctions de la CARU concernent presque tous les aspects de la mise en œuvre des dispositions de fond du statut de 1975. Les fonctions de réglementation de la commission dans le domaine de la conservation et de la préservation des ressources biologiques, de la prévention et de la surveillance de la pollution, ainsi que celles qui concernent la coordination des mesures prises par les Parties, revêtent une importance particulière dans la présente affaire. La Cour les examinera au stade de son analyse des positions des Parties sur l'interprétation et l'application des articles 36 et 41 du statut de 1975.

177. Quant à l'article 27, la Cour considère que son libellé reflète non seulement la nécessité de concilier les intérêts variés des Etats riverains dans un contexte transfrontière et, en particulier, dans l'utilisation d'une ressource naturelle partagée, mais aussi celle de trouver un équilibre entre l'utilisation et la protection des eaux du fleuve qui soit conforme à l'objectif de développement durable. La Cour a déjà examiné les obligations découlant des articles 7 à 12 du statut de 1975 qui, selon l'article 27, doivent être respectées par toute partie souhaitant exercer son droit d'utiliser les eaux du fleuve pour l'une quelconque des fins y énoncées dès lors que le régime du fleuve ou la qualité de ses eaux risque de pâtir de cette

ronment and the joint management of this shared resource. This objective must also be ensured through CARU, which constitutes "the joint machinery" necessary for its achievement, and through the regulations adopted by it as well as the regulations and measures adopted by the Parties.

174. The Court recalls that the Parties concluded the treaty embodying the 1975 Statute, in implementation of Article 7 of the 1961 Treaty, requiring the Parties jointly to establish a régime for the use of the river covering, *inter alia*, provisions for preventing pollution and protecting and preserving the aquatic environment. Thus, optimum and rational utilization may be viewed as the cornerstone of the system of co-operation established in the 1975 Statute and the joint machinery set up to implement this co-operation.

175. The Court considers that the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other. The need for this balance is reflected in various provisions of the 1975 Statute establishing rights and obligations for the Parties, such as Articles 27, 36, and 41. The Court will therefore assess the conduct of Uruguay in authorizing the construction and operation of the Orion (Botnia) mill in the light of those provisions of the 1975 Statute, and the rights and obligations prescribed therein.

176. The Court has already addressed in paragraphs 84 to 93 above the role of CARU with respect to the procedural obligations laid down in the 1975 Statute. In addition to its role in that context, the functions of CARU relate to almost all aspects of the implementation of the substantive provisions of the 1975 Statute. Of particular relevance in the present case are its functions relating to rule-making in respect of conservation and preservation of living resources, the prevention of pollution and its monitoring, and the co-ordination of actions of the Parties. These functions will be examined by the Court in its analysis of the positions of the Parties with respect to the interpretation and application of Articles 36 and 41 of the 1975 Statute.

177. Regarding Article 27, it is the view of the Court that its formulation reflects not only the need to reconcile the varied interests of riparian States in a transboundary context and in particular in the use of a shared natural resource, but also the need to strike a balance between the use of the waters and the protection of the river consistent with the objective of sustainable development. The Court has already dealt with the obligations arising from Articles 7 to 12 of the 1975 Statute which have to be observed, according to Article 27, by any party wishing to exercise its right to use the waters of the river for any of the purposes mentioned therein insofar as such use may be liable to affect the régime of the river

utilisation. La Cour tient à ajouter que l'utilisation en question ne pourrait être jugée équitable et raisonnable s'il n'était pas tenu compte des intérêts de l'autre Etat riverain à l'égard de la ressource partagée et de la protection environnementale de cette dernière. Aussi la Cour est-elle d'avis que l'article 27 traduit ce lien étroit entre l'utilisation équitable et raisonnable d'une ressource partagée et la nécessité de concilier le développement économique et la protection de l'environnement qui est au cœur du développement durable.

2. L'obligation de veiller à ce que la gestion du sol et des forêts ne cause pas un préjudice au régime du fleuve ou à la qualité de ses eaux (article 35)

178. A l'article 35 du statut de 1975, les parties:

> «s'obligent à adopter les mesures nécessaires pour que la gestion du sol et des forêts, l'utilisation des eaux souterraines et celle des affluents du fleuve n'entraînent pas de modification causant un préjudice sensible au régime de ce dernier ou à la qualité de ses eaux».

179. L'Argentine soutient que la décision de l'Uruguay de procéder à d'importantes plantations d'eucalyptus afin de fournir de la matière première à l'usine Orion (Botnia) a des incidences non seulement sur la gestion des sols et des forêts uruguayennes, mais aussi sur la qualité des eaux du fleuve. Pour sa part, l'Uruguay affirme que l'Argentine n'expose aucun argument fondé sur la manière dont il gère ses sols et ses forêts — et qu'elle «n'a pas non plus formulé d'allégations relatives aux eaux des affluents».

180. La Cour fait observer que l'Argentine n'a apporté aucune preuve à l'appui de ce qu'elle avance. En outre, l'article 35 concerne la gestion des sols et des forêts ainsi que l'utilisation des eaux souterraines et des affluents, et rien dans les éléments de preuve produits par l'Argentine ne permet de relier directement la façon dont l'Uruguay gère ses sols et ses forêts, ou utilise les eaux souterraines et les affluents, aux modifications alléguées de la qualité des eaux du fleuve Uruguay que l'Argentine attribue à l'usine de pâte à papier Orion (Botnia). De fait, si elle a développé une longue argumentation quant aux effets des rejets de l'usine de pâte à papier sur la qualité des eaux du fleuve, l'Argentine a en revanche été nettement moins diserte quant à l'effet délétère qu'auraient eu sur la qualité de ces eaux les opérations de plantation d'eucalyptus effectuées par l'Uruguay. La Cour en conclut que l'Argentine n'a pas établi le bien-fondé de ses allégations sur ce point.

3. L'obligation de coordonner les mesures propres à éviter une modification de l'équilibre écologique (article 36)

181. L'Argentine soutient que l'Uruguay a violé l'article 36 du statut

or the quality of its waters. The Court wishes to add that such utilization could not be considered to be equitable and reasonable if the interests of the other riparian State in the shared resource and the environmental protection of the latter were not taken into account. Consequently, it is the opinion of the Court that Article 27 embodies this interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection that is the essence of sustainable development.

2. The obligation to ensure that the management of the soil and woodland does not impair the régime of the river or the quality of its waters (Article 35)

178. Article 35 of the 1975 Statute provides that the parties:

> "undertake to adopt the necessary measures to ensure that the management of the soil and woodland and the use of groundwater and the waters of the tributaries of the river do not cause changes which may significantly impair the régime of the river or the quality of its waters".

179. Argentina contends that Uruguay's decision to carry out major eucalyptus planting operations to supply the raw material for the Orion (Botnia) mill has an impact on management of the soil and Uruguayan woodland, but also on the quality of the waters of the river. For its part, Uruguay states that Argentina does not make any arguments that are based on Uruguay's management of soil or woodland — "nor has it made any allegations concerning the waters of tributaries".

180. The Court observes that Argentina has not provided any evidence to support its contention. Moreover, Article 35 concerns the management of the soil and woodland as well as the use of groundwater and the water of tributaries, and there is nothing to suggest, in the evidentiary material submitted by Argentina, a direct relationship between Uruguay's management of the soil and woodland, or its use of ground water and water of tributaries and the alleged changes in the quality of the waters of the River Uruguay which had been attributed by Argentina to the Orion (Botnia) mill. Indeed, while Argentina made lengthy arguments about the effects of the pulp mill discharges on the quality of the waters of the river, no similar arguments have been presented to the Court regarding a deleterious relationship between the quality of the waters of the river and the eucalyptus-planting operations by Uruguay. The Court concludes that Argentina has not established its contention on this matter.

3. The obligation to co-ordinate measures to avoid changes in the ecological balance (Article 36)

181. Argentina contends that Uruguay has breached Article 36 of the

de 1975, qui fait obligation aux Parties de coordonner, par l'intermédiaire de la CARU, les mesures propres à éviter une modification de l'équilibre écologique du fleuve. Elle indique que les rejets de l'usine Orion (Botnia) ont modifié cet équilibre, et cite à titre d'exemples la prolifération d'algues du 4 février 2009, qui constitue selon elle une preuve flagrante d'une telle modification, et les rejets de toxines qui seraient à l'origine des malformations observées chez les rotifères dont des photographies ont été présentées à la Cour.

182. L'Uruguay considère que toute appréciation du comportement des Parties en ce qui concerne l'article 36 du statut de 1975 doit tenir compte des règles adoptées par la CARU, car cet article, qui crée une obligation de coopération, fait référence à ces règles et n'interdit pas en soi tel ou tel comportement. L'Uruguay estime que l'usine satisfait pleinement aux exigences de la CARU concernant l'équilibre écologique du fleuve, et conclut qu'il n'a pas agi de manière contraire à l'article 36 du statut de 1975.

183. Il est rappelé que, aux termes de l'article 36, «[l]es parties coordonnent, par l'intermédiaire de la commission, les mesures propres à éviter une modification de l'équilibre écologique et à contenir les fléaux et autres facteurs nocifs sur le fleuve et dans ses zones d'influence».

184. La Cour est d'avis que les Parties ne sauraient satisfaire à cette obligation isolément, par des actes individuels. Le respect de cette obligation exige une action concertée, par l'intermédiaire de la commission. Cette obligation est l'expression de la recherche par le statut de 1975 de l'intérêt collectif, et reflète l'un des objectifs ayant présidé à la mise en place de mécanismes communs, à savoir celui d'assurer une coordination entre les initiatives et mesures prises par les Parties aux fins de la gestion durable et de la protection environnementale du fleuve. Les Parties ont effectivement coordonné leur action en promulguant, dans le cadre de la commission, des normes qui figurent aux points E3 et E4 du digeste de la CARU. L'un des objectifs énoncés au point E3 consiste à «[p]rotéger et préserver le milieu aquatique et son équilibre écologique». De même, il est indiqué au point E4 que celui-ci a été élaboré «suivant ce qui [était] ... établi dans le[s] ... [a]rticles 36, 37, 38 et 39».

185. Selon la Cour, l'article 36 du statut de 1975 vise à empêcher toute pollution transfrontière susceptible de modifier l'équilibre écologique du fleuve, en coordonnant l'adoption des mesures nécessaires à cette fin, par l'intermédiaire de la CARU. Il oblige donc les deux Etats à prendre des mesures concrètes pour éviter toute modification de l'équilibre écologique. Ces mesures ne se limitent pas à l'adoption d'un cadre réglementaire — ce qu'ont fait les Parties par l'intermédiaire de la CARU; les deux Parties sont également tenues de respecter et de mettre en œuvre les mesures ainsi adoptées. Comme la Cour l'a souligné dans l'affaire relative au *Projet Gabčíkovo-Nagymaros*:

> «dans le domaine de la protection de l'environnement, la vigilance et la prévention s'imposent en raison du caractère souvent irréversible

1975 Statute, which places the Parties under an obligation to co-ordinate through CARU the necessary measures to avoid changing the ecological balance of the river. Argentina asserts that the discharges from the Orion (Botnia) mill altered the ecological balance of the river, and cites as examples the 4 February 2009 algal bloom, which, according to it, provides graphic evidence of a change in the ecological balance, as well as the discharge of toxins, which gave rise, in its view, to the malformed rotifers whose pictures were shown to the Court.

182. Uruguay considers that any assessment of the Parties' conduct in relation to Article 36 of the 1975 Statute must take account of the rules adopted by CARU, because this Article, creating an obligation of co-operation, refers to such rules and does not by itself prohibit any specific conduct. Uruguay takes the position that the mill fully meets CARU requirements concerning the ecological balance of the river, and concludes that it has not acted in breach of Article 36 of the 1975 Statute.

183. It is recalled that Article 36 provides that "[t]he parties shall co-ordinate, through the Commission, the necessary measures to avoid any change in the ecological balance and to control pests and other harmful factors in the river and the areas affected by it".

184. It is the opinion of the Court that compliance with this obligation cannot be expected to come through the individual action of either Party, acting on its own. Its implementation requires co-ordination through the Commission. It reflects the common interest dimension of the 1975 Statute and expresses one of the purposes for the establishment of the joint machinery which is to co-ordinate the actions and measures taken by the Parties for the sustainable management and environmental protection of the river. The Parties have indeed adopted such measures through the promulgation of standards by CARU. These standards are to be found in Sections E3 and E4 of the CARU Digest. One of the purposes of Section E3 is "[t]o protect and preserve the water and its ecological balance". Similarly, it is stated in Section E4 that the section was developed "in accordance with . . . Articles 36, 37, 38, and 39".

185. In the view of the Court, the purpose of Article 36 of the 1975 Statute is to prevent any transboundary pollution liable to change the ecological balance of the river by co-ordinating, through CARU, the adoption of the necessary measures. It thus imposes an obligation on both States to take positive steps to avoid changes in the ecological balance. These steps consist not only in the adoption of a regulatory framework, as has been done by the Parties through CARU, but also in the observance as well as enforcement by both Parties of the measures adopted. As the Court emphasized in the *Gabčíkovo-Nagymaros* case:

> "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage

des dommages causés à l'environnement et des limites inhérentes au mécanisme même de réparation de ce type de dommages» (*Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 78, par. 140).

186. Les Parties divergent encore quant à la nature de l'obligation énoncée à l'article 36; elles s'opposent en particulier sur la question de savoir s'il s'agit d'une obligation de comportement ou de résultat. L'Argentine soutient que, suivant leur sens ordinaire, les articles 36 et 41 du statut de 1975 établissent l'un et l'autre une obligation de résultat.

187. La Cour considère que l'obligation formulée à l'article 36 incombe aux deux Parties et leur impose d'adopter un comportement spécifique consistant à prendre les mesures nécessaires de façon coordonnée, par l'intermédiaire de la commission, pour éviter toute modification de l'équilibre écologique. L'obligation d'adopter des mesures réglementaires ou administratives, que ce soit de manière individuelle ou conjointe, et de les mettre en œuvre constitue une obligation de comportement. Les deux Parties doivent donc, en application de l'article 36, faire preuve de la diligence requise («due diligence») en agissant dans le cadre de la commission pour prendre les mesures nécessaires à la préservation de l'équilibre écologique du fleuve.

188. Cette vigilance et cette prévention sont particulièrement importantes lorsqu'il s'agit de préserver l'équilibre écologique puisque les effets négatifs des activités humaines sur les eaux du fleuve risquent de toucher d'autres composantes de l'écosystème du cours d'eau, telles que sa flore, sa faune et son lit. L'obligation de coordonner, par l'intermédiaire de la commission, l'adoption des mesures nécessaires, ainsi que la mise en application et le respect de ces mesures, jouent dans ce contexte un rôle central dans le système global de protection du fleuve Uruguay établi par le statut de 1975. Il est dès lors d'une importance cruciale que les Parties respectent cette obligation.

189. La Cour conclut des développements qui précèdent que l'Argentine n'a pas démontré de manière convaincante que l'Uruguay a refusé de prendre part aux efforts de coordination prévus par l'article 36, en violation de celui-ci.

4. L'obligation d'empêcher la pollution et de préserver le milieu aquatique (article 41)

190. L'article 41 est ainsi libellé:

«Sans préjudice des fonctions assignées à la commission en la matière, les parties s'obligent:

a) à protéger et à préserver le milieu aquatique et, en particulier, à en empêcher la pollution en établissant des normes et en adoptant les mesures appropriées, conformément aux accords internationaux applicables et, le cas échéant, en harmonie avec les

to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140).

186. The Parties also disagree with respect to the nature of the obligation laid down in Article 36, and in particular whether it is an obligation of conduct or of result. Argentina submits that, on a plain meaning, both Articles 36 and 41 of the 1975 Statute establish an obligation of result.

187. The Court considers that the obligation laid down in Article 36 is addressed to both Parties and prescribes the specific conduct of co-ordinating the necessary measures through the Commission to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct. Both Parties are therefore called upon, under Article 36, to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river.

188. This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil. The obligation to co-ordinate, through the Commission, the adoption of the necessary measures, as well as their enforcement and observance, assumes, in this context, a central role in the overall system of protection of the River Uruguay established by the 1975 Statute. It is therefore of crucial importance that the Parties respect this obligation.

189. In light of the above, the Court is of the view that Argentina has not convincingly demonstrated that Uruguay has refused to engage in such co-ordination as envisaged by Article 36, in breach of that provision.

4. The obligation to prevent pollution and preserve the aquatic environment (Article 41)

190. Article 41 provides that:

"Without prejudice to the functions assigned to the Commission in this respect, the parties undertake:

(a) to protect and preserve the aquatic environment and, in particular, to prevent its pollution, by prescribing appropriate rules and [adopting appropriate] measures in accordance with applicable international agreements and in keeping, where rele-

directives et les recommandations des organismes techniques internationaux;

b) à ne pas abaisser, dans leurs systèmes juridiques respectifs:

1) les normes techniques en vigueur pour prévenir la pollution des eaux, et
2) les pénalités établies pour les infractions;

c) à s'informer mutuellement des normes qu'elles se proposent d'établir en matière de pollution des eaux, en vue d'établir des normes équivalentes dans leurs systèmes juridiques respectifs.»

191. Selon l'Argentine, en autorisant le rejet de nutriments supplémentaires dans un fleuve qui connaît des phénomènes d'eutrophisation, d'inversion de courant et de stagnation, l'Uruguay a violé l'obligation qui lui incombe d'empêcher la pollution, faute d'avoir prescrit des mesures appropriées en ce qui concerne l'usine Orion (Botnia) et respecté les accords internationaux en matière d'environnement applicables, notamment la convention sur la diversité biologique et la convention de Ramsar. Elle soutient que le statut de 1975 interdit toute pollution portant atteinte à la protection et à la préservation du milieu aquatique ou modifiant l'équilibre écologique du fleuve. L'Argentine affirme en outre que l'obligation d'empêcher la pollution du fleuve est une obligation de résultat et qu'elle ne porte pas seulement sur la protection du milieu aquatique proprement dit, mais s'étend également à toute utilisation raisonnable et légitime du fleuve, y compris au tourisme et aux autres usages récréatifs.

192. L'Uruguay soutient que l'obligation d'«empêcher la pollution» énoncée à l'alinéa *a)* de l'article 41 du statut de 1975 n'emporte pas l'interdiction de tout déversement dans le fleuve. Seuls les rejets supérieurs aux limites fixées conjointement par les Parties au sein de la CARU, conformément à leurs obligations internationales, et qui ont pour cette raison des effets préjudiciables, sont susceptibles d'être qualifiés de «pollution» au sens de l'article 40 du statut de 1975. De surcroît, l'Uruguay estime que l'article 41 crée une obligation de comportement, et non de résultat, mais que, de fait, cela importe peu puisqu'il s'est acquitté de son devoir d'empêcher la pollution en exigeant de l'usine qu'elle réponde aux normes relatives aux meilleures techniques disponibles.

193. Avant d'en venir à l'analyse de l'article 41, la Cour rappelle ce qui suit:

> «L'obligation générale qu'ont les Etats de veiller à ce que les activités exercées dans les limites de leur juridiction ou sous leur contrôle respectent l'environnement dans d'autres Etats ou dans des zones ne relevant d'aucune juridiction nationale fait maintenant partie du corps de règles du droit international de l'environnement.» (*Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996 (I)*, p. 242, par. 29.)

194. Dans le cadre de l'affaire relative au *Projet Gabčíkovo-Nagymaros*, la Cour a par ailleurs eu l'occasion de souligner que «les

vant, with the guidelines and recommendations of international technical bodies;

(b) not to reduce in their respective legal systems:

1. the technical requirements in force for preventing water pollution, and
2. the severity of the penalties established for violations;

(c) to inform one another of any rules which they plan to prescribe with regard to water pollution in order to establish equivalent rules in their respective legal systems."

191. Argentina claims that by allowing the discharge of additional nutrients into a river that is eutrophic and suffers from reverse flow and stagnation, Uruguay violated the obligation to prevent pollution, as it failed to prescribe appropriate measures in relation to the Orion (Botnia) mill, and failed to meet applicable international environmental agreements, including the Biodiversity Convention and the Ramsar Convention. It maintains that the 1975 Statute prohibits any pollution which is prejudicial to the protection and preservation of the aquatic environment or which alters the ecological balance of the river. Argentina further argues that the obligation to prevent pollution of the river is an obligation of result and extends not only to protecting the aquatic environment proper, but also to any reasonable and legitimate use of the river, including tourism and other recreational uses.

192. Uruguay contends that the obligation laid down in Article 41 *(a)* of the 1975 Statute to "prevent . . . pollution" does not involve a prohibition on all discharges into the river. It is only those that exceed the standards jointly agreed by the Parties within CARU in accordance with their international obligations, and that therefore have harmful effects, which can be characterized as "pollution" under Article 40 of the 1975 Statute. Uruguay also maintains that Article 41 creates an obligation of conduct, and not of result, but that it actually matters little since Uruguay has complied with its duty to prevent pollution by requiring the plant to meet best available technology ("BAT") standards.

193. Before turning to the analysis of Article 41, the Court recalls that:

> "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29.)

194. The Court moreover had occasion to stress, in the *Gabčíkovo-Nagymaros Project* case, that "the Parties together should look afresh at

Parties devraient, ensemble, examiner à nouveau les effets sur l'environnement de l'exploitation de la centrale de Gabčíkovo» (*Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 78, par. 140). C'est en gardant à l'esprit ces déclarations que la Cour analysera maintenant l'article 41 du statut de 1975.

195. Compte tenu du rôle central de cette disposition dans le différend qui oppose les Parties à la présente affaire, ainsi que des profondes divergences entre celles-ci en ce qui concerne l'interprétation et l'application de cette disposition, la Cour souhaiterait faire quelques observations d'ordre général sur le contenu normatif de l'article 41 avant de se pencher sur les arguments spécifiques des Parties. Premièrement, selon la Cour, l'article 41 établit une distinction claire entre les fonctions réglementaires confiées à la CARU en vertu du statut de 1975 — qui font l'objet de l'article 56 — et l'obligation que ledit article impose aux Parties d'adopter individuellement des normes et des mesures destinées à «protéger et à préserver le milieu aquatique et, en particulier, à en empêcher la pollution». Ainsi, l'obligation que les Parties s'engagent à respecter en vertu de l'article 41, qui est distincte de celles prévues aux articles 36 et 56 du statut de 1975, consiste à adopter les normes et mesures appropriées au sein de leurs systèmes juridiques nationaux respectifs afin de protéger et de préserver le milieu aquatique et d'en empêcher la pollution. Cette conclusion est confortée par le libellé des alinéas *b)* et *c)* de l'article 41, qui mentionnent la nécessité pour les Parties de n'abaisser ni les normes techniques ni les pénalités en vigueur dans leurs législations respectives et de s'informer mutuellement des normes qu'elles se proposent d'édicter en vue d'établir des normes équivalentes dans leurs systèmes juridiques respectifs.

196. Deuxièmement, selon la Cour, une simple lecture du texte de l'article 41 montre que ce sont les normes et mesures que les Parties sont tenues d'établir dans leurs systèmes juridiques respectifs qui doivent être «conform[es] aux accords internationaux applicables» et, «le cas échéant, en harmonie avec les directives et les recommandations des organismes techniques internationaux».

197. Troisièmement, l'obligation de «préserver le milieu aquatique et, en particulier, [d']en empêcher la pollution en établissant des normes et en adoptant les mesures appropriées» impose d'exercer la diligence requise («due diligence») vis-à-vis de toutes les activités qui se déroulent sous la juridiction et le contrôle de chacune des parties. Cette obligation implique la nécessité non seulement d'adopter les normes et mesures appropriées, mais encore d'exercer un certain degré de vigilance dans leur mise en œuvre ainsi que dans le contrôle administratif des opérateurs publics et privés, par exemple en assurant la surveillance des activités entreprises par ces opérateurs, et ce, afin de préserver les droits de l'autre partie. Par conséquent, la responsabilité d'une partie au statut de 1975 serait engagée s'il était démontré qu'elle n'avait pas agi avec la diligence requise, faute d'avoir pris toutes les mesures appropriées pour assurer l'application de la réglementation pertinente à un opérateur public ou privé relevant de sa

the effects on the environment of the operation of the Gabčíkovo power plant" (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 78, para. 140). The Court is mindful of these statements in taking up now the examination of Article 41 of the 1975 Statute.

195. In view of the central role of this provision in the dispute between the Parties in the present case and their profound differences as to its interpretation and application, the Court will make a few remarks of a general character on the normative content of Article 41 before addressing the specific arguments of the Parties. First, in the view of the Court, Article 41 makes a clear distinction between regulatory functions entrusted to CARU under the 1975 Statute, which are dealt with in Article 56 of the Statute, and the obligation it imposes on the Parties to adopt rules and measures individually to "protect and preserve the aquatic environment and, in particular, to prevent its pollution". Thus, the obligation assumed by the Parties under Article 41, which is distinct from those under Articles 36 and 56 of the 1975 Statute, is to adopt appropriate rules and measures within the framework of their respective domestic legal systems to protect and preserve the aquatic environment and to prevent pollution. This conclusion is supported by the wording of paragraphs *(b)* and *(c)* of Article 41, which refer to the need not to reduce the technical requirements and severity of the penalties already in force in the respective legislation of the Parties as well as the need to inform each other of the rules to be promulgated so as to establish equivalent rules in their legal systems.

196. Secondly, it is the opinion of the Court that a simple reading of the text of Article 41 indicates that it is the rules and measures that are to be prescribed by the Parties in their respective legal systems which must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies".

197. Thirdly, the obligation to "preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures" is an obligation to act with due diligence in respect of all activities which take place under the jurisdiction and control of each party. It is an obligation which entails not only the adoption of appropriate rules and measures, but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators, to safeguard the rights of the other party. The responsibility of a party to the 1975 Statute would therefore be engaged if it was shown that it had failed to act diligently and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction. The obligation of due diligence under Article 41 *(a)* in the adoption and enforcement of appropriate

juridiction. L'obligation de diligence requise qu'impose l'alinéa *a)* de l'article 41 en ce qui concerne l'adoption et la mise en œuvre des normes et mesures appropriées est encore renforcée par la double exigence que ces normes et mesures soient «conform[es] aux accords internationaux applicables» et, «le cas échéant, en harmonie avec les directives et les recommandations des organismes techniques internationaux». Cette exigence présente l'avantage de garantir que les normes et mesures adoptées par les parties soient conformes aux accords internationaux applicables et prennent en même temps en compte les normes techniques convenues au niveau international.

198. Enfin, la portée de l'obligation d'empêcher la pollution doit être déterminée à la lumière de la définition de la pollution donnée à l'article 40 du statut de 1975. Celui-ci se lit ainsi: «Aux fins du présent statut, le terme «pollution» désigne l'introduction directe ou indirecte par l'homme de substances ou d'énergie nocives dans le milieu aquatique», le concept d'«effets nocifs» étant pour sa part défini comme suit dans le digeste de la CARU:

> «tout changement de la qualité des eaux qui empêche ou entrave leur utilisation légitime, produisant des effets délétères ou portant atteinte aux ressources vivantes, un risque à la santé humaine, une menace aux activités aquatiques y compris la pêche, ou la réduction des activités de récréation» (titre I, chapitre 1, section 2, article 1, alinéa *c)*, du digeste de la CARU (E3)).

199. Le digeste reflète la volonté des Parties et leur interprétation des dispositions du statut de 1975. Tout comme de nombreuses autres dispositions du statut, l'article 41 énonce les obligations d'ordre général, dont les Parties sont convenues, de réglementer et de limiter l'utilisation du fleuve et de protéger son environnement; c'est par le biais de l'activité réglementaire coordonnée de la CARU, telle que définie à l'article 56 du statut, de l'activité réglementaire de chacune des parties, ou par ces deux moyens, qu'un contenu plus précis est donné à ces obligations d'ordre général. Les deux types d'activités réglementaires sont conçus pour être complémentaires. Ainsi qu'expliqué plus bas (voir paragraphes 201 à 202, et 214), les normes établies par la CARU concernent principalement la qualité de l'eau. Le digeste de la CARU établit seulement des limites générales pour certains rejets ou effluents provenant d'installations industrielles, tels que les «hydrocarbures», les «solides sédimentables» et les «huiles et graisses», mais prévoit explicitement que la réglementation de ces questions est du ressort de chacune des parties. Il dispose également que, en ce qui concerne les effluents relevant de leur juridiction, chacune des parties doit prendre les «mesures correctives» nécessaires pour assurer la conformité aux normes relatives à la qualité de l'eau (digeste de la CARU, point E3: pollution, titre 2, chapitre 5, section 1, article 3). En Uruguay, ces mesures ont pris la forme d'un règlement sur la qualité des eaux (décret n° 253/79) et, en ce qui concerne l'usine Orion (Botnia), des conditions imposées dans le cadre de l'autorisation délivrée par le

rules and measures is further reinforced by the requirement that such rules and measures must be "in accordance with applicable international agreements" and "in keeping, where relevant, with the guidelines and recommendations of international technical bodies". This requirement has the advantage of ensuring that the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards.

198. Finally, the scope of the obligation to prevent pollution must be determined in light of the definition of pollution given in Article 40 of the 1975 Statute. Article 40 provides that: "For the purposes of this Statute, pollution shall mean the direct or indirect introduction by man into the aquatic environment of substances or energy which have harmful effects." The term "harmful effects" is defined in the CARU Digest as:

> "any alteration of the water quality that prevents or hinders any legitimate use of the water, that causes deleterious effects or harm to living resources, risks to human health, or a threat to water activities including fishing or reduction of recreational activities" (Title I, Chapter 1, Section 2, Article 1 *(c)* of the Digest (E3)).

199. The Digest expresses the will of the Parties and their interpretation of the provisions of the 1975 Statute. Article 41, not unlike many other provisions of the 1975 Statute, lays down broad obligations agreed to by the Parties to regulate and limit their use of the river and to protect its environment. These broad obligations are given more specific content through the co-ordinated rule-making action of CARU as established under Article 56 of the 1975 Statute or through the regulatory action of each of the parties, or by both means. The two regulatory actions are meant to complement each other. As discussed below (see paragraphs 201 to 202, and 214), CARU standards concern mainly water quality. The CARU Digest sets only general limits on certain discharges or effluents from industrial plants such as: "hydrocarbons", "sedimentable solids", and "oils and greases". As the Digest makes explicit, those matters are left to each party to regulate. The Digest provides that, as regards effluents within its jurisdiction, each party shall take the appropriate "corrective measures" in order to assure compliance with water quality standards (CARU Digest, Sec. E3: Pollution, Title 2, Chapter 5, Section 1, Article 3). Uruguay has taken that action in its Regulation on Water Quality (Decree No. 253/79) and in relation to the Orion (Botnia) mill in the conditions stipulated in the authorization issued by MVOTMA. In Argentina, the Entre Ríos Province, which borders the river opposite the plant, has regulated industrial discharges in a decree that also recognizes the binding effect of the

MVOTMA. En Argentine, la province d'Entre Ríos, qui jouxte le fleuve sur la rive opposée au site de l'usine, a réglementé les rejets industriels par des décrets qui reconnaissent également le caractère contraignant du digeste de la CARU (décret réglementaire n° 5837, gouvernement d'Entre Ríos (26 décembre 1991), et décret réglementaire n° 5394, gouvernement d'Entre Ríos (7 avril 1997)).

200. La Cour estime qu'il convient de traiter à ce stade de la question des règles à l'aune desquelles doit s'apprécier toute allégation de violation et, plus précisément, l'existence d'«effets nocifs». La Cour considère qu'il convient de rechercher ces règles dans le statut de 1975, dans les mesures communes que les Parties ont adoptées de manière coordonnée par l'intermédiaire de la CARU (comme le prévoit le texte introductif des articles 41 et 56 du statut), et dans les dispositions réglementaires adoptées par chacune des Parties dans la mesure exigée par le statut de 1975 (comme le prévoient les alinéas *a), b)* et *c)* de l'article 41).

201. En vertu de l'alinéa *a)* de l'article 56, la CARU a notamment pour fonction d'établir le cadre réglementaire relatif à la prévention de la pollution ainsi qu'à la conservation et à la préservation des ressources biologiques. C'est dans l'exercice de ce pouvoir réglementaire que la commission a adopté en 1984 le digeste sur les utilisations des eaux du fleuve Uruguay, qu'elle a depuis modifié. En 1990, lorsqu'elles ont adopté le point E3 du digeste, les Parties ont indiqué l'avoir élaboré au titre de l'alinéa *f)* de l'article 7 du traité de 1961 ainsi que des articles 35, 36, 41 à 45 et 56, alinéa *a)*, point 4), du statut de 1975. Ainsi que mentionné dans le digeste, les «objectifs de base» du point E3 sont les suivants:

«*a)* protéger et préserver le milieu aquatique et son équilibre écologique;

b) assurer toute utilisation légitime des eaux, en tenant compte des besoins à long terme et particulièrement [de] ceux concernant la consommation humaine;

c) prévenir toute nouvelle forme de pollution et essayer de la réduire, lorsque les valeurs de référence adoptées pour les différentes utilisations légitimes des eaux du fleuve sont dépassées;

d) promouvoir la recherche scientifique en matière de pollution.» (Titre I, chapitre 2, section 1, article 1.)

202. Les normes établies dans le cadre du digeste ne sont toutefois pas exhaustives. Comme cela a été indiqué précédemment, il est prévu qu'elles soient complétées par les normes et mesures devant être adoptées par chacune des Parties dans le cadre de sa législation interne.

La Cour appliquera donc, outre le statut de 1975, ces deux ensembles de règles pour déterminer si les Parties ont violé les obligations qu'elles avaient contractées en ce qui concerne les rejets d'effluents de l'usine et l'impact de ces rejets sur la qualité des eaux, l'équilibre écologique et la diversité biologique du fleuve.

CARU Digest (Regulatory Decree No. 5837, Government of Entre Ríos, 26 December 1991, and Regulatory Decree No. 5394, Government of Entre Ríos, 7 April 1997).

200. The Court considers it appropriate to now address the question of the rules by which any allegations of breach are to be measured and, more specifically, by which the existence of "harmful effects" is to be determined. It is the view of the Court that these rules are to be found in the 1975 Statute, in the co-ordinated position of the Parties established through CARU (as the introductory phrases to Article 41 and Article 56 of the Statute contemplate) and in the regulations adopted by each Party within the limits prescribed by the 1975 Statute (as paragraphs *(a)*, *(b)* and *(c)* of Article 41 contemplate).

201. The functions of CARU under Article 56 *(a)* include making rules governing the prevention of pollution and the conservation and preservation of living resources. In the exercise of its rule-making power, the Commission adopted in 1984 the Digest on the uses of the waters of the River Uruguay and has amended it since. In 1990, when Section E3 of the Digest was adopted, the Parties recognized that it was drawn up under Article 7 *(f)* of the 1961 Treaty and Articles 35, 36, 41 to 45 and 56 *(a)* (4) of the 1975 Statute. As stated in the Digest, the "basic purposes" of Section E3 of the Digest are to be as follows:

"*(a)* to protect and preserve the water and its ecological balance;

(b) to ensure any legitimate use of the water considering long term needs and particularly human consumption needs;

(c) to prevent all new forms of pollution and to achieve its reduction in case the standard values adopted for the different legitimate uses of the River's water are exceeded;

(d) to promote scientific research on pollution." (Title I, Chapter 2, Section 1, Article 1.)

202. The standards laid down in the Digest are not, however, exhaustive. As pointed out earlier, they are to be complemented by the rules and measures to be adopted by each of the Parties within their domestic laws.

The Court will apply, in addition to the 1975 Statute, these two sets of rules to determine whether the obligations undertaken by the Parties have been breached in terms of the discharge of effluent by the mill as well as in respect of the impact of those discharges on the quality of the waters of the river, on its ecological balance and on its biodiversity.

a) *Evaluation de l'impact sur l'environnement*

203. La Cour se penchera maintenant sur la relation entre la nécessité de réaliser une évaluation de l'impact sur l'environnement, lorsque l'activité projetée risque d'avoir un effet préjudiciable sur une ressource partagée et de causer un dommage transfrontière, et les obligations qui incombent aux Parties en vertu des alinéas *a)* et *b)* de l'article 41 du statut de 1975. Les Parties conviennent de la nécessité de procéder à une évaluation de l'impact sur l'environnement. L'Argentine soutient que, prises dans leur globalité, les obligations prévues par le statut imposaient l'obligation de procéder à une évaluation de l'impact sur l'environnement avant d'autoriser Botnia à construire l'usine, ce dont convient l'Uruguay. En revanche, les Parties sont en désaccord quant à la portée et au contenu de l'évaluation de l'impact sur l'environnement à laquelle aurait dû procéder l'Uruguay en ce qui concerne le projet d'usine Orion (Botnia). L'Argentine soutient en premier lieu que l'Uruguay a manqué de s'assurer que «des évaluations environnementales complètes [avaient été] préparées préalablement à ses décisions d'autoriser la construction…» et, en second lieu, que «[l]es décisions de l'Uruguay [ont été] ... basées sur des évaluations environnementales qui [n'étaient] pas satisfaisantes», essentiellement parce que l'Uruguay n'a pas pris en compte l'ensemble des impacts potentiels de l'usine, alors que le droit international et la pratique internationale l'exigeaient; elle mentionne à cet égard la convention de 1991 sur l'évaluation de l'impact sur l'environnement dans un contexte transfrontière de la Commission économique des Nations Unies pour l'Europe (ci-après la «convention d'Espoo») (*RTNU*, vol. 1989, p. 309) ainsi que les buts et principes de l'évaluation de l'impact sur l'environnement adoptés en 1987 par le Programme des Nations Unies pour l'environnement (ci-après les «buts et principes du PNUE») (*UNEP/WG.152/4 Annexe (1987)*, document adopté par le conseil d'administration du PNUE lors de sa 14e session (déc. 14/25 (1987)). L'Uruguay admet que, conformément à la pratique internationale, une évaluation de l'impact sur l'environnement de l'usine Orion (Botnia) était nécessaire, mais soutient que le droit international n'impose aucune condition quant au contenu d'une telle évaluation, sa réalisation relevant d'une procédure nationale, et non internationale, du moins lorsque le projet concerné n'est pas un projet commun à plusieurs Etats. L'Uruguay estime que, en vertu de la pratique des Etats et du projet d'articles sur la prévention des dommages transfrontières résultant d'activités dangereuses adopté en 2001 par la Commission du droit international, le droit international lui impose uniquement d'évaluer les éventuels effets nocifs transfrontières du projet sur les êtres humains, les biens et l'environnement des autres Etats, sans qu'il soit nécessaire d'évaluer les risques lointains ou purement théoriques.

204. La Cour considère que, pour s'acquitter comme il se doit des obligations qu'elles tiennent des alinéas *a)* et *b)* de l'article 41 du statut de 1975, les Parties sont tenues, aux fins de protéger et de préserver le

(a) *Environmental Impact Assessment*

203. The Court will now turn to the relationship between the need for an environmental impact assessment, where the planned activity is liable to cause harm to a shared resource and transboundary harm, and the obligations of the Parties under Article 41 *(a)* and *(b)* of the 1975 Statute. The Parties agree on the necessity of conducting an environmental impact assessment. Argentina maintains that the obligations under the 1975 Statute viewed together impose an obligation to conduct an environmental impact assessment prior to authorizing Botnia to construct the plant. Uruguay also accepts that it is under such an obligation. The Parties disagree, however, with regard to the scope and content of the environmental impact assessment that Uruguay should have carried out with respect to the Orion (Botnia) mill project. Argentina maintains in the first place that Uruguay failed to ensure that "full environmental assessments [had been] produced, prior to its decision to authorize the construction . . ."; and in the second place that "Uruguay's decisions [were] . . . based on unsatisfactory environmental assessments", in particular because Uruguay failed to take account of all potential impacts from the mill, even though international law and practice require it, and refers in this context to the 1991 Convention on Environmental Impact Assessment in a Transboundary Context of the United Nations Economic Commission for Europe (hereinafter the "Espoo Convention") (*UNTS*, Vol. 1989, p. 309), and the 1987 Goals and Principles of Environmental Impact Assessment of the United Nations Environment Programme (hereinafter the "UNEP Goals and Principles") (*UNEP/WG.152/4 Annex (1987)*, document adopted by UNEP Governing Council at its 14th Session (Dec. 14/25 (1987)). Uruguay accepts that, in accordance with international practice, an environmental impact assessment of the Orion (Botnia) mill was necessary, but argues that international law does not impose any conditions upon the content of such an assessment, the preparation of which being a national, not international, procedure, at least where the project in question is not one common to several States. According to Uruguay, the only requirements international law imposes on it are that there must be assessments of the project's potential harmful transboundary effects on people, property and the environment of other States, as required by State practice and the International Law Commission 2001 draft Articles on Prevention of Transboundary Harm from Hazardous Activities, without there being any need to assess remote or purely speculative risks.

204. It is the opinion of the Court that in order for the Parties properly to comply with their obligations under Article 41 *(a)* and *(b)* of the 1975 Statute, they must, for the purposes of protecting and preserving the

milieu aquatique lorsqu'elles envisagent des activités pouvant éventuellement causer un dommage transfrontière, de procéder à une évaluation de l'impact sur l'environnement. Comme la Cour l'a relevé dans l'affaire du *Différend relatif à des droits de navigation et des droits connexes*,

> «il existe des cas où l'intention des parties au moment même de la conclusion du traité a été, ou peut être présumée avoir été, de conférer aux termes employés — ou à certains d'entre eux — un sens ou un contenu évolutif et non pas intangible, pour tenir compte notamment de l'évolution du droit international» (*Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 242, par. 64).

Ainsi, l'obligation de protéger et de préserver, énoncée à l'alinéa *a)* de l'article 41 du statut, doit être interprétée conformément à une pratique acceptée si largement par les Etats ces dernières années que l'on peut désormais considérer qu'il existe, en droit international général, une obligation de procéder à une évaluation de l'impact sur l'environnement lorsque l'activité industrielle projetée risque d'avoir un impact préjudiciable important dans un cadre transfrontière, et en particulier sur une ressource partagée. De plus, on ne pourrait considérer qu'une partie s'est acquittée de son obligation de diligence, et du devoir de vigilance et de prévention que cette obligation implique, dès lors que, prévoyant de réaliser un ouvrage suffisamment important pour affecter le régime du fleuve ou la qualité de ses eaux, elle n'aurait pas procédé à une évaluation de l'impact sur l'environnement permettant d'apprécier les effets éventuels de son projet.

205. La Cour note que ni le statut de 1975 ni le droit international général ne précisent la portée et le contenu des évaluations de l'impact sur l'environnement. Elle relève par ailleurs que l'Argentine et l'Uruguay ne sont pas parties à la convention d'Espoo. Enfin, elle constate que l'autre instrument cité par l'Argentine à l'appui de son argument, à savoir les buts et principes du PNUE, ne lie pas les Parties, mais doit, en tant qu'il s'agit de directives établies par un organisme technique international, être pris en compte par chacune des Parties conformément à l'alinéa *a)* de l'article 41 lorsqu'elle adopte des mesures dans le cadre de sa réglementation interne. En outre, cet instrument dispose seulement que «[l]es effets sur l'environnement devraient être évalués, dans une [évaluation de l'impact sur l'environnement], à un niveau de détail correspondant à leur importance probable du point de vue de l'environnement» (principe 5), mais ne spécifie aucunement les éléments qu'une telle évaluation doit à tout le moins contenir. Dès lors, la Cour estime qu'il revient à chaque Etat de déterminer, dans le cadre de sa législation nationale ou du processus d'autorisation du projet, la teneur exacte de l'évaluation de l'impact sur l'environnement requise dans chaque cas en prenant en compte la nature et l'ampleur du projet en cause et son impact négatif probable sur l'environnement, ainsi que la nécessité d'exercer, lorsqu'il procède à une telle évaluation, toute la diligence requise. La Cour estime par ailleurs

aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment. As the Court has observed in the case concerning the *Dispute Regarding Navigational and Related Rights*,

> "there are situations in which the parties' intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used — or some of them — a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law" (*Dispute Regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 242, para. 64).

In this sense, the obligation to protect and preserve, under Article 41 *(a)* of the Statute, has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.

205. The Court observes that neither the 1975 Statute nor general international law specify the scope and content of an environmental impact assessment. It points out moreover that Argentina and Uruguay are not parties to the Espoo Convention. Finally, the Court notes that the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties, but, as guidelines issued by an international technical body, has to be taken into account by each Party in accordance with Article 41 *(a)* in adopting measures within its domestic regulatory framework. Moreover, this instrument provides only that the "environmental effects in an EIA should be assessed with a degree of detail commensurate with their likely environmental significance" (Principle 5) without giving any indication of minimum core components of the assessment. Consequently, it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment. The Court also considers that an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once

qu'une évaluation de l'impact sur l'environnement doit être réalisée avant la mise en œuvre du projet. En outre, une fois les opérations commencées, une surveillance continue des effets dudit projet sur l'environnement sera mise en place, qui se poursuivra au besoin pendant toute la durée de vie du projet.

206. La Cour a déjà examiné la place qu'occupe l'évaluation de l'impact sur l'environnement dans le cadre des obligations de nature procédurale imposées aux Parties par le statut de 1975 (paragraphes 119 et 120). Elle se penchera à présent sur les points en litige concernant spécifiquement le rôle de ce type d'évaluation dans le respect des obligations de fond des Parties, c'est-à-dire sur les questions de savoir, d'une part, si cette évaluation aurait, sur le plan méthodologique, nécessairement dû envisager d'autres sites possibles, compte tenu de la capacité de réception du fleuve dans la zone où l'usine devait être construite, et, d'autre part, si les populations susceptibles d'être affectées, en l'occurrence les populations riveraines uruguayenne comme argentine, auraient dû être consultées, ou l'ont en fait été, dans le cadre d'une évaluation de l'impact sur l'environnement.

i) *Le choix du site de Fray Bentos pour l'usine Orion (Botnia)*

207. Selon l'Argentine, si l'évaluation de l'impact sur l'environnement réalisée par l'Uruguay est insuffisante, c'est notamment parce qu'elle ne prévoit pas d'autres emplacements possibles pour la construction de l'usine, comme l'exige le droit international (buts et principes du PNUE, convention d'Espoo, politique opérationnelle SFI 4.01). L'Argentine soutient que le site choisi est particulièrement sensible d'un point de vue écologique et qu'il n'est pas propice à la dispersion des polluants «eu égard à la nature des eaux qui recevront la pollution, à la propension du site à la sédimentation et à l'eutrophisation, au phénomène d'inversion de courant et à la proximité de l'agglomération la plus importante du fleuve Uruguay».

208. L'Uruguay répond que le site de Fray Bentos a été initialement retenu en raison du volume d'eau particulièrement important du fleuve à cet endroit, qui constituerait un facteur propice à la dilution des effluents. Il précise que le site est en outre aisément accessible par voie fluviale, ce qui facilite la livraison des matières premières, et qu'une main-d'œuvre locale y est disponible. L'Uruguay considère que, s'il existe une obligation d'envisager d'autres sites, les instruments invoqués en ce sens par l'Argentine ne font pas obligation de le faire dans le cadre d'une évaluation de l'impact sur l'environnement, à moins que les circonstances ne l'imposent. Enfin, l'Uruguay affirme qu'il a de toute façon étudié les autres sites possibles et que l'opportunité du choix du site de l'usine Orion (Botnia) a été évaluée de manière exhaustive.

209. La Cour examinera à présent la question de savoir si, d'une part, l'Uruguay a manqué d'exercer la diligence requise dans le cadre de son évaluation de l'impact sur l'environnement, en particulier en ce qui

operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.

206. The Court has already considered the role of the environmental impact assessment in the context of the procedural obligations of the Parties under the 1975 Statute (paragraphs 119 and 120). It will now deal with the specific points in dispute with regard to the role of this type of assessment in the fulfilment of the substantive obligations of the Parties, that is to say, first, whether such an assessment should have, as a matter of method, necessarily considered possible alternative sites, taking into account the receiving capacity of the river in the area where the plant was to be built and, secondly, whether the populations likely to be affected, in this case both the Uruguayan and Argentine riparian populations, should have, or have in fact, been consulted in the context of the environmental impact assessment.

(i) *The siting of the Orion (Botnia) mill at Fray Bentos*

207. According to Argentina, one reason why Uruguay's environmental impact assessment is inadequate is that it contains no analysis of alternatives for the choice of the mill site, whereas the study of alternative sites is required under international law (UNEP Goals and Principles, Espoo Convention, IFC Operational Policy 4.01). Argentina contends that the chosen site is particularly sensitive from an ecological point of view and unconducive to the dispersion of pollutants "[b]ecause of the nature of the waters which will receive the pollution, the propensity of the site to sedimentation and eutrophication, the phenomenon of reverse flow and the proximity of the largest settlement on the River Uruguay".

208. Uruguay counters that the Fray Bentos site was initially chosen because of the particularly large volume of water in the river at that location, which would serve to promote effluent dilution. Uruguay adds that the site is moreover easily accessible for river navigation, which facilitates delivery of raw materials, and local manpower is available there. Uruguay considers that, if there is an obligation to consider alternative sites, the instruments invoked for that purpose by Argentina do not require alternative locations to be considered as part of an environmental impact assessment unless it is necessary in the circumstances to do so. Finally, Uruguay affirms that in any case it did so and that the suitability of the Orion (Botnia) site was comprehensively assessed.

209. The Court will now consider, first, whether Uruguay failed to exercise due diligence in conducting the environmental impact assessment, particularly with respect to the choice of the location of the plant

concerne le choix de l'emplacement de l'usine, et si, d'autre part, le site retenu, en l'occurrence Fray Bentos, était impropre à la construction d'une installation produisant des rejets industriels de cette nature et de cette ampleur ou pouvait avoir un impact préjudiciable sur le fleuve.

210. S'agissant du premier point, la Cour a déjà indiqué que la convention d'Espoo n'était pas applicable en l'espèce (voir paragraphe 205 ci-dessus); pour ce qui est des buts et principes du PNUE auxquels l'Argentine fait référence, et dont le caractère juridique a été explicité plus haut au paragraphe 205, la Cour rappelle que l'alinéa *c)* du principe 4 dispose simplement qu'une évaluation de l'impact sur l'environnement doit au minimum contenir «[une] description des autres solutions possibles, le cas échéant». Il convient par ailleurs de noter que l'Uruguay a précisé à plusieurs reprises que l'opportunité du choix de Fray Bentos avait été évaluée de manière exhaustive et que d'autres emplacements possibles avaient été envisagés. La Cour relèvera encore que l'étude d'impact cumulé (ci-après «CIS», selon l'acronyme anglais de «Cumulative Impact Study») finale réalisée par la SFI en septembre 2006 montre que Botnia a évalué au total quatre sites en 2003 — La Paloma, Paso de los Toros, Nueva Palmira et Fray Bentos —, avant de retenir celui de Fray Bentos. Ces évaluations concluaient que le site de La Paloma ne convenait pas parce que les quantités d'eau douce y étaient limitées et qu'il abritait d'importantes populations d'oiseaux, que celui de Nueva Palmira devait être écarté en raison de la présence de zones résidentielles, récréatives et culturellement importantes à proximité, et que celui de Paso de los Toros était à exclure en raison d'un trop faible débit pendant la saison sèche, d'un conflit potentiel avec d'autres utilisations de l'eau et d'un manque d'infrastructures. Dès lors, la Cour n'est pas convaincue par l'argument de l'Argentine selon lequel une évaluation des différents sites possibles n'a pas eu lieu avant le choix de l'emplacement définitif.

211. S'agissant du second point, la Cour ne peut manquer d'observer que le choix de l'emplacement effectif d'une usine telle que celle construite le long du fleuve Uruguay devrait tenir compte de la capacité des eaux du fleuve à recevoir, diluer et disperser des rejets d'effluents d'une installation de cette nature et de cette ampleur.

212. La Cour relève que, sur la question de la capacité de réception des eaux du fleuve à l'emplacement de l'usine, les Parties sont en désaccord sur les caractéristiques géomorphologiques et hydrodynamiques du fleuve dans la zone en question, notamment en ce qui concerne son débit et la manière dont le courant, y compris son sens et sa vitesse, agit à son tour sur la dispersion et la dilution des polluants. Les différentes interprétations avancées par les Parties quant au débit du fleuve résultent peut-être des différents modèles utilisés par celles-ci pour analyser les caractéristiques hydrodynamiques du fleuve Uruguay à Fray Bentos. L'Argentine a eu recours à un modèle tridimensionnel s'appuyant sur des mesures de la vitesse et du sens du courant à dix profondeurs différentes, et s'est servie d'un sonar — un profileur de courant à effet Doppler (ci-après «sonar

and, secondly, whether the particular location chosen for the siting of the plant, in this case Fray Bentos, was unsuitable for the construction of a plant discharging industrial effluent of this nature and on this scale, or could have a harmful impact on the river.

210. Regarding the first point, the Court has already indicated that the Espoo Convention is not applicable to the present case (see paragraph 205 above); while with respect to the UNEP Goals and Principles to which Argentina has referred, whose legal character has been described in paragraph 205 above, the Court recalls that Principle 4 *(c)* simply provides that an environmental impact assessment should include, at a minimum, "[a] description of practical alternatives, as appropriate". It is also to be recalled that Uruguay has repeatedly indicated that the suitability of the Fray Bentos location was comprehensively assessed and that other possible sites were considered. The Court further notes that the IFC's Final Cumulative Impact Study of September 2006 (hereinafter "CIS") shows that in 2003 Botnia evaluated four locations in total at La Paloma, at Paso de los Toros, at Nueva Palmira, and at Fray Bentos, before choosing Fray Bentos. The evaluations concluded that the limited amount of fresh water in La Paloma and its importance as a habitat for birds rendered it unsuitable, while for Nueva Palmira its consideration was discouraged by its proximity to residential, recreational, and culturally important areas, and with respect to Paso de los Toros insufficient flow of water during the dry season and potential conflict with competing water uses, as well as a lack of infrastructure, led to its exclusion. Consequently, the Court is not convinced by Argentina's argument that an assessment of possible sites was not carried out prior to the determination of the final site.

211. Regarding the second point, the Court cannot fail to note that any decision on the actual location of such a plant along the River Uruguay should take into account the capacity of the waters of the river to receive, dilute and disperse discharges of effluent from a plant of this nature and scale.

212. The Court notes, with regard to the receiving capacity of the river at the location of the mill, that the Parties disagree on the geomorphological and hydrodynamic characteristics of the river in the relevant area, particularly as they relate to river flow, and how the flow of the river, including its direction and its velocity, in turn determines the dispersal and dilution of pollutants. The differing views put forward by the Parties with regard to the river flow may be due to the different modelling systems which each has employed to analyse the hydrodynamic features of the River Uruguay at the Fray Bentos location. Argentina implemented a three-dimensional modelling that measured speed and direction at ten different depths of the river and used a sonar — an Acoustic Doppler Current Profiler (hereafter

ADCP») — pour enregistrer, pendant environ un an, la vitesse du courant à différentes profondeurs. Le système tridimensionnel a produit un grand nombre de données, intégrées ensuite dans un modèle hydrodynamique numérique. En revanche, Botnia a fondé son évaluation de l'impact sur l'environnement sur un modèle bidimensionnel — le RMA2. L'étude d'impact cumulé d'EcoMetrix, quant à elle, se fondait à la fois sur un modèle tridimensionnel et sur un modèle bidimensionnel, mais n'indiquait pas si un sonar ADCP avait été utilisé à différentes profondeurs.

213. La Cour n'estime pas nécessaire d'examiner en détail la validité scientifique et technique des différents types de modélisation, de calibrage et de validation mis en œuvre par les Parties pour déterminer le débit du fleuve et le sens de son courant dans la zone concernée. La Cour observe cependant que, si les deux Parties conviennent que des inversions de courant se produisent fréquemment et que des périodes de bas débit et de stagnation peuvent être observées dans la zone concernée, elles sont en désaccord sur les conséquences de ces phénomènes pour les rejets de l'usine Orion (Botnia) dans ce tronçon du fleuve.

214. La Cour est d'avis que, en élaborant ses normes relatives à la qualité de l'eau conformément aux articles 36 et 56 du statut de 1975, la CARU a certainement tenu compte de la capacité de réception et de la sensibilité des eaux du fleuve, y compris dans les zones fluviales qui bordent Fray Bentos. Dès lors, s'il n'est pas établi que les rejets d'effluents de l'usine Orion (Botnia) ont, du fait de leur taux de concentration, excédé les limites fixées par ces normes, la Cour ne saurait conclure que l'Uruguay a violé les obligations lui incombant en vertu du statut de 1975. Qui plus est, aucune des Parties n'a soutenu devant la Cour que, en élaborant ses normes relatives à la qualité de l'eau, la CARU n'avait pas dûment tenu compte des caractéristiques géomorphologiques et hydrologiques du fleuve et de la capacité de ses eaux à disperser et diluer différents types de rejets. La Cour estime que, si pareille insuffisance était avérée, notamment en ce qui concerne certaines portions du fleuve, telles que le tronçon qui borde Fray Bentos, les Parties devraient entamer une révision des normes relatives à la qualité de l'eau établies par la CARU pour s'assurer qu'elles tiennent bien compte des caractéristiques du fleuve et permettent d'en protéger les eaux et l'écosystème.

ii) *Consultation des populations concernées*

215. Les Parties sont en désaccord sur la mesure dans laquelle les populations susceptibles d'être affectées par la construction de l'usine Orion (Botnia), notamment les riverains en Argentine, ont été consultées au cours de la réalisation de l'évaluation de l'impact sur l'environnement. Les deux Parties conviennent que la consultation des populations concernées doit faire partie de l'évaluation de l'impact sur l'environnement, mais l'Argentine affirme que le droit international impose aux Etats des obligations spécifiques à cet égard. A l'appui de cet argument, elle cite les

"ADCP") — to record water flow velocities for a range of depths for about a year. The three-dimensional system generated a large number of data later introduced in a numerical hydrodynamic model. On the other hand, Botnia based its environmental impact assessment on a bi-dimensional modelling — the RMA2. The EcoMetrix CIS implemented both three-dimensional and bi-dimensional models. However, it is not mentioned whether an ADCP sonar was used at different depths.

213. The Court sees no need to go into a detailed examination of the scientific and technical validity of the different kinds of modelling, calibration and validation undertaken by the Parties to characterize the rate and direction of flow of the waters of the river in the relevant area. The Court notes however that both Parties agree that reverse flows occur frequently and that phenomena of low flow and stagnation may be observed in the concerned area, but that they disagree on the implications of this for the discharges from the Orion (Botnia) mill into this area of the river.

214. The Court considers that in establishing its water quality standards in accordance with Articles 36 and 56 of the 1975 Statute, CARU must have taken into account the receiving capacity and sensitivity of the waters of the river, including in the areas of the river adjacent to Fray Bentos. Consequently, in so far as it is not established that the discharges of effluent of the Orion (Botnia) mill have exceeded the limits set by those standards, in terms of the level of concentrations, the Court finds itself unable to conclude that Uruguay has violated its obligations under the 1975 Statute. Moreover, neither of the Parties has argued before the Court that the water quality standards established by CARU have not adequately taken into consideration the geomorphological and hydrological characteristics of the river and the capacity of its waters to disperse and dilute different types of discharges. The Court is of the opinion that, should such inadequacy be detected, particularly with respect to certain areas of the river such as at Fray Bentos, the Parties should initiate a review of the water quality standards set by CARU and ensure that such standards clearly reflect the characteristics of the river and are capable of protecting its waters and its ecosystem.

(ii) *Consultation of the affected populations*

215. The Parties disagree on the extent to which the populations likely to be affected by the construction of the Orion (Botnia) mill, particularly on the Argentine side of the river, were consulted in the course of the environmental impact assessment. While both Parties agree that consultation of the affected populations should form part of an environmental impact assessment, Argentina asserts that international law imposes specific obligations on States in this regard. In support of this argument, Argentina points to Articles 2.6 and 3.8 of

articles 2.6 et 3.8 de la convention d'Espoo, l'article 13 du projet d'articles de la Commission du droit international de 2001 sur la prévention des dommages transfrontières résultant d'activités dangereuses et les principes 7 et 8 des buts et principes du PNUE. L'Uruguay estime que les dispositions invoquées par l'Argentine ne peuvent servir de fondement juridique à une obligation de consulter les populations concernées et ajoute qu'en tout état de cause ces populations ont bien été consultées.

216. La Cour estime qu'aucune obligation juridique de consulter les populations concernées ne découle pour les Parties des instruments invoqués par l'Argentine.

217. En ce qui concerne les faits de l'espèce, la Cour note que, tant avant qu'après l'octroi de l'autorisation environnementale préalable, l'Uruguay a entrepris des activités visant à consulter les populations concernées, à la fois sur la rive argentine et sur la rive uruguayenne du fleuve. Ainsi, des réunions ont eu lieu le 2 décembre 2003 à Río Negro et le 26 mai 2004 à Fray Bentos, avec la participation d'organisations non gouvernementales argentines. En outre, le 21 décembre 2004, une séance publique de discussion a eu lieu à Fray Bentos, qui, selon l'Uruguay, a porté entre autres sujets sur la

> «manipulation de produits chimiques dans l'usine et dans le port, l'apparition de pluies acides, de dioxines, de furanes et d'autres composés polychlorés hautement toxiques pouvant avoir des effets dommageables sur l'environnement, la conformité à la convention de Stockholm, les rejets atmosphériques de l'usine, les émissions électromagnétiques et électrostatiques [et] les rejets liquides dans le fleuve».

Des habitants de Fray Bentos et des régions voisines d'Uruguay et d'Argentine ont participé à la réunion et présenté 138 documents, dans lesquels sont exposées leurs questions ou préoccupations.

218. De plus, la Cour note que, entre juin et novembre 2005, plus de quatre-vingts entretiens ont été menés par le Consensus Building Institute, organisation sans but lucratif spécialisée dans la facilitation du dialogue, la médiation et la négociation, que la SFI avait chargée de ce travail. Ces entretiens se sont déroulés entre autres à Fray Bentos, Gualeguaychú, Montevideo et Buenos Aires; y ont notamment participé des groupes de la société civile, des organisations non gouvernementales, des associations professionnelles, des représentants officiels, des agences de tourisme, des chefs d'entreprise locaux, des pêcheurs, des agriculteurs et des propriétaires de plantations des deux rives du fleuve. En décembre 2005, le projet d'étude d'impact cumulé et le rapport du Consensus Building Institute ont été publiés, et la SFI a ouvert une période de consultation afin de recevoir de nouveaux commentaires des parties prenantes en Argentine et en Uruguay.

219. Compte tenu de ce qui précède, la Cour constate qu'une consultation par l'Uruguay des populations concernées a bien eu lieu.

the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the UNEP Goals and Principles. Uruguay considers that the provisions invoked by Argentina cannot serve as a legal basis for an obligation to consult the affected populations and adds that in any event the affected populations had indeed been consulted.

216. The Court is of the view that no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina.

217. Regarding the facts, the Court notes that both before and after the granting of the initial environmental authorization, Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and the Uruguayan sides of the river. These activities included meetings on 2 December 2003 in Río Negro, and on 26 May 2004 in Fray Bentos, with participation of Argentine non-governmental organizations. In addition, on 21 December 2004, a public hearing was convened in Fray Bentos which, according to Uruguay, addressed among other subjects, the

> "handling of chemical products in the plant and in the port; the appearance of acid rain, dioxins, furans and other polychlorates of high toxicity that could affect the environment; compliance with the Stockholm Convention; atmospheric emissions of the plant; electromagnetic and electrostatic emissions; [and] liquid discharges into the river".

Inhabitants of Fray Bentos and nearby regions of Uruguay and Argentina participated in the meeting and submitted 138 documents containing questions or concerns.

218. Further, the Court notes that between June and November 2005 more than 80 interviews were conducted by the Consensus Building Institute, a non-profit organization specializing in facilitated dialogues, mediation, and negotiation, contracted by the IFC. Such interviews were conducted *inter alia* in Fray Bentos, Gualeguaychú, Montevideo, and Buenos Aires, with interviewees including civil society groups, non-governmental organizations, business associations, public officials, tourism operators, local business owners, fishermen, farmers and plantation owners on both sides of the river. In December 2005, the draft CIS and the report prepared by the Consensus Building Institute were released, and the IFC opened a period of consultation to receive additional feedback from stakeholders in Argentina and Uruguay.

219. In the light of the above, the Court finds that consultation by Uruguay of the affected populations did indeed take place.

b) *La question des techniques de production utilisées à l'usine Orion (Botnia)*

220. L'Argentine soutient que l'Uruguay n'a pas pris toutes les mesures propres à empêcher la pollution en n'exigeant pas de l'usine qu'elle utilise les «meilleures techniques disponibles», alors que cette exigence résulterait de l'alinéa *d)* de l'article 5 de la convention POP, dont les dispositions seraient incorporées, par l'effet de la «clause de renvoi», dans l'alinéa *a)* de l'article 41 du statut de 1975. Selon l'Argentine, les rapports d'experts qu'elle cite établissent que l'usine n'utilise pas les meilleures techniques disponibles et que ses performances sont en deçà des normes internationales, si l'on considère les diverses techniques de production de pâte à papier disponibles. L'Uruguay conteste ces affirmations. S'appuyant sur l'étude d'impact cumulé finale, le deuxième rapport Hatfield et l'audit réalisé à la demande de la SFI par l'AMEC, l'Uruguay affirme que, par la technologie qu'elle emploie, l'usine Orion (Botnia) est une des usines de pâte à papier les plus performantes au monde, mettant en œuvre les meilleures techniques disponibles et se conformant notamment aux normes fixées par l'Union européenne dans ce domaine.

221. L'Argentine, cependant, dénonce en particulier l'absence de tout «traitement tertiaire des effluents» (c'est-à-dire un troisième traitement des résidus de production avant leur rejet dans la nature), qui serait nécessaire pour réduire le volume des nutriments, dont le phosphore, dès lors que les rejets sont déversés dans un environnement très sensible. L'usine de pâte à papier est, selon l'Argentine, également dépourvue d'un bassin d'urgence vide, censé contenir les déversements soudains d'effluents. Répondant à une question posée par un juge, l'Argentine estime qu'il serait possible d'ajouter un système de traitement tertiaire, mais que l'Uruguay n'a pas évalué comme il se devait les possibilités s'offrant en la matière à l'usine Orion (Botnia).

222. L'Uruguay fait observer que «les experts n'ont pas jugé nécessaire de prévoir, pour l'usine, une phase de traitement tertiaire». En réponse à cette même question, l'Uruguay a fait valoir que, bien que possible, l'ajout d'une installation de traitement tertiaire ne serait pas globalement bénéfique pour l'environnement, puisqu'il entraînerait une hausse importante de la consommation d'énergie, des émissions de carbone de l'usine, de la production de boues et de l'utilisation de produits chimiques. L'Uruguay a invariablement soutenu que la technique de blanchiment utilisée était adéquate, que les bassins d'urgence installés étaient suffisants, que la production de composés chimiques synthétiques de l'usine répondait aux exigences technologiques et que le risque potentiel de cette production avait bien été évalué.

223. Tout d'abord, la Cour fera observer que l'obligation d'empêcher la pollution et de protéger ainsi que de préserver le milieu aquatique du fleuve Uruguay énoncée à l'alinéa *a)* de l'article 41, et l'exercice de la diligence requise («due diligence») qu'elle implique, entraîne la nécessité

(b) *Question of the production technology used in the Orion (Botnia) mill*

220. Argentina maintains that Uruguay has failed to take all measures to prevent pollution by not requiring the mill to employ the "best available techniques", even though this is required under Article 5 *(d)* of the POPs Convention, the provisions of which are incorporated by virtue of the "referral clause" in Article 41 *(a)* of the 1975 Statute. According to Argentina, the experts' reports it cites establish that the mill does not use best available techniques and that its performance is not up to international standards, in the light of the various techniques available for producing pulp. Uruguay contests these claims. Relying on the CIS, the second Hatfield report and the audit conducted by AMEC at the IFC's request, Uruguay asserts that the Orion (Botnia) mill is, by virtue of the technology employed there, one of the best pulp mills in the world, applying best available techniques and complying with European Union standards, among others, in the area.

221. Argentina, however, specifically criticizes the absence of any "tertiary treatment of effluent" (i.e., a third round of processing production waste before discharge into the natural environment), which is necessary to reduce the quantity of nutrients, including phosphorus, since the effluent is discharged into a highly sensitive environment. The mill also lacks, according to Argentina, an empty emergency basin, designed to contain effluent spills. Answering a question asked by a judge, Argentina considers that a tertiary treatment would be possible, but that Uruguay failed to conduct an adequate assessment of tertiary treatment options for the Orion (Botnia) mill.

222. Uruguay observes that "the experts did not consider it necessary to equip the mill with a tertiary treatment phase". Answering the same question, Uruguay argued that, though feasible, the addition of a tertiary treatment facility would not be environmentally advantageous overall, as it would significantly increase the energy consumption of the plant, its carbon emissions, together with sludge generation and chemical use. Uruguay has consistently maintained that the bleaching technology used is acceptable, that the emergency basins in place are adequate, that the mill's production of synthetic chemical compounds meets technological requirements and that the potential risk from this production was indeed assessed.

223. To begin with, the Court observes that the obligation to prevent pollution and protect and preserve the aquatic environment of the River Uruguay, laid down in Article 41 *(a)*, and the exercise of due diligence implied in it, entail a careful consideration of the technology to be used

d'examiner avec soin la technologie à laquelle l'installation industrielle a recours, en particulier dans un secteur tel que celui de la fabrication de pâte à papier, où sont souvent employées ou produites des substances ayant un impact sur l'environnement. Ce point est d'autant plus important que, aux termes de l'alinéa *a)* de l'article 41, le cadre réglementaire qu'il incombe aux Parties d'adopter doit être en harmonie avec les directives et les recommandations des organismes techniques internationaux.

224. La Cour note que l'usine Orion (Botnia) utilise le procédé Kraft de fabrication de pâte blanchie. D'après le document de référence de décembre 2001 sur les meilleures techniques disponibles en matière de prévention et de réduction intégrées de la pollution dans l'industrie de la pâte à papier (ci-après «IPPC-BAT») de la Commission européenne, que les Parties ont qualifié de texte de référence pour ce secteur, le procédé Kraft, déjà utilisé à l'époque dans environ 80 % de la production mondiale de pâte à papier, constitue donc le procédé de production chimique de pâte à papier le plus répandu. L'usine utilise un procédé de blanchiment exempt de chlore élémentaire dit «léger» («ECF light»), ainsi que des systèmes de traitement des eaux usées primaire et secondaire faisant intervenir un procédé de traitement par boues activées.

225. La Cour estime que, s'agissant de la technologie employée, et sur la base des documents que lui ont soumis les Parties, en particulier du document IPPC-BAT, aucun élément de preuve ne vient à l'appui de la prétention de l'Argentine selon laquelle l'usine Orion (Botnia) n'appliquerait pas les meilleures techniques disponibles en matière de rejets d'effluents par tonne de pâte à papier produite. Cette conclusion est étayée par le fait que, comme démontré ci-dessous, l'Argentine n'a pas présenté d'éléments de preuve établissant clairement que l'usine Orion (Botnia) ne respecte pas les prescriptions du statut de 1975, du digeste de la CARU ou des règlements applicables des Parties en ce qui concerne la concentration d'effluents par litre d'eaux usées déversés par l'usine et la quantité absolue d'effluents pouvant être rejetée en une journée.

226. La Cour rappelle que l'Uruguay a soumis de très nombreuses informations relatives à la surveillance des effluents de l'usine Orion (Botnia), qui figurent dans les multiples rapports établis par EcoMetrix et la DINAMA (évaluation indépendante de la performance environnementale, réalisée par EcoMetrix à la demande de la SFI (phase 2 : examen de la performance environnementale à six mois), juillet 2008 ; évaluation indépendante de la performance environnementale, réalisée par EcoMetrix à la demande de la SFI (phase 3 : examen de la performance environnementale de l'année 2008) (ci-après le «troisième rapport de suivi d'EcoMetrix»), mars 2009 ; DINAMA, rapport d'évaluation de la performance dans la première année d'opération de l'usine Orion (Botnia) et de la qualité de l'environnement dans la zone d'influence, mai 2009 ; DINAMA, rapport semestriel des résultats du plan de contrôle des émissions et de la performance environnementale), et que l'Argentine a avancé, à cet égard, que l'Uruguay bénéficiait, sur cette question, sinon de l'exclusivité des éléments de preuve factuels, du moins d'un accès très privilégié

by the industrial plant to be established, particularly in a sector such as pulp manufacturing, which often involves the use or production of substances which have an impact on the environment. This is all the more important in view of the fact that Article 41 *(a)* provides that the regulatory framework to be adopted by the Parties has to be in keeping with the guidelines and recommendations of international technical bodies.

224. The Court notes that the Orion (Botnia) mill uses the bleached Kraft pulping process. According to the December 2001 Integrated Pollution Prevention and Control Reference Document on Best Available Techniques in the Pulp and Paper Industry of the European Commission (hereinafter "IPPC-BAT"), which the Parties referred to as the industry standard in this sector, the Kraft process already accounted at that time for about 80 per cent of the world's pulp production and is therefore the most applied production method of chemical pulping processes. The plant employs an ECF-light (Elemental chlorine-free) bleaching process and a primary and secondary wastewater treatment involving activated sludge treatment.

225. The Court finds that, from the point of view of the technology employed, and based on the documents submitted to it by the Parties, particularly the IPPC-BAT, there is no evidence to support the claim of Argentina that the Orion (Botnia) mill is not BAT-compliant in terms of the discharges of effluent for each tonne of pulp produced. This finding is supported by the fact that, as shown below, no clear evidence has been presented by Argentina establishing that the Orion (Botnia) mill is not in compliance with the 1975 Statute, the CARU Digest and applicable regulations of the Parties in terms of the concentration of effluents per litre of wastewater discharged from the plant and the absolute amount of effluents that can be discharged in a day.

226. The Court recalls that Uruguay has submitted extensive data regarding the monitoring of effluent from the Orion (Botnia) mill, as contained in the various reports by EcoMetrix and DINAMA (EcoMetrix, Independent Performance Monitoring as required by the IFC Phase 2: Six Month Environmental Performance Review (July 2008); EcoMetrix, Independent Performance Monitoring as required by the IFC, Phase 3: Environmental Performance Review (2008 Monitoring Year) (hereinafter "EcoMetrix Third Monitoring Report"); DINAMA, Performance Report for the First Year of Operation of the Botnia Plant and the Environmental Quality of the Area of Influence, May 2009; DINAMA, Six Month Report on the Botnia Emission Control and Environmental Performance Plan), and that Argentina expressed the view, in this regard, that Uruguay had on this matter, much greater, if not exclusive, access to the factual evidence. However, the Court notes that Argentina has itself generated much factual information and that the materials which Uruguay produced have

à ceux-ci. La Cour note cependant que l'Argentine a elle-même produit un grand nombre d'informations factuelles, et que les éléments soumis par l'Uruguay ou bien lui ont été accessibles à différents stades de la procédure ou bien figurent dans le domaine public. Aussi n'estime-t-elle pas que l'Argentine ait été désavantagée en ce qui concerne la production d'éléments de preuve relatifs aux déversements d'effluents provenant de l'usine de pâte à papier.

227. Afin de déterminer si les concentrations des polluants déversés par l'usine Orion (Botnia) respectent les limites réglementaires, la Cour devra les évaluer à l'aune des limites autorisées en matière de rejet d'effluents — tant en ce qui concerne la concentration d'effluents par litre d'eaux usées déversés qu'en ce qui concerne la quantité absolue d'effluents pouvant être rejetée en une journée — figurant dans les textes de réglementation applicables des Parties, tels que qualifiés plus haut par la Cour au paragraphe 200, et dans les autorisations relatives à l'usine accordées par les autorités uruguayennes. Le digeste, en effet, ne fixe que des limites générales pour les «hydrocarbures», les «solides sédimentables» et les «huiles et graisses», et n'en prévoit pas de spécifiques en ce qui concerne les substances à propos desquelles les Parties sont en désaccord. L'Argentine n'a pas allégué que l'usine Orion (Botnia) n'avait pas respecté les normes de la CARU relatives aux effluents (digeste de la CARU, point E3 (1984, tel que modifié)).

228. De l'examen des données réunies après sa mise en service, telles qu'elles figurent dans les différents rapports de la DINAMA et d'EcoMetrix, il ne ressort pas que les rejets de l'usine Orion (Botnia) ont excédé les limites fixées par les normes relatives aux effluents énoncées dans la réglementation applicable de l'Uruguay telle que qualifiée plus haut par la Cour au paragraphe 200 ou dans l'autorisation environnementale préalable accordée par le MVOTMA (autorisation environnementale préalable accordée pour l'usine Orion (Botnia) par le MVOTMA (14 février 2005)), si ce n'est dans quelques cas où les concentrations ont dépassé les limites autorisées. Des valeurs excédant les limites prescrites dans le décret n° 253/79 ou dans l'autorisation environnementale préalable du MVOTMA n'ont été mesurées qu'en ce qui concerne les paramètres suivants: l'azote, les nitrates et les AOX (composés organo-halogénés adsorbables). Dans ces cas, les mesures enregistrées pour un jour donné dépassaient le maximum autorisé. Toutefois, l'autorisation environnementale préalable du 14 février 2005 prévoit expressément la possibilité de calculer pour ces paramètres une moyenne annuelle. Le dépassement le plus notable est celui enregistré pour les AOX, paramètre utilisé sur le plan international pour surveiller les effluents rejetés par les usines de pâte à papier, comprenant parfois des polluants organiques persistants (POP). Selon le document de référence sur les IPPC-BAT, soumis par les Parties et considéré par elles comme le texte de référence pour ce secteur, «les autorités chargées de la protection de l'environnement de nombreux pays ont imposé des restrictions sévères aux rejets de substances organiques chlorées, mesurées en AOX, dans le milieu aquatique». Après la

been available to Argentina at various stages of the proceedings or have been available in the public domain. Therefore the Court does not consider that Argentina has been at a disadvantage with regard to the production of evidence relating to the discharges of effluent of the mill.

227. To determine whether the concentrations of pollutants discharged by the Orion (Botnia) mill are within the regulatory limits, the Court will have to assess them against the effluent discharge limits — both in terms of the concentration of effluents in each litre of wastewater discharged and the absolute amount of effluents that can be discharged in a day — prescribed by the applicable regulatory standards of the Parties, as characterized by the Court in paragraph 200 above, and the permits issued for the plant by the Uruguayan authorities, since the Digest only sets general limits on "hydrocarbons", "sedimentable solids", and "oils and greases", but does not establish specific ones for the substances in contention between the Parties. Argentina did not allege any non-compliance of the Orion (Botnia) mill with CARU's effluent standards (CARU Digest, Sec. E3 (1984, as amended)).

228. Taking into account the data collected after the start-up of the mill as contained in the various reports by DINAMA and EcoMetrix, it does not appear that the discharges from the Orion (Botnia) mill have exceeded the limits set by the effluent standards prescribed by the relevant Uruguayan regulation as characterized by the Court in paragraph 200 above, or the initial environmental authorization issued by MVOTMA (MVOTMA, Initial Environmental Authorization for the Botnia Plant (14 February 2005)), except for a few instances in which the concentrations have exceeded the limits. The only parameters for which a recorded measurement exceeded the standards set by Decree No. 253/79 or the initial environmental authorization by MVOTMA are: nitrogen, nitrates, and AOX (Adsorbable Organic Halogens). In those cases, measurements taken on one day exceeded the threshold. However, the initial environmental authorization of 14 February 2005 specifically allows yearly averaging for the parameters. The most notable of these cases in which the limits were exceeded is the one relating to AOX, which is the parameter used internationally to monitor pulp mill effluent, sometimes including persistent organic pollutants (POPs). According to the IPPC-BAT reference document submitted by the Parties, and considered by them as the industry standard in this sector, "the environmental control authorities in many countries have set severe restrictions on the discharges of chlorinated organics measured as AOX into the aquatic environment". Concentrations of AOX reached at one point on 9 January 2008, after the mill began operations, as high a level as 13 mg/L, whereas the maximum limit used in the environ-

mise en service de l'usine de pâte à papier, les concentrations d'AOX ont pu atteindre en une occasion, le 9 janvier 2008, 13 mg/l, alors que la limite maximale utilisée dans l'évaluation de l'impact sur l'environnement et prescrite ultérieurement par le MVOTMA était de 6 mg/l. Toutefois, en l'absence d'éléments de preuve établissant de manière convaincante qu'il ne s'agissait pas là d'un épisode isolé mais bien d'un problème plus durable, la Cour n'est pas à même de conclure que l'Uruguay a violé les dispositions du statut de 1975.

c) *L'impact des rejets sur la qualité des eaux du fleuve*

229. Comme indiqué ci-dessus (paragraphe 165), les Parties ont, au cours des trois dernières années, soumis à la Cour quantité de documents contenant des données et analyses d'ordre factuel et scientifique concernant les concentrations de référence des polluants présents dans le fleuve avant la mise en service de l'usine, ainsi que les résultats de relevés relatifs à ses eaux et aux émissions atmosphériques après le début des activités de production et, pour certains, jusqu'au milieu de l'année 2009.

230. S'agissant des données de référence, les études et rapports soumis par les Parties contenaient des informations et analyses relatives, entre autres, à la qualité de l'eau et de l'air, au phytoplancton et au zooplancton présents dans le fleuve, aux indicateurs de santé et biomarqueurs de pollution chez les poissons du fleuve, à la surveillance de l'ichtyofaune autour de l'usine de pâte à papier Orion (Botnia), aux populations de poissons et à la diversité des espèces du fleuve, aux concentrations en acides résiniques, en phénols chlorés et en phytostérols observées chez les poissons du fleuve, à l'étude des espèces appartenant au genre *Tillandsia*, à l'audit avant la mise en service de l'usine Orion (Botnia) et à des études du mercure et du plomb dans les muscles des poissons.

231. L'Argentine soutient que les données de référence de l'Uruguay laissent à désirer à bien des égards et qu'elles sont, notamment, incomplètes. L'Uruguay rejette cette assertion, et prétend que, de fait, l'Argentine s'est fondée sur ces données pour sa propre évaluation de la qualité de l'eau. L'Uruguay soutient que, contrairement aux affirmations de l'Argentine, il a commencé à recueillir des données de référence en août 2006, dans le cadre du contrôle préopérationnel de la qualité de l'eau effectué par la DINAMA avant la mise en service de l'usine (en novembre 2007). Ce contrôle s'est étendu sur une période de quinze mois et est venu compléter près de quinze années d'une surveillance plus générale menée sous la houlette de la CARU au titre du programme PROCON (Programme de contrôle de la qualité et de la pollution des eaux du fleuve Uruguay, selon l'acronyme espagnol de «Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay»). L'Argentine n'a pas, à l'audience, contesté l'allégation du conseil de l'Uruguay selon laquelle elle s'était servie des données fournies par celui-ci pour sa propre évaluation de la qualité de l'eau.

232. Parmi les données présentées par les Parties concernant le contrôle

mental impact assessment and subsequently prescribed by MVOTMA was 6 mg/L. However, in the absence of convincing evidence that this is not an isolated episode but rather a more enduring problem, the Court is not in a position to conclude that Uruguay has breached the provisions of the 1975 Statute.

(c) *Impact of the discharges on the quality of the waters of the river*

229. As pointed out earlier (see paragraph 165), the Parties have over the last three years presented to the Court a vast amount of factual and scientific material containing data and analysis of the baseline levels of contaminants already present in the river prior to the commissioning of the plant and the results of measurements of its water and air emissions after the plant started its production activities and, in some cases, until mid-2009.

230. Regarding the baseline data, the studies and reports submitted by the Parties contained data and analysis relating, *inter alia*, to water quality, air quality, phytoplankton and zooplankton of the river, health indicators and biomarkers of pollution in fish from the river, monitoring of fish fauna in the area around the Orion (Botnia) mill, fish community and species diversity in the river, concentrations of resin acids, chlorinated phenols and plant sterols in fish from the river, survey of species belonging to the genus Tillandsia, the Orion (Botnia) mill pre-start-up audit, and analysis of mercury and lead in fish muscle.

231. Argentina contends that Uruguay's baseline data were both inadequate and incomplete in many aspects. Uruguay rejects this allegation, and argues that Argentina has actually relied on Uruguay's baseline data to give its own assessment of water quality. According to Uruguay, contrary to Argentina's assertions, collection of baseline data by Uruguay started in August 2006, when DINAMA started to conduct for a period of 15 months pre-operational water quality monitoring prior to the commissioning of the plant in November 2007, which served to complement almost 15 years of more general monitoring that had been carried out within CARU under the PROCON programme (River Uruguay Water Quality and Pollution Control Programme, from the Spanish acronym for "Programa de Calidad de Aguas y Control de la Contaminación del Río Uruguay"). Argentina did not challenge counsel for Uruguay's statement during the oral proceedings that it used Uruguay's baseline data for the assessment of water quality.

232. The data presented by the Parties on the post-operation monitor-

et le suivi postopérationnel de la performance effective de l'usine quant aux effets des rejets sur le fleuve figurent des relevés obtenus au moyen de différents programmes de surveillance. Ces derniers ont été réalisés, entre autres, par une équipe scientifique argentine regroupant des chercheurs de deux universités nationales mandatée par le secrétariat d'Etat argentin à l'environnement et au développement durable (dix sites), par l'OSE (l'organisme public uruguayen chargé de l'assainissement et de la distribution de l'eau, selon l'acronyme espagnol d'«Obras Sanitarias del Estado»), par la DINAMA, indépendamment de Botnia (seize sites), et par Botnia faisant rapport à la DINAMA et à la SFI (quatre sites; et prélèvement des effluents).

233. Les sites de prélèvement relevant de la responsabilité de l'Argentine sont situés sur la rive argentine du fleuve, le plus en amont d'entre eux se trouvant à 10 kilomètres de l'usine, le plus en aval à 16 kilomètres environ. Trois d'entre eux (les sites U0, U2 et U3), néanmoins, se trouvent près de l'usine; et trois autres sont situés dans la baie de Nandubaysal et la lagune Inés. Ce sont eux qui ont fourni les données qui, selon le conseil de l'Argentine, «ont permis aux scientifiques argentins de clairement différencier la baie du reste du fleuve, étant donné qu'elle se comporte comme un écosystème relativement autonome par rapport à celui-ci» (rapport scientifique et technique, chapitre 3, annexe intitulée «Background Biogeochemical Studies», par. 4.1.2; voir aussi *ibid.*, par. 4.3.1.2).

234. Les sites de prélèvement relevant de la responsabilité de l'Uruguay (DINAMA) et de Botnia sont situés du côté uruguayen du fleuve. Le point de prélèvement de l'OSE est situé au niveau de la prise d'eau potable de Fray Bentos, devant la station n° 11 de la DINAMA.

235. L'équipe argentine a recueilli des données entre novembre 2007 et avril 2009, une bonne partie de la surveillance commençant à partir d'octobre 2008. L'Uruguay, par l'intermédiaire de la DINAMA, assure une surveillance du site depuis mars 2006, ses plus récents relevés couvrant la période allant jusqu'au mois de juin 2009. L'OSE, dans le cadre de la responsabilité globale qui lui incombe d'assurer la qualité de l'eau uruguayenne, a recueilli des informations utiles, qui ont été reprises dans les rapports périodiques sur l'exploitation de l'usine.

236. La Cour dispose également de l'interprétation des données qu'ont fournie les experts désignés par les Parties, les Parties elles-mêmes et leurs conseils. Toutefois, lorsqu'elle appréciera la valeur des éléments de preuve qui lui ont été soumis, la Cour, afin de déterminer si, en autorisant la construction et la mise en service de l'usine Orion (Botnia), l'Uruguay a violé les obligations qui étaient les siennes en vertu des articles 36 et 41 du statut de 1975, soupèsera et évaluera essentiellement les données elles-mêmes — et non les interprétations divergentes qu'en ont faites les Parties ou leurs experts et consultants.

237. Le désaccord entre les Parties quant à l'impact des effluents rejetés par l'usine Orion (Botnia) sur la qualité de l'eau du fleuve porte sur les paramètres et substances suivants: oxygène dissous; phosphore total (et

ing of the actual performance of the plant in terms of the impact of its emissions on the river includes data obtained through different testing programmes conducted, *inter alia*, by an Argentine scientific team from two national universities, contracted by the National Secretariat of Environment and Sustainable Development of Argentina (ten sites), the OSE (Uruguay's State Agency for Sanitary Works, from the Spanish acronym for "Obras Sanitarias del Estado"), DINAMA, independently of Botnia (16 sites), and Botnia, reporting to DINAMA and the IFC (four sites; and testing the effluent).

233. The monitoring sites maintained by Argentina are located on the Argentine side of the river; with the most upstream position located 10 km from the plant and the furthest downstream one at about 16 km from the plant. Nevertheless, three of the sites (U0, U2 and U3) are near the plant; while another three are in Nandubaysal Bay and Inés Lagoon, the data from which, according to Argentina's counsel, "enabled the scientists to clearly set the bay apart, as it acts as an ecosystem that is relatively detached from the Uruguay river" (Scientific and Technical Report, Chapter 3, appendix: "Background Biogeochemical Studies", para. 4.1.2; see also *ibid.*, para. 4.3.1.2).

234. The monitoring sites maintained by Uruguay (DINAMA) and by Botnia are located on the Uruguayan side. The OSE monitoring point is located at the drinking water supply intake pipe for Fray Bentos, at or near DINAMA station 11.

235. Argentina's team gathered data from November 2007 until April 2009 with many of the results being obtained from October 2008. Uruguay, through DINAMA, has been carrying out its monitoring of the site since March 2006. Its most recent data cover the period up to June 2009. The OSE, in terms of its overall responsibility for Uruguayan water quality, has been gathering relevant data which has been used in the periodic reports on the operation of the plant.

236. The Court also has before it interpretations of the data provided by experts appointed by the Parties, and provided by the Parties themselves and their counsel. However, in assessing the probative value of the evidence placed before it, the Court will principally weigh and evaluate the data, rather than the conflicting interpretations given to it by the Parties or their experts and consultants, in order to determine whether Uruguay breached its obligations under Articles 36 and 41 of the 1975 Statute in authorizing the construction and operation of the Orion (Botnia) mill.

237. The particular parameters and substances that are subject to controversy between the Parties in terms of the impact of the discharges of effluent from the Orion (Botnia) mill on the quality of the waters of the

la question connexe de l'eutrophisation due aux phosphates); substances phénoliques; nonylphénols et éthoxylates de nonylphénol; dioxines et furanes. La Cour procédera maintenant à l'examen des moyens de preuve produits par les Parties en ce qui concerne ces paramètres et substances.

i) *L'oxygène dissous*

238. C'est à l'audience que l'Argentine a, pour la première fois, fait état de l'altération des teneurs en oxygène dissous du fleuve que provoquerait l'usine Orion (Botnia), en renvoyant à des données présentées dans le rapport de l'organisme public uruguayen OSE. Pour l'Argentine, puisque l'oxygène dissous contribue à la qualité de l'environnement et qu'il existe une norme de la CARU fixant (à 5,6 mg/l) sa concentration minimale dans les eaux du fleuve, l'introduction dans le milieu aquatique, par l'usine Orion (Botnia), de substances ou d'énergie ayant fait chuter les taux d'oxygène dissous en deçà de ce seuil constitue une violation de l'obligation d'empêcher la pollution et de préserver ce milieu aquatique. L'Uruguay soutient que les chiffres que l'Argentine a puisés dans les relevés de l'OSE concernaient l'«oxidabilidad», qui renvoie à la «demande en oxygène» et non à l'«oxígeno disuelto» — c'est-à-dire l'oxygène dissous —, et qu'une chute du niveau de la demande en oxygène révèle une amélioration de la qualité de l'eau puisque ce niveau doit être maintenu aussi bas que possible.

239. La Cour note qu'en ce qui concerne l'oxygène dissous, une concentration moyenne de 3,8 mg/l après la mise en service de l'usine constituerait effectivement, si elle était avérée, une violation des normes de la CARU, ce chiffre étant au-dessous du seuil de 5,6 mg d'oxygène dissous par litre d'eau requis selon le digeste de la CARU (E3, titre 2, chapitre 4, section 2). Elle estime toutefois que cette allégation de l'Argentine n'a pas été prouvée. Premièrement, les chiffres sur lesquels se fonde l'Argentine ne correspondent pas aux valeurs indiquées dans le troisième rapport de suivi d'EcoMetrix, qui fait état de concentrations d'oxygène dissous supérieures au seuil fixé par la CARU dans tous les échantillons prélevés entre février et octobre 2008. Deuxièmement, le rapport de la DINAMA sur la qualité des eaux de surface et des sédiments de juillet 2009 (rapport semestriel: janvier-juin) (ci-après le «rapport de la DINAMA sur la qualité de l'eau») (voir p. 7, fig. 4.5: moyenne de 9,4 mg/l) fait état de concentrations d'oxygène dissous bien supérieures aux valeurs minimales requises dans le digeste de la CARU. Troisièmement, le rapport de l'Argentine en date du 30 juin 2009 indique, dans son résumé, que les paramètres de qualité de l'eau relevés au cours de la période présentaient des valeurs «normales, avec des variations saisonnières de la température et des concentrations correspondantes en oxygène dissous». Les centaines de valeurs consignées dans les données de ce chapitre du «Rapport Colombo» étayent cette conclusion, même si certaines sont légèrement inférieures. Quatrièmement, les chiffres relatifs à l'oxygène dissous figu-

river are: dissolved oxygen; total phosphorus (and the related matter of eutrophication due to phosphate); phenolic substances; nonylphenols and nonylphenolethoxylates; and dioxins and furans. The Court now turns to the assessment of the evidence presented to it by the Parties with respect to these parameters and substances.

(i) *Dissolved oxygen*

238. Argentina raised for the first time during the oral proceedings the alleged negative impact of the Orion (Botnia) mill on dissolved oxygen in the river referring to data contained in the report of the Uruguayan OSE. According to Argentina, since dissolved oxygen is environmentally beneficial and there is a CARU standard which sets a minimum level of dissolved oxygen for the river waters (5.6 mg/L), the introduction by the Orion (Botnia) mill into the aquatic environment of substances or energy which caused the dissolved oxygen level to fall below that minimum constitutes a breach of the obligation to prevent pollution and to preserve the aquatic environment. Uruguay argues that Argentina's figures taken from the measurements of the OSE were for "oxidabilidad", which refers to the "demand for oxygen" and not for "oxígeno disuelto" — i.e., dissolved oxygen. Uruguay also claims that a drop in the level of demand for oxygen shows an improvement in the quality of the water, since the level of demand should be kept as low as possible.

239. The Court observes that a post-operational average value of 3.8 mg/L for dissolved oxygen would indeed, if proven, constitute a violation of CARU standards, since it is below the minimum value of 5.6 mg of dissolved oxygen per litre required according to the CARU Digest (E3, Title 2, Chapter 4, Section 2). However, the Court finds that the allegation made by Argentina remains unproven. First, the figures on which Argentina bases itself do not correspond to the ones for dissolved oxygen that appear in the EcoMetrix Third Monitoring Report, where the samples taken between February and October 2008 were all above the CARU minimum standard for dissolved oxygen. Secondly, DINAMA's Surface Water and Sediment Quality Data Report of July 2009 (Six Month Report: January-June) (hereinafter "DINAMA's Water Quality Report") (see p. 7, fig. 4.5: average of 9.4 mg/L) displays concentrations of dissolved oxygen that are well above the minimum level required under the CARU Digest. Thirdly, Argentina's 30 June 2009 report says in its summary that the records of water quality parameters over the period were "normal for the river with typical seasonal patterns of temperature and associated dissolved oxygen". The hundreds of measurements presented in the figures in that chapter of the "Colombo Report" support that conclusion even taking account of some slightly lower figures. Fourthly, the figures relating to dissolved oxygen contained in DINAMA's Water Quality Report have essentially the same characteristics as those gathered by Argentina — they

rant dans le rapport de la DINAMA sur la qualité de l'eau présentent essentiellement les mêmes caractéristiques que ceux recueillis par l'Argentine — les valeurs sont supérieures au seuil fixé par la CARU, et sont les mêmes en amont et en aval de l'usine. La Cour en conclut que ces valeurs ne semblent pas avoir notablement changé au fil du temps et que rien ne vient étayer l'affirmation selon laquelle la référence à l'«oxidabilidad» dans le rapport de l'OSE invoquée par l'Argentine devrait être interprétée comme un renvoi à l'«oxygène dissous».

ii) *Le phosphore*

240. Les Parties s'accordent sur le niveau élevé de phosphore total dans le fleuve Uruguay. Selon l'Uruguay, la quantité totale de phosphore (naturel et anthropique) rejeté dans le fleuve est d'environ 19 000 tonnes par an, auxquelles l'usine Orion (Botnia) contribue à hauteur de quelque 15 tonnes (pour l'année 2008), voire moins, selon les estimations pour 2009. L'Argentine n'a pas contesté ces chiffres au cours de la procédure. L'Uruguay avance en outre qu'il ne saurait être allégué de violation des dispositions du statut de 1975, puisque cette forte concentration ne peut être attribuée avec certitude à l'usine Orion (Botnia), et que la CARU n'a fixé aucune norme concernant le phosphore. L'Uruguay soutient également qu'il ressort des données fournies par la DINAMA, comparées aux données de référence également recueillies par cette dernière, que «[l]es teneurs en phosphore étaient généralement plus faibles après la mise en service de l'usine, par rapport aux données de référence de 2005-2006» (troisième rapport de suivi d'EcoMetrix, mars 2009).

241. L'un des grands points de désaccord entre les Parties concerne le lien entre l'augmentation de la concentration de phosphore dans les eaux du fleuve et la prolifération d'algues survenue en février 2009, ainsi que la question de savoir si l'eutrophisation du fleuve est due à l'exploitation de l'usine Orion (Botnia). L'Argentine affirme que l'usine est à l'origine de cette eutrophisation et de l'élévation de la teneur en phosphates, tandis que l'Uruguay nie que l'une comme l'autre soient attribuables à l'exploitation de l'usine à Fray Bentos.

242. La Cour relève que la CARU n'a pas adopté de normes de qualité de l'eau relatives aux concentrations de phosphore total et de phosphates dans le fleuve. L'Argentine ne dispose pas, elle non plus, de normes de qualité de l'eau pour ce qui est du phosphore total. La Cour devra donc se référer aux normes de qualité de l'eau et limites de rejets de phosphore total édictées par l'Uruguay dans le cadre de sa législation interne, telle que qualifiée par la Cour plus haut, au paragraphe 200, afin de déterminer si la teneur en phosphore total a dépassé les limites fixées dans les textes de réglementation des Parties adoptés conformément à l'alinéa *a)* de l'article 41 du statut de 1975. La concentration de phosphore total ne peut, selon les normes de qualité de l'eau fixées par ce décret, excéder 0,025 mg/l pour certaines utilisations, telles que l'eau potable, l'irrigation des cultures destinées à la consommation humaine et l'utilisation de

are above the CARU minimum and are the same upstream and downstream. Thus, the Court concludes that there appears to be no significant difference between the sets of data over time and that there is no evidence to support the contention that the reference to "oxidabilidad" in the OSE report referred to by Argentina should be interpreted to mean "dissolved oxygen".

(ii) *Phosphorus*

240. There is agreement between the Parties that total phosphorus levels in the River Uruguay are high. According to Uruguay, the total amount of (natural and anthropogenic) phosphorus emitted into the river per year is approximately 19,000 tonnes, of which the Orion (Botnia) mill has a share of some 15 tonnes (in 2008) or even less, as was expected for 2009. These figures have not been disputed by Argentina during the proceedings. Uruguay contends further that no violation of the provisions of the 1975 Statute can be alleged since the high concentration cannot be clearly attributed to the Orion (Botnia) mill as the source, and since no standard is set by CARU for phosphorus. Uruguay maintains also that based on data provided by DINAMA as compared to baseline data also compiled by DINAMA, it can be demonstrated that "[t]otal phosphorus levels were generally lower post-start-up as compared to the 2005-2006 baseline" (EcoMetrix Third Monitoring Report, March 2009).

241. A major disagreement between the Parties relates to the relationship between the higher concentration of phosphorus in the waters of the river and the algal bloom of February 2009 and whether operation of the Orion (Botnia) mill has caused the eutrophication of the river. Argentina claims that the Orion (Botnia) mill is the cause of the eutrophication and higher concentration of phosphates, while Uruguay denies the attributability of these concentrations as well as the eutrophication to the operation of the plant in Fray Bentos.

242. The Court notes that CARU has not adopted a water quality standard relating to levels of total phosphorus and phosphates in the river. Similarly, Argentina has no water quality standards for total phosphorus. The Court will therefore have to use the water quality and effluent limits for total phosphorus enacted by Uruguay under its domestic legislation, as characterized by the Court in paragraph 200 above, to assess whether the concentration levels of total phosphorus have exceeded the limits laid down in the regulations of the Parties adopted in accordance with Article 41 *(a)* of the 1975 Statute. The water quality standard for total phosphorus under the Uruguayan Regulation is 0.025 mg/L for certain purposes such as drinking water, irrigation of crops for human consumption and water used for recreational purposes which involve direct human contact with the water (Decree No. 253/79, Regulation of

l'eau à des fins récréatives qui impliquent un contact humain direct avec cette eau (décret nº 253/79, réglementation de la qualité de l'eau). Le décret uruguayen fixe aussi — à 5 mg/l — la norme en matière de rejet de phosphore total (*ibid.*, article 11, alinéa 2)). L'usine Orion (Botnia) doit satisfaire à l'une et l'autre de ces normes.

243. La Cour estime que, sur la base des éléments de preuve qui lui ont été soumis, l'usine Orion (Botnia) a jusqu'à présent satisfait aux normes en matière de rejet de phosphore total. Dans ce contexte, la Cour note que, selon le troisième rapport de suivi d'EcoMetrix, les relevés de l'Uruguay enregistrent, pour les rejets d'effluents de l'usine, une valeur moyenne de 0,59 mg/l de phosphore total en 2008. En outre, d'après le rapport de la DINAMA sur les émissions de juillet 2009, les chiffres relatifs aux effluents variaient, pour la période allant de novembre 2008 à mai 2009, entre 0,053 mg/l et 0,41 mg/l (voir, par exemple, DINAMA, rapport semestriel des résultats du plan de contrôle des émissions et de la performance environnementale (11 novembre 2008-31 mai 2009), 22 juillet 2009, p. 5; voir aussi p. 25 et 26). L'Argentine ne conteste pas ces chiffres, dont les valeurs sont clairement inférieures à la norme établie en vertu du décret uruguayen.

244. La Cour notera à cet égard que, dès le 11 février 2005, la DINAMA relevait, dans son rapport d'évaluation de l'impact sur l'environnement relatif à l'usine Orion (Botnia), la forte teneur en nutriments (phosphore et azote) dans le fleuve, et indiquait ceci:

> «Cette situation provoque fréquemment la prolifération d'algues parfois très toxiques en raison de la présence de cyanobactéries. Ces proliférations — qui ont augmenté, à la fois en fréquence et en intensité, ces dernières années — constituent un risque sanitaire et provoquent de lourdes pertes économiques, dans la mesure où elles perturbent certaines utilisations de l'eau comme les activités de loisirs et l'approvisionnement en eau de boisson. A cette situation existante, il convient d'ajouter qu'à l'avenir l'usine rejettera un total de 200 tonnes/an d'azote et de 20 tonnes/an de phosphore, soit des valeurs équivalant approximativement aux rejets d'une ville de 65 000 habitants dépourvue de système de traitement des eaux usées.» (P. 20, par. 6.1.)

245. Le rapport de la DINAMA se poursuit en ces termes:

> «Il est également entendu qu'il serait contre-indiqué d'autoriser le rejet de déchets de nature à accroître la valeur de tout paramètre ayant déjà atteint un seuil critique, même lorsque cette augmentation est considérée comme insignifiante par l'entreprise. Néanmoins, les variations de ces valeurs ne dépendant pas des seuls effluents du projet — ces paramètres étant susceptibles d'être modifiés par le déversement de tout effluent industriel ou domestique —, le rejet des déchets proposé dans le projet pourrait être accepté, à condition de prévoir une compensation en cas d'augmentation provoquant le

Water Quality). The Uruguayan Decree also establishes a total phosphorus discharge standard of 5 mg/L (Decree No. 253/79 Regulation of Water Quality, Art. 11 (2)). The Orion (Botnia) mill must comply with both standards.

243. The Court finds that based on the evidence before it, the Orion (Botnia) mill has so far complied with the standard for total phosphorus in effluent discharge. In this context, the Court notes that, for 2008 according to the EcoMetrix Third Monitoring Report, the Uruguayan data recorded an average of 0.59 mg/L total phosphorus in effluent discharge from the plant. Moreover, according to the DINAMA 2009 Emissions Report, the effluent figures for November 2008 to May 2009 were between 0.053 mg/L and 0.41 mg/L (e.g., DINAMA, "Six Month Report on the Botnia Emission Control and Environmental Performance Plan November 11, 2008 to May 31, 2009" (22 July 2009) p. 5; see also pp. 25 and 26). Argentina does not contest these figures which clearly show values much below the standard established under the Uruguayan Decree.

244. The Court observes in this connection that as early as 11 February 2005, DINAMA, in its environmental impact assessment for the Orion (Botnia) mill, noted the heavy load of nutrients (phosphorus and nitrogen) in the river and stated that:

> "This situation has generated the frequent proliferation of algae, in some cases with an important degree of toxicity as a result of the proliferation of cyanobacteria. These proliferations, which in recent years have shown an increase in both frequency and intensity, constitute a health risk and result in important economic losses since they interfere with some uses of water, such as recreational activities and the public supply of drinking water. To this already existing situation it must be added that, in the future, the effluent in the plant will emit a total of 200 t/a of N[itrogen] and 20 t/a of P[hosphorus], values that are the approximate equivalent of the emission of the untreated sewage of a city of 65,000 people." (P. 20, para. 6.1.)

245. The DINAMA Report then continues as follows:

> "It is also understood that it is not appropriate to authorize any waste disposal that would increase any of the parameters that present critical values, even in cases in which the increase is considered insignificant by the company. Nevertheless, considering that the parameters in which the quality of water is compromised are not specific to the effluents of this project, but rather would be affected by the waste disposal of any industrial or domestic effluent under consideration, it is understood that the waste disposal proposed in the project may be accepted, as long as there is compensation for any

dépassement de la valeur standard pour l'un quelconque des paramètres critiques.» (Rapport de la DINAMA, p. 21.)

246. La Cour observera en outre que l'autorisation environnementale préalable, accordée le 15 février 2005, faisait obligation à Botnia de respecter ces conditions, les normes de la CARU et les meilleures techniques disponibles, telles que définies dans le document IPPC-BAT de la Commission européenne de décembre 2001. Elle imposait également la réalisation d'un plan de mise en œuvre de mesures d'atténuation et de compensation. Ce plan avait été réalisé avant la fin de l'année 2007 et l'autorisation de mise en service fut accordée le 8 novembre 2007. Le 29 avril 2008, Botnia et l'OSE ont conclu un accord concernant le traitement des eaux usées municipales de Fray Bentos, visant à réduire les rejets de phosphore total et autres polluants.

247. La Cour estime que le volume de phosphore total rejeté dans le fleuve qui est attribuable à l'usine Orion (Botnia) est proportionnellement insignifiant, par rapport à la teneur globale du fleuve en phosphore total provenant d'autres sources. Elle conclut donc que le fait que la concentration de phosphore total dans le fleuve dépasse les limites fixées par la législation uruguayenne en matière de normes de qualité de l'eau ne saurait être considéré comme une violation de l'alinéa *a)* de l'article 41 du statut de 1975, compte tenu de la teneur relativement élevée en phosphore total du fleuve avant la mise en service de l'usine et des mesures prises par l'Uruguay à titre de compensation.

248. La Cour en vient maintenant à l'examen de la question de la prolifération d'algues du 4 février 2009. L'Argentine a attribué celle-ci aux nutriments rejetés dans le fleuve par l'usine Orion (Botnia). A l'appui de cette assertion, elle renvoie à la présence d'effluents dans les algues bleues ainsi qu'à diverses images satellite montrant la concentration de chlorophylle dans l'eau. De telles proliférations se produisent, selon l'Argentine, pendant la saison chaude et sont dues à une croissance explosive d'algues, en particulier de cyanobactéries, consécutive à un enrichissement en nutriments, principalement des phosphates, entre autres éléments entrant dans la composition des détergents et fertilisants.

249. L'Uruguay soutient que la prolifération d'algues de février 2009 — et la forte concentration de chlorophylle — n'a pas été causée par l'usine Orion (Botnia), mais pourrait être apparue très en amont de celle-ci et s'explique très probablement non pas par les rejets d'effluents de l'usine, mais par l'afflux de visiteurs à l'occasion du carnaval annuel de Gualeguaychú et l'augmentation correspondante du volume des eaux usées. L'Uruguay soutient que les relevés de l'Argentine montrent en réalité que, depuis sa mise en service, l'usine Orion (Botnia) n'a à aucun moment provoqué l'augmentation de la concentration de phosphore dans le fleuve.

250. Les Parties sont d'accord sur plusieurs points en ce qui concerne la prolifération d'algues du 4 février 2009: elles conviennent notamment

increase over and above the standard value for any of the critical parameters." (DINAMA Report, p. 21.)

246. The Court further notes that the initial environmental authorization, granted on 15 February 2005, required compliance by Botnia with those conditions, with CARU standards and with best available techniques as included in the December 2001 IPPC-BAT of the European Commission. It also required the completion of an implementation plan for mitigation and compensation measures. That plan was completed by the end of 2007 and the authorization to operate was granted on 8 November 2007. On 29 April 2008, Botnia and the OSE concluded an Agreement Regarding Treatment of the Municipal Wastewater of Fray Bentos, aimed at reducing total phosphorus and other contaminants.

247. The Court considers that the amount of total phosphorus discharge into the river that may be attributed to the Orion (Botnia) mill is insignificant in proportionate terms as compared to the overall total phosphorus in the river from other sources. Consequently, the Court concludes that the fact that the level of concentration of total phosphorus in the river exceeds the limits established in Uruguayan legislation in respect of water quality standards cannot be considered as a violation of Article 41 *(a)* of the 1975 Statute in view of the river's relatively high total phosphorus content prior to the commissioning of the plant, and taking into account the action being taken by Uruguay by way of compensation.

248. The Court will now turn to the consideration of the issue of the algal bloom of 4 February 2009. Argentina claims that the algal bloom of 4 February 2009 was caused by the Orion (Botnia) mill's emissions of nutrients into the river. To substantiate this claim Argentina points to the presence of effluent products in the blue-green algal bloom and to various satellite images showing the concentration of chlorophyll in the water. Such blooms, according to Argentina, are produced during the warm season by the explosive growth of algae, particularly cyanobacteria, responding to nutrient enrichment, mainly phosphate, among other compounds present in detergents and fertilizers.

249. Uruguay contends that the algal bloom of February 2009, and the high concentration of chlorophyll, was not caused by the Orion (Botnia) mill but could have originated far upstream and may have most likely been caused by the increase of people present in Gualeyguaychú during the yearly carnival held in that town, and the resulting increase in sewage, and not by the mill's effluents. Uruguay maintains that Argentine data actually prove that the Orion (Botnia) mill has not added to the concentration of phosphorus in the river at any time since it began operating.

250. The Parties are in agreement on several points regarding the algal bloom of 4 February 2009, including the fact that the concentrations of

que les concentrations de nutriments dans le fleuve Uruguay ont atteint des niveaux élevés tant avant qu'après cet épisode, et que celui-ci a été très bref. Les Parties semblent également d'accord pour reconnaître l'existence de liens étroits entre prolifération d'algues, élévation des températures, faiblesse ou inversion du courant, et présence dans le fleuve de fortes concentrations de nutriments tels que l'azote et le phosphore. Il n'a toutefois pas été établi à la satisfaction de la Cour que la prolifération d'algues du 4 février 2009 avait été causée par les rejets de nutriments de l'usine Orion (Botnia).

iii) *Les substances phénoliques*

251. L'Argentine soutient que les rejets de polluants émanant de l'usine Orion (Botnia) ont, depuis la mise en service de celle-ci, enfreint la norme relative aux substances phénoliques établie par la CARU, les données de référence antérieures à l'exploitation ne faisant apparaître aucun dépassement des valeurs maximales fixées par celle-ci. L'Uruguay, pour sa part, affirme que ces valeurs ont été maintes fois dépassées, sur toute la longueur du fleuve, bien avant le démarrage des activités de l'usine. A l'appui de cette assertion, il cite plusieurs études, dont l'étude d'impact cumulé finale réalisée par EcoMetrix selon laquelle le taux maximal de substances phénoliques, fixé à 0,001 mg/l par la norme de qualité de l'eau de la CARU, a fréquemment été dépassé.

252. La Cour note également que, selon les données fournies par l'Uruguay, des valeurs supérieures à la limite autorisée par la norme de la qualité de l'eau avaient été observées bien avant la mise en service de l'usine. Ainsi, selon l'étude d'impact cumulé finale réalisée en septembre 2006 par EcoMetrix à la demande de la SFI, les substances phénoliques ont fréquemment excédé la limite autorisée, les concentrations les plus élevées étant mesurées dans la partie argentine du fleuve. Certains relevés figurant dans le rapport le plus récent soumis à la Cour indiquent encore des concentrations excessives, mais la plupart enregistrent des valeurs inférieures à la limite autorisée (Rapport de la DINAMA sur la qualité de l'eau de juillet 2009, p. 21, par. 4.1.11.2 et appendice I, qui indique des taux compris entre 0,0005 et 0,012 mg/l).

253. Un conseil de l'Argentine a fait valoir à l'audience que c'était l'activité de l'usine qui avait entraîné des dépassements des valeurs limites, lesquels n'avaient jamais été observés antérieurement. Les concentrations de substances polluantes, a-t-il déclaré, avaient en moyenne triplé, la valeur maximale étant vingt fois supérieure à la valeur autorisée. Selon l'Uruguay, les données figurant dans le rapport de juillet 2009 de la DINAMA indiquent que les concentrations de substances phénoliques mesurées après la mise en service étaient inférieures aux valeurs de référence sur l'ensemble du fleuve, y compris au niveau de la prise d'eau de l'OSE.

254. D'après les éléments versés au dossier, y compris les données fournies par les Parties, la Cour conclut que les éléments de preuve sont insuf-

nutrients in the River Uruguay have been at high levels both before and after the bloom episode, and the fact that the bloom disappeared shortly after it had begun. The Parties also appear to agree on the interdependence between algae growth, higher temperatures, low and reverse flows, and presence of high levels of nutrients such as nitrogen and phosphorus in the river. It has not, however, been established to the satisfaction of the Court that the algal bloom episode of 4 February 2009 was caused by the nutrient discharges from the Orion (Botnia) mill.

(iii) *Phenolic substances*

251. With regard to phenolic substances, Argentina contends that the Orion (Botnia) mill's emission of pollutants have resulted in violations of the CARU standard for phenolic substances once the plant started operating, while, according to Argentina, pre-operational baseline data did not show that standard to have been exceeded. Uruguay on the other hand argues that there have been numerous violations of the standard, throughout the river, long before the plant went into operation. Uruguay substantiates its arguments by pointing to several studies including the EcoMetrix final Cumulative Impact Study, which had concluded that phenolic substances were found to have frequently exceeded the water quality standard of 0.001 mg/L fixed by CARU.

252. The Court also notes that Uruguayan data indicate that the water quality standard was being exceeded from long before the plant began operating. The Cumulative Impact Study prepared in September 2006 by EcoMetrix for the IFC states that phenolics were found frequently to exceed the standard, with the highest values on the Argentine side of the river. The standard is still exceeded in some of the measurements in the most recent report before the Court but most are below it (DINAMA July 2009 Water Quality Report, p. 21, para. 4.1.11.2 and App. 1, showing measurements from 0.0005 to 0.012 mg/L).

253. During the oral proceedings, counsel for Argentina claimed that the standard had not previously been exceeded and that the plant has caused the limit to be exceeded. The concentrations, he said, had increased on average by three times and the highest figure was 20 times higher. Uruguay contends that the data contained in the DINAMA 2009 Report shows that the post-operational levels of phenolic substances were lower than the baseline levels throughout the river including at the OSE water intake.

254. Based on the record, and the data presented by the Parties, the Court concludes that there is insufficient evidence to attribute the alleged

fisants pour attribuer l'augmentation alléguée des concentrations de substances phénoliques dans le fleuve aux activités de l'usine Orion (Botnia).

iv) *La présence de nonylphénols dans le milieu aquatique*

255. L'Argentine affirme que l'usine Orion (Botnia) rejette, ou a rejeté, des nonylphénols, ce qui aurait un effet dommageable, ou ferait du moins peser une lourde menace, sur le milieu aquatique. Selon elle, la source de pollution la plus probable est à rechercher dans les agents tensioactifs (détergents), les éthoxylates de nonylphénol, utilisés pour nettoyer la pâte à papier et les équipements de l'usine elle-même. Toujours selon l'Argentine, l'analyse de 46 relevés a permis d'établir que les plus fortes concentrations de nonylphénols, notamment celles qui étaient supérieures aux normes pertinentes de l'Union européenne, se trouvaient dans les échantillons d'eau prélevés dans le tronçon situé en face et en aval de l'usine et dans les échantillons d'algues bleues ayant proliféré le 4 février 2009, avec des concentrations plus faibles en amont et en aval, laissant penser que les effluents rejetés par l'usine Orion (Botnia) étaient la source la plus probable de ces résidus. En outre, les prélèvements effectués sur les sédiments du fond du fleuve dans le tronçon situé en face et en aval de l'usine auraient montré que la concentration de nonylphénols avait augmenté rapidement entre septembre 2006 et février 2009, confirmant ainsi la présence accrue de ces composés dans le fleuve Uruguay. Pour l'Argentine, la répartition spatiale des effets sublétaux détectés chez les rotifères (absence de vertèbres), les coquillages asiatiques transplantés (réduction des réserves lipidiques) et les poissons (effets estrogènes) coïncidait avec le périmètre de distribution des nonylphénols, signe que ces composés pourraient avoir un effet perturbateur important.

256. L'Uruguay rejette les allégations de l'Argentine relatives aux nonylphénols et aux éthoxylates de nonylphénol, et dément catégoriquement l'usage de ces deux substances par l'usine Orion (Botnia). Il fournit des déclarations sous serment émanant de responsables de Botnia selon lesquelles l'usine n'utilise pas, et n'a jamais utilisé, de nonylphénols ou de dérivés d'éthoxylates de nonylphénol dans l'un quelconque de ses procédés de fabrication de pâte à papier, y compris au cours des opérations de lavage et de nettoyage de la pâte, et qu'aucun agent nettoyant contenant des nonylphénols n'est ou n'a été utilisé pour nettoyer les équipements de l'usine (déclaration sous serment de M. González, 2 octobre 2009).

257. La Cour tient à rappeler que la question des nonylphénols n'avait pas été soulevée en l'affaire avant que l'Argentine ne verse au dossier son rapport du 30 juin 2009. Bien que les concentrations de nonylphénols aient été mesurées depuis novembre 2008, l'Argentine n'a pas, de l'avis de la Cour, produit d'éléments de preuve établissant clairement un lien entre les nonylphénols présents dans les eaux du fleuve et l'usine Orion (Botnia). L'Uruguay a également démenti catégoriquement devant la Cour l'utilisation par l'usine Orion (Botnia) d'éthoxylates de nonylphénol dans ses procédés de fabrication et de nettoyage. La Cour est donc amenée à

increase in the level of concentrations of phenolic substances in the river to the operations of the Orion (Botnia) mill.

(iv) *Presence of nonylphenols in the river environment*

255. Argentina claims that the Orion (Botnia) mill emits, or has emitted, nonylphenols and thus has caused damage to, or at least has substantially put at risk, the river environment. According to Argentina, the most likely source of these emissions are surfactants (detergents), nonylphenolethoxylates used to clean the wood pulp as well as the installations of the plant itself. Argentina also contends that from 46 measurements performed in water samples the highest concentrations, in particular those exceeding the European Union relevant standards, were determined in front-downstream the mill and in the bloom sample collected on 4 February 2009, with lower levels upstream and downstream, indicating that the Orion (Botnia) mill effluent is the most probable source of these residues. In addition, according to Argentina, bottom sediments collected in front-downstream the mill showed a rapid increase of nonylphenols from September 2006 to February 2009, corroborating the increasing trend of these compounds in the River Uruguay. For Argentina, the spatial distribution of sub-lethal effects detected in rotifers (absence of spines), transplanted Asiatic clams (reduction of lipid reserves) and fish (estrogenic effects) coincided with the distribution area of nonylphenols suggesting that these compounds may be a significant stress factor.

256. Uruguay rejects Argentina's claim relating to nonylphenols and nonylphenolethoxylates, and categorically denies the use of nonylphenols and nonylphenolethoxylates by the Orion (Botnia) mill. In particular, it provides affidavits from Botnia officials to the effect that the mill does not use and has never used nonylphenols or nonylphenolethoxylate derivatives in any of its processes for the production of pulp, including in the pulp washing and cleaning stages, and that no cleaning agents containing nonylphenols are or have been used for cleaning the plant's equipment (Affidavit of Mr. González, 2 October 2009).

257. The Court recalls that the issue of nonylphenols was included in the record of the case before the Court only by the Report submitted by Argentina on 30 June 2009. Although testing for nonylphenols had been carried out since November 2008, Argentina has not however, in the view of the Court, adduced clear evidence which establishes a link between the nonylphenols found in the waters of the river and the Orion (Botnia) mill. Uruguay has also categorically denied before the Court the use of nonylphenolethoxylates for production or cleaning by the Orion (Botnia) mill. The Court therefore concludes that the evidence in

conclure que les éléments versés au dossier ne viennent pas étayer les allégations de l'Argentine.

v) *Les dioxines et furanes*

258. L'Argentine a affirmé que les concentrations de dioxines et de furanes étaient généralement très faibles dans les sédiments de surface, mais que les données issues de ses études laissaient apparaître une tendance à la hausse par rapport aux données recueillies avant la mise en service de l'usine Orion (Botnia). L'Argentine ne prétend pas que les normes établies n'ont pas été respectées, mais s'appuie sur un échantillonnage de poissons *sábalos* effectué par son équipe de surveillance, qui a révélé que l'un de ces poissons présentait des taux élevés de dioxines et de furanes, pour conclure à une présence de plus en plus notable de ces deux substances dans le fleuve depuis la mise en service de l'usine Orion (Botnia). L'Uruguay conteste cette assertion, affirmant que l'élévation de ces taux ne peut être attribuée à l'exploitation de l'usine Orion (Botnia) vu le nombre d'usines en service sur les rives du fleuve et dans la baie voisine de Nandubaysal, et le fait que le *sábalo* ayant fait l'objet de ce contrôle est une espèce de grands migrateurs. En outre, selon l'Uruguay, il ressort des résultats des analyses que ni dioxines ni furanes n'ont été introduits dans les effluents de l'usine Orion (Botnia) puisque les concentrations de ces deux substances n'étaient pas plus élevées, de manière mesurable, dans les effluents de l'usine que dans l'eau puisée dans le fleuve pour les besoins du processus de fabrication.

259. La Cour estime que les éléments de preuve ne permettent pas d'établir clairement un lien entre la présence accrue de dioxines et de furanes dans le fleuve et l'exploitation de l'usine Orion (Botnia).

d) *Effets sur la diversité biologique*

260. L'Argentine affirme que l'Uruguay «a négligé de prendre toutes les mesures propres à protéger et à préserver la diversité biologique du fleuve Uruguay et ses zones d'influence». Selon l'Argentine, l'obligation conventionnelle «de protéger et de préserver le milieu aquatique» comprend une obligation de protéger la diversité biologique du fleuve, y compris «les habitats et les espèces de la flore et de la faune». Par l'effet de la «clause de renvoi» contenue dans l'alinéa *a)* de l'article 41, l'Argentine soutient que le statut de 1975 impose à l'Uruguay, dans le cadre des activités qu'il entreprend sur le fleuve et dans ses zones d'influence, d'honorer les obligations découlant de la convention CITES, de la convention sur la diversité biologique et de la convention de Ramsar. Elle affirme que son programme de surveillance a permis de mettre en évidence des effets anormaux chez les organismes aquatiques — tels que la malformation des rotifères et la réduction des réserves lipidiques des coquillages — et une biomagnification de certains polluants persistants, comme les dioxines et les furanes, chez les poissons détritivores (tel le poisson *sábalo*). L'Argentine affirme également que, lors des inversions de courant,

the record does not substantiate the claims made by Argentina on this matter.

(v) *Dioxins and furans*

258. Argentina has alleged that while the concentration of dioxins and furans in surface sediments is generally very low, data from its studies demonstrated an increasing trend compared to data compiled before the Orion (Botnia) mill commenced operations. Argentina does not claim a violation of standards, but relies on a sample of *sábalo* fish tested by its monitoring team, which showed that one fish presented elevated levels of dioxins and furans which, according to Argentina, pointed to a rise in the incidence of dioxins and furans in the river after the commissioning of the Orion (Botnia) mill. Uruguay contests this claim, arguing that such elevated levels cannot be linked to the operation of the Orion (Botnia) mill, given the presence of so many other industries operating along the River Uruguay and in neighbouring Nandubaysal Bay, and the highly migratory nature of the *sábalo* species which was tested. In addition, Uruguay advances that its testing of the effluent coming from the Orion (Botnia) mill demonstrate that no dioxins and furans could have been introduced into the mill effluent, as the levels detected in the effluent were not measurably higher than the baseline levels in the River Uruguay.

259. The Court considers that there is no clear evidence to link the increase in the presence of dioxins and furans in the river to the operation of the Orion (Botnia) mill.

(d) *Effects on biodiversity*

260. Argentina asserts that Uruguay "has failed to take all measures to protect and preserve the biological diversity of the River Uruguay and the areas affected by it". According to Argentina, the treaty obligation "to protect and preserve the aquatic environment" comprises an obligation to protect the biological diversity including "habitats as well as species of flora and fauna". By virtue of the "referral clause" in Article 41 *(a)*, Argentina argues that the 1975 Statute requires Uruguay, in respect of activities undertaken in the river and areas affected by it, to comply with the obligations deriving from the CITES Convention, the Biodiversity Convention and the Ramsar Convention. Argentina maintains that through its monitoring programme abnormal effects were detected in aquatic organisms — such as malformation of rotifers and loss of fat by clams — and the biomagnification of persistent pollutants such as dioxins and furans was detected in detritus feeding fish (such as the sábalo fish). Argentina also contends that the operation of the mill poses a threat, under conditions of reverse flow, to the Esteros de Farrapos site, situated "in the lower section of the River . . . downstream from

l'exploitation de l'usine fait peser un risque sur le site d'Esteros de Farrapos, situé sur le cours inférieur du fleuve Uruguay «en aval du barrage de Salto Grande et à la frontière avec l'Argentine», à quelques kilomètres en amont de l'usine Orion (Botnia).

261. L'Uruguay affirme que l'Argentine n'a pas démontré qu'il avait commis la moindre violation de la convention sur la diversité biologique, tandis que la convention de Ramsar est sans pertinence en l'espèce puisque le site d'Esteros de Farrapos ne figure pas sur la liste des sites Ramsar dont les caractéristiques écologiques sont menacées. Quant à la possibilité que le panache d'effluents provenant de l'usine atteigne Esteros de Farrapos, l'Uruguay a reconnu à l'audience qu'un tel phénomène pouvait se produire lorsque certaines conditions étaient réunies. Toutefois l'Uruguay a ajouté que l'on peut s'attendre à ce que la dilution des effluents de l'usine au 1/1000 rende ces derniers relativement inoffensifs, étant ramenée bien en deçà de toute concentration constitutive de pollution. L'Uruguay soutient que les allégations de l'Argentine concernant les effets préjudiciables des effluents de l'usine Orion (Botnia) sur les poissons et les rotifères ne sont pas crédibles. Il renvoie à un rapport détaillé récemment publié par la DINAMA sur l'ichtyofaune, selon lequel la biodiversité des espèces n'a pas changé entre 2008 et 2009. L'Uruguay ajoute que, dans son rapport de juillet 2009 sur les résultats des analyses effectuées en février 2009 sur les sédiments dans lesquels s'alimentent certaines espèces de poissons, la DINAMA a déclaré que «la qualité des sédiments au fond du fleuve Uruguay n'a[vait] pas été altérée du fait de l'activité industrielle de l'usine Botnia».

262. De l'avis de la Cour, dans le cadre de leur obligation de préserver le milieu aquatique, les Parties ont le devoir de protéger la faune et la flore du fleuve. Les normes et les mesures qu'elles sont tenues d'adopter au titre de l'article 41 devraient également refléter leurs engagements internationaux en matière de protection de la biodiversité et des habitats, outre les autres normes relatives à la qualité de l'eau et aux rejets d'effluents. La Cour ne dispose cependant pas d'éléments de preuve suffisants pour lui permettre de conclure que l'Uruguay n'a pas respecté l'obligation lui incombant de préserver le milieu aquatique, y compris en protégeant la faune et la flore. Les éléments recueillis montrent plutôt qu'aucun lien n'a pu être clairement établi entre les effluents de l'usine Orion (Botnia) et les malformations des rotifères, les concentrations de dioxines mesurées chez le *sábalo* ou la réduction des réserves lipidiques des coquillages, dont il est fait état dans les constatations du programme de surveillance environnementale du fleuve Uruguay mis en œuvre par l'Argentine (programme URES).

e) *Pollution atmosphérique*

263. L'Argentine affirme que l'usine Orion (Botnia) a provoqué une pollution atmosphérique, sonore et visuelle qui a eu un impact négatif sur «le milieu aquatique», en violation de l'article 41 du statut de 1975. Elle

the Salto Grande dam and on the frontier with Argentina", a few kilometres upstream from the Orion (Botnia) mill.

261. Uruguay states that Argentina has failed to demonstrate any breach by Uruguay of the Biodiversity Convention, while the Ramsar Convention has no bearing in the present case because Esteros de Farrapos was not included in the list of Ramsar sites whose ecological character is threatened. With regard to the possibility of the effluent plume from the mill reaching Esteros de Farrapos, Uruguay in the oral proceedings acknowledged that under certain conditions that might occur. However, Uruguay added that it would be expected that the dilution of the effluent from the mill of 1:1000 would render the effluent quite harmless and below any concentration capable of constituting pollution. Uruguay contends that Argentina's claims regarding the harmful effects on fish and rotifers as a result of the effluents from the Orion (Botnia) mill are not credible. It points out that a recent comprehensive report of DINAMA on ichthyofauna concludes that compared to 2008 and 2009 there has been no change in species biodiversity. Uruguay adds that the July 2009 report of DINAMA, with results of its February 2009 monitoring of the sediments in the river where some fish species feed, stated that "the quality of the sediments at the bottom of the Uruguay River has not been altered as a consequence of the industrial activity of the Botnia plant".

262. The Court is of the opinion that as part of their obligation to preserve the aquatic environment, the Parties have a duty to protect the fauna and flora of the river. The rules and measures which they have to adopt under Article 41 should also reflect their international undertakings in respect of biodiversity and habitat protection, in addition to the other standards on water quality and discharges of effluent. The Court has not, however, found sufficient evidence to conclude that Uruguay breached its obligation to preserve the aquatic environment including the protection of its fauna and flora. The record rather shows that a clear relationship has not been established between the discharges from the Orion (Botnia) mill and the malformations of rotifers, or the dioxin found in the sábalo fish or the loss of fat by clams reported in the findings of the Argentine River Uruguay Environmental Surveillance (URES) programme.

(e) *Air pollution*

263. Argentina claims that the Orion (Botnia) mill has caused air, noise and visual pollution which negatively impact on "the aquatic environment" in violation of Article 41 of the 1975 Statute. Argentina also

fait également valoir que ce dernier a été conclu pour protéger non seulement la qualité des eaux, mais aussi, plus généralement, le «régime» et les «zones d'influence» du fleuve, c'est-à-dire «l'ensemble des éléments qui influencent, et qui sont influencés par, l'écosystème du fleuve pris dans son ensemble». L'Uruguay soutient que la Cour n'est pas compétente pour traiter ces questions et qu'en tout état de cause le bien-fondé des allégations de l'Argentine n'est pas établi.

264. Pour ce qui est de la pollution visuelle et sonore, la Cour a déjà conclu au paragraphe 52 que ces questions ne relevaient pas de sa compétence en vertu du statut de 1975. Pour ce qui est de la pollution atmosphérique, la Cour est d'avis que, si les rejets des cheminées de l'usine déposaient dans le milieu aquatique des substances nocives, cette pollution indirecte du fleuve relèverait des dispositions du statut de 1975. L'Uruguay semble adhérer à cette conclusion. Quoi qu'il en soit, eu égard aux conclusions de la Cour sur la qualité de l'eau, la Cour estime que les éléments versés au dossier n'établissent pas clairement que des substances toxiques ont été introduites dans le milieu aquatique en conséquence des rejets atmosphériques de l'usine Orion (Botnia).

f) *Conclusions relatives à l'article 41*

265. Il découle de ce qui précède que les éléments de preuve versés au dossier ne permettent pas d'établir de manière concluante que l'Uruguay n'a pas agi avec la diligence requise ou que les rejets d'effluents de l'usine Orion (Botnia) ont eu des effets délétères ou ont porté atteinte aux ressources biologiques, à la qualité des eaux ou à l'équilibre écologique du fleuve depuis le démarrage des activités de l'usine en novembre 2007. En conséquence, sur la base des preuves qui lui ont été présentées, la Cour conclut que l'Uruguay n'a pas violé ses obligations au titre de l'article 41.

g) *Obligations continues: suivi et contrôle*

266. De l'avis de la Cour, les deux Parties ont l'obligation de veiller à ce que la CARU, en tant que mécanisme commun créé par le statut de 1975, puisse continûment exercer les pouvoirs que lui confère le statut, y compris ses fonctions de surveillance de la qualité des eaux du fleuve et d'évaluation de l'impact de l'exploitation de l'usine Orion (Botnia) sur le milieu aquatique. L'Uruguay, pour sa part, a l'obligation de poursuivre le contrôle et le suivi du fonctionnement de l'usine conformément à l'article 41 du statut et de s'assurer que Botnia respecte la réglementation interne uruguayenne ainsi que les normes fixées par la commission. En vertu du statut de 1975, les Parties sont juridiquement tenues de poursuivre leur coopération par l'intermédiaire de la CARU et de permettre à cette dernière de développer les moyens nécessaires à la promotion de l'utilisation équitable du fleuve, tout en protégeant le milieu aquatique.

* *

argues that the 1975 Statute was concluded not only to protect the quality of the waters, but also, more generally, the "régime" of the river and "the areas affected by it, i.e., all the factors that affect, and are affected by the ecosystem of the river as a whole". Uruguay contends that the Court has no jurisdiction over those matters and that, in any event, the claims are not established on the merits.

264. With respect to noise and visual pollution, the Court has already concluded in paragraph 52 that it has no jurisdiction on such matters under the 1975 Statute. As regards air pollution, the Court is of the view that if emissions from the plant's stacks have deposited into the aquatic environment substances with harmful effects, such indirect pollution of the river would fall under the provisions of the 1975 Statute. Uruguay appears to agree with this conclusion. Nevertheless, in view of the findings of the Court with respect to water quality, it is the opinion of the Court that the record does not show any clear evidence that substances with harmful effects have been introduced into the aquatic environment of the river through the emissions of the Orion (Botnia) mill into the air.

(f) *Conclusions on Article 41*

265. It follows from the above that there is no conclusive evidence in the record to show that Uruguay has not acted with the requisite degree of due diligence or that the discharges of effluent from the Orion (Botnia) mill have had deleterious effects or caused harm to living resources or to the quality of the water or the ecological balance of the river since it started its operations in November 2007. Consequently, on the basis of the evidence submitted to it, the Court concludes that Uruguay has not breached its obligations under Article 41.

(g) *Continuing obligations: monitoring*

266. The Court is of the opinion that both Parties have the obligation to enable CARU, as the joint machinery created by the 1975 Statute, to exercise on a continuous basis the powers conferred on it by the 1975 Statute, including its function of monitoring the quality of the waters of the river and of assessing the impact of the operation of the Orion (Botnia) mill on the aquatic environment. Uruguay, for its part, has the obligation to continue monitoring the operation of the plant in accordance with Article 41 of the Statute and to ensure compliance by Botnia with Uruguayan domestic regulations as well as the standards set by CARU. The Parties have a legal obligation under the 1975 Statute to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment.

* *

V. Les demandes présentées par les Parties dans leurs conclusions finales

267. La Cour ayant conclu que l'Uruguay a manqué aux obligations de nature procédurale lui incombant en vertu du statut de 1975 (voir paragraphes 111, 122, 131, 149, 157 et 158 ci-dessus), il lui appartient de tirer les conséquences de ces faits internationalement illicites qui engagent la responsabilité internationale de l'Uruguay et de déterminer le contenu de celle-ci.

268. L'Argentine demande en premier lieu à la Cour de constater que l'Uruguay a violé les obligations de nature procédurale lui incombant en vertu du statut de 1975, et a engagé sa responsabilité internationale à ce titre. Elle demande aussi à la Cour d'ordonner à l'Uruguay la cessation immédiate de ces faits internationalement illicites.

269. La Cour considère que la constatation du comportement illicite de l'Uruguay en ce qui concerne ses obligations de nature procédurale constitue en elle-même une mesure de satisfaction pour l'Argentine. Les manquements de l'Uruguay aux obligations de nature procédurale ayant eu lieu par le passé et ayant pris fin, il n'y a pas lieu d'en ordonner la cessation.

270. L'Argentine estime toutefois qu'un constat d'illicéité constituerait une forme de réparation insuffisante, quand bien même la Cour constaterait que l'Uruguay n'a manqué à aucune obligation de fond découlant du statut de 1975, mais seulement à certaines de ses obligations de nature procédurale. L'Argentine soutient en effet que les obligations de nature procédurale et les obligations de fond prévues par le statut de 1975 sont étroitement liées et qu'on ne saurait les dissocier sous l'angle de la réparation, car les manquements aux premières continueraient à produire des effets indésirables alors même qu'ils auraient pris fin. En conséquence, l'Argentine estime que l'Uruguay est tenu de «rétablir sur le terrain et au plan juridique la situation qui existait avant la perpétration de[s] ... faits internationalement illicites». A ce titre, l'usine Orion (Botnia) devrait être démantelée. Selon l'Argentine, la *restitutio in integrum* serait en effet la forme de réparation de principe du fait internationalement illicite. En s'appuyant sur l'article 35 des articles de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite, l'Argentine soutient que la restitution jouirait d'une priorité sur toutes les autres formes de réparation, sauf lorsqu'elle est «matériellement impossible» ou impose «une charge hors de toute proportion avec l'avantage qui dériverait de la restitution plutôt que de l'indemnisation». Elle expose que le démantèlement de l'usine n'est pas matériellement impossible et n'emporterait par ailleurs pas de charge hors de toute proportion dans le chef de l'Etat défendeur, dès lors que ce dernier a

> «souligné que la construction des usines ne reviendrait pas à constituer un fait accompli susceptible de porter préjudice aux droits de l'Argentine, et que la décision de poursuivre les travaux et de

V. The Claims Made by the Parties in Their Final Submissions

267. Having concluded that Uruguay breached its procedural obligations under the 1975 Statute (see paragraphs 111, 122, 131, 149, 157 and 158 above), it is for the Court to draw the conclusions following from these internationally wrongful acts giving rise to Uruguay's international responsibility and to determine what that responsibility entails.

268. Argentina first requests the Court to find that Uruguay has violated the procedural obligations incumbent on it under the 1975 Statute and has thereby engaged its international responsibility. Argentina further requests the Court to order that Uruguay immediately cease these internationally wrongful acts.

269. The Court considers that its finding of wrongful conduct by Uruguay in respect of its procedural obligations per se constitutes a measure of satisfaction for Argentina. As Uruguay's breaches of the procedural obligations occurred in the past and have come to an end, there is no cause to order their cessation.

270. Argentina nevertheless argues that a finding of wrongfulness would be insufficient as reparation, even if the Court were to find that Uruguay has not breached any substantive obligation under the 1975 Statute but only some of its procedural obligations. Argentina maintains that the procedural obligations and substantive obligations laid down in the 1975 Statute are closely related and cannot be severed from one another for purposes of reparation, since undesirable effects of breaches of the former persist even after the breaches have ceased. Accordingly, Argentina contends that Uruguay is under an obligation to "re-establish on the ground and in legal terms the situation that existed before [the] internationally wrongful acts were committed". To this end, the Orion (Botnia) mill should be dismantled. According to Argentina, *restitutio in integrum* is the primary form of reparation for internationally wrongful acts. Relying on Article 35 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts, Argentina maintains that restitution takes precedence over all other forms of reparation except where it is "materially impossible" or involves "a burden out of all proportion to the benefit deriving from restitution instead of compensation". It asserts that dismantling the mill is not materially impossible and would not create for the Respondent State a burden out of all proportion, since the Respondent has

> "maintained that construction of the mills would not amount to a fait accompli liable to prejudice Argentina's rights and that it was for Uruguay alone to decide whether to proceed with construction

prendre ainsi le risque de devoir démanteler les usines en cas de décision défavorable de la Cour relevait de sa seule responsabilité»,

ainsi que la Cour l'a noté dans son ordonnance sur la demande en indication de mesures conservatoires soumise par l'Argentine en la présente affaire (*ordonnance du 13 juillet 2006, C.I.J. Recueil 2006*, p. 125, par. 47). L'Argentine ajoute que le caractère éventuellement disproportionné de la restitution doit s'apprécier au plus tard au moment du dépôt de la requête introductive d'instance, puisque dès cet instant l'Uruguay ne pouvait ignorer le risque qu'il encourait en poursuivant la construction de l'usine litigieuse, ayant connaissance de la demande argentine de cessation des travaux et de rétablissement de la situation antérieure. L'Argentine considère enfin que les articles 42 et 43 du statut de 1975 sont inapplicables en l'espèce car ils établissent un régime de responsabilité en l'absence de fait illicite.

271. Considérant que les obligations de nature procédurale sont distinctes des obligations de fond prévues par le statut de 1975, et que le contenu de la règle en cause doit être pris en compte pour déterminer la forme que doit prendre l'obligation de réparer découlant de sa violation, l'Uruguay soutient que la restitution ne serait pas une forme de réparation appropriée s'il n'était trouvé responsable que de manquements à des obligations de nature procédurale. L'Uruguay souligne qu'en toute hypothèse le démantèlement de l'usine Orion (Botnia) emporterait une «disproportion frappante entre la gravité des conséquences du fait illicite reproché et celles du remède demandé», le caractère éventuellement disproportionné de la charge que représente la restitution devant s'apprécier au moment où la Cour statue et non, comme le soutient l'Argentine, au moment de sa saisine. L'Uruguay ajoute que le statut de 1975 constitue une *lex specialis* au regard du droit de la responsabilité internationale, ses articles 42 et 43 érigeant l'indemnisation, et non la restitution, comme la forme de réparation appropriée en cas de pollution du fleuve survenant en violation du statut de 1975.

272. N'ayant pas été saisie d'une demande de réparation fondée sur un régime de responsabilité en l'absence de fait illicite, la Cour n'estime pas nécessaire de déterminer si les articles 42 et 43 du statut de 1975 établissent un tel régime. Il ne saurait par contre être déduit du texte desdits articles, qui visent spécifiquement des cas de pollution, qu'ils auraient pour objet ou pour effet d'écarter toute autre forme de réparation que l'indemnisation en cas de manquement aux obligations de nature procédurale découlant du statut de 1975.

273. La Cour rappelle que, selon le droit international coutumier, la restitution est l'une des formes de réparation du préjudice; elle consiste dans le rétablissement de la situation qui existait avant la survenance du fait illicite. La Cour rappelle également que, dans les cas où la restitution est matériellement impossible ou emporte une charge hors de toute proportion avec l'avantage qui en dériverait, la réparation prend alors la forme de l'indemnisation ou de la satisfaction, voire de l'indemnisation et

> and thereby assume the risk of having to dismantle the mills in the event of an adverse decision by the Court",

as the Court noted in its Order on Argentina's request for the indication of provisional measures in this case (*Order of 13 July 2006, I.C.J. Reports 2006*, p. 125, para. 47). Argentina adds that whether or not restitution is disproportionate must be determined at the latest as of the filing of the Application instituting proceedings, since as from that time Uruguay, knowing of Argentina's request to have the work halted and the *status quo ante* re-established, could not have been unaware of the risk it ran in proceeding with construction of the disputed mill. Lastly, Argentina considers Articles 42 and 43 of the 1975 Statute to be inapplicable in the present case, since they establish a régime of responsibility in the absence of any wrongful act.

271. Taking the view that the procedural obligations are distinct from the substantive obligations laid down in the 1975 Statute, and that account must be taken of the purport of the rule breached in determining the form to be taken by the obligation of reparation deriving from its violation, Uruguay maintains that restitution would not be an appropriate form of reparation if Uruguay is found responsible only for breaches of procedural obligations. Uruguay argues that the dismantling of the Orion (Botnia) mill would at any rate involve a "striking disproportion between the gravity of the consequences of the wrongful act of which it is accused and those of the remedy claimed", and that whether or not a disproportionate burden would result from restitution must be determined as of when the Court rules, not, as Argentina claims, as of the date it was seised. Uruguay adds that the 1975 Statute constitutes a *lex specialis* in relation to the law of international responsibility, as Articles 42 and 43 establish compensation, not restitution, as the appropriate form of reparation for pollution of the river in contravention of the 1975 Statute.

272. The Court, not having before it a claim for reparation based on a régime of responsibility in the absence of any wrongful act, deems it unnecessary to determine whether Articles 42 and 43 of the 1975 Statute establish such a régime. But it cannot be inferred from these Articles, which specifically concern instances of pollution, that their purpose or effect is to preclude all forms of reparation other than compensation for breaches of procedural obligations under the 1975 Statute.

273. The Court recalls that customary international law provides for restitution as one form of reparation for injury, restitution being the re-establishment of the situation which existed before occurrence of the wrongful act. The Court further recalls that, where restitution is materially impossible or involves a burden out of all proportion to the benefit deriving from it, reparation takes the form of compensation or satisfaction, or even both (see *Gabčíkovo-Nagymaros Project (Hungary/Slovakia),*

de la satisfaction (voir *Projet Gabčíkovo-Nagymaros (Hongrie/Slovaquie), arrêt, C.I.J. Recueil 1997*, p. 81, par. 152; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif, C.I.J. Recueil 2004 (I)*, p. 198, par. 152-153; *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I)*, p. 233, par. 460; voir également les articles 34 à 37 des articles de la Commission du droit international sur la responsabilité de l'Etat pour fait internationalement illicite).

274. Tout comme les autres formes de réparation, la restitution doit être appropriée au préjudice subi, compte tenu de la nature du fait illicite dont il procède. Comme la Cour l'a souligné,

> «savoir ce qui constitue «une réparation dans une forme adéquate» ... dépend, manifestement, des circonstances concrètes de chaque affaire ainsi que de la nature exacte et de l'importance du préjudice, puisqu'il s'agit de déterminer quelle est la «réparation dans une forme adéquate» qui correspond à ce préjudice» (*Avena et autres ressortissants mexicains (Mexique c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2004 (I)*, p. 59, par. 119).

275. Comme la Cour a eu l'occasion de le montrer (voir paragraphes 154 à 157 ci-dessus), les obligations de nature procédurale du statut de 1975 n'emportaient pas, après l'expiration de la période de négociation, l'interdiction pour l'Uruguay de construire l'usine Orion (Botnia) en l'absence du consentement de l'Argentine. La Cour a relevé cependant que la construction de cette usine avait commencé avant la fin des négociations, en violation des obligations de nature procédurale énoncées par le statut de 1975. Par ailleurs, ainsi que la Cour l'a constaté sur la base des éléments de preuve qui lui ont été soumis, le fonctionnement de l'usine Orion (Botnia) n'a pas entraîné une violation des obligations de fond prévues par le statut de 1975 (paragraphes 180, 189 et 265 ci-dessus). Dès lors qu'il n'était pas interdit à l'Uruguay de construire et de mettre en service l'usine Orion (Botnia) après l'expiration de la période de négociation, et que l'Uruguay n'a violé aucune des obligations de fond imposées par le statut de 1975, ordonner le démantèlement de cette installation ne saurait constituer, de l'avis de la Cour, une forme de réparation appropriée à la violation des obligations de nature procédurale.

276. L'Uruguay n'ayant pas manqué aux obligations de fond découlant du statut de 1975, la Cour ne saurait davantage, pour les mêmes raisons, accueillir la demande de l'Argentine relative à l'indemnisation de certains préjudices dans différents secteurs économiques, notamment le tourisme et l'agriculture, dont elle allègue l'existence.

277. L'Argentine demande aussi à la Cour de dire et juger que l'Uruguay doit «donner des garanties adéquates qu'[il] s'abstiendra à l'avenir d'empêcher l'application du statut du fleuve Uruguay de 1975 et, en particulier, du mécanisme de consultation institué par le chapitre II de ce traité».

Judgment, I.C.J. Reports 1997, p. 81, para. 152; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, p. 198, paras. 152-153; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 233, para. 460; see also Articles 34 to 37 of the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts).

274. Like other forms of reparation, restitution must be appropriate to the injury suffered, taking into account the nature of the wrongful act having caused it. As the Court has made clear,

> "[w]hat constitutes 'reparation in an adequate form' clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the viewpoint of what is the 'reparation in an adequate form' that corresponds to the injury" (*Avena and Other Mexican Nationals (Mexico* v. *United States of America), Judgment, I.C.J. Reports 2004 (I)*, p. 59, para. 119).

275. As the Court has pointed out (see paragraphs 154 to 157 above), the procedural obligations under the 1975 Statute did not entail any ensuing prohibition on Uruguay's building of the Orion (Botnia) mill, failing consent by Argentina, after the expiration of the period for negotiation. The Court has however observed that construction of that mill began before negotiations had come to an end, in breach of the procedural obligations laid down in the 1975 Statute. Further, as the Court has found, on the evidence submitted to it, the operation of the Orion (Botnia) mill has not resulted in the breach of substantive obligations laid down in the 1975 Statute (paragraphs 180, 189 and 265 above). As Uruguay was not barred from proceeding with the construction and operation of the Orion (Botnia) mill after the expiration of the period for negotiation and as it breached no substantive obligation under the 1975 Statute, ordering the dismantling of the mill would not, in the view of the Court, constitute an appropriate remedy for the breach of procedural obligations.

276. As Uruguay has not breached substantive obligations arising under the 1975 Statute, the Court is likewise unable, for the same reasons, to uphold Argentina's claim in respect of compensation for alleged injuries suffered in various economic sectors, specifically tourism and agriculture.

277. Argentina further requests the Court to adjudge and declare that Uruguay must "provide adequate guarantees that it will refrain in future from preventing the Statute of the River Uruguay of 1975 from being applied, in particular the consultation procedure established by Chapter II of that Treaty".

278. La Cour n'aperçoit pas en la présente espèce de circonstances spéciales requérant d'ordonner une mesure telle que celle que réclame l'Argentine. Comme la Cour a eu récemment l'occasion de le rappeler :

> «[S]i la Cour peut, comme il lui est arrivé de le faire, ordonner à l'Etat responsable d'un comportement internationalement illicite d'offrir à l'Etat lésé des assurances et des garanties de non-répétition, c'est seulement si les circonstances le justifient, ce qu'il lui appartient d'apprécier.
>
> En règle générale, il n'y a pas lieu de supposer que l'Etat dont un acte ou un comportement a été déclaré illicite par la Cour répétera à l'avenir cet acte ou ce comportement, puisque sa bonne foi doit être présumée (voir *Usine de Chorzów, fond, arrêt n° 13, 1928, C.P.J.I. série A n° 17*, p. 63 ; *Essais nucléaires (Australie c. France), arrêt, C.I.J. Recueil 1974*, p. 272, par. 60 ; *Essais nucléaires (Nouvelle-Zélande c. France), arrêt, C.I.J. Recueil 1974*, p. 477, par. 63 ; et *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 437, par. 101). Il n'y a donc pas lieu, sauf circonstances spéciales ... d'ordonner [que des assurances et des garanties de non-répétition soient offertes].» (*Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 267, par. 150.)

279. L'Uruguay demande pour sa part à la Cour de confirmer son droit «de poursuivre l'exploitation de l'usine Botnia conformément aux dispositions du statut de 1975». L'Argentine estime que cette demande doit être rejetée, notamment parce que, ayant été formulée pour la première fois dans la duplique de l'Uruguay, elle constituerait une demande reconventionnelle irrecevable au regard de l'article 80 du Règlement.

280. Sans qu'il soit nécessaire à la Cour de trancher la question de recevabilité de cette demande, il lui suffit de constater que la demande de l'Uruguay n'a aucune portée utile dès lors que les demandes de l'Argentine relatives aux violations, par l'Uruguay, de ses obligations de fond et au démantèlement de l'usine Orion (Botnia) ont été rejetées.

* * *

281. La Cour souligne enfin que le statut de 1975 impose aux Parties de coopérer entre elles, selon les modalités qu'il précise, afin d'assurer la réalisation de son objet et de son but. Cette obligation de coopération s'étend au contrôle et au suivi d'une installation industrielle, telle que l'usine Orion (Botnia). A cet égard, la Cour relève qu'il existe entre les Parties une longue et efficace tradition de coopération et de coordination dans le cadre de la CARU. En agissant conjointement au sein de la CARU, les Parties ont établi une réelle communauté d'intérêts et de droits dans la gestion du fleuve Uruguay et dans la protection de son environnement. Elles ont également coordonné leurs actions au moyen

278. The Court fails to see any special circumstances in the present case requiring the ordering of a measure such as that sought by Argentina. As the Court has recently observed:

> "[W]hile the Court may order, as it has done in the past, a State responsible for internationally wrongful conduct to provide the injured State with assurances and guarantees of non-repetition, it will only do so if the circumstances so warrant, which it is for the Court to assess.
>
> As a general rule, there is no reason to suppose that a State whose act or conduct has been declared wrongful by the Court will repeat that act or conduct in the future, since its good faith must be presumed (see *Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 63; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 60; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 477, para. 63; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 437, para. 101). There is thus no reason, except in special circumstances . . . to order [the provision of assurances and guarantees of non-repetition]." (*Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua), Judgment, I.C.J. Reports 2009*, p. 267, para. 150.)

279. Uruguay, for its part, requests the Court to confirm its right "to continue operating the Botnia plant in conformity with the provisions of the 1975 Statute". Argentina contends that this claim should be rejected, in particular because it is a counter-claim first put forward in Uruguay's Rejoinder and, as such, is inadmissible by virtue of Article 80 of the Rules of Court.

280. There is no need for the Court to decide the admissibility of this claim; it is sufficient to observe that Uruguay's claim is without any practical significance, since Argentina's claims in relation to breaches by Uruguay of its substantive obligations and to the dismantling of the Orion (Botnia) mill have been rejected.

* * *

281. Lastly, the Court points out that the 1975 Statute places the Parties under a duty to co-operate with each other, on the terms therein set out, to ensure the achievement of its object and purpose. This obligation to co-operate encompasses ongoing monitoring of an industrial facility, such as the Orion (Botnia) mill. In that regard the Court notes that the Parties have a long-standing and effective tradition of co-operation and co-ordination through CARU. By acting jointly through CARU, the Parties have established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment. They have also co-ordinated their actions through the joint

du mécanisme conjoint constitué par la CARU, conformément aux dispositions du statut de 1975, et trouvé dans ce cadre des solutions appropriées à leurs divergences sans éprouver la nécessité d'avoir recours au règlement judiciaire des différends prévu à l'article 60 du statut, jusqu'à ce que la présente affaire soit portée devant la Cour.

* * *

282. Par ces motifs,

La COUR,

1) Par treize voix contre une,

Dit que la République orientale de l'Uruguay a manqué aux obligations de nature procédurale lui incombant en vertu des articles 7 à 12 du statut du fleuve Uruguay de 1975 et que la constatation par la Cour de cette violation constitue une satisfaction appropriée;

POUR : M. Tomka, *vice-président, faisant fonction de président en l'affaire*; MM. Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, *juges*; M. Vinuesa, *juge* ad hoc;

CONTRE : M. Torres Bernárdez, *juge* ad hoc;

2) Par onze voix contre trois,

Dit que la République orientale de l'Uruguay n'a pas manqué aux obligations de fond lui incombant en vertu des articles 35, 36 et 41 du statut du fleuve Uruguay de 1975;

POUR : M. Tomka, *vice-président, faisant fonction de président en l'affaire*; MM. Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood, *juges*; M. Torres Bernárdez, *juge* ad hoc;

CONTRE : MM. Al-Khasawneh, Simma, *juges*; M. Vinuesa, *juge* ad hoc;

3) A l'unanimité,

Rejette le surplus des conclusions des Parties.

Fait en français et en anglais, le texte français faisant foi, au Palais de la Paix, à La Haye, le vingt avril deux mille dix, en trois exemplaires, dont l'un sera déposé aux archives de la Cour et les autres seront transmis respectivement au Gouvernement de la République argentine et au Gouvernement de la République orientale de l'Uruguay.

Le vice-président,
(Signé) Peter TOMKA.

Le greffier,
(Signé) Philippe COUVREUR.

mechanism of CARU, in conformity with the provisions of the 1975 Statute, and found appropriate solutions to their differences within its framework without feeling the need to resort to the judicial settlement of disputes provided for in Article 60 of the Statute until the present case was brought before the Court.

* * *

282. For these reasons,

THE COURT,

(1) By thirteen votes to one,

Finds that the Eastern Republic of Uruguay has breached its procedural obligations under Articles 7 to 12 of the 1975 Statute of the River Uruguay and that the declaration by the Court of this breach constitutes appropriate satisfaction;

IN FAVOUR: *Vice-President* Tomka, *Acting President*; *Judges* Koroma, Al-Khasawneh, Simma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Vinuesa;

AGAINST: *Judge* ad hoc Torres Bernárdez;

(2) By eleven votes to three,

Finds that the Eastern Republic of Uruguay has not breached its substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay;

IN FAVOUR: *Vice-President* Tomka, *Acting President*; *Judges* Koroma, Abraham, Keith, Sepúlveda-Amor, Bennouna, Skotnikov, Cançado Trindade, Yusuf, Greenwood; *Judge* ad hoc Torres Bernárdez;

AGAINST: *Judges* Al-Khasawneh, Simma; *Judge* ad hoc Vinuesa;

(3) Unanimously,

Rejects all other submissions by the Parties.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twentieth day of April, two thousand and ten, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Argentine Republic and the Government of the Eastern Republic of Uruguay, respectively.

(Signed) Peter TOMKA,
Vice-President.

(Signed) Philippe COUVREUR,
Registrar.

MM. les juges AL-KHASAWNEH et SIMMA joignent à l'arrêt l'exposé de leur opinion dissidente commune; M. le juge KEITH joint à l'arrêt l'exposé de son opinion individuelle; M. le juge SKOTNIKOV joint une déclaration à l'arrêt; M. le juge CANÇADO TRINDADE joint à l'arrêt l'exposé de son opinion individuelle; M. le juge YUSUF joint une déclaration à l'arrêt; M. le juge GREENWOOD joint à l'arrêt l'exposé de son opinion individuelle; M. le juge *ad hoc* TORRES BERNÁRDEZ joint à l'arrêt l'exposé de son opinion individuelle; M. le juge *ad hoc* VINUESA joint à l'arrêt l'exposé de son opinion dissidente.

(Paraphé) P.T.
(Paraphé) Ph.C.

Judges AL-KHASAWNEH and SIMMA append a joint dissenting opinion to the Judgment of the Court; Judge KEITH appends a separate opinion to the Judgment of the Court; Judge SKOTNIKOV appends a declaration to the Judgment of the Court; Judge CANÇADO TRINDADE appends a separate opinion to the Judgment of the Court; Judge YUSUF appends a declaration to the Judgment of the Court; Judge GREENWOOD appends a separate opinion to the Judgment of the Court; Judge *ad hoc* TORRES BERNÁRDEZ appends a separate opinion to the Judgment of the Court; Judge *ad hoc* VINUESA appends a dissenting opinion to the Judgment of the Court.

(Initialled) P.T.

(Initialled) Ph.C.

INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS,
ADVISORY OPINIONS AND ORDERS

CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT

(HUNGARY/SLOVAKIA)

JUDGMENT OF 25 SEPTEMBER 1997

1997

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

AFFAIRE RELATIVE AU PROJET GABČÍKOVO-NAGYMAROS

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INTERNATIONAL COURT OF JUSTICE

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CASE CONCERNING THE GABČÍKOVO-NAGYMAROS PROJECT

(HUNGARY/SLOVAKIA)

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AFFAIRE RELATIVE AU PROJET GABČÍKOVO-NAGYMAROS

(HONGRIE/SLOVAQUIE)

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JUDGMENT

Present: *President* SCHWEBEL; *Vice-President* WEERAMANTRY; *Judges* ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS, REZEK; *Judge* ad hoc SKUBISZEWSKI; *Registrar* VALENCIA-OSPINA.

In the case concerning the Gabčíkovo-Nagymaros Project,

between

the Republic of Hungary,

represented by

H.E. Mr. György Szénási, Ambassador, Head of the International Law Department, Ministry of Foreign Affairs,

as Agent and Counsel;

H.E. Mr. Dénes Tomaj, Ambassador of the Republic of Hungary to the Netherlands,

as Co-Agent;

Mr. James Crawford, Whewell Professor of International Law, University of Cambridge,

Mr. Pierre-Marie Dupuy, Professor at the University Panthéon-Assas (Paris II) and Director of the Institut des hautes études internationales of Paris,

Mr. Alexandre Kiss, Director of Research, Centre national de la recherche scientifique (retd.),

Mr. László Valki, Professor of International Law, Eötvös Loránd University, Budapest,

— Développement durable — Dispositions du traité permettant aux parties, d'un commun accord, de tenir compte de ces normes — Rejet du traité — Manquements réciproques — Intégrité de la règle pacta sunt servanda *— Traité demeurant en vigueur tant qu'il n'y est pas mis fin d'un commun accord.*

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ARRÊT

Présents: M. SCHWEBEL, *Président*; M. WEERAMANTRY, *Vice-Président*; MM. ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS, REZEK, *juges*; M. SKUBISZEWSKI, *juge* ad hoc; M. VALENCIA-OSPINA, *Greffier*.

En l'affaire relative au projet Gabčíkovo-Nagymaros,

entre

la République de Hongrie,

représentée par

S. Exc. M. György Szénási, ambassadeur, directeur du département de droit international au ministère des affaires étrangères,

comme agent et conseil;

S. Exc. M. Dénes Tomaj, ambassadeur de la République de Hongrie aux Pays-Bas,

comme coagent;

M. James Crawford, professeur de droit international, titulaire de la chaire Whewell à l'Université de Cambridge,

M. Pierre-Marie Dupuy, professeur à l'Université Panthéon-Assas (Paris II) et directeur de l'Institut des hautes études internationales de Paris,

M. Alexandre Kiss, directeur de recherches au Centre national de la recherche scientifique (en retraite),

M. László Valki, professeur de droit international à l'Université Eötvös Loránd de Budapest,

Mr. Boldizsár Nagy, Associate Professor of International Law, Eötvös Loránd University, Budapest,
Mr. Philippe Sands, Reader in International Law, University of London, School of Oriental and African Studies, and Global Professor of Law, New York University,
Ms Katherine Gorove, consulting Attorney,

as Counsel and Advocates;

Dr. Howard Wheater, Professor of Hydrology, Imperial College, London,
Dr. Gábor Vida, Professor of Biology, Eötvös Loránd University, Budapest, Member of the Hungarian Academy of Sciences,
Dr. Roland Carbiener, Professor emeritus of the University of Strasbourg,
Dr. Klaus Kern, consulting Engineer, Karlsruhe,

as Advocates;

Mr. Edward Helgeson,
Mr. Stuart Oldham,
Mr. Péter Molnár,

as Advisers;

Dr. György Kovács,
Mr. Timothy Walsh,
Mr. Zoltán Kovács,

as Technical Advisers;

Dr. Attila Nyikos,

as Assistant;

Mr. Axel Gosseries, LL.M.,

as Translator;

Ms Éva Kocsis,
Ms Katinka Tompa,

as Secretaries,

and

the Slovak Republic,

represented by

H.E. Dr. Peter Tomka, Ambassador, Legal Adviser of the Ministry of Foreign Affairs,

as Agent;

Dr. Václav Mikulka, Member of the International Law Commission,

as Co-Agent, Counsel and Advocate;

Mr. Derek W. Bowett, C.B.E., Q.C., F.B.A., Whewell Professor emeritus of International Law at the University of Cambridge, former Member of the International Law Commission,

as Counsel;

Mr. Stephen C. McCaffrey, Professor of International Law at the University of the Pacific, McGeorge School of Law, Sacramento, United States of America, former Member of the International Law Commission,
Mr. Alain Pellet, Professor at the University of Paris X-Nanterre and at the

M. Boldizsár Nagy, professeur associé de droit international à l'Université Eötvös Loránd de Budapest,
M. Philippe Sands, chargé de cours de droit international à la School of Oriental and African Studies de l'Université de Londres, et *Global Professor of Law* à l'Université de New York,
Mme Katherine Gorove, juriste-conseil,

comme conseils et avocats;

M. Howard Wheater, professeur d'hydrologie à l'Imperial College de Londres,
M. Gábor Vida, professeur de biologie à l'Université Eötvös Loránd de Budapest, membre de l'Académie des sciences de Hongrie,
M. Roland Carbiener, professeur émérite de l'Université de Strasbourg,
M. Klaus Kern, ingénieur-conseil à Karlsruhe,

comme avocats;

M. Edward Helgeson,
M. Stuart Oldham,
M. Péter Molnár,

comme conseillers;

M. György Kovács,
M. Timothy Walsh,
M. Zoltán Kovács,

comme conseillers techniques;

M. Attila Nyikos,

comme assistant;

M. Axel Gosseries, LL.M.,

comme traducteur;

Mme Eva Kocsis,
Mme Katinka Tompa,

comme secrétaires,

et

la République slovaque,

représentée par

S. Exc. M. Peter Tomka, ambassadeur, conseiller juridique du ministère des affaires étrangères,

comme agent;

M. Václav Mikulka, membre de la Commission du droit international,

comme coagent, conseil et avocat;

M. Derek W. Bowett, C.B.E., Q.C., F.B.A., professeur émérite, ancien titulaire de la chaire Whewell à l'Université de Cambridge, ancien membre de la Commission du droit international,

comme conseil;

M. Stephen C. McCaffrey, professeur de droit international à la McGeorge School of Law de l'Université du Pacifique à Sacramento (Etats-Unis d'Amérique), ancien membre de la Commission du droit international,
M. Alain Pellet, professeur à l'Université de Paris X-Nanterre et à l'Institut

Institute of Political Studies, Paris, Member of the International Law Commission,
Mr. Walter D. Sohier, Member of the Bar of the State of New York and of the District of Columbia,
Sir Arthur Watts, K.C.M.G., Q.C., Barrister, Member of the Bar of England and Wales,
Mr. Samuel S. Wordsworth, avocat à la cour d'appel de Paris, Solicitor of the Supreme Court of England and Wales, Frere Cholmeley, Paris,

as Counsel and Advocates;

Mr. Igor Mucha, Professor of Hydrogeology and Former Head of the Groundwater Department at the Faculty of Natural Sciences of Comenius University in Bratislava,
Mr. Karra Venkateswara Rao, Director of Water Resources Engineering, Department of Civil Engineering, City University, London,

Mr. Jens Christian Refsgaard, Head of Research and Development, Danish Hydraulic Institute,

as Counsel and Experts;

Dr. Cecília Kandráčová, Director of Department, Ministry of Foreign Affairs,
Mr. Luděk Krajhanzl, Attorney at Law, Vyroubal Krajhanzl Skácel and Partners, Prague,
Mr. Miroslav Liška, Head of the Division for Public Relations and Expertise, Water Resources Development State Enterprise, Bratislava,

Dr. Peter Vršanský, Minister-Counsellor, Chargé d'affaires *a.i.*, of the Embassy of the Slovak Republic, The Hague,

as Counsellors;

Miss Anouche Beaudouin, allocataire de recherche at the University of Paris X-Nanterre,
Ms Cheryl Dunn, Frere Cholmeley, Paris,
Ms Nikoleta Glindová, attaché, Ministry of Foreign Affairs,
Mr. Drahoslav Štefánek, attaché, Ministry of Foreign Affairs,

as Legal Assistants,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called "Hungary") to the Netherlands and the Chargé d'affaires *ad interim* of the Slovak Republic (hereinafter called "Slovakia") to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:

d'études politiques de Paris, membre de la Commission du droit international,
M. Walter D. Sohier, membre des barreaux de l'Etat de New York et du district de Columbia,
sir Arthur Watts, K.C.M.G., Q.C., *Barrister*, membre du barreau d'Angleterre et du pays de Galles,
M. Samuel S. Wordsworth, avocat à la cour d'appel de Paris et *Solicitor* auprès de la Cour suprême d'Angleterre et du pays de Galles, Frere Cholmeley, Paris,

comme conseils et avocats;

M. Igor Mucha, professeur d'hydrogéologie et ancien directeur du département des eaux souterraines à la faculté des sciences naturelles de l'Université Comenius de Bratislava,
M. Karra Venkateswara Rao, directeur de la section des techniques d'aménagement hydrauliques du département du génie civil de la City University de Londres,
M. Jens Christian Refsgaard, directeur de la recherche et du développement à l'Institut danois d'hydraulique,

comme conseils et experts;

Mme Cecília Kandráčová, directeur de département au ministère des affaires étrangères,
M. Luděk Krajhanzl, avocat, cabinet Vyroubal Krajhanzl Skácel et associés, Prague,
M. Miroslav Liška, directeur de la division des relations publiques et de l'expertise de l'entreprise d'Etat pour la mise en valeur des ressources en eau, Bratislava,
M. Peter Vršanský, ministre conseiller, chargé d'affaires par intérim de l'ambassade de la République slovaque aux Pays-Bas,

comme conseillers;

Mlle Anouche Beaudouin, allocataire de recherche à l'Université de Paris X-Nanterre,
Mme Cheryl Dunn, Frere Cholmeley, Paris,
Mme Nikoleta Glindová, attachée au ministère des affaires étrangères,
M. Drahoslav Štefánek, attaché au ministère des affaires étrangères,

comme assistants juridiques,

LA COUR,

ainsi composée,

après délibéré en chambre du conseil,

rend l'arrêt suivant:

1. Par lettre en date du 2 juillet 1993, déposée au Greffe de la Cour le même jour, l'ambassadeur aux Pays-Bas de la République de Hongrie (dénommée ci-après la «Hongrie») et le chargé d'affaires par intérim aux Pays-Bas de la République slovaque (dénommée ci-après la «Slovaquie») ont notifié conjointement à la Cour un compromis en langue anglaise, signé à Bruxelles le 7 avril 1993 et entré en vigueur le 28 juin 1993 à la date de l'échange des instruments de ratification.

2. Dans sa traduction française, le texte du compromis se lit comme suit:

"*The Republic of Hungary and the Slovak Republic,*

Considering that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as 'the Treaty'), and on the construction and operation of the 'provisional solution';

Bearing in mind that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project;

Recognizing that the Parties concerned have been unable to settle these differences by negotiations;

Having in mind that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabčíkovo-Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

Desiring that these differences should be settled by the International Court of Justice;

Recalling their commitment to apply, pending the Judgment of the International Court of Justice, such a temporary water management régime of the Danube as shall be agreed between the Parties;

Desiring further to define the issues to be submitted to the International Court of Justice,

Have agreed as follows:

Article 1

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

Article 2

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

(a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

«*La République de Hongrie et la République slovaque*,

Considérant que des contestations ont surgi entre la République fédérative tchèque et slovaque et la République de Hongrie concernant l'application et la terminaison du traité relatif à la construction et au fonctionnement du système de barrage de Gabčíkovo-Nagymaros, signé à Budapest le 16 septembre 1977, et des instruments y afférents (ci-après dénommés le «traité»), ainsi que la construction et le fonctionnement de la «solution provisoire»;

Tenant compte de ce que la République slovaque est l'un des deux Etats successeurs de la République fédérative tchèque et slovaque et l'unique Etat successeur en ce qui concerne les droits et obligations relatifs au projet Gabčíkovo-Nagymaros;

Reconnaissant que les parties concernées ne sont pas parvenues à régler ces contestations par voie de négociation;

Ayant à l'esprit que tant la délégation tchécoslovaque que la délégation hongroise ont déclaré qu'elles s'engageaient à soumettre les contestations liées au projet Gabčíkovo-Nagymaros sous tous ses aspects à un arbitrage international obligatoire ou à la Cour internationale de Justice;

Souhaitant que ces contestations soient réglées par la Cour internationale de Justice;

Rappelant qu'elles se sont engagées à appliquer, en attendant l'arrêt de la Cour internationale de Justice, le régime temporaire de gestion des eaux du Danube dont seront convenues les Parties;

Désirant en outre définir les questions à soumettre à la Cour internationale de Justice,

Sont convenues de ce qui suit:

Article premier

Les Parties soumettent à la Cour internationale de Justice, conformément au paragraphe 1 de l'article 40 du Statut de la Cour, les questions énoncées à l'article 2 ci-après.

Article 2

1) La Cour est priée de dire, sur la base du traité et des règles et principes du droit international général, ainsi que de tous autres traités qu'elle jugera applicables:

a) si la République de Hongrie était en droit de suspendre puis d'abandonner, en 1989, les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie est responsable aux termes du traité;

b) si la République fédérative tchèque et slovaque était en droit de recourir, en novembre 1991, à la «solution provisoire» et de mettre en service, à partir d'octobre 1992, ce système, décrit dans le rapport en date du 23 novembre 1992 du groupe de travail d'experts indépendants nommés par la Commission des Communautés européennes, la République de Hongrie et la République fédérative tchèque et slovaque (construction d'un barrage sur le Danube au kilomètre 1851,7 du fleuve, en territoire tchécoslovaque, et conséquences en résultant pour l'écoulement des eaux et la navigation);

(c) what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

Article 3

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of:

(a) a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

(b) a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties within such time-limits as the Court may order.

(d) The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

Article 4

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

Article 5

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article 6

(1) The present Special Agreement shall be subject to ratification.

c) quels sont les effets juridiques de la notification, le 19 mai 1992, de la terminaison du traité par la République de Hongrie.

2) La Cour est également priée de déterminer les conséquences juridiques, y compris les droits et obligations pour les Parties, de l'arrêt qu'elle rendra sur les questions énoncées au paragraphe 1 du présent article.

Article 3

1) Toutes les questions de procédure et de preuve seront réglées conformément aux dispositions du Statut et du Règlement de la Cour.

2) Toutefois, les Parties prient la Cour de bien vouloir ordonner que la procédure écrite comprenne les pièces suivantes:

a) un mémoire présenté par chacune des Parties au plus tard dix mois après la date de la notification du présent compromis au Greffier de la Cour internationale de Justice;

b) un contre-mémoire présenté par chacune des Parties au plus tard sept mois après la date à laquelle chacune aura reçu la copie certifiée conforme du mémoire de l'autre Partie;

c) une réplique présentée par chacune des Parties dans les délais que la Cour indiquera.

d) La Cour pourra, si elle le juge utile, demander aux Parties de déposer des pièces de procédure écrite supplémentaires.

3) Les pièces de procédure écrite susmentionnées et leurs annexes, déposées auprès du Greffier, ne seront transmises à l'autre Partie que lorsque le Greffier aura reçu de ladite Partie la pièce de procédure correspondante.

Article 4

1) Les Parties conviennent, en attendant l'arrêt définitif de la Cour, d'établir et d'appliquer un régime temporaire de gestion des eaux pour le Danube.

2) Les Parties conviennent en outre qu'au cas où, au cours de la période précédant l'établissement ou l'application d'un tel régime, l'une d'entre elles considérerait que la conduite de l'autre met ses droits en danger, elle pourra demander des consultations immédiates et, au besoin, qu'il soit recouru à des experts, y compris la Commission des Communautés européennes, en vue de protéger ces droits; et que la protection de ces droits ne sera pas recherchée au moyen d'une demande présentée à la Cour en vertu de l'article 41 du Statut.

3) Les deux Parties acceptent cet engagement en tant qu'élément fondamental de la conclusion et du maintien de la validité du compromis.

Article 5

1) Les Parties s'engagent à accepter l'arrêt de la Cour comme définitif et obligatoire pour elles et à l'exécuter intégralement et de bonne foi.

2) Aussitôt que l'arrêt leur aura été remis, les Parties engageront des négociations pour fixer les modalités de son exécution.

3) Si les Parties ne peuvent parvenir à un accord dans un délai de six mois, l'une ou l'autre d'entre elles pourra prier la Cour de rendre un arrêt supplémentaire pour déterminer les modalités d'exécution de son arrêt.

Article 6

1) Le présent compromis est soumis à ratification.

(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.

(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals."

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, Members of the United Nations and other States entitled to appear before the Court.

4. Since the Court included upon the Bench no judge of Slovak nationality, Slovakia exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Krzysztof Jan Skubiszewski.

5. By an Order dated 14 July 1993, the Court fixed 2 May 1994 as the time-limit for the filing by each of the Parties of a Memorial and 5 December 1994 for the filing by each of the Parties of a Counter-Memorial, having regard to the provisions of Article 3, paragraph 2 *(a)* and *(b)*, of the Special Agreement. Those pleadings were duly filed within the prescribed time-limits.

6. By an Order dated 20 December 1994, the President of the Court, having heard the Agents of the Parties, fixed 20 June 1995 as the time-limit for the filing of the Replies, having regard to the provisions of Article 3, paragraph 2 *(c)*, of the Special Agreement. The Replies were duly filed within the time-limit thus prescribed and, as the Court had not asked for the submission of additional pleadings, the case was then ready for hearing.

7. By letters dated 27 January 1997, the Agent of Slovakia, referring to the provisions of Article 56, paragraph 1, of the Rules of Court, expressed his Government's wish to produce two new documents; by a letter dated 10 February 1997, the Agent of Hungary declared that his Government objected to their production. On 26 February 1997, after having duly ascertained the views of the two Parties, the Court decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of those documents under certain conditions of which the Parties were advised. Within the time-limit fixed by the Court to that end, Hungary submitted comments on one of those documents under paragraph 3 of that same Article. The Court authorized Slovakia to comment in turn upon those observations, as it had expressed a wish to do so; its comments were received within the time-limit prescribed for that purpose.

8. Moreover, each of the Parties asked to be allowed to show a video cassette in the course of the oral proceedings. The Court agreed to those requests, provided that the cassettes in question were exchanged in advance between the Parties, through the intermediary of the Registry. That exchange was effected accordingly.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after having ascertained the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. By a letter dated 16 June 1995, the Agent of Slovakia invited the Court

2) Les instruments de ratification seront échangés aussitôt que possible à Bruxelles.

3) Le présent compromis entrera en vigueur à la date de l'échange des instruments de ratification. Il fera ensuite l'objet d'une notification conjointe au Greffier de la Cour.

En foi de quoi les soussignés, dûment habilités à cet effet, ont signé le présent compromis et y ont apposé leur sceau.»

3. Conformément au paragraphe 3 de l'article 40 du Statut et à l'article 42 du Règlement de la Cour, des copies de la notification et du compromis ont été transmises par le Greffier au Secrétaire général de l'Organisation des Nations Unies, aux Membres des Nations Unies et aux autres Etats admis à ester devant la Cour.

4. La Cour ne comptant pas sur le siège de juge de nationalité slovaque, la Slovaquie s'est prévalue du droit que lui confère le paragraphe 2 de l'article 31 du Statut de procéder à la désignation d'un juge *ad hoc* pour siéger en l'affaire: elle a désigné à cet effet M. Krzysztof Jan Skubiszewski.

5. Par ordonnance en date du 14 juillet 1993, la Cour a fixé au 2 mai 1994 la date d'expiration du délai pour le dépôt d'un mémoire par chaque Partie, et au 5 décembre 1994 la date d'expiration du délai pour le dépôt par chacune d'elles d'un contre-mémoire, eu égard aux dispositions de l'article 3, paragraphe 2, alinéas *a)* et *b)*, du compromis. Ces pièces ont été dûment déposées dans les délais ainsi prescrits.

6. Par ordonnance en date du 20 décembre 1994, le Président de la Cour, après avoir entendu les agents des Parties, a fixé au 20 juin 1995 la date d'expiration du délai pour le dépôt des répliques, eu égard aux dispositions de l'article 3, paragraphe 2, alinéa *c)*, du compromis. Les répliques ont été dûment déposées dans le délai ainsi prescrit et, la Cour n'ayant pas demandé la production de pièces supplémentaires, l'affaire s'est alors trouvée en état.

7. Par lettres du 27 janvier 1997, l'agent de la Slovaquie, se référant aux dispositions du paragraphe 1 de l'article 56 du Règlement, a exprimé le désir de son gouvernement de produire deux nouveaux documents; par lettre du 10 février 1997, l'agent de la Hongrie a fait savoir que son gouvernement s'y opposait. Le 26 février 1997, après avoir dûment recueilli les vues des deux Parties, la Cour a décidé, conformément au paragraphe 2 de l'article 56 du Règlement, d'autoriser la production de ces documents sous certaines conditions dont les Parties ont été avisées. Dans le délai fixé par la Cour à cet effet, la Hongrie a présenté des observations au titre du paragraphe 3 du même article sur l'un de ces documents. La Cour a autorisé la Slovaquie, comme celle-ci en avait exprimé le souhait, à soumettre à son tour des commentaires sur ces observations; lesdits commentaires ont été reçus dans le délai prescrit à cette fin.

8. Chacune des Parties a en outre demandé de pouvoir présenter une vidéocassette au cours de la procédure orale. La Cour a accédé à ces demandes, à la condition que les cassettes en question soient au préalable échangées entre les Parties par l'entremise du Greffe. Il a ainsi été procédé.

9. Conformément au paragraphe 2 de l'article 53 du Règlement, la Cour a décidé, après s'être renseignée auprès des Parties, que des exemplaires des pièces de procédure et des documents y annexés seraient rendus accessibles au public à compter de l'ouverture de la procédure orale.

10. Par lettre en date du 16 juin 1995, l'agent de la Slovaquie avait invité la

to visit the locality to which the case relates and there to exercise its functions with regard to the obtaining of evidence, in accordance with Article 66 of the Rules of Court. For his part, the Agent of Hungary indicated, by a letter dated 28 June 1995, that, if the Court should decide that a visit of that kind would be useful, his Government would be pleased to co-operate in organizing it. By a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit *in situ*; and, by a letter dated 3 February 1997, they jointly notified to it the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement of 14 November 1995. By an Order dated 5 February 1997, the Court decided to accept the invitation to exercise its functions with regard to the obtaining of evidence at a place to which the case relates and, to that end, to adopt the arrangements proposed by the Parties. The Court visited the area from 1 to 4 April 1997; it visited a number of locations along the Danube and took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties.

11. The Court held a first round of ten public hearings from 3 to 7 March and from 24 to 27 March 1997, and a second round of four public hearings on 10, 11, 14 and 15 April 1997, after having made the visit *in situ* referred to in the previous paragraph. During those hearings, the Court heard the oral arguments and replies of:

For Hungary: H.E. Mr. Szénási,
Professor Valki,
Professor Kiss,
Professor Vida,
Professor Carbiener,
Professor Crawford,
Professor Nagy,
Dr. Kern,
Professor Wheater,
Ms Gorove,
Professor Dupuy,
Professor Sands.

For Slovakia: H.E. Dr. Tomka,
Dr. Mikulka,
Mr. Wordsworth,
Professor McCaffrey,
Professor Mucha,
Professor Pellet,
Mr. Refsgaard,
Sir Arthur Watts.

12. The Parties replied orally and in writing to various questions put by Members of the Court. Referring to the provisions of Article 72 of the Rules of Court, each of the Parties submitted to the Court its comments upon the replies given by the other Party to some of those questions.

*

Cour à se déplacer sur les lieux auxquels se rapporte l'affaire et à y exercer ses fonctions relatives à l'établissement des preuves, conformément à l'article 66 du Règlement. Pour sa part, l'agent de la Hongrie avait indiqué, par lettre en date du 28 juin 1995, que, si la Cour jugeait une telle visite utile, son gouvernement serait heureux de collaborer à l'organisation de celle-ci. Par lettre du 14 novembre 1995, les agents des Parties notifièrent conjointement à la Cour le texte d'un protocole d'accord, conclu à Budapest et à New York le même jour, en vue de proposer à la Cour les modalités d'une telle descente sur les lieux; et, par lettre du 3 février 1997, ils lui notifièrent conjointement le texte d'un procès-verbal établi à Budapest et à New York le même jour, qui complétait le protocole d'accord du 14 novembre 1995. La Cour, par ordonnance en date du 5 février 1997, a décidé de donner suite à l'invitation qui lui était faite d'exercer ses fonctions relatives à l'établissement des preuves sur les lieux auxquels l'affaire se rapporte, et d'adopter à cette fin les modalités proposées par les Parties. La Cour s'est déplacée sur les lieux du 1er au 4 avril 1997; elle a visité un certain nombre de sites le long du Danube et a pris note des explications techniques qui lui ont été fournies par les représentants que les Parties avaient désignés à cet effet.

11. La Cour a tenu une première série de dix audiences publiques du 3 au 7 mars et du 24 au 27 mars 1997; elle a tenu une seconde série de quatre audiences publiques les 10, 11, 14 et 15 avril 1997, après avoir effectué la descente sur les lieux dont il est fait mention au paragraphe précédent. Au cours de ces audiences ont été entendus en leurs plaidoiries et réponses:

Pour la Hongrie:
S. Exc. M. Szénási,
M. Valki,
M. Kiss,
M. Vida,
M. Carbiener,
M. Crawford,
M. Nagy,
M. Kern,
M. Wheater,
Mme Gorove,
M. Dupuy,
M. Sands.

Pour la Slovaquie:
S. Exc. M. Tomka,
M. Mikulka,
M. Wordsworth,
M. McCaffrey,
M. Mucha,
M. Pellet,
M. Refsgaard,
sir Arthur Watts.

12. Les Parties ont répondu oralement et par écrit à diverses questions posées par des membres de la Cour. Se référant aux dispositions de l'article 72 du Règlement, chacune des Parties a fait tenir à la Cour des observations sur les réponses données par l'autre Partie à certaines de ces questions.

*

13. In the course of the written proceedings, the following submissions were presented by the Parties:

On behalf of Hungary,

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

"On the basis of the evidence and legal argument presented in the Memorial, Counter-Memorial and this Reply, the Republic of Hungary

Requests the Court to adjudge and declare

First, that the Republic of Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

Second, that the Czech and Slovak Federal Republic was not entitled to proceed to the 'provisional solution' (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

Third, that by its Declaration of 19 May 1992, Hungary validly terminated the Treaty on the Construction and Operation of the Gabčíkovo-Nagymaros Barrage System of 16 September 1977;

Requests the Court to adjudge and declare further

that the legal consequences of these findings and of the evidence and the arguments presented to the Court are as follows:

(1) that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic;
(2) that the Slovak Republic bears responsibility to the Republic of Hungary for maintaining in operation the 'provisional solution' referred to above;
(3) that the Slovak Republic is internationally responsible for the damage and loss suffered by the Republic of Hungary and by its nationals as a result of the 'provisional solution';
(4) that the Slovak Republic is under an obligation to make reparation in respect of such damage and loss, the amount of such reparation, if it cannot be agreed by the Parties within six months of the date of the Judgment of the Court, to be determined by the Court;
(5) that the Slovak Republic is under the following obligations:
   (a) to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;
   (b) to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution; and
   (c) to provide appropriate guarantees against the repetition of the damage and loss suffered by the Republic of Hungary and by its nationals."

13. Dans la procédure écrite, les conclusions ci-après ont été présentées par les Parties:

Au nom de la Hongrie,

dans le mémoire, le contre-mémoire et la réplique (textes identiques *mutatis mutandis*):

«Sur la base des éléments de preuve et des arguments juridiques présentés dans son mémoire, son contre-mémoire et sa réplique, la République de Hongrie

Prie la Cour de dire et juger:

Premièrement, que la République de Hongrie était en droit de suspendre puis d'abandonner les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie était responsable aux termes du traité;

Deuxièmement, que la République fédérative tchèque et slovaque n'était pas en droit de recourir à la «solution provisoire» (construction d'un barrage sur le Danube au kilomètre 1851,7 du fleuve, en territoire tchécoslovaque, et conséquences en résultant pour l'écoulement des eaux et la navigation);

Troisièmement, que, par sa déclaration du 19 mai 1992, la Hongrie a valablement mis fin au traité du 16 septembre 1977 relatif à la construction et au fonctionnement du système de barrage de Gabčíkovo-Nagymaros;

Prie la Cour de dire et juger également

que les conséquences juridiques de ces conclusions et des éléments de preuve et arguments présentés à la Cour sont les suivantes:

1) que le traité du 16 septembre 1977 n'a jamais été en vigueur entre la République de Hongrie et la République slovaque;
2) que la République slovaque est responsable envers la Hongrie pour avoir poursuivi l'exploitation de la «solution provisoire»;
3) que la République slovaque est internationalement responsable des dommages et pertes que la République de Hongrie et ses ressortissants ont subis du fait de la «solution provisoire»;
4) que la République slovaque est tenue de réparer ces dommages et ces pertes, et que le montant de ladite réparation sera déterminé par la Cour si les Parties ne peuvent en convenir entre elles dans les six mois suivant la date à laquelle la Cour aura rendu son arrêt;
5) que la République slovaque est tenue des obligations suivantes:
   a) rétablir les eaux du Danube dans leur cours le long de la frontière internationale entre la République de Hongrie et la République slovaque, c'est-à-dire le principal chenal de navigation tel que défini par les traités applicables;
   b) rétablir la situation dans laquelle le Danube se trouvait avant la mise en service de la solution provisoire;
   c) fournir des garanties adéquates contre la répétition des dommages et pertes subis par la République de Hongrie et par ses ressortissants.»

On behalf of Slovakia,

in the Memorial, the Counter-Memorial and the Reply (*mutatis mutandis* identical texts):

"On the basis of the evidence and legal arguments presented in the Slovak Memorial, Counter-Memorial and in this Reply, and reserving the right to supplement or amend its claims in the light of further written pleadings, the Slovak Republic

Requests the Court to adjudge and declare:

1. That the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčíkovo/Nagymaros System of Locks, and related instruments, and to which the Slovak Republic is the acknowledged successor, is a treaty in force and has been so from the date of its conclusion; and that the notification of termination by the Republic of Hungary on 19 May 1992 was without legal effect.
2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributed responsibility to the Republic of Hungary.
3. That the act of proceeding with and putting into operation Variant C, the 'provisional solution', was lawful.
4. That the Republic of Hungary must therefore cease forthwith all conduct which impedes the full and bona fide implementation of the 1977 Treaty and must take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty.
5. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary is liable to pay, and the Slovak Republic is entitled to receive, full compensation for the loss and damage caused to the Slovak Republic by those breaches, plus interest and loss of profits, in the amounts to be determined by the Court in a subsequent phase of the proceedings in this case."

14. In the oral proceedings, the following submissions were presented by the Parties

On behalf of Hungary,

at the hearing of 11 April 1997:

The submissions read at the hearing were *mutatis mutandis* identical to those presented by Hungary during the written proceedings.

On behalf of Slovakia,

at the hearing of 15 April 1997:

"On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Slovak Republic,

Requests the Court to adjudge and declare:

1. That the Treaty, as defined in the first paragraph of the Preamble to the Compromis between the Parties, dated 7 April 1993, concerning the construction and operation of the Gabčikovo/Nagymaros System of Locks and related instruments, concluded between Hungary and

Au nom de la Slovaquie,

dans le mémoire, le contre-mémoire et la réplique (textes identiques *mutatis mutandis*):

«Sur la base des éléments de preuve et des arguments juridiques présentés dans son mémoire, son contre-mémoire et sa réplique, et en se réservant le droit de compléter ou de modifier son argumentation à la lumière d'autres exposés, la République slovaque

Prie la Cour de dire et juger:

1. Que le traité du 16 septembre 1977 entre la Hongrie et la Tchécoslovaquie relatif à la construction et à l'exploitation du système d'écluses de Gabčíkovo-Nagymaros, et les instruments s'y rapportant, à l'égard duquel il est reconnu que la République slovaque est l'Etat successeur, constitue un traité en vigueur et ce depuis la date de sa conclusion; et que la notification de terminaison effectuée le 19 mai 1992 par la République de Hongrie est sans effet juridique.
2. Que la République de Hongrie n'était pas en droit de suspendre puis d'abandonner les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie est responsable aux termes du traité de 1977.
3. Que le recours à la variante C, la «solution provisoire», et sa mise en service constituaient un acte licite.
4. Que la République de Hongrie doit dès lors mettre immédiatement un terme à toute conduite qui empêche l'application intégrale et de bonne foi du traité de 1977 et doit prendre toutes les mesures nécessaires pour s'acquitter des obligations que lui impose ce traité sans plus tarder, afin de faire en sorte que le traité soit à nouveau respecté.
5. Qu'en conséquence de sa violation du traité de 1977 la République de Hongrie doit payer, et la République slovaque a le droit de recevoir, une indemnisation complète au titre des pertes et dommages occasionnés par ces violations à la République slovaque, y compris les intérêts et la réparation du manque à gagner, dont le montant sera déterminé par la Cour lors d'une phase ultérieure de la présente instance.»

14. Dans la procédure orale, les conclusions ci-après ont été présentées par les Parties:

Au nom de la Hongrie,

à l'audience du 11 avril 1997:

Les conclusions lues à l'audience étaient *mutatis mutandis* identiques à celles présentées par la Hongrie dans la procédure écrite.

Au nom de la Slovaquie,

à l'audience du 15 avril 1997:

«Sur la base des éléments de preuve et des arguments juridiques présentés dans ses écritures et ses plaidoiries orales, la République slovaque

Prie la Cour de bien vouloir dire et juger:

1. Que le traité, tel qu'il est défini à l'alinéa premier du préambule du compromis entre les Parties en date du 7 avril 1993, relatif à la construction et à l'exploitation du système d'écluses de Gabčíkovo-Nagymaros et les instruments s'y rapportant, conclu entre la Hongrie et la Tché-

Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 19 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect;

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčíkovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary;
3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the 'provisional solution' and to put this system into operation from October 1992; and that the Slovak Republic was, and remains, entitled to continue the operation of this system;

4. That the Republic of Hungary shall therefore cease forthwith all conduct which impedes the bona fide implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties;
5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;
6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by those breaches together with interest thereon;
7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."

* * *

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabčíkovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.

It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the barrage system was designed to attain

> "the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water

coslovaquie, à l'égard duquel la République slovaque est l'Etat successeur, n'a jamais cessé d'être en vigueur et le demeure, et que la notification, le 19 mai 1992, de la prétendue terminaison du traité par la République de Hongrie n'a eu aucun effet sur la validité de celui-ci;

2. Que la République de Hongrie n'était pas en droit de suspendre puis d'abandonner les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie est responsable aux termes du traité;
3. Que la République fédérative tchèque et slovaque était en droit de recourir, en novembre 1991, à la «solution provisoire» et de mettre ce système en service à partir d'octobre 1992 et que la République slovaque était et demeure en droit de continuer à mettre en œuvre ce système;
4. Que la République de Hongrie doit dès lors mettre immédiatement un terme à toute conduite qui empêche l'application de bonne foi du traité de 1977 et qu'elle doit prendre toutes les mesures nécessaires pour s'acquitter sans retard des obligations que lui impose ce traité, afin de faire en sorte que le traité soit à nouveau respecté, sous réserve des modifications qui pourraient y être apportées par accord entre les Parties;
5. Que la République de Hongrie doit donner des garanties adéquates de s'abstenir d'empêcher l'application du traité et le fonctionnement continu du système;
6. Qu'en conséquence de sa violation du traité de 1977, la République de Hongrie doit, outre la reprise immédiate de l'exécution de ses obligations en vertu du traité, payer à la République slovaque une indemnisation complète au titre des pertes et dommages, y compris le manque à gagner, occasionnés par ces violations, assortis des intérêts;
7. Que les Parties doivent engager immédiatement des négociations en vue, notamment, de l'adoption d'un nouveau calendrier et de mesures appropriées pour la mise en œuvre du traité par les deux Parties et la fixation du montant de l'indemnité due par la République de Hongrie à la République slovaque; et que si les Parties ne peuvent parvenir à un accord dans un délai de six mois, l'une ou l'autre d'entre elles pourra prier la Cour de rendre un arrêt supplémentaire pour déterminer les modalités d'exécution de son arrêt.»

* * *

15. La présente affaire trouve son origine dans la signature, le 16 septembre 1977, par la République populaire hongroise et la République socialiste tchécoslovaque d'un traité «relatif à la construction et au fonctionnement du système d'écluses de Gabčíkovo-Nagymaros» (dénommé ci-après le «traité de 1977»). Le nom des deux Etats contractants a varié au cours des ans; ils seront dénommés ci-après la Hongrie et la Tchécoslovaquie. Le traité de 1977 est entré en vigueur le 30 juin 1978.

Il prévoit la construction et l'exploitation du système d'écluses par les parties «en tant qu'investissement conjoint». Selon le préambule du traité, le système de barrage avait pour but

> «de mettre en valeur, de façon générale, les ressources naturelles de la section Bratislava-Budapest du Danube aux fins du développe-

resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties".

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by the Malý Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Malý Danube and that channel, in Slovak territory, constitutes the Žitný Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetköz. Čunovo and, further downstream, Gabčíkovo, are situated in this sector of the river on Slovak territory, Čunovo on the right bank and Gabčíkovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).

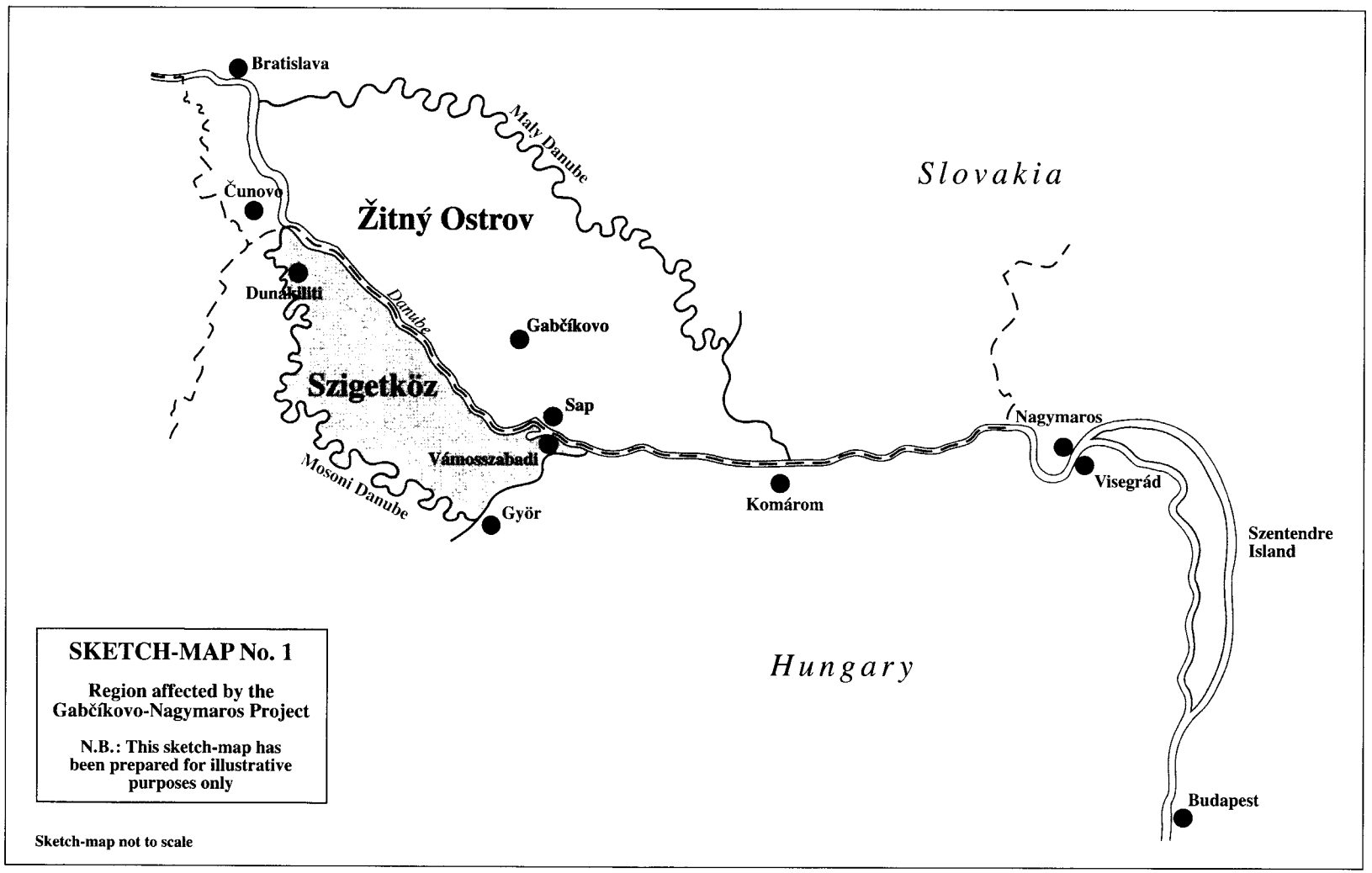
17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.

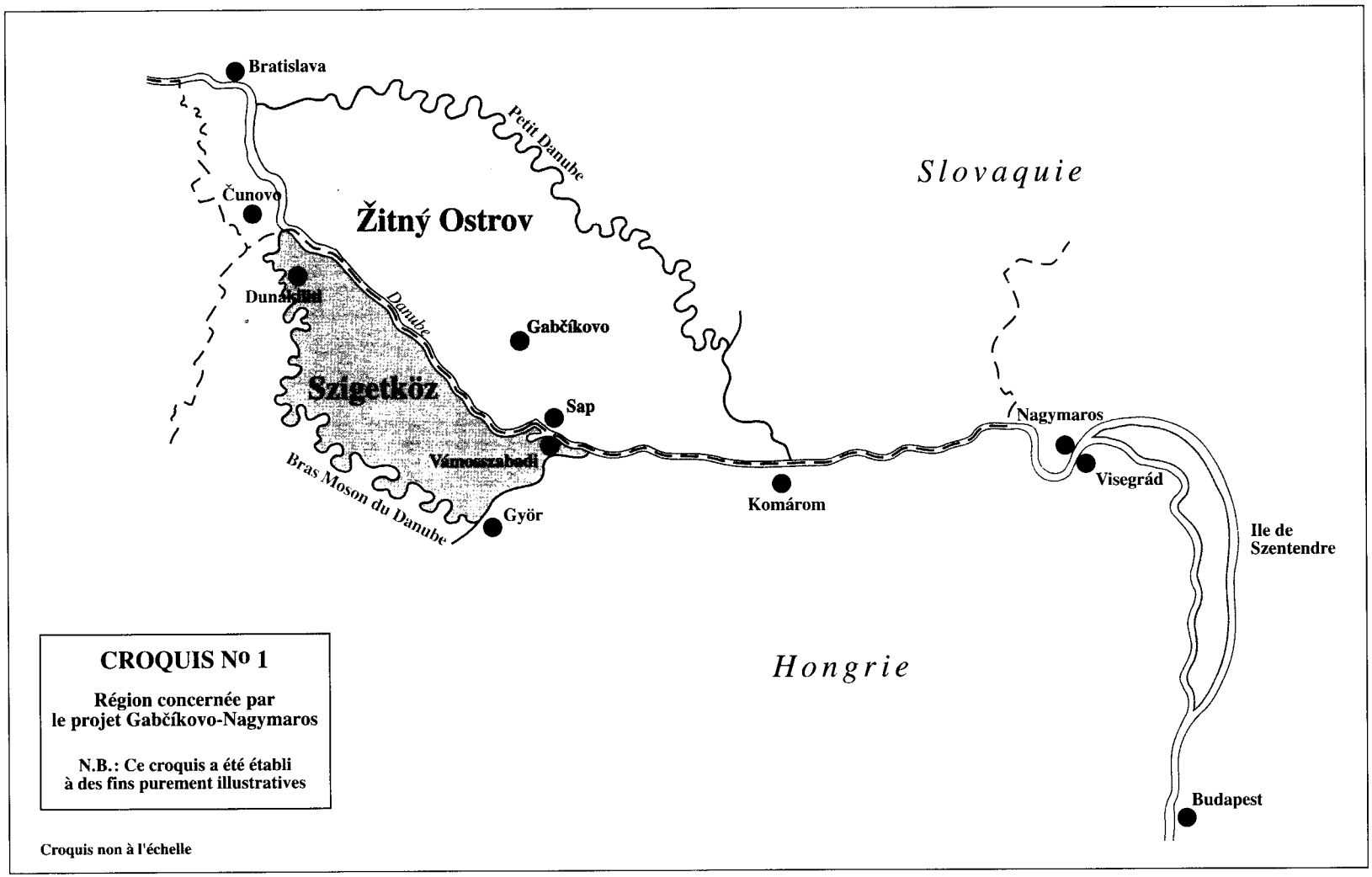
ment des secteurs des ressources hydrauliques, de l'énergie, des transports et de l'agriculture et des autres secteurs de l'économie nationale des parties contractantes».

L'investissement conjoint tendait ainsi essentiellement à la production d'hydro-électricité, à l'amélioration de la navigation sur le tronçon en cause du Danube et à la protection des régions riveraines contre les inondations. En même temps, les parties contractantes, selon les termes du traité, s'engageaient tant à veiller à ce que la mise en œuvre du projet ne compromette pas la qualité des eaux du Danube qu'à s'acquitter de leurs obligations concernant la protection de la nature et découlant de la construction et du fonctionnement du système d'écluses.

16. Par sa longueur, le Danube est le deuxième fleuve d'Europe, longeant ou traversant neuf pays sur un cours de 2860 kilomètres et se dirigeant vers l'est, depuis la Forêt-Noire jusqu'à la mer Noire. Sur 142 kilomètres, il constitue la frontière entre la Slovaquie et la Hongrie. Le secteur auquel se rapporte la présente affaire est un tronçon d'environ 200 kilomètres, entre Bratislava, en Slovaquie, et Budapest, en Hongrie. En aval de Bratislava, la déclivité du fleuve diminue sensiblement, créant une plaine alluviale de gravier et de sédiments sableux. Cette plaine est délimitée au nord-est, en territoire slovaque, par le petit Danube et au sud-ouest, en territoire hongrois, par le bras Moson du Danube. La frontière entre les deux Etats est constituée dans la majeure partie de cette région par le chenal principal du fleuve. La zone comprise entre le petit Danube et ce chenal constitue, en territoire slovaque, le Žitný Ostrov; celle comprise entre le chenal principal et le bras Moson du Danube constitue, en territoire hongrois, le Szigetköz. Čunovo et, plus en aval, Gabčíkovo sont situés dans ce secteur du fleuve, en territoire slovaque; Čunovo est situé sur la rive droite du fleuve et Gabčíkovo sur la rive gauche. Plus bas, après jonction des divers bras, le fleuve entre en territoire hongrois et le relief devient plus accidenté. Nagymaros se trouve dans une vallée étroite à un endroit où le Danube fait un coude juste avant de se diriger vers le sud, entourant la grande île fluviale de Szentendre avant d'atteindre Budapest (voir ci-après, p. 19, le croquis n° 1).

17. Le Danube a toujours joué un rôle vital dans le développement commercial et économique des Etats riverains; il a mis en évidence et a accru leur interdépendance, rendant indispensable la coopération internationale. Des améliorations apportées au chenal de navigation ont permis au Danube, aujourd'hui relié par un canal au Main et de là au Rhin, de devenir une importante artère de navigation reliant la mer du Nord à la mer Noire. Dans le tronçon du fleuve auquel se rapporte la présente affaire, des mesures de protection contre les inondations ont été prises au cours des siècles, l'agriculture et la sylviculture ont été pratiquées et, plus récemment, la région a connu un essor démographique et industriel. Les effets cumulatifs, sur le fleuve et l'environnement, des diverses activités humaines menées au cours des ans n'ont pas tous été positifs, notamment en ce qui concerne le régime des eaux.


Bratislava
Čunovo
Žitný Ostrov
Maly Danube
Slovakia
Dunakiliti
Danube
Gabčíkovo
Szigetköz
Sap
Vámosszabadi
Mosoni Danube
Győr
Komárom
Nagymaros
Visegrád
Szentendre Island
Budapest
Hungary
SKETCH-MAP No. 1
Region affected by the Gabčíkovo-Nagymaros Project
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale


Bratislava
Petit Danube
Slovaquie
Čunovo
Žitný Ostrov
Dunakiliti
Danube
Gabčíkovo
Szigetköz
Sap
Nagymaros
Vámosszabadi
Visegrád
Bras Moson du Danube
Komárom
Győr
Ile de
Szentendre
Hongrie
Budapest
CROQUIS Nº 1
Région concernée par
le projet Gabčíkovo-Nagymaros
N.B.: Ce croquis a été établi
à des fins purement illustratives
Croquis non à l'échelle

Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčíkovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (see sketch-map No. 2, p. 21 below). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, *inter alia*, a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčíkovo System of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river; a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW); and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976; Article 4, paragraph 1, for its part, specified that "the joint investment [would] be carried out in conformity with the joint contractual plan".

According to Article 3, paragraph 1:

> "Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through . . . (. . . 'government delegates')."

Those delegates had, *inter alia*, "to ensure that construction of the System of Locks is . . . carried out in accordance with the approved joint contractual plan and the project work schedule". When the works were brought into operation, they were moreover "To establish the operating

Des mesures destinées à atténuer ces problèmes ne pouvaient être prises que dans le cadre d'une coopération internationale. Les projets de gestion des eaux du Danube ont souvent cherché à combiner amélioration des conditions de navigation, lutte contre les inondations et production d'électricité par des centrales hydro-électriques. Certains Etats riverains ont largement tiré parti des ressources du Danube en matière de production d'énergie hydro-électrique. Les tentatives qui ont été faites pour exploiter le potentiel du tronçon particulier du fleuve qui est en cause dans la présente instance se sont échelonnées sur une période de vingt-cinq ans, qui a culminé avec la signature du traité de 1977.

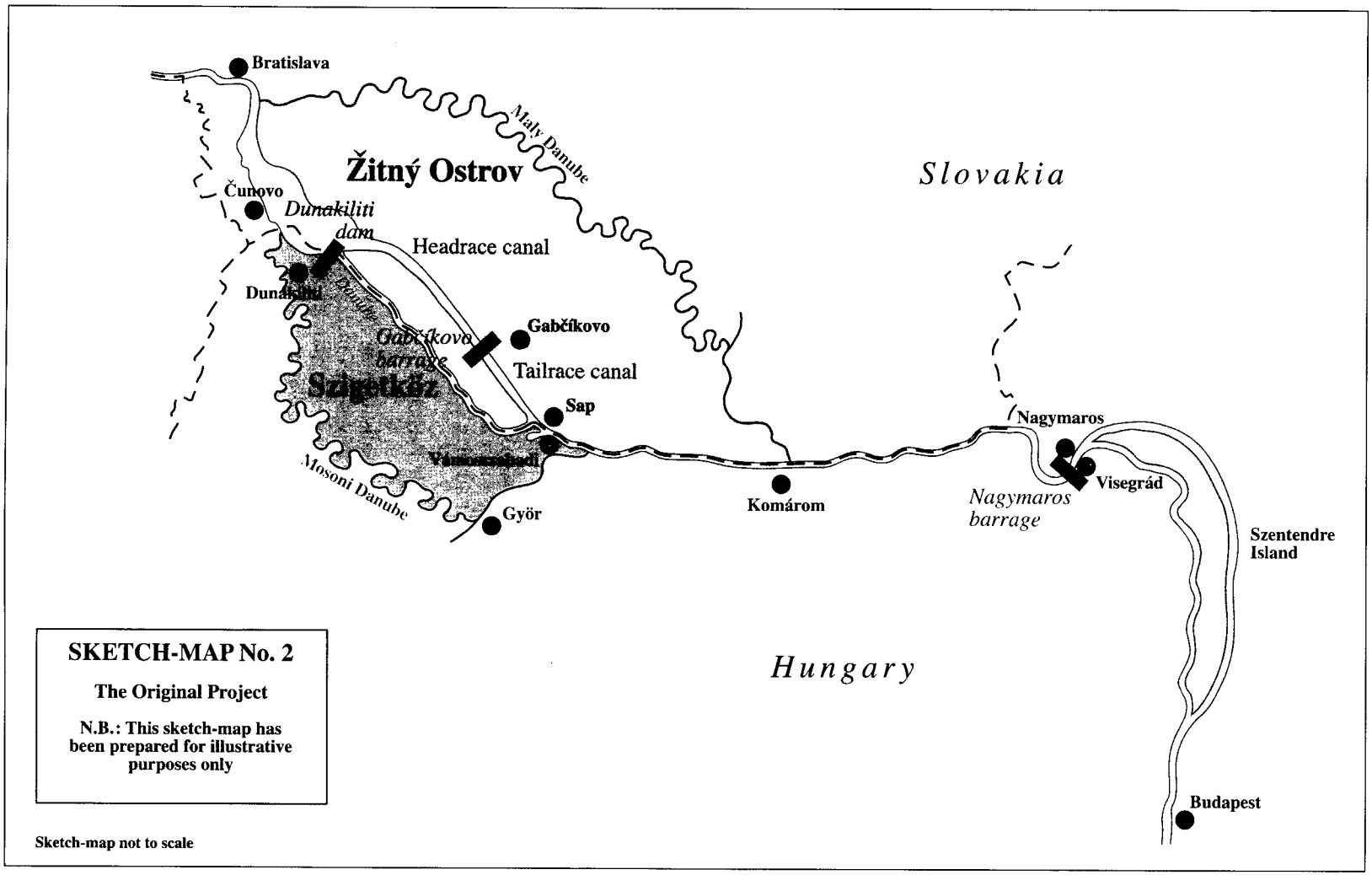
18. Les principaux ouvrages à construire en exécution du projet sont décrits au paragraphe 1 de l'article premier du traité de 1977. Deux séries d'écluses étaient prévues, l'une à Gabčíkovo (en territoire tchécoslovaque), l'autre à Nagymaros (en territoire hongrois), en vue de constituer «un système d'ouvrages opérationnel, unique et indivisible» (voir ci-après, p. 21, le croquis n° 2). La Cour aura plus loin l'occasion de revenir sur le détail de ces ouvrages, qui devaient notamment comprendre un réservoir en amont de Dunakiliti, en territoire hongrois et en territoire tchécoslovaque; un barrage à Dunakiliti, en territoire hongrois; un canal de dérivation, en territoire tchécoslovaque, sur lequel devait être construit le système d'écluses de Gabčíkovo (de même qu'une centrale hydro-électrique d'une capacité installée de 720 mégawatts (MW)); l'approfondissement du lit du Danube après la jonction du canal de dérivation et de l'ancien lit du fleuve; un renforcement des ouvrages de protection contre les inondations le long du Danube en amont de Nagymaros; le système d'écluses de Nagymaros, en territoire hongrois (avec une centrale hydro-électrique d'une capacité de 158 MW); et l'approfondissement du lit du Danube en aval.

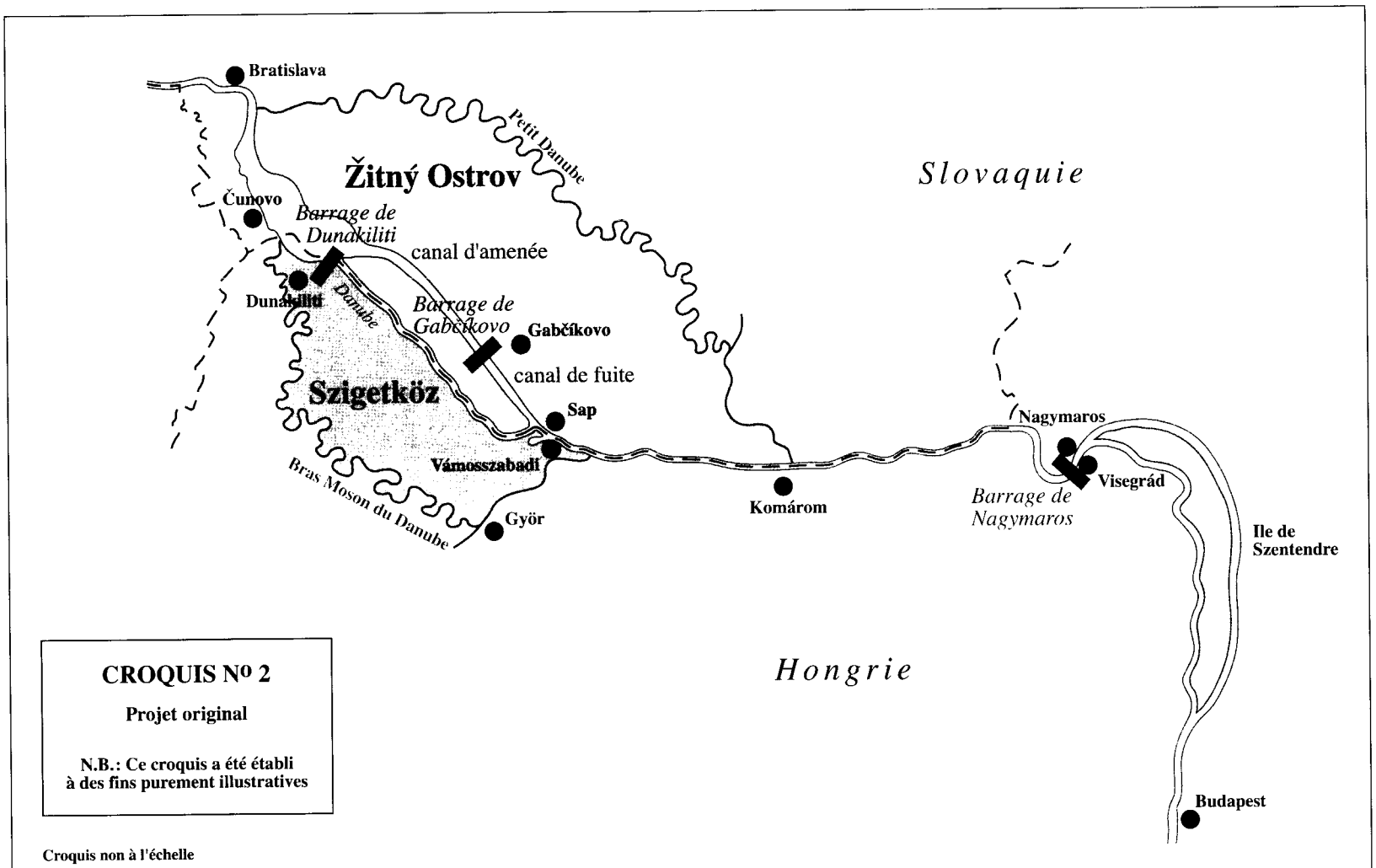
Le paragraphe 4 de l'article premier du traité prévoyait que les spécifications techniques concernant le système seraient fixées dans le «plan contractuel conjoint», qui devait être établi conformément à l'accord signé à cette fin par les deux gouvernements le 6 mai 1976; le paragraphe 1 de l'article 4 précisait quant à lui que «l'investissement conjoint [serait] effectué conformément au plan contractuel conjoint».

Aux termes du paragraphe 1 de l'article 3:

> «Les opérations liées à la réalisation de l'investissement conjoint et à l'exécution des tâches relatives au fonctionnement du système d'écluses seront dirigées et supervisées par les gouvernements des parties contractantes, par l'intermédiaire de ... (... «délégués gouvernementaux»).»

Ces délégués étaient notamment chargés de «veiller à ce que la construction du système d'écluses soit ... réalisée conformément au plan contractuel conjoint approuvé et au calendrier des travaux du projet». Lors de la mise en service des ouvrages, ils devaient en outre «établir les procédures


Bratislava
Malý Dunaj
Žitný Ostrov
Slovakia
Čunovo
Dunakiliti dam
Headrace canal
Dunakiliti
Danube
Gabčíkovo barrage
Gabčíkovo
Tailrace canal
Szigetköz
Sap
Vámosszabadi
Mosoni Danube
Győr
Komárom
Nagymaros
Visegrád
Nagymaros barrage
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 2
The Original Project
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale


Bratislava
Petit Danube
Žitný Ostrov
Slovaquie
Čunovo
Barrage de Dunakiliti
canal d'amenée
Dunakiliti
Danube
Barrage de Gabčikovo
Gabčíkovo
canal de fuite
Szigetköz
Sap
Vámosszabadi
Bras Moson du Danube
Győr
Komárom
Nagymaros
Visegrád
Barrage de Nagymaros
Ile de Szentendre
Budapest
Hongrie
CROQUIS Nº 2
Projet original
N.B.: Ce croquis a été établi à des fins purement illustratives
Croquis non à l'échelle

and operational procedures of the System of Locks and ensure compliance therewith."

Article 4, paragraph 4, stipulated that:

> "Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990."

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabčíkovo and Nagymaros would be "jointly owned" by the contracting parties "in equal measure". Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at the hydroelectric power plants (Art. 9).

According to Article 10, the works were to be managed by the State on whose territory they were located, "in accordance with the jointly-agreed operating and operational procedures", while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

> "The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge."

Paragraph 3 of that Article was worded as follows:

> "In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced."

Article 15 specified that the contracting parties

> "shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks".

opérationnelles concernant le système d'écluses et en assurer l'observation».

Le paragraphe 4 de l'article 4 stipulait que:

> «Les opérations liées à l'investissement conjoint ser[aient] organisées par les parties contractantes de façon que les centrales de génération d'énergie soient mises en service pendant la période 1986-1990.»

L'article 5 disposait que les coûts de l'investissement conjoint seraient pris en charge, à parts égales, par les parties contractantes. Il précisait les travaux à réaliser par chacune d'entre elles. L'article 8 ajoutait que le barrage de Dunakiliti, le canal de dérivation et les deux séries d'écluses de Gabčíkovo et Nagymaros seraient «la propriété conjointe, à parts égales», des parties contractantes. Les autres ouvrages devaient être la propriété de l'Etat sur le territoire duquel ils étaient construits.

Les parties devaient de même participer à parts égales à l'utilisation du système mis en place et plus particulièrement à l'utilisation de l'énergie de base et de pointe générée dans les centrales hydro-électriques (art. 9).

Aux termes de l'article 10, les ouvrages devaient être gérés par l'Etat sur le territoire duquel ils se trouvaient, «conformément aux procédures opérationnelles arrêtées d'un commun accord», alors que l'article 12 prévoyait que les frais d'exploitation, d'entretien (réparation) et de reconstruction des ouvrages du système d'écluses appartenant en commun aux parties contractantes seraient aussi pris en charge conjointement, à parts égales, par celles-ci.

Conformément à l'article 14:

> «Le débit spécifié dans l'équilibre hydraulique prévu dans le plan contractuel conjoint approuvé sera assuré dans le lit du Danube [entre Dunakiliti et Sap], à moins que des conditions naturelles ou d'autres circonstances n'exigent temporairement un débit supérieur ou inférieur.»

Le paragraphe 3 de cet article était ainsi libellé:

> «Au cas où les prélèvements d'eau du Danube, dans le secteur hungaro-tchécoslovaque, dépasseraient les quantités d'eau spécifiées dans l'équilibre hydraulique prévu dans le plan contractuel conjoint approuvé et où les prélèvements entraîneraient une diminution de la production d'énergie électrique, la part d'énergie électrique revenant à la partie contractante ayant procédé aux prélèvements excédentaires sera réduite en conséquence.»

L'article 15 précisait que les parties contractantes

> «veiller[aient], selon les modalités spécifiées dans le plan contractuel conjoint, à ce que la qualité des eaux du Danube ne soit pas compromise par suite de la construction et du fonctionnement du système d'écluses».

Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.

Article 18, paragraph 1, provided as follows:

> "The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks."

It was stipulated in Article 19 that:

> "The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

> "*(d)* In the Dunakiliti-Hrušov head-water area, the State frontier shall run from boundary point 161.V.O.á. to boundary stone No. I.5. in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States."

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected "by the Contracting Parties on the basis of a separate treaty". No such treaty was concluded.

Finally a dispute settlement provision was contained in Article 27, worded as follows:

> "1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.
>
> 2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system

L'article 16 indiquait quelles étaient les obligations des parties contractantes en ce qui concerne l'entretien du lit du Danube.

Quant à l'article 18, il prévoyait ce qui suit en son paragraphe 1:

> «Les parties contractantes, conformément aux obligations qu'elles ont précédemment assumées et en particulier à l'article 3 de la convention relative au régime de la navigation sur le Danube signée à Belgrade le 18 août 1948, veilleront à ce que la navigation puisse se poursuivre de façon ininterrompue et dans des conditions de sécurité dans le chenal international, tant pendant la construction que pendant le fonctionnement du système d'écluses.»

L'article 19 stipulait:

> «Les parties contractantes assureront, par les moyens spécifiés dans le plan contractuel conjoint, le respect des obligations concernant la protection de la nature découlant de la construction et du fonctionnement du système d'écluses.»

L'article 20 disposait que, dans le cadre de leurs investissements nationaux, les parties contractantes prendraient les mesures appropriées pour protéger les intérêts en matière de pêche conformément à la convention relative à la pêche dans le Danube, signée à Bucarest le 29 janvier 1958.

Aux termes du paragraphe 1 de l'article 22 du traité, les parties contractantes étaient convenues, dans le contexte de la construction et du fonctionnement du système d'écluses, d'apporter des modifications mineures au tracé de la frontière d'Etat qui les sépare; ces modifications étaient les suivantes:

> «*d)* Dans le secteur d'amont de Dunakiliti-Hrušov, la frontière d'Etat ira du point frontière 161.V.O.á. à la borne frontière n° I.5., en ligne droite, de façon que les territoires affectés, à concurrence d'environ 10-10 hectares, soient répartis également entre les deux Etats.»

Il était en outre disposé, au paragraphe 2, que la revision de la frontière d'Etat et l'échange de territoires ainsi prévus seraient effectués «par les parties contractantes sur la base d'un traité distinct». Un tel traité n'a pas été conclu.

Enfin, l'article 27 contenait des dispositions relatives au règlement des différends, rédigées comme suit:

> «1. Le règlement des différends concernant toutes questions relatives à la réalisation et au fonctionnement du système d'écluses incombera aux délégués gouvernementaux.
>
> 2. Si les délégués gouvernementaux ne peuvent parvenir à un accord sur les questions en litige, ils les soumettront aux gouvernements des parties contractantes pour décisions.»

19. Sur un grand nombre de points, le plan contractuel conjoint mentionné au paragraphe précédent précisait à la fois les objectifs du système

and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabčíkovo bypass canal would have a discharge capacity of 4,000 cubic metres per second (m^3/s). The power plant would include "Eight . . . turbines with 9.20 m diameter running wheels" and would "mainly operate in peak-load time and continuously during high water". This type of operation would give an energy production of 2,650 gigawatt/hours (GWh) per annum. The Plan further stipulated in paragraph 4.4.2:

> "The low waters are stored every day, which ensures the peak-load time operation of the Gabčíkovo hydropower plant . . . a minimum of 50 m^3/s additional water is provided for the old bed [of the Danube] besides the water supply of the branch system."

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500 m^3/s, the excess amounts of water would be channelled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

> "The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 m^3/s discharge must be released into the old Danube bed, in addition to the occasional possibilities for rinsing the bed."

The Joint Contractual Plan also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system." (Joint Contractual Plan, Summary Documentation, Vol. O-1-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a "hydropower station . . . type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 m^3/s" per day. The intended annual production was to be 1,025 GWh (i.e., 38 per cent of the production of Gabčíkovo, for an installed power only equal to 21 per cent of that of Gabčíkovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčíkovo.

*

21. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at

et les caractéristiques des ouvrages. Dans sa dernière version, il spécifiait en son paragraphe 6.2 que le canal de dérivation de Gabčíkovo aurait une capacité de débit de 4000 mètres cubes par seconde (m^3/s). La centrale compterait «huit turbines ... avec des aubes de 9,20 mètres de diamètre» et «fonctionner[ait] principalement en régime de pointe et en mode continu lors des hautes eaux». Ce type de fonctionnement permettrait une production d'énergie électrique de 2650 gigawatts/heure (GWh) par an. Le plan ajoutait en son paragraphe 4.4.2:

> «Les basses eaux sont emmagasinées chaque jour pour permettre le fonctionnement en régime de pointe de la centrale hydro-électrique de Gabčíkovo ... tandis qu'un débit minimum de 50 m^3/s est assuré à l'ancien lit [du Danube] en sus de l'eau fournie au système de bras.»

Le plan spécifiait en outre que, dans les cas où le débit dans le canal de dérivation dépasserait 4000-4500 m^3/s, les quantités d'eau excédentaires seraient déversées dans l'ancien lit. Enfin, selon le paragraphe 7.7 du plan:

> «Le règlement opérationnel conjoint prévoit qu'en cas de besoin pendant la saison végétative le barrage de Dunakiliti devra envoyer 200 m^3/s dans l'ancien lit du Danube en sus des volumes occasionnellement nécessaires pour le rinçage du lit.»

Le plan contractuel conjoint comprenait également des «consignes provisoires d'exploitation et d'entretien» dont l'article 23 précisait que: «Les consignes d'exploitation définitives [seraient] agréées dans un délai d'un an à compter de la mise en service du système.» (Plan contractuel conjoint, documentation de synthèse, vol. O-1-A.)

Quant à Nagymaros, avec six turbines, il devait s'agir, selon le paragraphe 6.3 du plan, d'une «centrale hydro-électrique ... du type centrale de base capable de fonctionner en régime de pointe pendant cinq heures avec un débit situé entre 1000 et 2500 m^3/s» par jour. La production annuelle prévue était de 1025 GWh (soit trente-huit pour cent de la production de Gabčíkovo pour une puissance installée n'atteignant que vingt et un pour cent de celle de Gabčíkovo).

20. Ainsi, le projet devait se présenter comme un projet conjoint intégré dans lequel les deux parties contractantes seraient sur un pied d'égalité en ce qui concerne le financement, la construction et l'exploitation des ouvrages. Son caractère unique et indivisible devait être concrétisé grâce au plan contractuel conjoint qui complétait le traité. C'est sous le contrôle de la Hongrie, en particulier, que se seraient trouvés les vannes de Dunakiliti et les ouvrages de Nagymaros, tandis que les ouvrages de Gabčíkovo aurait été placés sous le contrôle de la Tchécoslovaquie.

*

21. Le calendrier de réalisation des travaux avait pour sa part été fixé dans un accord d'assistance mutuelle signé par les deux parties le 16 sep-

the same time as the Treaty itself. The Agreement moreover made some adjustments to the allocation of the works between the parties as laid down by the Treaty.

Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 (one amending Article 4, paragraph 4, of the 1977 Treaty and the other the Agreement on mutual assistance), to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 (which amended the Agreement on mutual assistance), to accelerate the Project.

22. As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July 1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

23. During this period, negotiations were being held between the parties. Czechoslovakia also started investigating alternative solutions. One of them, subsequently known as "Variant C", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (see sketch-map No. 3, p. 26 below). In its final stage, Variant C included the construction at Čunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was to have a smaller surface area and provide approximately 30 per cent less storage than the reservoir initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, *inter alia*, floodwater to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric power plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old bed of the Danube). The supply of water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures in the bypass canal at Dobrohošt' and Gabčíkovo. A solution was to be found for the Hungarian bank. Moreover, the question of the deepening of the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained outstanding.

On 23 July 1991, the Slovak Government decided "to begin, in September 1991, construction to put the Gabčíkovo Project into operation by the provisional solution". That decision was endorsed by the Federal Czechoslovak Government on 25 July. Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted

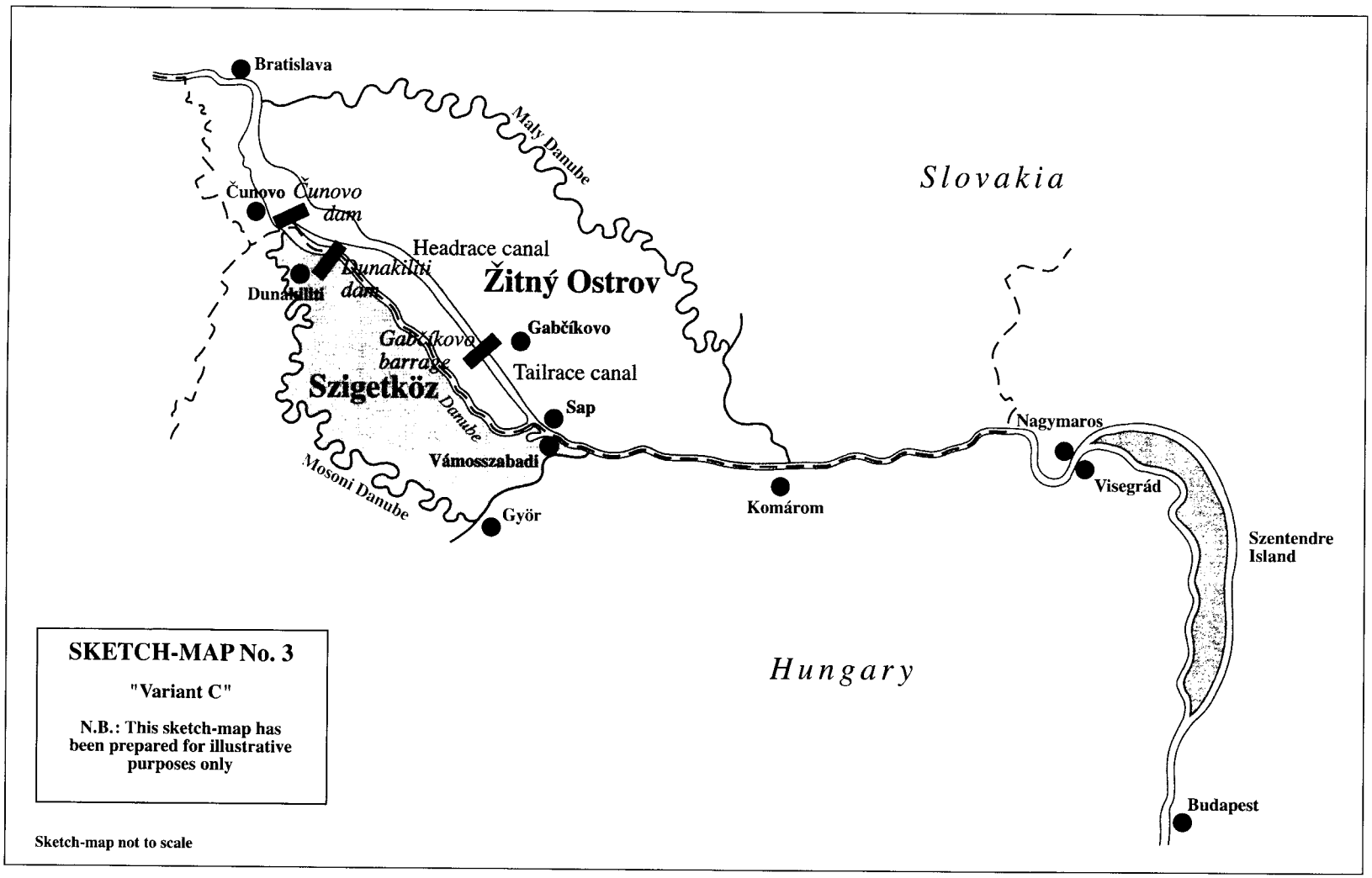
tembre 1977, en même temps que le traité lui-même. L'accord apportait par ailleurs quelques retouches à la répartition des travaux entre les parties telle qu'opérée par le traité.

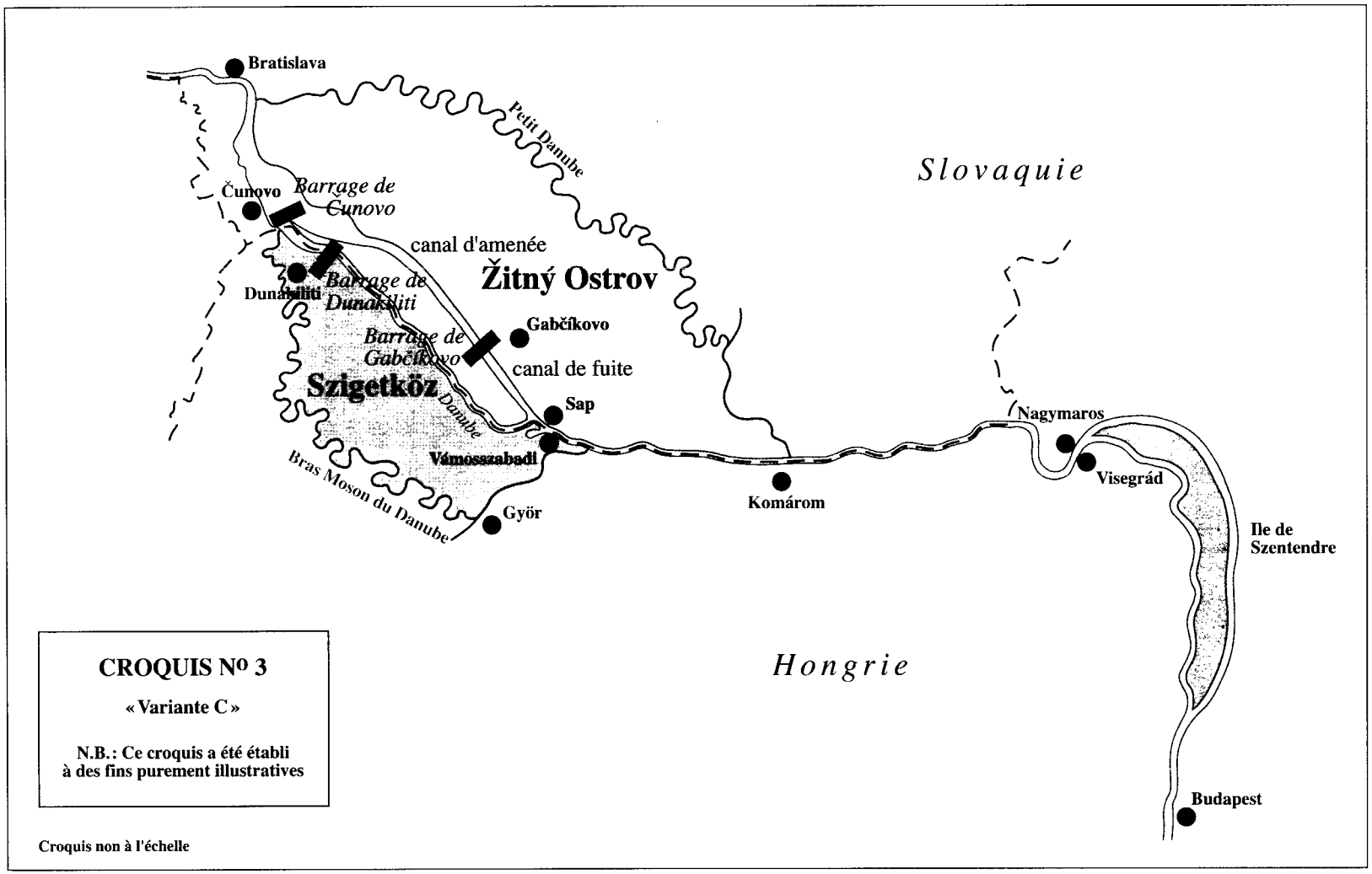
Les travaux relatifs au projet commencèrent en 1978. A l'initiative de la Hongrie, les deux parties convinrent d'abord, par deux protocoles signés le 10 octobre 1983 (l'un amendant le paragraphe 4 de l'article 4 du traité de 1977 et l'autre l'accord d'assistance mutuelle), de ralentir les travaux et de différer la mise en service des centrales, puis, par un protocole signé le 6 février 1989 (qui amendait l'accord d'assistance mutuelle), d'accélérer le projet.

22. A la suite de vives critiques que le projet avait suscitées en Hongrie, le Gouvernement hongrois décida le 13 mai 1989 de suspendre les travaux à Nagymaros en attendant l'achèvement de diverses études que les autorités compétentes devaient mener à bien avant le 31 juillet 1989. Le 21 juillet 1989, le Gouvernement hongrois prolongea jusqu'au 31 octobre 1989 la suspension des travaux à Nagymaros et suspendit en outre les travaux à Dunakiliti jusqu'à la même date. Enfin, le 27 octobre 1989, la Hongrie décida d'abandonner les travaux à Nagymaros et de maintenir le statu quo à Dunakiliti.

23. Au cours de cette période, des négociations furent tenues entre les parties. La Tchécoslovaquie mit aussi à l'étude des solutions de rechange. L'une d'entre elles, dénommée par la suite «variante C», impliquait le détournement unilatéral du Danube par la Tchécoslovaquie sur son territoire à quelque 10 kilomètres en amont de Dunakiliti (voir ci-après, p. 26, le croquis n° 3). Dans son dernier état, la variante C comportait la construction à Čunovo d'un barrage déversoir et d'une digue reliant ce barrage à la rive sud du canal de dérivation. Le réservoir correspondant devait avoir une surface plus réduite et disposer d'une capacité de retenue d'environ trente pour cent inférieure à celle du réservoir initialement envisagé. Des ouvrages accessoires étaient prévus, à savoir: une prise d'eau destinée à alimenter le bras Moson du Danube; un déversoir permettant, notamment, de diriger les eaux de crue dans l'ancien lit du Danube; une écluse de navigation auxiliaire; et deux centrales hydroélectriques (l'une permettant une production annuelle de 4 GWh sur le bras Moson du Danube, l'autre une production de 174 GWh sur l'ancien lit du Danube). L'alimentation en eau des bras secondaires du Danube sur la rive tchécoslovaque devait être assurée grâce à deux prises d'eau situées, dans le canal de dérivation, à Dobrohošt' et à Gabčíkovo. Une solution devait être trouvée pour la rive hongroise. En outre, la question de l'approfondissement du lit du Danube au confluent du canal de dérivation et de l'ancien lit du fleuve restait posée.

Le 23 juillet 1991, le Gouvernement slovaque décida de «commencer en septembre 1991 les constructions en vue de permettre la mise en exploitation du projet de Gabčíkovo grâce à la solution provisoire». Cette décision fut entérinée par le Gouvernement fédéral tchécoslovaque le 25 juillet. Les travaux relatifs à la variante C commencèrent en novembre 1991. Les discussions se poursuivirent en vain entre les deux parties


Bratislava
Mały Danube
Slovakia
Čunovo
Čunovo dam
Headrace canal
Dunakiliti
Dunakiliti dam
Žitný Ostrov
Gabčíkovo
Gabčíkovo barrage
Tailrace canal
Szigetköz
Danube
Sap
Nagymaros
Vámosszabadi
Mosoni Danube
Visegrád
Győr
Komárom
Szentendre Island
Hungary
Budapest
SKETCH-MAP No. 3
"Variant C"
N.B.: This sketch-map has been prepared for illustrative purposes only
Sketch-map not to scale


Bratislava
Petit Danube
Slovaquie
Čunovo
Barrage de Čunovo
canal d'amenée
Žitný Ostrov
Dunakiliti
Barrage de Dunakiliti
Gabčíkovo
Barrage de Gabčíkovo
canal de fuite
Szigetköz
Danube
Sap
Vámosszabadi
Bras Moson du Danube
Győr
Komárom
Nagymaros
Visegrád
Ile de Szentendre
Budapest
Hongrie
CROQUIS Nº 3
« Variante C »
N.B.: Ce croquis a été établi à des fins purement illustratives
Croquis non à l'échelle

to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

24. On 23 October 1992, the Court was seised of an "Application of the Republic of Hungary *v.* The Czech and Slovak Federal Republic on the Diversion of the Danube River"; however, Hungary acknowledged that there was no basis on which the Court could have founded its jurisdiction to entertain that application, on which Czechoslovakia took no action. In the meanwhile, the Commission of the European Communities had offered to mediate and, during a meeting of the two parties with the Commission held in London on 28 October 1992, the parties entered into a series of interim undertakings. They principally agreed that the dispute would be submitted to the International Court of Justice, that a tripartite fact-finding mission should report on Variant C not later than 31 October, and that a tripartite group of independent experts would submit suggestions as to emergency measures to be taken.

25. On 1 January 1993 Slovakia became an independent State. On 7 April 1993, the "Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčíkovo-Nagymaros Project" was signed in Brussels, the text of which is reproduced in paragraph 2 above. After the Special Agreement was notified to the Court, Hungary informed the Court, by a letter dated 9 August 1993, that it considered its "initial Application [to be] now without object, and . . . lapsed".

According to Article 4 of the Special Agreement, "The Parties [agreed] that, pending the final Judgment of the Court, they [would] establish and implement a temporary water management régime for the Danube." However, this régime could not easily be settled. The filling of the Čunovo dam had rapidly led to a major reduction in the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. On 26 August 1993, Hungary and Slovakia reached agreement on the setting up of a tripartite group of experts (one expert designated by each party and three independent experts designated by the Commission of the European Communities)

> "In order to provide reliable and undisputed data on the most important effects of the current water discharge and the remedial measures already undertaken as well as to make recommendations for appropriate measures."

On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement "concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube",

et, le 19 mai 1992, le Gouvernement hongrois transmit au Gouvernement tchécoslovaque une note verbale mettant fin, à compter du 25 mai 1992, au traité de 1977. Le 15 octobre 1992, la Tchécoslovaquie entama les travaux devant permettre la fermeture du Danube et elle procéda, à partir du 23 octobre, au barrage du fleuve.

24. Le 23 octobre 1992, la Cour fut saisie d'une «requête de la République de Hongrie contre la République fédérative tchèque et slovaque concernant le détournement du Danube»; toutefois, la Hongrie reconnaissait qu'il n'y avait aucune base sur laquelle la Cour eût pu fonder sa compétence pour connaître de cette requête, à laquelle la Tchécoslovaquie ne donna pas suite. Dans l'intervalle, la Commission des Communautés européennes avait offert sa médiation et, lors d'une réunion tenue à Londres le 28 octobre 1992 entre les deux parties et la Commission, les parties prirent divers engagements transitoires. Elles convinrent surtout que le différend serait soumis à la Cour internationale de Justice, qu'une mission d'enquête tripartite ferait rapport sur la variante C le 31 octobre au plus tard et qu'un groupe tripartite d'experts indépendants ferait des propositions concernant les mesures d'urgence à prendre.

25. Le 1er janvier 1993, la Slovaquie devint un Etat indépendant. Le 7 avril 1993 fut signé à Bruxelles le «Compromis visant à soumettre à la Cour internationale de Justice les contestations entre la République de Hongrie et la République slovaque concernant le projet Gabčíkovo-Nagymaros», dont le texte est reproduit au paragraphe 2 ci-dessus. Après la notification du compromis à la Cour, la Hongrie, par lettre du 9 août 1993, informa la Cour qu'elle considérait sa «requête initiale [comme désormais] sans objet et ... caduque».

Aux termes de l'article 4 du compromis: «Les Parties [étaient convenues], en attendant l'arrêt définitif de la Cour, d'établir et d'appliquer un régime temporaire de gestion des eaux pour le Danube.» Toutefois, l'établissement de ce régime ne fut pas aisé. La mise en eau du barrage de Čunovo avait rapidement entraîné une importante réduction du débit et du niveau des eaux en aval dans l'ancien lit du Danube comme dans les bras secondaires du fleuve. Le 26 août 1993, la Hongrie et la Slovaquie s'accordèrent pour créer un groupe tripartite d'experts (un expert nommé par chaque partie et trois experts indépendants nommés par la Commission des Communautés européennes)

> «afin de recueillir des données fiables et incontestées sur les effets les plus importants du débit actuel et des mesures correctives déjà entreprises, ainsi que pour formuler des recommandations sur les mesures appropriées».

Le 1er décembre 1993, les experts nommés par la Commission des Communautés européennes recommandèrent l'adoption de diverses mesures en vue de remédier, à titre temporaire, à la situation. Les Parties ne purent se mettre d'accord sur ces recommandations. A l'issue de longues négociations, elles conclurent finalement, le 19 avril 1995, un accord «concernant certaines mesures techniques temporaires et les débits d'eau dans le Danube

on 19 April 1995. That Agreement raised the discharge of water into the Mosoni Danube to 43 m^3/s. It provided for an annual average of 400 m^3/s in the old bed (not including flood waters). Lastly, it provided for the construction by Hungary of a partially underwater weir near to Dunakiliti with a view to improving the water supply to the side-arms of the Danube on the Hungarian side. It was specified that this temporary agreement would come to an end 14 days after the Judgment of the Court.

* * *

26. The first subparagraph of the Preamble to the Special Agreement covers the disputes arising between Czechoslovakia and Hungary concerning the application and termination, not only of the 1977 Treaty, but also of "related instruments"; the subparagraph specifies that, for the purposes of the Special Agreement, the 1977 Treaty and the said instruments shall be referred to as "the Treaty". "The Treaty" is expressly referred to in the wording of the questions submitted to the Court in Article 2, paragraph 1, subparagraphs *(a)* and *(c)*, of the Special Agreement.

The Special Agreement however does not define the concept of "related instruments", nor does it list them. As for the Parties, they gave some consideration to that question — essentially in the written proceedings — without reaching agreement as to the exact meaning of the expression or as to the actual instruments referred to. The Court notes however that the Parties seemed to agree to consider that that expression covers at least the instruments linked to the 1977 Treaty which implement it, such as the Agreement on mutual assistance of 16 September 1977 and its amending Protocols dated, respectively, 10 October 1983 and 6 February 1989 (see paragraph 21 above), and the Agreement as to the common operational regulations of Plenipotentiaries fulfilling duties related to the construction and operation of the Gabčíkovo-Nagymaros Barrage System signed in Bratislava on 11 October 1979. The Court notes that Hungary, unlike Slovakia, declined to apply the description of related instruments to the 1977 Treaty to the Joint Contractual Plan (see paragraph 19 above), which it refused to see as "an agreement at the same level as the other . . . related Treaties and inter-State agreements".

Lastly the Court notes that the Parties, in setting out the replies which should in their view be given to the questions put in the Special Agreement, concentrated their reasoning on the 1977 Treaty; and that they would appear to have extended their arguments to "related instruments" in considering them as accessories to a whole treaty system, whose fate was in principle linked to that of the main part, the 1977 Treaty. The Court takes note of the positions of the Parties and considers that it does not need to go into this matter further at this juncture.

* * *

et le bras Moson du Danube». Cet accord portait le débit d'eau dans le bras Moson à 43 m^3/s. Il prévoyait une moyenne annuelle de 400 m^3/s dans l'ancien lit (en ce non compris les eaux de crue). Il prescrivait enfin la construction par la Hongrie d'un déversoir partiellement noyé près de Dunakiliti, en vue d'améliorer l'alimentation en eau des bras secondaires du Danube du côté hongrois. Il était précisé que cet accord temporaire prendrait fin quatorze jours après le prononcé de l'arrêt de la Cour.

* * *

26. Le premier alinéa du préambule du compromis vise les contestations surgies entre la Tchécoslovaquie et la Hongrie concernant l'application et la terminaison non seulement du traité de 1977, mais aussi des «instruments y afférents»; l'alinéa précise qu'aux fins du compromis le traité de 1977 et lesdits instruments seront dénommés le «traité». Il est expressément fait référence au «traité» dans le texte des questions posées à la Cour à l'article 2, paragraphe 1, alinéas *a)* et *c)*, du compromis.

Le compromis ne définit toutefois pas la notion d'«instruments ... afférents» au traité de 1977 et n'énumère pas davantage ceux-ci. Quant aux Parties, elles ont consacré quelques développements à cette question — essentiellement dans la procédure écrite — sans parvenir à s'entendre sur le sens exact de l'expression ni sur les instruments concrets auxquels elle renverrait. La Cour constate cependant que les Parties paraissent s'accorder pour considérer que cette expression vise au moins les instruments liés au traité de 1977 qui en assurent la mise en œuvre, tels que l'accord d'assistance mutuelle du 16 septembre 1977 et ses protocoles modificatifs en date, respectivement, du 10 octobre 1983 et du 6 février 1989 (voir paragraphe 21 ci-dessus), et l'accord relatif à la réglementation opérationnelle commune applicable aux plénipotentiaires s'acquittant de fonctions liées à la construction et à l'exploitation du système de barrage de Gabčíkovo-Nagymaros, signé à Bratislava le 11 octobre 1979. La Cour note que la Hongrie, contrairement à la Slovaquie, a dénié le caractère d'instrument afférent au traité de 1977 au plan contractuel conjoint (voir paragraphe 19 ci-dessus), dans lequel elle a refusé de voir «un accord au même titre que les autres traités et accords entre Etats ... liés [au traité de 1977]».

La Cour fera enfin observer qu'en exposant quelles sont, à leur sens, les réponses qui devraient être données aux questions posées dans le compromis, les Parties ont concentré leur argumentation sur le traité de 1977; et qu'elles paraissent avoir étendu leurs arguments à des instruments y afférents» en les considérant comme des éléments accessoires d'un ensemble conventionnel, dont le sort était en principe lié à celui de l'élément principal constitué par le traité. La Cour prend acte de ces positions des Parties et estime ne pas avoir à approfondir davantage cette question à ce stade.

* * *

27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 *(a)*, of the Special Agreement, the Court is requested to decide first

> "whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary".

28. The Court would recall that the Gabčíkovo-Nagymaros System of Locks is characterized in Article 1, paragraph 1, of the 1977 Treaty as a "single and indivisible operational system of works".

The principal works which were to constitute this system have been described in general terms above (see paragraph 18). Details of them are given in paragraphs 2 and 3 of Article 1 of the Treaty.

For Gabčíkovo, paragraph 2 lists the following works:

"*(a)* the Dunakiliti-Hrušov head-water installations in the Danube sector at r.km. (river kilometre(s)) 1860-1842, designed for a maximum flood stage of 131.10 m.B. (metres above sea-level, Baltic system), in Hungarian and Czechoslovak territory;

(b) the Dunakiliti dam and auxiliary navigation lock at r.km. 1842, in Hungarian territory;

(c) the by-pass canal (head-water canal and tail-water canal) at r.km. 1842-1811, in Czechoslovak territory;

(d) series of locks on the by-pass canal, in Czechoslovak territory, consisting of a hydroelectric power plant with installed capacity of 720 MW, double navigation locks and appurtenances thereto;

(e) improved old bed of the Danube at r.km. 1842-1811, in the joint Hungarian-Czechoslovak section;

(f) deepened and regulated bed of the Danube at r.km. 1811-1791, in the joint Hungarian-Czechoslovak section."

For Nagymaros, paragraph 3 specifies the following works:

"*(a)* head-water installations and flood-control works in the Danube sector at r.km. 1791-1696.25 and in the sectors of tributaries affected by flood waters, designed for a maximum flood stage of 107.83 m.B., in Hungarian and Czechoslovak territory;

(b) series of locks at r.km. 1696.25, in Hungarian territory, consisting of a dam, a hydroelectric power plant with installed capacity of 158 MW, double navigation locks and appurtenances thereto;

(c) deepened and regulated bed of the Danube, in both its branches, at r.km. 1696.25-1657, in the Hungarian section."

27. La Cour passera maintenant à l'examen des questions soumises par les Parties. Aux termes de l'article 2, paragraphe 1, alinéa *a)*, du compromis, il est demandé en premier lieu à la Cour de dire

> «si la République de Hongrie était en droit de suspendre puis d'abandonner, en 1989, les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont la République de Hongrie est responsable aux termes du traité».

28. La Cour rappellera que le système d'écluses de Gabčíkovo-Nagymaros est qualifié, au paragraphe 1 de l'article premier du traité de 1977, de «système d'ouvrages opérationnel, unique et indivisible».

Les principaux ouvrages qui devaient constituer ce système ont été décrits en termes généraux ci-dessus (voir paragraphe 18). Le détail en est donné aux paragraphes 2 et 3 de l'article premier du traité.

S'agissant de Gabčíkovo, le paragraphe 2 énumère les ouvrages suivants:

«*a)* les installations d'amont de Dunakiliti-Hrušov, dans le secteur du Danube, aux kilomètres 1860-1842, conçues pour un niveau maximal des hautes eaux de 131,10 mètres au-dessus du niveau de la mer, système de la Baltique, en territoires hongrois et tchécoslovaque;

b) le barrage de Dunakiliti et l'écluse de navigation auxiliaire au kilomètre 1842, en territoire hongrois;

c) le canal de dérivation (canal d'amont et canal d'aval) aux kilomètres 1842-1811, en territoire tchécoslovaque;

d) une série d'écluses sur le canal de dérivation, en territoire tchécoslovaque, comprenant une centrale hydro-électrique d'une capacité installée de 720 MW, des écluses de navigation doubles et le matériel connexe;

e) une amélioration de l'ancien lit du Danube aux kilomètres 1842-1811, dans le secteur commun hungaro-tchécoslovaque;

f) l'approfondissement et la régulation du lit du Danube aux kilomètres 1811-1791, dans le secteur conjoint hungaro-tchécoslovaque».

Quant à Nagymaros, le paragraphe 3 énumère les ouvrages ci-après:

«*a)* installations d'amont et ouvrages de protection contre les inondations dans le secteur du Danube aux kilomètres 1791-1696,25 et dans les secteurs des affluents affectés par les crues, conçus pour un niveau maximum des hautes eaux de 107,83 mètres au-dessus du niveau de la mer, système de la Baltique, en territoires hongrois et tchécoslovaque;

b) une série d'écluses au kilomètre 1696,25, en territoire hongrois, comprenant un barrage, une centrale hydro-électrique d'une capacité installée de 158 MW, des écluses de navigation doubles et un matériel connexe;

c) l'approfondissement et la régulation du lit du Danube, dans ses deux branches, aux kilomètres 1696,25-1657, dans le secteur hongrois».

29. Moreover, the precise breakdown of the works incumbent on each party was set out in Article 5, paragraph 5, of the 1977 Treaty, as follows:

"5. The labour and supplies required for the realization of the joint investment shall be apportioned between the Contracting Parties in the following manner:

(a) The Czechoslovak Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the left bank, in Czechoslovak territory;
(2) the head-water canal of the by-pass canal, in Czechoslovak territory;
(3) the Gabčíkovo series of locks, in Czechoslovak territory;
(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district;
(5) restoration of vegetation in Czechoslovak territory;

(b) The Hungarian Party shall be responsible for:

(1) the Dunakiliti-Hrušov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;
(2) the Dunakiliti-Hrušov head-water installations on the right bank, in Hungarian territory;
(3) the Dunakiliti dam, in Hungarian territory;
(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;
(5) deepening of the bed of the Danube below Palkovičovo, in Hungarian and Czechoslovak territory;
(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;
(7) operational equipment of the Gabčíkovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;
(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;
(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;
(10) the Nagymaros series of locks, in Hungarian territory;
(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;
(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;
(13) restoration of vegetation in Hungarian territory."

29. Par ailleurs, la ventilation précise des travaux incombant à chaque partie était opérée comme suit au paragraphe 5 de l'article 5 du traité de 1977:

«5. La main-d'œuvre et les fournitures nécessaires pour la réalisation de l'investissement conjoint seront réparties comme suit entre les parties contractantes:

a) la partie tchécoslovaque sera responsable:

1) des installations d'amont de Dunakiliti-Hrušov sur la rive gauche, en territoire tchécoslovaque;
2) du canal d'amont du canal de dérivation, en territoire tchécoslovaque;
3) de la série d'écluses de Gabčíkovo, en territoire tchécoslovaque;
4) des ouvrages de protection contre les inondations des installations d'amont de Nagymaros, en territoire tchécoslovaque, à l'exception du district inférieur d'Ipel;
5) de la remise en état de la végétation en territoire tchécoslovaque;

b) la partie hongroise sera responsable:

1) des installations d'amont de Dunakiliti-Hrušov, sur la rive droite, en territoire tchécoslovaque, y compris la vanne de connexion et la vanne de détournement;
2) des installations d'amont de Dunakiliti-Hrušov, sur la rive droite, en territoire hongrois;
3) du barrage de Dunakiliti, en territoire hongrois;
4) du canal d'aval du canal de dérivation, en territoire tchécoslovaque;
5) de l'approfondissement du lit du Danube en aval de Palkovičovo, en territoire hongrois et en territoire tchécoslovaque;
6) de l'amélioration de l'ancien lit du Danube, en territoire hongrois et en territoire tchécoslovaque;
7) du matériel opérationnel du système d'écluses de Gabčíkovo (matériel de transport, machines d'entretien), en territoire tchécoslovaque;
8) des ouvrages de protection contre les inondations des installations d'amont de Nagymaros dans le district inférieur d'Ipel, en territoire tchécoslovaque;
9) des ouvrages de protection contre les inondations des installations d'amont de Nagymaros, en territoire hongrois;
10) de la série d'écluses de Nagymaros, en territoire hongrois;
11) de l'approfondissement du lit d'aval en dessous du système d'écluses de Nagymaros, en territoire hongrois;
12) du matériel opérationnel du système d'écluses de Nagymaros (matériel de transport, machines d'entretien), en territoire hongrois;
13) de la remise en état de la végétation en territoire hongrois.»

30. As the Court has already indicated (see paragraph 18 above), Article 1, paragraph 4, of the 1977 Treaty stipulated in general terms that the "technical specifications" concerning the System of Locks would be included in the "joint contractual plan". The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977 (see paragraph 21 above). In accordance with the provisions of Article 1, paragraph 1, of that Agreement, the whole of the works of the barrage system were to have been completed in 1991. As indicated in paragraph 2 of that same article, a summary construction schedule was appended to the Agreement, and provision was made for a more detailed schedule to be worked out in the Joint Contractual Plan. The Agreement of 16 September 1977 was twice amended further. By a Protocol signed on 10 October 1983, the parties agreed first to postpone the works and the putting into operation of the power plants for four more years; then, by a Protocol signed on 6 February 1989, the parties decided, conversely, to bring them forward by 15 months, the whole system having to be operational in 1994. A new summary construction schedule was appended to each of those Protocols; those schedules were in turn to be implemented by means of new detailed schedules, included in the Joint Contractual Plan.

31. In spring 1989, the work on the Gabčíkovo sector was well advanced: the Dunakiliti dam was 90 per cent complete, the Gabčíkovo dam was 85 per cent complete, and the bypass canal was between 60 per cent complete (downstream of Gabčíkovo) and 95 per cent complete (upstream of Gabčíkovo) and the dykes of the Dunakiliti-Hrušov reservoir were between 70 and 98 per cent complete, depending on the location. This was not the case in the Nagymaros sector where, although dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

32. In the wake of the profound political and economic changes which occurred at this time in central Europe, the Gabčíkovo-Nagymaros Project was the object, in Czechoslovakia and more particularly in Hungary, of increasing apprehension, both within a section of public opinion and in some scientific circles. The uncertainties not only about the economic viability of the Project, but also, and more so, as to the guarantees it offered for preservation of the environment, engendered a climate of growing concern and opposition with regard to the Project.

33. It was against this background that, on 13 May 1989, the Government of Hungary adopted a resolution to suspend works at Nagymaros, and ordered

> "the Ministers concerned to commission further studies in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment. In the interests of

30. Comme la Cour l'a déjà indiqué (voir paragraphe 18), le paragraphe 4 de l'article premier du traité de 1977 stipulait en termes généraux que les «spécifications techniques» concernant le système d'écluses seraient fixées dans le «plan contractuel conjoint». Le calendrier de réalisation des travaux avait pour sa part été fixé dans l'accord d'assistance mutuelle signé par les deux parties le 16 septembre 1977 (voir paragraphe 21 ci-dessus). Conformément aux dispositions du paragraphe 1 de l'article premier de cet accord, l'ensemble des travaux du système de barrage devaient être achevés en 1991. Ainsi qu'il était indiqué au paragraphe 2 du même article, un calendrier sommaire des travaux de construction était annexé à l'accord; il y était prévu qu'un échéancier plus détaillé serait établi dans le cadre du plan contractuel conjoint. L'accord du 16 septembre 1977 fut amendé à deux reprises. Par un protocole signé le 10 octobre 1983, il fut d'abord convenu par les parties de repousser de quatre années les travaux et la mise en service des centrales; puis, par un protocole signé le 6 février 1989, les parties décidèrent à l'inverse de les accélérer de quinze mois, l'ensemble du système devant être opérationnel en 1994. Un nouveau calendrier sommaire des travaux de construction était annexé à chacun de ces protocoles; ces calendriers devaient à leur tour recevoir effet au moyen de nouveaux échéanciers détaillés inscrits dans le plan contractuel conjoint.

31. Au printemps 1989, les travaux concernant le secteur de Gabčíkovo étaient bien avancés: le barrage de Dunakiliti était réalisé à 90 %, celui de Gabčíkovo à 85 %, le canal de dérivation entre 60 % (en aval de Gabčíkovo) et 95 % (en amont de Gabčíkovo) et les digues du réservoir de Dunakiliti-Hrušov entre 70 et 98 %, selon les endroits. Il n'en allait pas de même dans le secteur de Nagymaros où, si des digues avaient été édifiées, le seul ouvrage relatif au barrage lui-même à avoir été mis en place était le batardeau qui devait en permettre la construction.

32. Dans le sillage des changements politiques et économiques profonds survenus à cette époque en Europe centrale, le projet Gabčíkovo-Nagymaros suscita en Tchécoslovaquie et tout particulièrement en Hongrie de plus en plus d'appréhensions dans une partie de l'opinion publique et du monde scientifique. Les incertitudes éprouvées, non seulement quant à la viabilité économique du projet, mais aussi et plus encore quant aux garanties qu'il présentait pour ce qui est du respect de l'environnement, engendrèrent un climat d'inquiétude et de contestation croissantes autour de ce projet.

33. C'est dans ce contexte que le Gouvernement hongrois adopta, le 13 mai 1989, une résolution par laquelle il suspendait les travaux à Nagymaros et ordonnait

> «aux ministres intéressés de faire faire de nouvelles études afin de mettre le conseil des ministres en mesure de présenter au Parlement des suggestions dûment fondées concernant la modification du traité international sur l'investissement considéré. Il nous faut, à cet égard,

> the above, we must examine the international and legal consequences, the technical considerations, the obligations related to continuous navigation on the Danube and the environmental/ecological and seismic impacts of the eventual stopping of the Nagymaros investment. To be further examined are the opportunities for the replacement of the lost electric energy and the procedures for minimising claims for compensation."

The suspension of the works at Nagymaros was intended to last for the duration of these studies, which were to be completed by 31 July 1989. Czechoslovakia immediately protested and a document defining the position of Czechoslovakia was transmitted to the Ambassador of Hungary in Prague on 15 May 1989. The Prime Ministers of the two countries met on 24 May 1989, but their talks did not lead to any tangible result. On 2 June, the Hungarian Parliament authorized the Government to begin negotiations with Czechoslovakia for the purpose of modifying the 1977 Treaty.

34. At a meeting held by the Plenipotentiaries on 8 and 9 June 1989, Hungary gave Czechoslovakia a number of assurances concerning the continuation of works in the Gabčíkovo sector, and the signed Protocol which records that meeting contains the following passage:

> "The Hungarian Government Commissioner and the Hungarian Plenipotentiary stated, that the Hungarian side will complete construction of the Gabčíkovo Project in the agreed time and in accordance with the project plans. Directives have already been given to continue works suspended in the area due to misunderstanding."

These assurances were reiterated in a letter that the Commissioner of the Government of Hungary addressed to the Czechoslovak Plenipotentiary on 9 June 1989.

35. With regard to the suspension of work at Nagymaros, the Hungarian Deputy Prime Minister, in a letter dated 24 June 1989 addressed to his Czechoslovak counterpart, expressed himself in the following terms:

> "The Hungarian Academy of Sciences (HAS) has studied the environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabčíkovo-Nagymaros Barrage System (GNBS).
>
> . . . . . .
>
> Having studied the expected impacts of the construction in accordance with the original plan, the Committee *[ad hoc]* of the Academy [set up for this purpose] came to the conclusion that we do not have adequate knowledge of the consequences of environmental risks.
>
> In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impacts will

examiner les conséquences internationales et juridiques, les aspects techniques, l'obligation que nous avons d'assurer la navigation continue sur le Danube et les incidences du point de vue écologique et sismique de l'arrêt éventuel de l'investissement de Nagymaros. Il convient en outre d'examiner les possibilités de remplacer l'énergie électrique perdue ainsi que les moyens à mettre en œuvre pour réduire au minimum les demandes d'indemnisation.»

La suspension des travaux à Nagymaros était prévue pour le temps de la réalisation de ces études; celles-ci devaient être terminées pour le 31 juillet 1989. La Tchécoslovaquie protesta immédiatement; un document définissant la position tchécoslovaque fut remis à l'ambassadeur de Hongrie à Prague le 15 mai 1989. Les premiers ministres des deux pays se rencontrèrent le 24 mai 1989, sans que leurs entretiens n'aboutissent à des résultats tangibles. Le 2 juin, le Parlement hongrois autorisa le gouvernement à entamer des négociations avec la Tchécoslovaquie à l'effet de modifier le traité de 1977.

34. Au cours d'une réunion que les plénipotentiaires tinrent les 8 et 9 juin 1989, la Hongrie donna à la Tchécoslovaquie diverses assurances concernant la poursuite des travaux dans le secteur de Gabčíkovo; le protocole signé qui rend compte de cette réunion contient le passage suivant:

«Le commissaire du Gouvernement hongrois et le plénipotentiaire hongrois ont fait savoir que la partie hongroise mènerait à bien la réalisation du projet de Gabčíkovo dans les délais convenus et conformément aux plans du projet. Des directives ont déjà été données pour que les travaux suspendus pour cause de malentendu reprennent dans la zone.»

Ces assurances furent réitérées dans une lettre que le commissaire du Gouvernement hongrois adressa au plénipotentiaire tchécoslovaque le 9 juin 1989.

35. S'agissant de la suspension des travaux à Nagymaros, le vice-premier ministre hongrois, dans une lettre en date du 24 juin 1989 adressée à son homologue tchécoslovaque, s'exprima dans les termes suivants:

«L'Académie des sciences de Hongrie (ASH) a étudié les conséquences qu'aurait sur l'environnement, l'écologie et la qualité de l'eau ainsi que sur la situation sismologique, la décision d'abandonner ou de réaliser la construction du barrage de Nagymaros, dans le cadre du système de barrage de Gabčíkovo-Nagymaros.

. . . . . .

Après avoir étudié les conséquences prévues de la construction réalisée selon le plan initial, le comité *[ad hoc]* de l'Académie [créé à cette fin] est arrivé à la conclusion que nous ne disposons pas de connaissances satisfaisantes sur les conséquences des risques écologiques.

A son avis, le risque qu'entraînerait la construction du système de barrage conformément au plan initial ne peut être considéré comme acceptable. On ne peut évidemment pas déclarer non plus que des consé-

ensue for certain, therefore, according to their recommendation, further thorough and time consuming studies are necessary."

36. The Hungarian and Czechoslovak Prime Ministers met again on 20 July 1989 to no avail. Immediately after that meeting, the Hungarian Government adopted a second resolution, under which the suspension of work at Nagymaros was extended to 31 October 1989. However, this resolution went further, as it also prescribed the suspension, until the same date, of the "Preparatory works on the closure of the riverbed at . . . Dunakiliti"; the purpose of this measure was to invite "international scientific institutions [and] foreign scientific institutes and experts" to co-operate with "the Hungarian and Czechoslovak institutes and experts" with a view to an assessment of the ecological impact of the Project and the "development of a technical and operational water quality guarantee system and . . . its implementation".

37. In the ensuing period, negotiations were conducted at various levels between the two States, but proved fruitless. Finally, by a letter dated 4 October 1989, the Hungarian Prime Minister formally proposed to Czechoslovakia that the Nagymaros sector of the Project be abandoned and that an agreement be concluded with a view to reducing the ecological risks associated with the Gabčíkovo sector of the Project. He proposed that that agreement should be concluded before 30 July 1990.

The two Heads of Government met on 26 October 1989, and were unable to reach agreement. By a Note Verbale dated 30 October 1989, Czechoslovakia, confirming the views it had expressed during those talks, proposed to Hungary that they should negotiate an agreement on a system of technical, operational and ecological guarantees relating to the Gabčíkovo-Nagymaros Project, "on the assumption that the Hungarian party will immediately commence preparatory work on the refilling of the Danube's bed in the region of Dunakiliti". It added that the technical principles of the agreement could be initialled within two weeks and that the agreement itself ought to be signed before the end of March 1990. After the principles had been initialled, Hungary "[was to] start the actual closure of the Danube bed". Czechoslovakia further stated its willingness to "conclu[de] . . . a separate agreement in which both parties would oblige themselves to limitations or exclusion of peak hour operation mode of the . . . System". It also proposed "to return to deadlines indicated in the Protocol of October 1983", the Nagymaros construction deadlines being thus extended by 15 months, so as to enable Hungary to take advantage of the time thus gained to study the ecological issues and formulate its own proposals in due time. Czechoslovakia concluded by announcing that, should Hungary continue unilaterally to breach the Treaty, Czechoslovakia would proceed with a provisional solution.

In the meantime, the Hungarian Government had on 27 October adopted a further resolution, deciding to abandon the construction of the

quences préjudiciables se produiraient inévitablement et il est donc nécessaire, conformément à la recommandation du comité, d'effectuer de nouvelles études approfondies qui exigeront beaucoup de temps.»

36. Les premiers ministres hongrois et tchécoslovaque se rencontrèrent de nouveau le 20 juillet 1989, sans succès. Aussitôt après cette rencontre, le Gouvernement hongrois adopta une deuxième résolution, aux termes de laquelle la suspension des travaux à Nagymaros était prorogée jusqu'au 31 octobre 1989. Cette résolution allait cependant plus loin, car elle prescrivait également la suspension, jusqu'à la même date, des «travaux préparatoires en vue de la fermeture du lit du fleuve à Dunakiliti»; cette mesure avait pour objet d'inviter «[des] institutions scientifiques internationales et ... [des] instituts et experts scientifiques étrangers» à coopérer avec «[les] instituts et experts hongrois et tchécoslovaques» en vue d'apprécier les incidences écologiques du projet et de «mettre au point et réaliser un système technique et opérationnel garantissant la qualité de l'eau».

37. Dans la période qui suivit, des négociations furent menées à divers niveaux entre les deux Etats, mais elles s'avérèrent infructueuses. Finalement, par lettre en date du 4 octobre 1989, le premier ministre hongrois proposa formellement à la Tchécoslovaquie l'abandon du projet dans le secteur de Nagymaros et la conclusion d'un accord ayant pour objet de réduire les risques écologiques liés au projet dans le secteur de Gabčíkovo. Il suggérait que cet accord soit conclu avant le 30 juillet 1990.

Les deux chefs de gouvernement se rencontrèrent le 26 octobre 1989 et ne purent parvenir à un accord. Par note verbale du 30 octobre 1989, la Tchécoslovaquie, confirmant le point de vue qu'elle avait exprimé lors de ces entretiens, proposa à la Hongrie de négocier un accord au sujet d'un système de garanties techniques, opérationnelles et écologiques relatif au projet Gabčíkovo-Nagymaros, «en partant de l'hypothèse que la partie hongroise commencera immédiatement les travaux de préparation du remplissage du lit du Danube dans la région de Dunakiliti». Elle ajoutait que les principes techniques dudit accord pourraient être paraphés sous quinzaine et que l'accord lui-même devrait être signé avant la fin mars 1990. Dès le paraphe, la Hongrie «devra[it] commencer à fermer effectivement le lit du Danube». La Tchécoslovaquie se disait en outre prête à «conclure un accord distinct par lequel les deux parties s'engageraient d'elles-mêmes à limiter ou à exclure le fonctionnement en régime de pointe du système». Elle proposait encore «de revenir ... aux dates limites indiquées dans le protocole d'octobre 1983», les délais de construction de Nagymaros étant ainsi prorogés de quinze mois afin de permettre à la Hongrie de mettre à profit le temps gagné pour étudier les questions écologiques et formuler ses propositions en temps voulu. Enfin, la Tchécoslovaquie annonçait que, si la Hongrie continuait à enfreindre unilatéralement les dispositions du traité, la Tchécoslovaquie se verrait contrainte de mettre en œuvre une solution provisoire.

Dans l'intervalle, le Gouvernement hongrois avait adopté le 27 octobre 1989 une nouvelle résolution par laquelle il décidait d'abandonner la construc-

Nagymaros dam and to leave in place the measures previously adopted for suspending the works at Dunakiliti. Then, by Notes Verbales dated 3 and 30 November 1989, Hungary proposed to Czechoslovakia a draft treaty incorporating its earlier proposals, relinquishing peak power operation of the Gabčíkovo power plant and abandoning the construction of the Nagymaros dam. The draft provided for the conclusion of an agreement on the completion of Gabčíkovo in exchange for guarantees on protection of the environment. It finally envisaged the possibility of one or other party seising an arbitral tribunal or the International Court of Justice in the event that differences of view arose and persisted between the two Governments about the construction and operation of the Gabčíkovo dam, as well as measures to be taken to protect the environment. Hungary stated that it was ready to proceed immediately "with the preparatory operations for the Dunakiliti bed-decanting", but specified that the river would not be dammed at Dunakiliti until the agreement on guarantees had been concluded.

38. During winter 1989-1990, the political situation in Czechoslovakia and Hungary alike was transformed, and the new Governments were confronted with many new problems.

In spring 1990, the new Hungarian Government, in presenting its National Renewal Programme, announced that the whole of the Gabčíkovo-Nagymaros Project was a "mistake" and that it would initiate negotiations as soon as possible with the Czechoslovak Government "on remedying and sharing the damages". On 20 December 1990, the Hungarian Government adopted a resolution for the opening of negotiations with Czechoslovakia on the termination of the Treaty by mutual consent and the conclusion of an agreement addressing the consequences of the termination. On 15 February 1991, the Hungarian Plenipotentiary transmitted a draft agreement along those lines to his Czechoslovak counterpart.

On the same day, the Czechoslovak President declared that the Gabčíkovo-Nagymaros Project constituted a "totalitarian, gigomaniac monument which is against nature", while emphasizing that "the problem [was] that [the Gabčíkovo power plant] [had] already been built". For his part, the Czechoslovak Minister of the Environment stated, in a speech given to Hungarian parliamentary committees on 11 September 1991, that "the G/N Project [was] an old, obsolete one", but that, if there were "many reasons to change, modify the treaty . . . it [was] not acceptable to cancel the treaty . . . and negotiate later on".

During the ensuing period, Hungary refrained from completing the work for which it was still responsible at Dunakiliti. Yet it continued to maintain the structures it had already built and, at the end of 1991, completed the works relating to the tailrace canal of the bypass canal assigned to it under Article 5, paragraph 5 *(b)*, of the 1977 Treaty.

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tion du barrage de Nagymaros et de maintenir les mesures de suspension des travaux antérieurement adoptées pour Dunakiliti. Puis, par des notes verbales en date des 3 et 30 novembre 1989, la Hongrie proposa à la Tchécoslovaquie un projet de traité concrétisant ses propositions antérieures et portant renonciation à l'exploitation de la centrale de Gabčíkovo en régime de pointe et abandon de la construction du barrage de Nagymaros. Le projet prévoyait en outre la conclusion d'un accord sur l'achèvement de Gabčíkovo au prix de garanties concernant la protection de l'environnement. Il envisageait enfin la possibilité pour l'une ou l'autre partie de saisir un tribunal arbitral ou la Cour internationale de Justice au cas où des divergences de vues auraient surgi et persisté entre les deux gouvernements au sujet de la construction et du fonctionnement du barrage de Gabčíkovo ainsi que des mesures à prendre pour protéger l'environnement. La Hongrie se déclarait prête à engager immédiatement «les opérations de préparation du décantage du lit du Danube», mais précisait que le fleuve ne serait barré à Dunakiliti qu'après conclusion de l'accord sur les garanties.

38. Au cours de l'hiver 1989-1990, la situation politique changea profondément tant en Tchécoslovaquie qu'en Hongrie et les nouveaux gouvernements eurent à faire face à de nombreux nouveaux problèmes.

Au printemps 1990, le nouveau Gouvernement hongrois, en présentant son «programme de renouveau national», déclara que l'ensemble du projet Gabčíkovo-Nagymaros constituait une «erreur» et qu'il engagerait aussitôt que possible des négociations avec le Gouvernement tchécoslovaque «sur la remise en l'état des lieux et le partage des dommages». Le 20 décembre 1990, le Gouvernement hongrois adopta une résolution en vue de l'ouverture de négociations avec la Tchécoslovaquie sur la terminaison du traité par consentement mutuel et la conclusion d'un accord qui réglerait les conséquences de cette terminaison. Le 15 février 1991, le plénipotentiaire hongrois faisait parvenir à son homologue tchécoslovaque un projet d'accord en ce sens.

Le même jour, le président tchécoslovaque déclara que le projet Gabčíkovo-Nagymaros constituait un «monument totalitaire, atteint de gigantisme et contraire à la nature», tout en soulignant que «le problème [était] que [la centrale de Gabčíkovo] a[vait] déjà été construite». Pour sa part, le ministre tchécoslovaque de l'environnement indiqua, dans un discours prononcé devant des commissions du Parlement hongrois le 11 septembre 1991, que «le projet G/N constituait un vieux projet, de caractère désuet», mais que s'il existait «de nombreuses raisons de changer, de modifier le traité ... il n'[était] pas acceptable d'annuler le traité ... et de négocier plus tard».

La Hongrie, au cours de la période qui suivit, s'abstint de terminer les travaux qui lui incombaient encore à Dunakiliti. Elle continua cependant d'entretenir les ouvrages qu'elle y avait déjà construits et, à la fin de l'année 1991, elle termina les travaux afférents au canal de fuite du canal de dérivation, dont elle avait la responsabilité en vertu de l'article 5, paragraphe 5, alinéa *b)*, du traité de 1977.

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39. The two Parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place.

Further, they do not dispute the fact that, however flexible they may have been, these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners.

40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a "state of ecological necessity".

Hungary contended that the various installations in the Gabčíkovo-Nagymaros System of Locks had been designed to enable the Gabčíkovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 km^2) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčíkovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows. At Gabčíkovo/Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 m^3/s, in addition to the water provided to the system of side-arms. That volume could be increased to 200 m^3/s during the growing season. Additional discharges, and in particular a number of artificial floods, could also be effected, at an unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetköz. Furthermore, the groundwater would then no longer have been supplied by the Danube — which, on the contrary, would have acted as a drain — but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir; instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built,

39. Les deux Parties à la présente instance s'accordent pour reconnaître que le traité de 1977 ainsi que l'accord d'assistance mutuelle de 1977 et le protocole de 1989 susmentionnés ont été valablement conclus et étaient dûment en vigueur au moment où se sont produits les faits ci-dessus rapportés.

Elles ne contestent pas davantage que ces textes, aussi souples qu'ils aient été, n'envisageaient pas la possibilité pour les signataires de suspendre ou d'abandonner unilatéralement les travaux qui y étaient prévus, voire de réaliser ceux-ci selon un calendrier nouveau qui n'eût pas été agréé par les deux partenaires.

40. Tout au long de la procédure, la Hongrie a soutenu que, si elle avait suspendu ou abandonné certains travaux, elle n'avait en revanche jamais suspendu l'application du traité de 1977 lui-même. Elle a essentiellement invoqué, pour justifier sa conduite, un «état de nécessité écologique».

La Hongrie a fait valoir que les diverses installations du système d'écluses de Gabčíkovo-Nagymaros avaient été conçues pour permettre à la centrale de Gabčíkovo de fonctionner en régime de pointe. L'eau ne se serait écoulée à travers la centrale que deux fois par jour, lors des périodes de forte demande d'électricité. L'exploitation en régime de pointe rendait nécessaires l'énorme étendue (60 km^2) du réservoir prévu à Dunakiliti ainsi que le barrage de Nagymaros, qui devait atténuer les vagues de fond et réduire la variation du niveau des eaux en aval de Gabčíkovo. Un tel régime, considéré comme économiquement plus rentable que l'utilisation des installations au fil de l'eau, comportait des risques écologiques inacceptables pour elle.

D'après la Hongrie, les principaux dangers écologiques qu'aurait engendrés le système étaient les suivants. Pour ce qui est de Gabčíkovo/Dunakiliti, selon le projet initial, tel qu'il a été précisé dans le plan contractuel conjoint, le débit réservé dans l'ancien lit du Danube était limité à 50 m^3/s, en sus de l'eau fournie au système de bras. Ce volume pouvait être porté à 200 m^3/s en saison végétative. Des déversements supplémentaires, et notamment des inondations artificielles, pouvaient également être réalisés, à un rythme non précisé. Dans ces conditions, le niveau des eaux souterraines aurait baissé dans la plus grande partie du Szigetköz. En outre, la nappe aquifère aurait désormais été alimentée non plus par le Danube — qui au contraire aurait joué le rôle de drain —, mais par le réservoir d'eaux stagnantes de Dunakiliti et les bras secondaires qui se seraient envasés. Sur le long terme, la qualité des eaux en aurait gravement souffert. En ce qui concerne les eaux de surface, des risques d'eutrophisation seraient apparus, notamment dans le réservoir. A l'ancien Danube aurait par ailleurs été substituée une rivière ensablée où n'aurait coulé qu'un filet d'eau assez mince. Le réseau des bras aurait été isolé le plus souvent du lit principal. La faune et la flore du fleuve, comme celles des plaines alluviales, auraient été condamnées à disparaître.

Quant à Nagymaros, la Hongrie a fait valoir que, si ce barrage avait

the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells would have deteriorated in this sector. What is more, the operation of the Gabčíkovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would have been severely jeopardized.

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a "state of ecological necessity" did indeed exist in 1989.

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 — in particular Articles 15 and 19 relating, respectively, to water quality and nature protection — in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project's impact on the environment; Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it imputes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

42. Hungary moreover contended from the outset that its conduct in the present case should not be evaluated only in relation to the law of treaties. It also observed that, in accordance with the provisions of Article 4, the Vienna Convention of 23 May 1969 on the Law of Treaties could not be applied to the 1977 Treaty, which was concluded before that Convention entered into force as between the parties. Hungary has indeed acknowledged, with reference to the jurisprudence of the Court, that in many respects the Convention reflects the existing customary law. Hungary nonetheless stressed the need to adopt a cautious attitude, while

été construit, le lit du Danube en amont se serait envasé et, par suite, la qualité de l'eau recueillie dans les puits filtrants sur berge se serait détériorée dans ce secteur. Bien plus, l'exploitation de la centrale de Gabčíkovo en régime de pointe aurait engendré d'importantes variations journalières du niveau des eaux dans le réservoir d'amont, ce qui aurait notamment menacé les habitats aquatiques. En outre, la construction et l'exploitation du barrage de Nagymaros auraient entraîné une érosion du lit en aval, le long de l'île de Szentendre. De ce fait, le niveau des eaux dans le fleuve aurait baissé sur ce tronçon et la productivité des puits filtrants sur berge assurant, pour les deux tiers, l'alimentation en eau de la ville de Budapest aurait sensiblement diminué. Par ailleurs, la couche filtrante se serait amincie et aurait même pu disparaître; des sédiments fins se seraient déposés dans certaines poches du fleuve. Pour cette double raison, la qualité de l'eau d'infiltration aurait été gravement menacée.

De l'ensemble de ces prévisions, à l'appui desquelles elle a cité diverses études scientifiques, la Hongrie a conclu qu'un «état de nécessité écologique» existait bien en 1989.

41. Dans ses écritures, la Hongrie a aussi reproché à la Tchécoslovaquie d'avoir, dès avant 1989, violé différentes dispositions du traité de 1977 — en particulier ses articles 15 et 19 relatifs, respectivement, à la protection de la qualité des eaux et à la protection de la nature — en refusant de prendre en considération les dangers écologiques qui s'étaient alors précisés et en insistant sur la poursuite des travaux, notamment à Nagymaros. La Hongrie a soutenu dans ce contexte que, conformément aux termes du paragraphe 2 de l'article 3 de l'accord du 6 mai 1976 relatif au plan contractuel conjoint, les recherches concernant l'impact du projet sur l'environnement incombaient à la Tchécoslovaquie; et la Hongrie a souligné que les recherches entreprises par la partie tchécoslovaque n'avaient pas été menées de manière adéquate, les effets potentiels du projet sur l'environnement n'ayant été évalués par la Tchécoslovaquie qu'à partir de septembre 1990. Toutefois, dans le dernier état de son argumentation, la Hongrie ne semble pas avoir entendu formuler ce grief comme un moyen autonome tendant à justifier formellement la suspension et l'abandon des travaux dont elle était responsable aux termes du traité de 1977. Elle a plutôt présenté les violations du traité antérieures à 1989, qu'elle impute à la Tchécoslovaquie, comme l'un des éléments qui ont concouru à la survenance d'un état de nécessité.

42. La Hongrie a d'ailleurs d'emblée soutenu que sa conduite en l'espèce ne devrait pas être appréciée exclusivement à l'aune du droit des traités. Elle a en outre fait observer que, conformément aux dispositions de son article 4, la convention de Vienne du 23 mai 1969 sur le droit des traités ne pouvait s'appliquer au traité de 1977, conclu avant que celle-ci n'entre en vigueur entre les parties. La Hongrie a certes reconnu, en faisant référence à la jurisprudence de la Cour, qu'à bien des égards la convention traduit le droit coutumier existant. Elle n'en a pas moins souligné la nécessité de faire preuve de prudence, tout en suggérant que la

suggesting that the Court should consider, in each case, the conformity of the prescriptions of the Convention with customary international law.

43. Slovakia, for its part, denied that the basis for suspending or abandoning the performance of a treaty obligation can be found outside the law of treaties. It acknowledged that the 1969 Vienna Convention could not be applied as such to the 1977 Treaty, but at the same time stressed that a number of its provisions are a reflection of pre-existing rules of customary international law and specified that this is, in particular, the case with the provisions of Part V relating to invalidity, termination and suspension of the operation of treaties. Slovakia has moreover observed that, after the Vienna Convention had entered into force for both parties, Hungary affirmed its accession to the substantive obligations laid down by the 1977 Treaty when it signed the Protocol of 6 February 1989 that cut short the schedule of work; and this led it to conclude that the Vienna Convention was applicable to the "contractual legal régime" constituted by the network of interrelated agreements of which the Protocol of 1989 was a part.

44. In the course of the proceedings, Slovakia argued at length that the state of necessity upon which Hungary relied did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. At the same time, it cast doubt upon whether "ecological necessity" or "ecological risk" could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act.

In any event, Slovakia denied that there had been any kind of "ecological state of necessity" in this case either in 1989 or subsequently. It invoked the authority of various scientific studies when it claimed that Hungary had given an exaggeratedly pessimistic description of the situation. Slovakia did not, of course, deny that ecological problems could have arisen. However, it asserted that they could to a large extent have been remedied. It accordingly stressed that no agreement had been reached with respect to the modalities of operation of the Gabčíkovo power plant in peak mode, and claimed that the apprehensions of Hungary related only to operating conditions of an extreme kind. In the same way, it contended that the original Project had undergone various modifications since 1977 and that it would have been possible to modify it even further, for example with respect to the discharge of water reserved for the old bed of the Danube, or the supply of water to the side-arms by means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977 Treaty — particularly its Articles 15 and 19 — and maintained, *inter alia*, that according to the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 relating to the Joint Contractual Plan, research into the impact of the Project on the environment was not the exclusive responsibility of Czechoslovakia but of either one of the parties, depending on the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in viola-

Cour examine dans chaque cas si les prescriptions de la convention correspondent à l'état du droit international coutumier.

43. La Slovaquie, pour sa part, a dénié que la suspension ou l'abandon de l'exécution d'une obligation conventionnelle puisse trouver son fondement hors du droit des traités. Elle a reconnu que la convention de Vienne de 1969 ne pouvait pas s'appliquer comme telle au traité de 1977; mais elle a en même temps souligné que nombre de ses dispositions traduisent des règles préexistantes du droit international coutumier et a précisé que tel est en particulier le cas des dispositions de sa partie V afférente à la nullité, à l'extinction et à la suspension de l'application des traités. La Slovaquie a par ailleurs fait observer qu'après l'entrée en vigueur de la convention de Vienne entre les deux parties, la Hongrie avait confirmé son adhésion aux obligations de fond créées par le traité de 1977 en signant le protocole du 6 février 1989 qui abrégeait le calendrier des travaux; et elle en a conclu que la convention de Vienne s'appliquait au «régime juridique contractuel» constitué par le réseau d'accords liés les uns aux autres dont le protocole de 1989 faisait partie.

44. Au cours de la procédure, la Slovaquie a longuement plaidé que l'état de nécessité invoqué par la Hongrie ne constituait pas un motif de suspension d'une obligation conventionnelle reconnu par le droit des traités. Elle a en même temps mis en doute que la «nécessité écologique» ou le «risque écologique» puissent constituer, au regard du droit de la responsabilité des Etats, une circonstance excluant l'illicéité d'un acte.

La Slovaquie a en tout état de cause nié qu'il y ait eu en l'espèce un quelconque «état de nécessité écologique», en 1989 ou par la suite. Se réclamant de diverses études scientifiques, elle a prétendu que la Hongrie avait donné une description exagérément pessimiste de la situation. La Slovaquie n'a certes pas contesté que des problèmes écologiques auraient pu se poser; mais elle a fait valoir qu'il aurait pu y être largement remédié. Ainsi, elle a souligné qu'aucun accord n'était intervenu quant aux modalités d'exploitation de la centrale de Gabčíkovo en régime de pointe, et a affirmé que les appréhensions hongroises ne se rapportaient qu'à des conditions d'exploitation de nature extrême. De même, elle a soutenu que le projet initial avait déjà subi depuis 1977 diverses modifications et qu'il aurait pu être encore modifié, par exemple en ce qui concerne le débit de l'eau réservé pour l'ancien lit du Danube ou l'alimentation des bras secondaires par l'effet de déversoirs noyés.

45. La Slovaquie a en outre démenti avoir violé de quelque façon que ce soit le traité de 1977 — en particulier ses articles 15 et 19 — et a notamment fait valoir que, conformément aux termes du paragraphe 2 de l'article 3 de l'accord du 6 mai 1976 relatif au plan contractuel conjoint, les recherches concernant l'impact du projet sur l'environnement n'incombaient pas exclusivement à la Tchécoslovaquie, mais à l'une ou à l'autre des parties, selon l'emplacement des ouvrages.

Enfin, elle a à son tour fait grief à la Hongrie d'avoir arrêté ses mesures unilatérales de suspension et d'abandon des travaux en violation des dis-

tion of the provisions of Article 27 of the 1977 Treaty (see paragraph 18 above), which it submits required prior recourse to the machinery for dispute settlement provided for in that Article.

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46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971,* p. 47, and *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973,* p. 18; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980,* pp. 95-96).

Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabčíkovo-Nagymaros Project.

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.

Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining — in a limitative manner — the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 228; and see Article 17 of the Draft Articles on State Responsi-

positions de l'article 27 du traité de 1977 (voir paragraphe 18 ci-dessus), qui, d'après elle, prescrivaient le recours préalable aux mécanismes de règlement des différends prévus par cet article.

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46. La Cour n'a pas à s'attarder sur la question de l'applicabilité en l'espèce de la convention de Vienne de 1969 sur le droit des traités. Il lui suffira de rappeler qu'à plusieurs reprises déjà elle a eu l'occasion de dire que certaines des règles énoncées dans ladite convention pouvaient être considérées comme une codification du droit coutumier existant. La Cour est d'avis qu'à bien des égards tel est le cas des règles de la convention de Vienne afférentes à l'extinction et à la suspension de l'application des traités, énoncées à ses articles 60 à 62 (voir *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 47, et *Compétence en matière de pêcheries (Royaume-Uni c. Islande), compétence de la Cour, arrêt, C.I.J. Recueil 1973*, p. 18; voir également *Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte, avis consultatif, C.I.J. Recueil 1980*, p. 95-96).

La Cour ne perd pas non plus de vue que la convention de Vienne est en tout état de cause applicable au protocole du 6 février 1989 par lequel la Hongrie et la Tchécoslovaquie étaient convenues d'accélérer les travaux relatifs au projet Gabčíkovo-Nagymaros.

47. La Cour n'a pas davantage à s'étendre sur la question des relations qu'entretiennent le droit des traités et le droit de la responsabilité des Etats, à laquelle les Parties ont consacré de longs développements. Ces deux branches du droit international ont en effet, à l'évidence, des champs d'application distincts. C'est au regard du droit des traités qu'il convient de déterminer si une convention est ou non en vigueur, et si elle a ou non été régulièrement suspendue ou dénoncée. C'est en revanche au regard du droit de la responsabilité des Etats qu'il y a lieu d'apprécier dans quelle mesure la suspension ou la dénonciation d'une convention qui serait incompatible avec le droit des traités engage la responsabilité de l'Etat qui y a procédé.

Ainsi, la convention de Vienne de 1969 sur le droit des traités se borne à définir — de façon limitative — les conditions dans lesquelles un traité peut, de façon licite, être dénoncé ou suspendu; les effets d'une dénonciation ou d'une suspension qui ne satisferait pas à ces conditions sont par contre expressément exclus du champ d'application de la convention par le jeu de son article 73. Il est au demeurant bien établi que, dès lors qu'un Etat a commis un acte internationalement illicite, sa responsabilité internationale est susceptible d'être engagée, quelle que soit la nature de l'obligation méconnue (voir *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, C.I.J. Recueil 1950*, p. 228, et l'article 17 du projet d'articles sur la

bility provisionally adopted by the International Law Commission on first reading, *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 32).

48. The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".

The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

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49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:

"*Article 33. State of Necessity*

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

responsabilité des Etats adopté à titre provisoire par la Commission du droit international en première lecture, *Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 30-31).

48. La Cour ne peut suivre la Hongrie lorsque celle-ci soutient qu'en suspendant puis en abandonnant en 1989 les travaux dont elle avait encore la charge à Nagymaros et à Dunakiliti elle n'a pas pour autant suspendu l'application du traité de 1977 lui-même, puis rejeté ce traité. Le comportement de la Hongrie à l'époque ne peut être interprété que comme traduisant sa volonté de ne pas exécuter au moins certaines dispositions du traité et du protocole du 6 février 1989, telles que précisées dans le plan contractuel conjoint. L'effet du comportement de la Hongrie a été de rendre impossible la réalisation du système d'ouvrages que le traité qualifiait expressément d'«unique et indivisible».

La Cour fera d'ailleurs observer qu'en invoquant l'état de nécessité pour tenter de justifier ce comportement la Hongrie a choisi de se placer d'emblée sur le terrain du droit de la responsabilité des Etats, impliquant par là qu'en l'absence d'une telle circonstance sa conduite eût été illicite. L'état de nécessité allégué par la Hongrie — à le supposer établi — ne pourrait donc permettre de conclure qu'en 1989 elle aurait agi conformément à ses obligations en vertu du traité de 1977 ou que ces obligations auraient cessé de la lier. Il permettrait seulement d'affirmer que, compte tenu des circonstances, la Hongrie n'aurait pas engagé sa responsabilité internationale en agissant comme elle l'a fait. La Cour notera enfin que la Hongrie a expressément reconnu qu'en tout état de cause un tel état de nécessité ne la dispenserait pas de devoir dédommager son partenaire.

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49. La Cour examinera à présent la question de savoir s'il existait, en 1989, un état de nécessité qui eût permis à la Hongrie, sans engager sa responsabilité internationale, de suspendre et d'abandonner des travaux qu'elle était tenue de réaliser conformément au traité de 1977 et aux instruments y afférents.

50. Dans l'instance, les Parties se sont accordées pour estimer que l'existence d'un état de nécessité doit être appréciée à la lumière des critères énoncés par la Commission du droit international à l'article 33 du projet d'articles sur la responsabilité internationale des Etats qu'elle a adopté en première lecture. Cette disposition est ainsi conçue:

«*Article 33. Etat de nécessité*

1. L'état de nécessité ne peut pas être invoqué par un Etat comme une cause d'exclusion de l'illicéité d'un fait de cet Etat non conforme à une de ses obligations internationales, à moins que

a) ce fait n'ait constitué le seul moyen de sauvegarder un intérêt essentiel dudit Etat contre un péril grave et imminent; et que

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity." (*Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the "state of necessity" as being

> "the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State" (*ibid.*, para. 1).

It concluded that "the notion of state of necessity is . . . deeply rooted in general legal thinking" (*ibid.*, p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

> "in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness . . ." (*ibid.*, p. 51, para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must

b) ce fait n'ait pas gravement porté atteinte à un intérêt essentiel de l'Etat à l'égard duquel l'obligation existait.

2. En tout état de cause, l'état de nécessité ne peut pas être invoqué par un Etat comme une cause d'exclusion d'illicéité

a) si l'obligation internationale à laquelle le fait de l'Etat n'est pas conforme découle d'une norme impérative du droit international général; ou

b) si l'obligation internationale à laquelle le fait de l'Etat n'est pas conforme est prévue par un traité qui, explicitement ou implicitement, exclut la possibilité d'invoquer l'état de nécessité en ce qui concerne cette obligation; ou

c) si l'Etat en question a contribué à la survenance de l'état de nécessité.» (*Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 33.)

Dans son commentaire, la Commission a défini l'«état de nécessité» comme

> «la situation où se trouve un Etat n'ayant absolument pas d'autre moyen de sauvegarder un intérêt essentiel menacé par un péril grave et imminent que celui d'adopter un comportement non conforme à ce qui est requis de lui par une obligation internationale envers un autre Etat» (*ibid.*, par. 1).

Elle a conclu que: «La notion d'état de nécessité est ... profondément enracinée dans la théorie générale du droit.» (*Ibid.*, p. 47, par. 31.)

51. La Cour considère tout d'abord que l'état de nécessité constitue une cause, reconnue par le droit international coutumier, d'exclusion de l'illicéité d'un fait non conforme à une obligation internationale. Elle observe en outre que cette cause d'exclusion de l'illicéité ne saurait être admise qu'à titre exceptionnel. Telle était aussi l'opinion de la Commission du droit international lorsqu'elle a expliqué qu'elle avait opté pour une formule négative à l'article 33 de son projet

> «pour marquer, par cet aspect formel aussi, que l'hypothèse d'une invocation à titre de justification de l'état de nécessité doit être considérée comme constituant vraiment une exception — une exception encore plus rarement admissible que ce n'est le cas pour les autres circonstances excluant l'illicéité...» (*ibid.*, p. 50, par. 40).

Ainsi, d'après la Commission, l'état de nécessité ne peut être invoqué qu'à certaines conditions, strictement définies, qui doivent être cumulativement réunies; et l'Etat concerné n'est pas seul juge de la réunion de ces conditions.

52. Dans la présente affaire, les conditions de base suivantes, énoncées au projet d'article 33, sont pertinentes: un «intérêt essentiel» de l'Etat auteur du fait contraire à l'une de ses obligations internationales doit avoir été en cause; cet intérêt doit avoir été menacé par un «péril grave et imminent»; le fait incriminé doit avoir été le «seul moyen» de sauvegar-

have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.

The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.

The Commission, in its Commentary, indicated that one should not, in that context, reduce an "essential interest" to a matter only of the "existence" of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, "a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]" (*ibid.*, p. 35, para. 3); and specified, with reference to State practice, that "It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States." (*Ibid.*, p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

> "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." (*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the "peril" invoked by Hungary, of its "grave and imminent" nature, as well as of the absence of any "means" to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

der ledit intérêt; ce fait ne doit pas avoir «gravement porté atteinte à un intérêt essentiel» de l'Etat à l'égard duquel l'obligation existait; et l'Etat auteur dudit fait ne doit pas avoir «contribué à la survenance de l'état de nécessité». Ces conditions reflètent le droit international coutumier.

La Cour s'emploiera maintenant à rechercher si ces conditions étaient remplies au moment de la suspension et de l'abandon, par la Hongrie, des travaux qu'elle devait accomplir conformément au traité de 1977.

53. La Cour ne voit aucune difficulté à reconnaître que les préoccupations exprimées par la Hongrie en ce qui concerne son environnement naturel dans la région affectée par le projet Gabčíkovo-Nagymaros avaient trait à un «intérêt essentiel» de cet Etat, au sens où cette expression est utilisée à l'article 33 du projet de la Commission du droit international.

La Commission, dans son commentaire, a indiqué qu'il ne fallait pas, dans ce contexte, réduire un «intérêt essentiel» de l'Etat à sa seule «existence», et que tout était, en définitive, question d'espèce (voir *Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 48, par. 32); en même temps, elle a mentionné, parmi les situations susceptibles d'engendrer un état de nécessité, «un danger grave ... pour la conservation écologique [du] territoire [d'un Etat] ou d'une partie de son territoire» (*ibid.*, p. 34, par. 3) et a précisé, en se référant à la pratique des Etats, que: «C'est surtout dans les deux dernières décennies que la sauvegarde de l'équilibre écologique en est venue à être considérée comme répondant à un «intérêt essentiel» de tous les Etats.» (*Ibid.*, p. 38, par. 14.)

La Cour rappellera qu'elle a récemment eu l'occasion de souligner dans les termes suivants toute l'importance que le respect de l'environnement revêt à son avis, non seulement pour les Etats mais aussi pour l'ensemble du genre humain:

> «l'environnement n'est pas une abstraction, mais bien l'espace où vivent les êtres humains et dont dépendent la qualité de leur vie et leur santé, y compris pour les générations à venir. L'obligation générale qu'ont les Etats de veiller à ce que les activités exercées dans les limites de leur juridiction ou sous leur contrôle respectent l'environnement dans d'autres Etats ou dans des zones ne relevant d'aucune juridiction nationale fait maintenant partie du corps de règles du droit international de l'environnement.» (*Licéité de la menace ou de l'emploi d'armes nucléaires, avis consultatif, C.I.J. Recueil 1996*, p. 241-242, par. 29.)

54. La vérification de l'existence, en 1989, du «péril» invoqué par la Hongrie, de son caractère «grave et imminent», ainsi que de l'absence, pour y faire face, de tout «moyen» autre que les mesures de suspension et d'abandon des travaux prises par la Hongrie, constitue autant d'opérations complexes.

As the Court has already indicated (see paragraphs 33 *et seq.*), Hungary on several occasions expressed, in 1989, its "uncertainties" as to the ecological impact of putting in place the Gabčíkovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a "peril" in the sense of a component element of a state of necessity. The word "peril" certainly evokes the idea of "risk"; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, "grave" and "imminent" "peril" existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.

The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gab-

Comme la Cour l'a déjà indiqué (voir paragraphes 33 et suivants), la Hongrie a à maintes reprises fait état, en 1989, de ses «incertitudes» quant aux incidences écologiques de la mise en place du système de barrage de Gabčíkovo-Nagymaros: c'est la raison pour laquelle elle a demandé avec insistance que de nouvelles études scientifiques soient effectuées.

La Cour considère cependant que, quelque sérieuses qu'aient été ces incertitudes, elles ne sauraient, à elles seules, établir l'existence objective d'un «péril» en tant qu'élément constitutif d'un état de nécessité. Le mot «péril» évoque certes l'idée de «risque»; c'est précisément en cela que le «péril» se distingue du dommage matérialisé. Mais il ne saurait y avoir d'état de nécessité sans un «péril» dûment avéré au moment pertinent; la seule appréhension d'un «péril» possible ne saurait à cet égard suffire. Il pourrait d'ailleurs difficilement en aller autrement dès lors que le «péril» constitutif de l'état de nécessité doit être à la fois «grave» et «imminent». L'«imminence» est synonyme d'«immédiateté» ou de «proximité» et dépasse de loin le concept d'«éventualité». Comme l'a souligné la Commission du droit international dans son commentaire, le péril «extrêmement grave et imminent» doit s'être «trouvé peser au moment même sur l'intérêt menacé» (*Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 48, par. 33). Cela n'exclut pas, de l'avis de la Cour, qu'un «péril» qui s'inscrirait dans le long terme puisse être tenu pour «imminent» dès lors qu'il serait établi, au moment considéré, que la réalisation de ce péril, pour lointaine qu'elle soit, n'en serait pas moins certaine et inévitable.

La thèse hongroise sur l'état de nécessité ne pourrait emporter la conviction de la Cour s'il n'était pas au moins prouvé qu'un «péril» réel, «grave» et «imminent» existait en 1989 et que seules les mesures prises par la Hongrie pouvaient permettre d'y faire face.

Les deux Parties ont versé au dossier de l'affaire un impressionnant matériel de nature scientifique à l'effet d'étayer leurs thèses respectives. La Cour a étudié très attentivement ce matériel, dans lequel les Parties ont développé leurs points de vue opposés sur les conséquences écologiques du projet. Elle conclut toutefois que, comme elle le montrera ci-après, il ne lui est pas nécessaire, pour répondre aux questions qui lui ont été posées dans le compromis, de déterminer lequel de ces points de vue est scientifiquement le plus solide.

55. La Cour se penchera d'abord sur la situation à Nagymaros. Comme cela a déjà été mentionné (voir paragraphe 40), la Hongrie a soutenu que, si les ouvrages de Nagymaros avaient été réalisés comme prévu, l'environnement — et en particulier les ressources en eau potable — dans la région aurait été exposé à de graves dangers en raison, d'une part, des problèmes liés au réservoir d'amont et, d'autre part, des risques d'érosion du lit du fleuve en aval.

La Cour constate que les dangers imputés au réservoir d'amont s'inscrivaient pour la plupart dans le long terme et, surtout, qu'ils demeuraient incertains. Même si le plan contractuel conjoint envisageait que

čikovo power plant would "mainly operate in peak-load time and continuously during high water", the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court's appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a "grave peril" for the environment in the area, one would be bound to conclude that the peril was not "imminent" at the time at which Hungary suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčíkovo sector. It will recall that Hungary's concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetköz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above).

Whether in relation to the Dunakiliti site or to the whole of the Szigetköz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it appre-

la centrale de Gabčíkovo «fonctionner[ait] principalement en régime de pointe et en mode continu lors des hautes eaux», les consignes d'exploitation définitives n'avaient pas encore été arrêtées (voir le paragraphe 19 ci-dessus); or tout danger lié à la mise en œuvre de la partie du projet concernant Nagymaros aurait été étroitement dépendant de la mesure dans laquelle et des modalités selon lesquelles il aurait été recouru au régime de pointe. En conséquence, même s'il avait pu être établi — ce que la Cour, au vu des éléments de preuve qui lui ont été soumis, n'estime pas être le cas — que le réservoir d'amont aurait en définitive constitué un «péril grave» pour l'environnement dans la région, force est de conclure que ce péril n'était pas «imminent» au moment où la Hongrie a suspendu puis abandonné les travaux afférents au barrage.

Pour ce qui est de l'abaissement du lit du fleuve en aval du barrage de Nagymaros, le danger pouvait paraître à la fois plus grave et plus pressant, dans la mesure où c'était l'alimentation en eau potable de la ville de Budapest qui aurait été affectée. La Cour fera toutefois observer que le lit du Danube dans la région de Szentendre avait déjà été approfondi avant 1980 en vue d'en extraire des matériaux de construction et que le fleuve avait dès cette époque atteint dans ce secteur la profondeur requise par le traité de 1977. Le péril invoqué par la Hongrie s'était ainsi déjà largement réalisé depuis plusieurs années, si bien qu'il ne pouvait pas, en 1989, s'agir d'un péril résultant entièrement du projet. La Cour soulignera cependant que, à supposer que la construction et l'exploitation du barrage auraient créé de graves risques, comme l'a soutenu la Hongrie, celle-ci avait à sa disposition des moyens, autres que la suspension et l'abandon des travaux, pour faire face à cette situation. Elle aurait ainsi pu procéder régulièrement au déversement de gravier dans le fleuve en aval du barrage. Elle aurait également pu, si nécessaire, pourvoir à l'alimentation de Budapest en eau potable en traitant de manière appropriée l'eau du fleuve. Les deux Parties ont expressément reconnu que cette possibilité demeurait ouverte même si — ce qui ne constitue pas un élément déterminant au regard de l'état de nécessité — l'épuration des eaux du fleuve, comme les autres mesures envisagées, aurait à l'évidence constitué une technique plus coûteuse.

56. La Cour en vient maintenant au secteur de Gabčíkovo. Elle rappellera que les préoccupations hongroises dans ce secteur concernaient d'une part la qualité des eaux de surface dans le réservoir de Dunakiliti, avec ses incidences sur la qualité des eaux souterraines dans la région, et, d'autre part, plus généralement, le niveau, le mouvement et la qualité tant des eaux de surface que des eaux souterraines dans l'ensemble du Szigetköz, avec leurs incidences sur la faune et la flore de la plaine alluviale du Danube (voir le paragraphe 40 ci-dessus).

Qu'il s'agisse du site de Dunakiliti ou de l'ensemble du Szigetköz, la Cour constate ici encore que le péril allégué par la Hongrie s'inscrivait dans le long terme et — élément plus important — demeurait incertain. Comme le reconnaît elle-même la Hongrie, les dommages qu'elle appré-

hended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the *ad hoc* Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that:

> "The measuring results of an at least five-year monitoring period following the completion of the Gabčíkovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included."

The report concludes as follows:

> "It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.
>
> The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use."

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989.

The Court moreover considers that Hungary could, in this context

hendait devaient résulter avant tout de processus naturels relativement lents dont les effets ne pouvaient être aisément évalués.

Même si les travaux étaient plus avancés dans ce secteur qu'à Nagymaros, ils n'étaient pas terminés en juillet 1989 et, comme la Cour l'a exposé au paragraphe 34 ci-dessus, la Hongrie s'était expressément engagée, au début du mois de juin 1989, à les poursuivre. Le rapport en date du 23 juin 1989 du comité *ad hoc* de l'Académie des sciences de Hongrie, auquel il a été fait allusion au paragraphe 35 du présent arrêt, n'exprime pas la conscience d'un péril avéré — pas même sous la forme d'un péril précis, dont la réalisation aurait été inéluctable dans le long terme — lorsqu'il déclare:

> «Pour prévoir de façon fiable les incidences du système de barrage sur l'environnement, il est indispensable de disposer des résultats de mesures effectuées au cours d'une période de suivi d'au moins cinq ans à compter de l'achèvement des travaux de construction à Gabčíkovo. Il est sans aucun doute nécessaire de mettre en place et d'exploiter régulièrement un système de suivi global, qui devrait être beaucoup plus développé qu'à l'heure actuelle. Il conviendrait d'y inclure l'analyse, jusqu'ici négligée, d'indicateurs biologiques capables de révéler avec sensibilité les changements qui se produisent dans l'environnement.»

Et le rapport de conclure:

> «On peut dire que, de la période de conception et de construction jusqu'à ce jour, les incidences sur l'environnement, l'écologie et la qualité de l'eau n'ont pas été correctement prises en compte. Il est impossible d'évaluer les incidences sur l'environnement en raison de la complexité des processus écologiques ainsi que du manque de données chiffrées et de calculs pertinents.
>
> Les données recueillies grâce au système de suivi récemment mis en œuvre dans une zone très limitée ne permettent pas de prévoir les incidences qui se produiront probablement à plus long terme. Afin de limiter toute nouvelle dégradation de la qualité de l'eau, qui joue un rôle primordial en l'occurrence, il y a lieu de procéder à une nouvelle analyse sur plusieurs années de manière à disposer de données plus complètes et plus fréquentes. La qualité prévue de l'eau influe également sur les écosystèmes aquatiques, les sols et l'utilisation de la zone à des fins récréatives et touristiques.»

La Cour notera aussi que, dans l'instance, la Hongrie a reconnu qu'en règle générale la qualité des eaux du Danube s'était améliorée au cours des vingt dernières années, même si ces eaux restaient sujettes à des conditions hypertrophiques.

Si «grave» qu'il eût pu être, le péril allégué pouvait difficilement, au vu de ce qui précède, être tenu pour suffisamment certain et, dès lors, «imminent», en 1989.

La Cour estime en outre que la Hongrie aurait là encore pu recourir à

also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, "the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim *summum jus summa injuria*" (*Yearbook of the International Law Commission*, 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčíkovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly,

d'autres moyens pour faire face aux dangers qu'elle redoutait. Dans le cadre du projet initial, la Hongrie paraissait notamment en mesure de contrôler au moins partiellement la répartition des eaux entre le canal de dérivation, l'ancien lit du Danube et les bras secondaires. On ne saurait perdre de vue que le barrage de Dunakiliti était situé en territoire hongrois et que la Hongrie pouvait aménager des ouvrages de régulation des flux dans l'ancien lit du Danube et dans les bras secondaires. De plus, il y a lieu de rappeler que l'article 14 du traité de 1977 prévoyait la possibilité pour chacune des parties de prélever des quantités d'eau supérieures à celles spécifiées dans le plan contractuel conjoint, tout en précisant qu'en pareil cas «la part d'énergie électrique revenant à la partie contractante ayant procédé aux prélèvements excédentaires sera[it] réduite en conséquence».

57. La Cour conclut de ce qui précède que, s'agissant aussi bien de Nagymaros que de Gabčíkovo, les périls invoqués par la Hongrie, sans préjudice de leur gravité éventuelle, n'étaient en 1989 ni suffisamment établis, ni «imminents»; et que, pour y faire face, la Hongrie disposait à l'époque d'autres moyens que la suspension et l'abandon de travaux dont elle avait la charge. Qui plus est, des négociations étaient en cours, qui auraient pu aboutir à une revision du projet et au report de certaines de ses échéances, sans qu'il fût besoin de l'abandonner. La Cour en infère que le respect par la Hongrie, en 1989, de ses obligations aux termes du traité de 1977 n'aurait pas abouti à une situation «que l'adage *summum jus summa injuria* caractérise parfaitement» (*Annuaire de la Commission du droit international*, 1980, vol. II, deuxième partie, p. 48, par. 31).

En outre, la Cour fera observer que la Hongrie a décidé de conclure le traité de 1977, traité qui — quelles que fussent les circonstances politiques dans lesquelles il a été conclu — a été considéré par la Hongrie comme valide et en vigueur jusqu'à la date indiquée pour sa terminaison en mai 1992. Comme il ressort des éléments en possession de la Cour, de nombreuses études de nature scientifique et technique avaient auparavant été menées, tant par la Hongrie que par la Tchécoslovaquie. On peut donc supposer que c'était en étant consciente de la situation telle qu'elle était alors connue que la Hongrie avait assumé ses obligations aux termes du traité. La Hongrie a soutenu devant la Cour que ces études avaient été insuffisantes et que l'état des connaissances à l'époque ne permettait pas d'évaluer pleinement les incidences écologiques du projet Gabčíkovo-Nagymaros. Il n'en reste pas moins que, bien que le traité de 1977 eût pour principal objet la construction d'un système d'écluses pour la production d'électricité, l'amélioration de la navigation sur le Danube et la protection contre les inondations, la nécessité d'assurer la protection de l'environnement n'avait pas échappé aux parties, ainsi qu'en témoignent les articles 15, 19 et 20 du traité.

De surcroît, la Cour ne peut manquer de noter les positions adoptées par la Hongrie après l'entrée en vigueur du traité de 1977. En 1983, la Hongrie a sollicité le ralentissement des travaux prescrits par le traité,

for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impair[ed] an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudge the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.

Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

* *

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(a)*, of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

* * *

60. By the terms of Article 2, paragraph 1 *(b)*, of the Special Agreement, the Court is asked in the second place to decide

> "*(b)* whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution'

pour des raisons essentiellement économiques mais aussi, subsidiairement, écologiques. En 1989, alors que, selon la Hongrie elle-même, l'état des connaissances scientifiques avait sensiblement évolué, elle a sollicité l'accélération desdits travaux, pour décider ensuite, trois mois plus tard, de les suspendre, puis de les abandonner. La Cour n'en ignore pas pour autant que de profonds changements étaient en cours en Hongrie en 1989 et que, pendant cette phase transitoire, il pouvait s'avérer bien plus difficile qu'à l'ordinaire de coordonner les différents points de vues qui prévalaient à divers moments.

La Cour infère de tous ces éléments qu'en l'espèce, même s'il avait été établi qu'il existait en 1989 un état de nécessité lié à l'exécution du traité de 1977, la Hongrie n'aurait pas été admise à s'en prévaloir pour justifier le manquement à ses obligations conventionnelles, car elle aurait contribué, par action ou omission, à sa survenance.

58. En conséquence, la Cour n'a pas à examiner la question de savoir si, en procédant comme elle l'a fait en 1989, la Hongrie aurait «gravement porté atteinte à un intérêt essentiel» de la Tchécoslovaquie, au sens de l'article 33 susmentionné du projet de la Commission du droit international; cette constatation ne saurait en rien préjuger des dommages que la Tchécoslovaquie affirme avoir subis du fait de la position hongroise.

La Cour n'a pas davantage à se pencher sur l'argument présenté par la Hongrie, suivant lequel certaines violations des articles 15 et 19 du traité de 1977, commises par la Tchécoslovaquie dès avant 1989, auraient concouru à l'état de nécessité allégué; et elle n'a pas non plus à se prononcer sur l'argument avancé par la Slovaquie, selon lequel la Hongrie aurait violé les dispositions de l'article 27 du traité, en 1989, en prenant des mesures unilatérales sans avoir au préalable eu recours aux mécanismes de règlement des différends prévus à cet article.

* *

59. Au vu des conclusions auxquelles elle est parvenue ci-dessus, la Cour répond à la question qui lui a été posée à l'article 2, paragraphe 1, alinéa *a)*, du compromis (voir ci-dessus paragraphe 27) que la Hongrie n'était pas en droit de suspendre puis d'abandonner, en 1989, les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont elle était responsable aux termes du traité de 1977 et des instruments y afférents.

* * *

60. Aux termes de l'article 2, paragraphe 1, alinéa *b)*, du compromis, il est demandé en second lieu à la Cour de dire

> «*b)* si la République fédérative tchèque et slovaque était en droit de recourir, en novembre 1991, à la «solution provisoire» et de

and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)".

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunakiliti, Czechoslovakia informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was *inter alia* expressed as follows in Czechoslovakia's Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

"Should the Republic of Hungary fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabčíkovo dam as agreed in the Joint Construction Plan."

As the Court has already indicated (see paragraph 23), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of those solutions implied an agreement between the parties, with the exception of one variant, subsequently known as "Variant C", which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalizing the planning of Variant C; it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991.

On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the

mettre en service, à partir d'octobre 1992, ce système, décrit dans le rapport en date du 23 novembre 1992 du groupe de travail d'experts indépendants nommés par la Commission des Communautés européennes, la République de Hongrie et la République fédérative tchèque et slovaque (construction d'un barrage sur le Danube au kilomètre 1851,7 du fleuve, en territoire tchécoslovaque, et conséquences en résultant pour l'écoulement des eaux et la navigation)».

61. La Cour rappellera que, dès que la Hongrie a suspendu les travaux à Nagymaros le 13 mai 1989 et a étendu cette suspension à certains travaux qui devaient être réalisés à Dunakiliti, la Tchécoslovaquie a informé la Hongrie qu'elle se verrait contrainte de prendre des mesures unilatérales si cette dernière persistait dans son refus de reprendre les travaux. Cela fut notamment exprimé de la façon suivante dans la note verbale tchécoslovaque en date du 30 octobre 1989, à laquelle il est fait référence au paragraphe 37 ci-dessus:

> «Si la République de Hongrie ne s'acquittait pas de ses responsabilités et continuait à enfreindre unilatéralement les dispositions du traité et des documents juridiques y afférents, la partie tchécoslovaque se verrait contrainte d'entreprendre à la place un projet provisoire sur son territoire pour éviter de nouvelles pertes. Ce projet provisoire conduirait à diriger vers le barrage de Gabčíkovo toute la quantité d'eau convenue dans le plan de construction conjoint.»

Comme la Cour l'a déjà indiqué (voir paragraphe 23), différentes solutions de rechange furent envisagées par la Tchécoslovaquie. En septembre 1990, les autorités hongroises furent avisées des sept hypothèses définies par la firme Hydroconsult de Bratislava. Toutes ces solutions impliquaient un accord entre les parties, à l'exception d'une variante, dénommée par la suite «variante C», qui était présentée comme une solution provisoire pouvant être réalisée sans la coopération de la Hongrie. D'autres contacts entre les parties eurent lieu sans conduire à une solution du différend. En mars 1991, la Hongrie entra en possession d'informations selon lesquelles la mise au point de la planification de la variante C avait sensiblement progressé; elle fit aussitôt connaître les craintes que cela lui inspirait.

62. Des réunions intergouvernementales de négociation se tinrent le 22 avril et le 15 juillet 1991.

Le 22 avril 1991, la Hongrie proposa la suspension, jusqu'en septembre 1993, de tous les travaux commencés sur la base du traité de 1977, étant entendu que les parties s'engageraient à s'abstenir de toute action unilatérale et que des études communes seraient menées dans l'intervalle. La Tchécoslovaquie maintint sa position antérieure selon laquelle les études envisagées devraient avoir lieu dans le cadre du traité de 1977 et sans suspension des travaux.

Le 15 juillet 1991, la Tchécoslovaquie confirma son intention de mettre

Gabčíkovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabčíkovo sector. Hungary, for its part, took the view that:

> "In the case of a total lack of understanding the so-called C variation or 'theoretical opportunity' suggested by the Czecho-Slovak party as a unilateral solution would be such a grave transgression of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years";

it further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:

> "Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.
>
> The preparatory works for diverting the water of the Danube near the Dunakiliti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations."

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

> "the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabčíkovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic".

On the same day, the Government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube.

By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against "any unilateral step that would be in contradiction with the interests of our [two] nations and international law" and indicated that they considered it "very important [to] receive information as early as possible on the

en service la centrale de Gabčíkovo et indiqua que les données disponibles permettaient d'évaluer les effets de quatre scénarios d'exploitation possibles requérant chacun la coopération des deux gouvernements. En même temps, elle proposa la constitution d'un comité d'experts tripartite (Hongrie, Tchécoslovaquie, Communautés européennes) qui aiderait à trouver des solutions techniques aux problèmes résultant de la mise en exploitation du secteur de Gabčíkovo. La Hongrie, quant à elle, exposa que:

> «Dans le cas où on ne parviendrait absolument pas à s'entendre, la solution dite variante C ou «possibilité théorique», proposée par la partie tchécoslovaque en tant que solution unilatérale, constituerait une atteinte grave à l'intégrité territoriale de la Hongrie et au droit international dont il n'existe aucun précédent même dans la pratique des anciens pays socialistes au cours des trente dernières années»;

elle proposa par ailleurs de constituer un comité bipartite d'évaluation des incidences écologiques, sous réserve que les travaux soient suspendus en territoire tchécoslovaque.

63. Par lettre en date du 24 juillet 1991, le Gouvernement hongrois communiqua au premier ministre slovaque le message suivant:

> «L'opinion publique hongroise et le Gouvernement hongrois suivent avec inquiétude et attention les nouvelles publiées dans la presse [tchécoslovaque] sur les mesures unilatérales prises par le Gouvernement de la République slovaque concernant le système de barrage.
>
> Les travaux préparatoires entrepris au voisinage du barrage de Dunakiliti pour détourner unilatéralement les eaux du Danube ont également de quoi inquiéter. Ces mesures vont à l'encontre des dispositions du traité de 1977 et sont préjudiciables aux relations de bon voisinage entre nos pays.»

Le 30 juillet 1991, le premier ministre slovaque informa le premier ministre hongrois de

> «la décision du Gouvernement slovaque et du Gouvernement de la République fédérative tchèque et slovaque de poursuivre les travaux de construction de la centrale de Gabčíkovo, à titre de solution provisoire, en vue de permettre sa mise en service sur le territoire de la République fédérative tchèque et slovaque».

Le même jour, le Gouvernement hongrois protesta, par note verbale, contre la mise en eau du canal d'amenée réalisée par l'entreprise tchécoslovaque de construction en pompant de l'eau du Danube.

Par lettre du 9 août 1991, adressée au premier ministre slovaque, les autorités hongroises s'élevèrent vivement «contre toute mesure unilatérale allant à l'encontre des intérêts [des deux] pays ainsi que du droit international» et indiquèrent qu'elles considéraient «comme très important d'être informé[es] dès que possible des détails de la solution provi-

details of the provisional solution". For its part, Czechoslovakia, in a Note Verbale dated 27 August 1991, rejected the argument of Hungary that the continuation of the works under those circumstances constituted a violation of international law, and made the following proposal:

> "Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabčíkovo system of locks and a solution of the system of locks based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution."

64. The construction permit for Variant C was issued on 30 October 1991. In November 1991 construction of a dam started at Čunovo, where both banks of the Danube are on Czechoslovak (now Slovak) territory.

In the course of a new inter-governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Gabčíkovo-Nagymaros Project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from the European Communities. However whereas, for Hungary, the work of that Committee would have been meaningless if Czechoslovakia continued construction of Variant C, for Czechoslovakia, the suspension of the construction, even on a temporary basis, was unacceptable.

That meeting was followed by a large number of exchanges of letters between the parties and various meetings between their representatives at the end of 1991 and early in 1992. On 23 January 1992, Czechoslovakia expressed its readiness "to stop work on the provisional solution and continue the construction upon mutual agreement" if the tripartite committee of experts whose constitution it proposed, and the results of the test operation of the Gabčíkovo part, were to "confirm that negative ecological effects exceed its benefits". However, the positions of the parties were by then comprehensively defined, and would scarcely develop any further. Hungary considered, as it indicated in a Note Verbale of 14 February 1992, that Variant C was in contravention

> "of [the Treaty of 1977] . . . and the convention ratified in 1976 regarding the water management of boundary waters.
>
> . . . . . .
>
> with the principles of sovereignty, territorial integrity, with the inviolability of State borders, as well as with the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention";

and the suspension of the implementation of Variant C was, in its view, a prerequisite. As for Czechoslovakia, it took the view that recourse to Variant C had been rendered inevitable, both for economic and ecologi-

soire». Pour sa part, la Tchécoslovaquie, dans une note verbale en date du 27 août 1991, rejeta l'argument hongrois selon lequel la poursuite des travaux dans ces conditions constituait une violation du droit international et fit la proposition suivante:

> «Pourvu que la partie hongroise apporte une solution technique concrète en vue de la mise en service du système d'écluses de Gabčíkovo et une solution pour le système d'écluses fondée sur le traité de 1977 en vigueur et sur les actes conventionnels y afférents, la partie tchécoslovaque est prête à exécuter la solution arrêtée d'un commun accord.»

64. Le permis de construire de la variante C fut délivré le 30 octobre 1991. En novembre 1991, la construction d'un barrage commença à Čunovo, où les deux rives du Danube se trouvent en territoire tchécoslovaque (aujourd'hui slovaque).

Au cours d'une nouvelle réunion intergouvernementale de négociation, le 2 décembre 1991, les parties s'accordèrent pour confier l'étude de l'ensemble de la question du projet Gabčíkovo-Nagymaros à un comité mixte d'experts auquel la Hongrie accepta d'associer un expert des Communautés européennes. Mais alors que, pour la Hongrie, le travail dudit comité aurait été dépourvu de sens si la Tchécoslovaquie poursuivait la construction de la variante C, pour la Tchécoslovaquie, une interruption, même provisoire, des travaux était inacceptable.

Cette réunion fut suivie de nombreux échanges de correspondances entre les parties et de diverses rencontres entre leurs représentants à la fin de l'année 1991 et au début de 1992. Le 23 janvier 1992, la Tchécoslovaquie se dit prête «à arrêter ses travaux afférents à la solution provisoire et à poursuivre la construction [qui serait] convenue d'un commun accord» si le comité d'experts tripartite dont elle proposait la constitution et les résultats de l'essai d'exploitation de l'élément de Gabčíkovo «confirm[ai]ent que les effets écologiques défavorables dépass[ai]ent les avantages recueillis». Toutefois, les positions des parties étaient alors globalement arrêtées, et ne devaient plus guère évoluer. La Hongrie estimait, comme elle l'a indiqué dans une note verbale du 14 février 1992, que la variante C était contraire

> «aux dispositions du [traité de 1977] ... comme à celles de la convention ratifiée en 1976 sur la réglementation en matière d'eaux frontières.
>
> . . . . . .
>
> aux principes de souveraineté et d'intégrité territoriale, à l'inviolabilité des frontières d'Etat ainsi qu'aux règles coutumières générales relatives aux fleuves internationaux et à l'esprit de la convention de Belgrade de 1948 sur le Danube»;

et la suspension de l'exécution de la variante C était pour elle un préalable. Quant à la Tchécoslovaquie, elle considérait que le recours à la variante C avait été rendu inévitable, pour des raisons tant économiques

cal as well as navigational reasons, because of the unlawful suspension and abandonment by Hungary of the works for which provision was made in the 1977 Treaty. Any negotiation had, in its view, to be conducted within the framework of the Treaty and without the implementation of Variant C — described as "provisional" — being called into question.

65. On 5 August 1992, the Czechoslovak representative to the Danube Commission informed it that "work on the severance cutting through of the Danube's flow will begin on 15 October 1992 at the 1,851.759-kilometre line" and indicated the measures that would be taken at the time of the "severance". The Hungarian representative on the Commission protested on 17 August 1992, and called for additional explanations.

During the autumn of 1992, the implementation of Variant C was stepped up. The operations involved in damming the Danube at Čunovo had been scheduled by Czechoslovakia to take place during the second half of October 1992, at a time when the waters of the river are generally at their lowest level. On the initiative of the Commission of the European Communities, trilateral negotiations took place in Brussels on 21 and 22 October 1992, with a view to setting up a committee of experts and defining its terms of reference. On that date, the first phase of the operations leading to the damming of the Danube (the reinforcement of the riverbed and the narrowing of the principal channel) had been completed. The closure of the bed was begun on 23 October 1992 and the construction of the actual dam continued from 24 to 27 October 1992: a pontoon bridge was built over the Danube on Czechoslovak territory using river barges, large stones were thrown into the riverbed and reinforced with concrete, while 80 to 90 per cent of the waters of the Danube were directed into the canal designed to supply the Gabčíkovo power plant. The implementation of Variant C did not, however, come to an end with the diversion of the waters, as there still remained outstanding both reinforcement work on the dam and the building of certain auxiliary structures.

The Court has already referred in paragraph 24 to the meeting held in London on 28 October 1992 under the auspices of the European Communities, in the course of which the parties to the negotiations agreed, *inter alia*, to entrust a tripartite Working Group composed of independent experts (i.e., four experts designated by the European Commission, one designated by Hungary and another by Czechoslovakia) with the task of reviewing the situation created by the implementation of Variant C and making proposals as to urgent measures to adopt. After having worked for one week in Bratislava and one week in Budapest, the Working Group filed its report on 23 November 1992.

66. A summary description of the constituent elements of Variant C appears at paragraph 23 of the present Judgment. For the purposes of the question put to the Court, the official description that should be adopted is, according to Article 2, paragraph 1 *(b)*, of the Special Agreement, the one given in the aforementioned report of the Working Group

qu'écologiques et de navigation, du fait de la suspension et de l'abandon illicites, par la Hongrie, des travaux prévus par le traité de 1977; toute négociation devait, selon elle, se poursuivre dans le cadre du traité et sans que l'exécution de la variante C — qualifiée de «provisoire» — soit mise en cause.

65. Le 5 août 1992, le représentant tchécoslovaque à la commission du Danube informa celle-ci que «les travaux de fermeture du Danube commencer[aient] le 15 octobre 1992 au point kilométrique 1851,759» et indiqua les mesures qui seraient prises au moment de la fermeture. Le représentant hongrois à la commission protesta le 17 août 1992, en réclamant plus d'explications.

Pendant l'automne 1992, l'exécution de la variante C s'accéléra. Les opérations de barrage du Danube à Čunovo avaient été prévues par la Tchécoslovaquie pour la seconde moitié du mois d'octobre 1992, à un moment où les eaux du fleuve sont en général à leur niveau le plus bas. A l'initiative de la Commission des Communautés européennes, des négociations trilatérales eurent lieu à Bruxelles les 21 et 22 octobre 1992 en vue de mettre en place un comité d'experts et de définir son mandat. A cette date, la première phase des opérations de barrage du Danube (renforcement du lit du fleuve et réduction de la largeur du chenal principal) était achevée. La fermeture du lit fut amorcée le 23 octobre 1992 et la construction du barrage proprement dit se poursuivit du 24 au 27 octobre 1992: un pont flottant fut aménagé sur le Danube en territoire tchécoslovaque au moyen de péniches, de grosses pierres furent déversées dans le lit de la rivière et recouvertes de béton, tandis que quatre-vingts à quatre-vingt-dix pour cent des eaux du Danube étaient dirigées dans le canal destiné à l'alimentation de la centrale de Gabčíkovo. L'exécution de la variante C n'était cependant pas terminée avec le détournement des eaux car il restait encore à effectuer des travaux de consolidation du barrage et à construire certains ouvrages auxiliaires.

La Cour a déjà évoqué au paragraphe 24 la réunion tenue à Londres le 28 octobre 1992 sous les auspices des Communautés européennes, au cours de laquelle les parties aux négociations convinrent notamment de charger un groupe de travail tripartite d'experts indépendants (soit quatre experts désignés par la Commission européenne, un expert désigné par la Hongrie et un autre désigné par la Tchécoslovaquie) d'étudier la situation créée par la mise en œuvre de la variante C et de faire des propositions sur les mesures d'urgence à adopter. Après avoir travaillé une semaine à Bratislava et une semaine à Budapest, le groupe de travail déposa son rapport le 23 novembre 1992.

66. Il a été procédé à une description sommaire des éléments constitutifs de la variante C au paragraphe 23 du présent arrêt. Aux fins de la question posée à la Cour, la description officielle à retenir est, selon l'article 2, paragraphe 1, alinéa *b)*, du compromis, celle qu'en fait le rapport susmentionné du groupe de travail d'experts indépendants; il y a lieu de

of independent experts, and it should be emphasized that, according to the Special Agreement, "Variant C" must be taken to include the consequences "on water and navigation course" of the dam closing off the bed of the Danube.

In the section headed "Variant C Structures and Status of Ongoing Work", one finds, in the report of the Working Group, the following passage:

> "In both countries the original structures for the Gabčíkovo scheme are completed except for the closure of the Danube river at Dunakiliti and the
>
> (1) Completion of the hydropower station (installation and testing of turbines) at Gabčíkovo.
>
> Variant C consists of a complex of structures, located in Czecho-Slovakia . . . The construction of these are planned for two phases. The structures include . . .:
>
> (2) By-pass weir controlling the flow into the river Danube.
> (3) Dam closing the Danubian river bed.
> (4) Floodplain weir (weir in the inundation).
> (5) Intake structure for the Mosoni Danube.
> (6) Intake structure in the power canal.
> (7) Earth barrages/dykes connecting structures.
> (8) Ship lock for smaller ships (15 m × 80 m).
> (9) Spillway weir.
> (10) Hydropower station.
>
> The construction of the structures 1-7 are included in Phase 1, while the remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995."

* *

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary's unlawful actions. It claimed

souligner par ailleurs que, d'après le compromis, la «variante C» doit être comprise comme incluant les conséquences «pour l'écoulement des eaux et la navigation» qui résultent du barrage fermant le lit du Danube.

Sous le point intitulé «Ouvrages de la variante C et état d'avancement des travaux», on trouve, dans le rapport du groupe de travail, le passage suivant:

> «Dans les deux pays, les ouvrages prévus à l'origine dans le programme de Gabčíkovo sont achevés, à l'exception de la fermeture du Danube à Dunakiliti ainsi que:
>
> 1) les derniers travaux de la centrale hydro-électrique (installation et essais des turbines) de Gabčíkovo.
>
> La variante C est un ensemble complexe d'ouvrages, situé en Tchécoslovaquie ... La construction de ces ouvrages est prévue en deux phases. Les ouvrages comprennent ...:
>
> 2) les déversoirs de dérivation contrôlant l'écoulement dans le Danube;
> 3) le barrage fermant le lit du Danube;
> 4) le déversoir de la plaine d'inondation;
> 5) l'ouvrage de prise alimentant le bras Moson du Danube;
> 6) l'ouvrage de prise alimentant le canal usinier;
> 7) les barrages/digues en terre reliant les ouvrages;
> 8) l'écluse destinée aux navires de faible tonnage (15 m × 80 m);
> 9) l'évacuateur de crue;
> 10) la centrale hydro-électrique.
>
> La construction des ouvrages 1 à 7 est prévue pendant la phase 1, tandis que les ouvrages 8 à 10 relèvent de la phase 2 prévue pour 1993-1995.»

* *

67. La Tchécoslovaquie avait soutenu que le recours à la variante C et la mise en service de celle-ci ne constituaient pas des faits internationalement illicites; la Slovaquie a repris cette thèse. Au cours de la procédure devant la Cour, la Slovaquie a affirmé que la décision de la Hongrie de suspendre puis d'abandonner la construction des ouvrages à Dunakiliti avait mis la Tchécoslovaquie dans l'impossibilité d'effectuer les travaux tels qu'ils avaient initialement été envisagés par le traité de 1977 et que cette dernière était en conséquence en droit de recourir à une solution qui était aussi proche que possible du projet initial. La Slovaquie a invoqué ce qu'elle a décrit comme un «principe d'application par approximation» pour justifier la construction et la mise en service de la variante C. Elle a expliqué que c'était là la seule possibilité qui lui restait «non seulement d'atteindre les buts visés par le traité de 1977, mais encore de respecter l'obligation continue de mettre en œuvre ledit traité de bonne foi».

68. La Slovaquie a aussi soutenu que la Tchécoslovaquie avait l'obligation d'atténuer les dommages résultant des agissements illicites de la

that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrongdoing State. It argued furthermore that "Mitigation of damages is also an aspect of the performance of obligations in good faith." For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunakiliti/Gabčíkovo and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia's conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia's obligations under other treaties, in particular the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia's arguments rested on an erroneous presentation of the facts and the law. Hungary denied, *inter alia*, having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that "no such rule" of "approximate application" of a treaty exists in international law; as to the argument derived from "mitigation of damage[s]", it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

* *

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčíkovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have

Hongrie. Elle a allégué qu'un Etat qui se trouve confronté au fait illicite d'un autre Etat est tenu de limiter ses pertes au minimum, et de réduire ainsi les dommages et intérêts susceptibles d'être réclamés à l'Etat auteur du fait illicite. Elle a en outre exposé que: «L'atténuation des dommages est aussi un aspect de l'exécution des obligations de bonne foi.» Pour la Slovaquie, les dommages et intérêts auraient en l'occurrence été considérables, compte tenu des investissements effectués et des préjudices supplémentaires, tant de nature économique qu'écologique, qui auraient résulté de l'inachèvement des travaux à Dunakiliti/Gabčíkovo et du défaut de mise en service du système. C'est pourquoi la Tchécoslovaquie était non seulement en droit, mais encore dans l'obligation, de mettre en œuvre la variante C.

69. Bien que la Slovaquie affirme que le comportement de la Tchécoslovaquie était licite, elle a soutenu à titre subsidiaire que, même si la Cour devait conclure dans un autre sens, la mise en service de la variante C pourrait encore être justifiée en tant que contre-mesure.

70. La Hongrie, pour sa part, a soutenu que la variante C constitue une violation substantielle du traité de 1977. Elle considère que la variante C viole aussi les obligations de la Tchécoslovaquie en vertu d'autres traités, notamment la convention sur la réglementation en matière d'eaux frontières, conclue à Budapest le 31 mai 1976, et ses obligations au titre du droit international général.

71. La Hongrie a prétendu que l'argumentation slovaque reposait sur une présentation erronée des faits et du droit. La Hongrie nie notamment avoir commis la moindre violation de ses obligations conventionnelles qui aurait pu justifier la mise en œuvre de la variante C. Elle estime qu'il n'existe «aucune règle» d'«application par approximation» d'un traité en droit international; quant à l'argument tiré de «l'atténuation des dommages», elle fait valoir qu'il a trait à l'appréciation du préjudice et ne saurait servir à excuser un comportement illicite sur le fond. La Hongrie expose en outre que la variante C ne satisfait pas aux conditions requises par le droit international en matière de contre-mesures, et en particulier à la condition de proportionnalité.

* *

72. Avant d'examiner les arguments que les Parties ont ainsi avancés, la Cour souhaite indiquer clairement qu'elle est consciente des sérieux problèmes auxquels la Tchécoslovaquie a dû faire face à la suite de la décision prise par la Hongrie de renoncer à la plus grande partie de la construction du système d'écluses qui lui incombait en vertu du traité de 1977. Des investissements très importants avaient été effectués, la construction de l'ouvrage de Gabčíkovo était pratiquement achevée, le canal de dérivation était terminé, et la Hongrie elle-même, en 1991, s'était dûment acquittée de ses obligations à cet égard en achevant les travaux du canal de fuite. Il ressort du rapport, en date du 31 octobre 1992, de la mission d'enquête tripartite à laquelle la Cour s'est référée au paragraphe 24 du présent arrêt que la non-

led to considerable financial losses, and that it could have given rise to serious problems for the environment.

73. Czechoslovakia repeatedly denounced Hungary's suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the Project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungary, and on many occasions called upon the latter to resume performance of its obligations under the Treaty.

When Hungary steadfastly refused to do so — although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia — and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabčíkovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia "was entitled to proceed, in November 1991" to Variant C, and "to put [it] into operation from October 1992".

75. With a view to justifying those actions, Slovakia invoked what it described as "the principle of approximate application", expressed by Judge Sir Hersch Lauterpacht in the following terms:

> "It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument — not to change it." (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčíkovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčíkovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried

utilisation du système aurait causé des pertes financières considérables et qu'elle aurait pu entraîner de graves problèmes pour l'environnement.

73. La Tchécoslovaquie a maintes fois indiqué que la suspension et l'abandon des travaux par la Hongrie constituaient une violation essentielle du traité de 1977 et elle aurait pu par conséquent invoquer celle-ci comme motif de mettre fin au traité; mais cela n'aurait en rien fait avancer le projet vers son achèvement. C'est pourquoi elle a préféré insister pour que la Hongrie mette en œuvre le traité et a demandé à de nombreuses reprises à celle-ci de reprendre l'exécution des obligations lui incombant en vertu du traité.

Lorsque la Hongrie a résolument refusé de s'exécuter — bien qu'elle eût exprimé sa volonté d'indemniser la Tchécoslovaquie pour les dommages subis — et lorsque les négociations sont arrivées au point mort du fait des positions diamétralement opposées des parties, la Tchécoslovaquie a décidé de mettre unilatéralement en service le système de Gabčíkovo, sous son contrôle et à son profit exclusifs.

74. Cette décision a comporté plusieurs étapes et, dans le compromis, les Parties ont demandé à la Cour de dire si la Tchécoslovaquie «était en droit de recourir, en novembre 1991», à la variante C et «de mettre en service [cette dernière], à partir d'octobre 1992».

75. En vue de justifier ces actions, la Slovaquie a invoqué ce qu'elle a décrit comme «le principe d'application par approximation» tel qu'exprimé par sir Hersch Lauterpacht dans les termes suivants:

> «C'est un principe sain de droit que si un instrument juridique de validité continue ne peut s'appliquer littéralement, du fait de la conduite de l'une des parties, il faut, sans permettre à celle-ci de se prévaloir de sa propre conduite, l'appliquer d'une manière s'approchant le plus possible de son but primitif. Agir ainsi est interpréter et donner effet à l'instrument et non le modifier.» (*Admissibilité de l'audition de pétitionnaires par le Comité du Sud-Ouest africain, C.I.J. Recueil 1956*, opinion individuelle de sir Hersch Lauterpacht, p. 46.)

Elle a prétendu qu'il s'agit d'un principe du droit international et d'un principe général de droit.

76. La Cour n'a pas à déterminer s'il existe un principe de droit international ou un principe général de droit d'«application par approximation» car, même si un tel principe existait, il ne pourrait par définition y être recouru que dans les limites du traité en cause. Or, de l'avis de la Cour, la variante C ne satisfait pas à cette condition primordiale au regard du traité de 1977.

77. Comme la Cour l'a déjà observé, la caractéristique fondamentale du traité de 1977 est, selon son article premier, de prévoir la construction du système d'écluses de Gabčíkovo-Nagymaros en tant qu'investissement conjoint constituant un système d'ouvrages opérationnel, unique et indivisible. Cet élément est également reflété aux articles 8 et 10 du traité, qui prévoient la propriété conjointe des ouvrages les plus importants du projet Gabčíkovo-Nagymaros et l'exploitation de cette propriété conjointe comme une entité unique et coordonnée. Par définition, tout cela ne pou-

out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.

Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 141, and *Yearbook of the International Law Commission*, 1993, Vol. II, Part 2, p. 57, para. 14).

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vait être réalisé par voie d'action unilatérale. En dépit d'une certaine ressemblance physique extérieure avec le projet initial, la variante C en diffère donc nettement quant à ses caractéristiques juridiques.

78. De plus, dans la pratique, la mise en service de la variante C a conduit la Tchécoslovaquie à s'approprier, essentiellement pour son usage et à son profit, entre quatre-vingts et quatre-vingt-dix pour cent des eaux du Danube avant de les restituer au lit principal du fleuve, en dépit du fait que le Danube est non seulement un cours d'eau international partagé mais aussi un fleuve frontière.

La Tchécoslovaquie a soutenu que la variante C, pour l'essentiel, n'est rien d'autre que ce à quoi la Hongrie avait déjà consenti et que seules ont été effectuées les modifications rendues nécessaires par suite de la décision de la Hongrie de ne pas exécuter ses obligations conventionnelles. Il est vrai que la Hongrie, en concluant le traité de 1977, avait accepté le barrage du Danube et le détournement de ses eaux dans le canal de dérivation. Mais c'était seulement dans le contexte d'une opération conjointe et d'un partage de ses bénéfices que la Hongrie avait donné son consentement. La suspension et le retrait de ce consentement ont constitué une violation par la Hongrie de ses obligations juridiques, montrant effectivement que celle-ci a refusé une exploitation conjointe; mais il ne saurait s'ensuivre que la Hongrie aurait perdu son droit fondamental à une part équitable et raisonnable des ressources d'un cours d'eau international.

La Cour conclut en conséquence que la Tchécoslovaquie, en mettant en service la variante C, n'a pas appliqué le traité de 1977 mais, au contraire, a violé certaines de ses dispositions expresses et, de ce fait, a commis un acte internationalement illicite.

79. La Cour note qu'entre novembre 1991 et octobre 1992 la Tchécoslovaquie s'est bornée à exécuter sur son propre territoire des travaux qui étaient certes nécessaires pour la mise en œuvre de la variante C, mais qui auraient pu être abandonnés si un accord était intervenu entre les parties et ne préjugeaient dès lors pas de la décision définitive à prendre. Tant que le Danube n'avait pas été barré unilatéralement, la variante C n'avait en fait pas été appliquée.

Une telle situation n'est pas rare en droit international, comme d'ailleurs en droit interne. Un fait illicite ou une infraction est fréquemment précédée d'actes préparatoires qui ne sauraient être confondus avec le fait ou l'infraction eux-mêmes. Il convient de distinguer entre la réalisation même d'un fait illicite (que celui-ci soit instantané ou continu) et le comportement antérieur à ce fait qui présente un caractère préparatoire et «qui ne saurait être traité comme un fait illicite» (voir par exemple le commentaire de l'article 41 du projet d'articles sur la responsabilité des Etats, «Rapport de la Commission du droit international sur les travaux de sa quarante-huitième session, 6 mai-26 juillet 1996», *Documents officiels de l'Assemblée générale, cinquante et unième session, supplément n° 10* (A/51/10), p. 164, et *Annuaire de la Commission du droit international*, 1993, vol. II, deuxième partie, p. 59, par. 14).

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80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained."

It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

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82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that "Variant C could be presented as a justified countermeasure to Hungary's illegal acts".

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law.

83. In order to be justifiable, a countermeasure must meet certain conditions (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 127, para. 249. See also *Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. XVIII, pp. 443 *et seq.*; also Articles 47 to 50 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 144-145.)

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary's suspension and abandon-

80. La Slovaquie a aussi soutenu que son action était motivée par une obligation d'atténuer des dommages lorsqu'elle a réalisé la variante C. Elle a déclaré que «c'est un principe de droit international qu'une partie lésée du fait de la non-exécution d'un engagement pris par une autre partie doit s'employer à atténuer les dommages qu'elle a subis».

Il découlerait d'un tel principe qu'un Etat lésé qui n'a pas pris les mesures nécessaires à l'effet de limiter les dommages subis ne serait pas en droit de réclamer l'indemnisation de ceux qui auraient pu être évités. Si ledit principe pourrait ainsi fournir une base pour le calcul de dommages et intérêts, en revanche, il ne saurait justifier ce qui constitue par ailleurs un fait illicite.

81. La Cour ayant conclu que la mise en service de la variante C a constitué un fait internationalement illicite, l'obligation d'atténuer les dommages invoquée par la Slovaquie n'a pas à être examinée plus avant.

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82. Bien qu'elle n'ait pas fait valoir à titre principal l'argumentation tirée des contre-mesures, puisqu'elle ne considère pas la variante C comme illicite, la Slovaquie a déclaré que «la variante C pourrait être considérée comme une contre-mesure justifiée en réponse aux actes illicites de la Hongrie».

La Cour, au paragraphe 78 ci-dessus, est parvenue à la conclusion que la Tchécoslovaquie a commis un acte internationalement illicite en mettant en service la variante C. Il lui faut donc à présent rechercher si cette illicéité peut être excusée au motif que la mesure ainsi adoptée l'aurait été en réaction au défaut préalable de la Hongrie de s'acquitter de ses obligations en vertu du droit international.

83. Pour pouvoir être justifiée, une contre-mesure doit satisfaire à certaines conditions (voir *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986*, p. 127, par. 249. Voir aussi *Sentence arbitrale du 9 décembre 1978 en l'affaire concernant l'accord relatif aux services aériens du 27 mars 1946 entre les Etats-Unis d'Amérique et la France*, Nations Unies, *Recueil des sentences arbitrales (RSA)*, vol. XVIII, p. 483 et suiv., et articles 47 à 50 du projet d'articles sur la responsabilité des Etats adopté par la Commission du droit international en première lecture, «Rapport de la Commission du droit international sur les travaux de sa quarante-huitième session, 6 mai-26 juillet 1996», *Documents officiels de l'Assemblée générale, cinquante et unième session, supplément n° 10* (A/51/10), p. 167-168.)

En premier lieu, elle doit être prise pour riposter à un fait internationalement illicite d'un autre Etat et doit être dirigée contre ledit Etat. Bien qu'elle n'ait pas été présentée à titre principal comme une contre-mesure, il est clair que la variante C a constitué une riposte à la suspension et à

ment of works and that it was directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 *et seq.*), that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.

In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

> "[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23,* p. 27).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz — failed to respect the proportionality which is required by international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obliga-

l'abandon des travaux par la Hongrie et qu'elle était dirigée contre cet Etat; et il est tout aussi clair, de l'avis de la Cour, que les agissements de la Hongrie étaient internationalement illicites.

84. En second lieu, l'Etat lésé doit avoir invité l'Etat auteur du fait illicite à mettre fin à son comportement illicite ou à en fournir réparation. Il ressort clairement des faits de la cause, tels que rappelés ci-dessus par la Cour (voir paragraphes 61 et suivants), que la Tchécoslovaquie, à de nombreuses reprises, a prié la Hongrie de reprendre l'exécution de ses obligations conventionnelles.

85. De l'avis de la Cour, une condition importante est que les effets d'une contre-mesure doivent être proportionnés aux dommages subis compte tenu des droits en cause.

En 1929, la Cour permanente de Justice internationale, à propos de la navigation sur l'Oder, a déclaré ce qui suit:

> «[la] communauté d'intérêts sur un fleuve navigable devient la base d'une communauté de droit, dont les traits essentiels sont la parfaite égalité de tous les Etats riverains dans l'usage de tout le parcours du fleuve et l'exclusion de tout privilège d'un riverain quelconque par rapport aux autres» (*Juridiction territoriale de la Commission internationale de l'Oder, arrêt n° 16, 1929, C.P.J.I. série A n° 23*, p. 27).

Le développement moderne du droit international a renforcé ce principe également pour les utilisations des cours d'eau internationaux à des fins autres que la navigation, comme en témoigne l'adoption par l'Assemblée générale des Nations Unies, le 21 mai 1997, de la convention sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation.

La Cour considère que la Tchécoslovaquie, en prenant unilatéralement le contrôle d'une ressource partagée, et en privant ainsi la Hongrie de son droit à une part équitable et raisonnable des ressources naturelles du Danube — avec les effets continus que le détournement de ses eaux déploie sur l'écologie de la région riveraine du Szigetköz — n'a pas respecté la proportionnalité exigée par le droit international.

86. Par ailleurs, comme la Cour l'a déjà relevé ci-dessus (voir paragraphe 78), le fait que la Hongrie ait consenti, dans le cadre du projet initial, au détournement du Danube (et, dans le plan contractuel conjoint, à titre provisoire à des prélèvements d'eau dans le Danube) ne saurait s'interpréter comme ayant autorisé la Tchécoslovaquie à procéder à un détournement unilatéral de cette importance sans le consentement de la Hongrie.

87. La Cour estime donc que le détournement du Danube effectué par la Tchécoslovaquie n'était pas une contre-mesure licite, faute d'être proportionnée. Elle n'a dès lors pas à statuer sur une autre condition dont dépend la licéité d'une contre-mesure, à savoir que celle-ci doit avoir pour but d'inciter l'Etat auteur du fait illicite à exécuter les obligations

tions under international law, and that the measure must therefore be reversible.

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88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(b)*, of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

* * *

89. By the terms of Article 2, paragraph 1 *(c)*, of the Special Agreement, the Court is asked, thirdly, to determine "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as "a serious breach of international law" and stated that, unless work was suspended while further enquiries took place, "the Hungarian Government [would] have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty". In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations "on every level", it could not agree "to stop all work on the provisional solution".

On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying a mutu-

qui lui incombent en droit international, et que la mesure doit partant être réversible.

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88. Au vu des conclusions auxquelles elle est parvenue ci-dessus, la Cour répond à la question qui lui a été posée à l'article 2, paragraphe 1, alinéa *b)*, du compromis (voir paragraphe 60) que la Tchécoslovaquie était en droit de recourir, en novembre 1991, à la variante C, dans la mesure où elle se bornait alors à entamer des travaux qui ne préjugeaient pas de la décision définitive qu'elle devait prendre. En revanche, la Tchécoslovaquie n'était pas en droit de mettre en service cette variante à partir d'octobre 1992.

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89. Aux termes de l'article 2, paragraphe 1, alinéa *c)*, du compromis, il est demandé à la Cour en troisième lieu de dire «quels sont les effets juridiques de la notification, le 19 mai 1992, de la terminaison du traité par la République de Hongrie».

La Cour relèvera qu'il lui a été demandé de déterminer les effets juridiques de la notification de terminaison du traité effectuée à la date du 19 mai 1992. Elle se bornera en conséquence à répondre à cette question.

90. La Cour rappellera que, début 1992, les parties au traité de 1977 avaient clairement fait connaître leurs positions respectives sur le recours par la Tchécoslovaquie à la variante C. Dans une note verbale du 14 février 1992, la Hongrie avait fait savoir qu'elle considérait que la variante C contrevenait au traité de 1977 (voir paragraphe 64 ci-dessus); la Tchécoslovaquie faisait de la mise en œuvre de la variante C une condition de toute nouvelle négociation. Le 26 février 1992, dans une lettre à son homologue tchécoslovaque, le premier ministre hongrois décrivit le détournement imminent du Danube comme «une grave violation du droit international» et affirma qu'à moins que les travaux ne soient suspendus pendant la réalisation de nouvelles études «le Gouvernement hongrois n'aura[it] d'autre choix, pour faire face à cette situation de nécessité, que de mettre fin au traité interétatique de 1977». Dans une note verbale du 18 mars 1992, la Tchécoslovaquie réaffirma que, tout en étant disposée à poursuivre les négociations «à tous les niveaux», elle ne pouvait pas accepter «d'arrêter les travaux afférents à la solution provisoire».

Le 24 mars 1992, le Parlement hongrois adopta une résolution par laquelle il autorisait le gouvernement à mettre fin au traité de 1977 si la Tchécoslovaquie n'avait pas cessé les travaux au 30 avril 1992. Le 13 avril 1992, le vice-président de la Commission des Communautés européennes écrivit aux deux parties pour leur confirmer que la Commission était disposée à présider un comité d'experts indépendants, comprenant des représentants des deux pays, en vue d'aider les deux gouvernements à dégager

ally acceptable solution. Commission involvement would depend on each Government not taking "any steps . . . which would prejudice possible actions to be undertaken on the basis of the report's findings". The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee "without any preliminary conditions"; criticizing Hungary's approach, he refused to suspend work on the provisional solution, but added, "in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States".

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions "inappropriate".

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia's refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

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92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had "remained inflexible" and continued with its implementation of Variant C, "a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty".

Slovakia, for its part, denied that a state of necessity existed on the

une solution qu'ils puissent tous deux accepter. La participation de la Commission était subordonnée à la condition que les deux gouvernements s'abstiennent de prendre «des mesures susceptibles de porter atteinte aux actions qu'il pourrait y avoir lieu d'entreprendre sur la base des conclusions du rapport». Le premier ministre tchécoslovaque, dans une lettre du 23 avril 1992 adressée au premier ministre hongrois, fit savoir que son gouvernement était toujours intéressé, «sans conditions préalables», à la constitution du comité envisagé; critiquant l'attitude de la Hongrie, il refusait de suspendre les travaux relatifs à la solution provisoire, mais ajoutait: «selon moi, d'ici le barrage du Danube (c'est-à-dire d'ici au 31 octobre 1992), il reste du temps pour résoudre les questions litigieuses sur la base d'un accord entre les deux Etats».

Le 7 mai 1992, la Hongrie, dans la résolution même où elle prenait la décision de mettre fin au traité, proposa, cette fois au premier ministre slovaque, une suspension de six mois des travaux relatifs à la variante C. Le premier ministre slovaque répondit que le Gouvernement slovaque était toujours prêt à négocier, mais qu'il considérait «inapproprié» de poser des conditions préalables.

91. Le 19 mai 1992, le Gouvernement hongrois transmit au Gouvernement tchécoslovaque une déclaration portant notification de la terminaison, par la Hongrie, du traité de 1977, à compter du 25 mai 1992. Dans une lettre du même jour adressée au premier ministre tchécoslovaque, le premier ministre hongrois précisait que la cause immédiate de la terminaison était le refus de la Tchécoslovaquie, exprimé dans sa lettre du 23 avril 1992, de suspendre les travaux afférents à la variante C pendant les efforts de médiation de la Commission des Communautés européennes. Dans sa déclaration, la Hongrie disait qu'elle ne pouvait accepter les effets néfastes de la mise en œuvre de la variante C sur l'environnement et sur la protection de la nature, qui seraient pratiquement équivalents aux dangers créés par la réalisation du projet initial. Elle ajoutait que la variante C contrevenait à de nombreux accords internationaux et violait l'intégrité territoriale de la Hongrie en détournant le Danube de son cours naturel.

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92. Au cours de la procédure, la Hongrie a présenté cinq motifs en vue de démontrer que la notification de terminaison était licite, et par suite effective: l'existence d'un état de nécessité, l'impossibilité d'exécuter le traité, la survenance d'un changement fondamental de circonstances, la violation substantielle du traité par la Tchécoslovaquie et, enfin, l'apparition de nouvelles normes de droit international de l'environnement. La Slovaquie a contesté chacun de ces motifs.

93. Sur le premier point, la Hongrie a affirmé que, puisque la Tchécoslovaquie «était demeurée inflexible» et avait poursuivi la mise en œuvre de la variante C, «l'état provisoire de nécessité [était] finalement devenu permanent, justifiant ainsi la terminaison du traité de 1977».

Pour sa part, la Slovaquie, se fondant sur ce qu'elle estime être les don-

basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:

> "*Article 61*
>
> *Supervening Impossibility of Performance*
>
> 1. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.
>
> 2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

Hungary declared that it could not be "obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage". It concluded that

> "By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform."

In Hungary's view, the "object indispensable for the execution of the treaty", whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, "a legal situation which was the raison d'être of the rights and obligations".

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical "disappearance or destruction" of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility "if the impossibility is the result of a breach by that party . . . of an obligation under the treaty".

95. As to "fundamental change of circumstances", Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

nées scientifiques, a contesté l'existence d'un état de nécessité et a fait valoir que, même si un tel état de nécessité avait existé, il n'aurait pu conférer le droit de mettre fin au traité en vertu de la convention de Vienne de 1969 sur le droit des traités.

94. Le deuxième argument de la Hongrie était tiré des termes de l'article 61 de la convention de Vienne, ainsi libellé:

«*Article 61*

Survenance d'une situation rendant l'exécution impossible

1. Une partie peut invoquer l'impossibilité d'exécuter un traité comme motif pour y mettre fin ou pour s'en retirer si cette impossibilité résulte de la disparition ou destruction définitives d'un objet indispensable à l'exécution de ce traité. Si l'impossibilité est temporaire, elle peut être invoquée seulement comme motif pour suspendre l'application du traité.

2. L'impossibilité d'exécution ne peut être invoquée par une partie comme motif pour mettre fin au traité, pour s'en retirer ou pour en suspendre l'application si cette impossibilité résulte d'une violation, par la partie qui l'invoque, soit d'une obligation du traité, soit de toute autre obligation internationale à l'égard de toute autre partie au traité.»

La Hongrie a déclaré qu'elle ne pouvait «être obligée d'accomplir une tâche pratiquement impossible, à savoir construire un système de barrage sur son propre territoire qui causerait des dommages irréparables à l'environnement». Elle a conclu que:

> «En mai 1992 l'objet essentiel du traité — un investissement économique conjoint qui était compatible avec la protection de l'environnement et qui était exploité par les deux parties conjointement — avait disparu de manière permanente, et [que] le traité était donc devenu impossible à exécuter.»

De l'avis de la Hongrie, il n'est pas nécessaire que la disparition ou la destruction de l'«objet indispensable à l'exécution de ce traité», qu'exige l'article 61 de la convention de Vienne, vise un objet physique; il peut aussi s'agir, suivant les termes utilisés par la Commission du droit international, d'«une situation juridique qui constituait la raison d'être des droits et obligations».

La Slovaquie a prétendu que la seule base sur laquelle l'impossibilité d'exécution puisse être invoquée comme motif de terminaison d'un traité est indiquée à l'article 61 de la convention de Vienne; que le paragraphe 1 de cet article envisage manifestement la «disparition ou destruction» matérielle de l'objet dont il s'agit; et que, en tout état de cause, selon le paragraphe 2, on ne peut invoquer l'impossibilité d'exécution «si cette impossibilité résulte d'une violation, par la partie qui l'invoque, ... d'une obligation aux termes du traité».

95. En ce qui concerne le «changement fondamental de circonstances», la Hongrie se fonde sur l'article 62 de la convention de Vienne sur le droit des traités, ainsi conçu:

"*Article 62*

Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

Hungary identified a number of "substantive elements" present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of "socialist integration", for which the Treaty had originally been a "vehicle", but which subsequently disappeared; the "single and indivisible operational system", which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the "framework treaty" into an "immutable norm"; and, finally, the transformation of a treaty consistent with environmental protection into "a prescription for environmental disaster".

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

« *Article 62*
Changement fondamental de circonstances

1. Un changement fondamental de circonstances qui s'est produit par rapport à celles qui existaient au moment de la conclusion d'un traité et qui n'avait pas été prévu par les parties ne peut pas être invoqué comme motif pour mettre fin au traité ou pour s'en retirer, à moins que:

a) l'existence de ces circonstances n'ait constitué une base essentielle du consentement des parties à être liées par le traité; et que

b) ce changement n'ait pour effet de transformer radicalement la portée des obligations qui restent à exécuter en vertu du traité.

2. Un changement fondamental de circonstances ne peut pas être invoqué comme motif pour mettre fin à un traité ou pour s'en retirer:

a) s'il s'agit d'un traité établissant une frontière; ou
b) si le changement fondamental résulte d'une violation, par la partie qui l'invoque, soit d'une obligation du traité, soit de toute autre obligation internationale à l'égard de toute autre partie au traité.

3. Si une partie peut, conformément aux paragraphes qui précèdent, invoquer un changement fondamental de circonstances comme motif pour mettre fin à un traité ou pour s'en retirer, elle peut également ne l'invoquer que pour suspendre l'application du traité.»

La Hongrie a énuméré divers «éléments de fond» présents lors de la conclusion du traité de 1977 qui, selon elle, avaient fondamentalement changé à la date à laquelle elle a notifié qu'elle mettait fin au traité. Parmi ces éléments, elle a évoqué la notion d'«intégration socialiste», dont le traité avait été initialement «le vecteur», mais qui avait par la suite disparu; le «système d'ouvrages opérationnel, unique et indivisible», auquel avait été substitué un projet unilatéral; le fait que la base de l'investissement conjoint prévu avait été radicalement transformée avec l'entrée soudaine des deux Etats dans l'économie de marché; l'attitude de la Tchécoslovaquie qui avait fait d'un «traité-cadre» une «norme immuable»; et enfin, la transformation d'un traité qui tenait compte de la protection de l'environnement en «traité porteur de catastrophes écologiques».

La Slovaquie, quant à elle, a soutenu que les changements signalés par la Hongrie n'avaient pas modifié la nature des obligations prévues initialement au traité, de sorte qu'aucun droit d'y mettre fin ne pouvait découler de ces changements.

96. La Hongrie a en outre fait valoir que la terminaison du traité était justifiée du fait des violations substantielles de ce traité commises par la Tchécoslovaquie, et elle a invoqué à cet égard l'article 60 de la convention de Vienne sur le droit des traités, qui dispose:

"*Article 60*

Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.

« *Article 60*

Extinction d'un traité ou suspension de son application comme conséquence de sa violation

1. Une violation substantielle d'un traité bilatéral par l'une des parties autorise l'autre partie à invoquer la violation comme motif pour mettre fin au traité ou suspendre son application en totalité ou en partie.

2. Une violation substantielle d'un traité multilatéral par l'une des parties autorise:

a) les autres parties, agissant par accord unanime, à suspendre l'application du traité en totalité ou en partie ou à mettre fin à celui-ci:

i) soit dans les relations entre elles-mêmes et l'Etat auteur de la violation,

ii) soit entre toutes les parties;

b) une partie spécialement atteinte par la violation à invoquer celle-ci comme motif de suspension de l'application du traité en totalité ou en partie dans les relations entre elle-même et l'Etat auteur de la violation;

c) toute partie autre que l'Etat auteur de la violation à invoquer la violation comme motif pour suspendre l'application du traité en totalité ou en partie en ce qui la concerne si ce traité est d'une nature telle qu'une violation substantielle de ses dispositions par une partie modifie radicalement la situation de chacune des parties quant à l'exécution ultérieure de ses obligations en vertu du traité.

3. Aux fins du présent article, une violation substantielle d'un traité est constituée par:

a) un rejet du traité non autorisé par la présente convention; ou

b) la violation d'une disposition essentielle pour la réalisation de l'objet ou du but du traité.

4. Les paragraphes qui précèdent ne portent atteinte à aucune disposition du traité applicable en cas de violation.

5. Les paragraphes 1 à 3 ne s'appliquent pas aux dispositions relatives à la protection de la personne humaine contenues dans des traités de caractère humanitaire, notamment aux dispositions excluant toute forme de représailles à l'égard des personnes protégées par lesdits traités.»

La Hongrie a prétendu en particulier que la Tchécoslovaquie avait violé le traité de 1977 en procédant à la construction et à la mise en service de la variante C, et en manquant à ses obligations au titre des articles 15 et 19 du traité. La Hongrie a par ailleurs soutenu que la Tchécoslovaquie avait méconnu d'autres conventions internationales (dont la convention sur la réglementation en matière d'eaux frontières du 31 mai 1976) et le droit international général.

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as "the best possible approximate application" of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungary argued, its termination was "forced by the other party's refusal to suspend work on Variant C".

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather "to the language of self-help or reprisals".

* *

98. The question, as formulated in Article 2, paragraph 1 *(c)*, of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment

La Slovaquie a nié qu'il y ait eu, de la part de la Tchécoslovaquie ou de sa propre part, une violation substantielle des obligations de protéger la qualité de l'eau et la nature, et a affirmé que la variante C, loin d'être une violation du traité, constituait en fait «la meilleure application possible [du traité] par approximation». Elle a en outre nié que la Tchécoslovaquie ait méconnu d'autres conventions internationales ou le droit international général.

97. La Hongrie a enfin soutenu que les normes du droit international qui se sont imposées par la suite en matière de protection de l'environnement rendaient impossible l'exécution du traité. L'obligation qui existait préalablement de ne pas causer de dommage substantiel au territoire d'un autre Etat était devenue avec le temps, au dire de la Hongrie, une obligation *erga omnes* de prévention des dommages conformément au «principe de précaution». Sur cette base, la Hongrie a fait valoir qu'elle avait été contrainte de mettre fin au traité «en raison du refus de l'autre partie de suspendre les travaux relatifs à la variante C».

La Slovaquie a exposé, en réponse, qu'aucun des nouveaux développements du droit international de l'environnement n'avait engendré de normes de *jus cogens* qui prévaudraient sur le traité. Elle a soutenu en outre que le droit à agir dont la Hongrie entend se prévaloir n'aurait pu en tout état de cause justifier légalement la terminaison du traité en vertu du droit des traités, mais relevait bien davantage «du vocabulaire de l'autoprotection ou des représailles».

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98. Telle qu'elle est formulée à l'article 2, paragraphe 1, alinéa *c)*, du compromis, la question posée relève du droit des traités puisque la Cour est priée de dire quels sont les effets juridiques de la notification de terminaison du traité. Il s'agit de savoir si la notification hongroise du 19 mai 1992 a mis fin au traité de 1977 ou n'a pas eu cet effet, faute d'être conforme aux exigences du droit international.

99. La Cour a déjà évoqué la question de l'applicabilité à la présente espèce de la convention de Vienne de 1969 sur le droit des traités. La convention de Vienne n'est pas directement applicable au traité de 1977 dans la mesure où les deux Etats n'ont ratifié cette convention qu'après avoir conclu le traité. En conséquence, seules les règles de la convention qui sont déclaratoires du droit coutumier sont applicables au traité de 1977. Comme la Cour l'a indiqué ci-dessus (voir paragraphe 46), tel est le cas, à bien des égards, des articles 60 à 62 de la convention de Vienne relatifs à l'extinction et à la suspension de l'application des traités. Les Parties en ont aussi largement convenu.

100. Le traité de 1977 ne contient pas de disposition concernant sa terminaison. Rien n'indique non plus que les parties entendaient admettre la possibilité de dénoncer le traité ou de s'en retirer. Au contraire, le traité établit un système durable d'investissement conjoint et d'exploitation

and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

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101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

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102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968*, doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it

conjointe. Par conséquent, les parties n'en ayant pas convenu autrement, le traité ne pouvait prendre fin que pour les motifs énumérés limitativement dans la convention de Vienne.

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101. La Cour examinera maintenant le premier motif invoqué par la Hongrie, à savoir celui tiré de l'état de nécessité. A cet égard, la Cour se bornera à observer que même si l'existence d'un état de nécessité est établie, il ne peut être mis fin à un traité sur cette base. L'état de nécessité ne peut être invoqué que pour exonérer de sa responsabilité un Etat qui n'a pas exécuté un traité. Même si l'on considère que l'invocation de ce motif est justifiée, le traité ne prend pas fin pour autant; il peut être privé d'effet tant que l'état de nécessité persiste; il peut être inopérant en fait, mais il reste en vigueur, à moins que les parties n'y mettent fin d'un commun accord. Dès que l'état de nécessité disparaît, le devoir de s'acquitter des obligations découlant du traité renaît.

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102. La Hongrie invoque aussi le principe de l'impossibilité d'exécution tel que traduit à l'article 61 de la convention de Vienne sur le droit des traités. Toutefois elle semble interpréter cette disposition d'une façon qui n'est conforme ni à son libellé ni aux intentions exprimées lors de la conférence diplomatique qui a adopté la convention. Le paragraphe 1 de l'article 61 exige qu'il y ait eu «disparition ou destruction définitives d'un objet indispensable à l'exécution» d'un traité, pour que l'impossibilité d'exécution puisse justifier la terminaison dudit traité. Au cours de la conférence, il a été proposé d'élargir la portée de cet article jusqu'à inclure des cas tels que l'impossibilité d'effectuer certains paiements en raison de difficultés financières graves (*Documents officiels de la conférence des Nations Unies sur le droit des traités, première session, Vienne, 26 mars-24 mai 1968*, doc. A/CONF.39/11, comptes rendus analytiques des séances plénières et des séances de la commission plénière, 62e séance de la commission plénière, p. 393-397). Bien qu'il ait été admis que de telles situations pourraient exclure l'illicéité de l'inexécution, par une partie, de ses obligations conventionnelles, les Etats participants n'ont pas été disposés à en faire un motif d'extinction ou de suspension d'un traité et ont préféré s'en tenir à une conception plus étroite.

103. La Hongrie a soutenu que l'objet essentiel du traité — un investissement économique conjoint compatible avec la protection de l'environnement et exploité conjointement par les deux parties contractantes — avait définitivement disparu, et que l'exécution du traité était ainsi devenue impossible. La Cour n'a pas à déterminer si le mot «objet» figurant à l'article 61 peut aussi être interprété comme visant un régime juridique car en tout état de cause, même si tel était le cas, elle aurait à

would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

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104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).

The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that

> "Article 62 of the Vienna Convention on the Law of Treaties, . . . may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances" (*I.C.J. Reports 1973*, p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of

conclure qu'en l'espèce ce régime n'avait pas définitivement disparu. Le traité de 1977 — et en particulier ses articles 15, 19 et 20 — offrait en effet aux parties les moyens nécessaires pour procéder à tout moment, par voie de négociation, aux réajustements requis entre impératifs économiques et impératifs écologiques. La Cour ajoutera que, si l'exploitation conjointe de l'investissement n'a plus été possible, c'est, à l'origine, parce que la Hongrie n'a pas exécuté la plupart des travaux qui lui incombaient aux termes du traité de 1977; or le paragraphe 2 de l'article 61 de la convention de Vienne prévoit expressément que l'impossibilité d'exécution ne peut être invoquée pour la terminaison d'un traité par une partie à ce traité lorsque cette impossibilité résulte de la violation par la même partie d'une obligation découlant dudit traité.

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104. La Hongrie soutient en outre qu'elle était en droit d'invoquer divers événements qui, en se cumulant, auraient constitué un changement fondamental de circonstances. A cet effet, elle a plus particulièrement mentionné des changements profonds de nature politique, le fait que le projet devenait de moins en moins rentable, les progrès des connaissances en matière d'environnement et le développement de nouvelles normes et prescriptions du droit international de l'environnement (voir paragraphe 95 ci-dessus).

La Cour rappellera que, dans l'affaire de la *Compétence en matière de pêcheries*, elle a dit que

> «l'article 62 de la convention de Vienne sur le droit des traités ... peut, à bien des égards, être considéré comme une codification du droit coutumier existant en ce qui concerne la cessation des relations conventionnelles en raison d'un changement de circonstances» (*C.I.J. Recueil 1973*, p. 63, par. 36).

Certes, la situation politique qui prévalait alors a certainement été pertinente au regard de la conclusion du traité de 1977. Mais la Cour rappellera que ce traité prévoyait un programme d'investissement conjoint pour la production d'énergie, la maîtrise des inondations et l'amélioration des conditions de navigation sur le Danube. De l'avis de la Cour, les conditions politiques de l'époque n'étaient donc pas liées à l'objet et au but du traité au point de constituer une base essentielle du consentement des parties et, en se modifiant, de transformer radicalement la portée des obligations qui restaient à exécuter. Il en va de même du système économique en vigueur au moment de la conclusion du traité de 1977. Par ailleurs, même si la rentabilité estimée du projet pouvait apparaître moins élevée en 1992 qu'en 1977, il ne ressort pas du dossier soumis à la Cour qu'elle était condamnée à chuter dans une proportion telle que les obligations conventionnelles des parties s'en fussent trouvées radicalement transformées.

La Cour ne saurait considérer que les nouvelles connaissances acquises

environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

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105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.

Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party.

en matière d'environnement et les progrès du droit de l'environnement aient présenté un caractère complètement imprévu. Bien plus, le libellé des articles 15, 19 et 20, conçu dans une perspective d'évolution, a mis les parties en mesure de tenir compte de ces développements et de les appliquer lorsqu'elles exécuteraient ces dispositions conventionnelles.

De l'avis de la Cour, les changements de circonstances que la Hongrie invoque ne sont pas, pris séparément ou conjointement, d'une nature telle qu'ils aient pour effet de transformer radicalement la portée des obligations qui restent à exécuter pour réaliser le projet. Un changement fondamental de circonstances doit être imprévu; les circonstances existant à l'époque où le traité a été conclu doivent avoir constitué une base essentielle du consentement des parties à être liées par le traité. Le fait que l'article 62 de la convention de Vienne sur le droit des traités soit libellé en termes négatifs et conditionnels indique d'ailleurs clairement que la stabilité des relations conventionnelles exige que le moyen tiré d'un changement fondamental de circonstances ne trouve à s'appliquer que dans des cas exceptionnels.

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105. La Cour examinera maintenant l'argument de la Hongrie selon lequel cet Etat était en droit de mettre fin au traité de 1977 au motif que la Tchécoslovaquie en avait violé les articles 15, 19 et 20 (ainsi que plusieurs autres conventions et règles du droit international général), et que la planification, la construction et la mise en service de la variante C constituaient aussi une violation substantielle du traité de 1977.

106. Pour ce qui est de la branche de l'argumentation de la Hongrie concernant d'autres conventions et règles générales du droit international, la Cour estime que seule une violation substantielle du traité lui-même par un Etat partie audit traité peut mettre l'autre partie en droit de s'en prévaloir pour mettre fin au traité. La violation d'autres règles conventionnelles ou d'autres règles du droit international général peut justifier l'adoption par l'Etat lésé de certaines mesures, y compris des contre-mesures, mais elle ne saurait justifier qu'il soit mis fin au traité sur la base du droit des traités.

107. La Hongrie a soutenu que la Tchécoslovaquie avait violé les articles 15, 19 et 20 du traité en refusant d'engager avec elle des négociations en vue d'adapter le plan contractuel conjoint pour tenir compte des nouveaux progrès scientifiques et juridiques en matière d'environnement. Les articles 15, 19 et 20 mettent à la charge des parties l'obligation de prendre conjointement et de façon continue des mesures appropriées pour assurer la protection de la qualité des eaux, de la nature et des intérêts en matière de pêcheries.

Les articles 15 et 19 prévoient expressément que les obligations qu'ils contiennent seront mises en œuvre selon les modalités prévues au plan contractuel conjoint. Que les parties n'aient pu se mettre d'accord sur ces modalités ne saurait, sur la base du dossier soumis à la Cour, être

The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.

In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (in which case the Vienna Convention did not apply):

> "Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith." (*I.C.J. Reports 1980*, p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days

attribué uniquement à une seule des parties. De l'avis de la Cour, il n'existe pas d'éléments de preuve suffisants pour conclure que la Tchécoslovaquie aurait constamment refusé de se concerter avec la Hongrie sur l'opportunité ou la nécessité de prendre des mesures de protection de l'environnement. Ce que le dossier fait apparaître, c'est qu'alors que les deux parties se montraient en principe disposées à entreprendre de nouvelles études, en pratique, la Tchécoslovaquie refusait d'envisager que les travaux à Dunakiliti et, plus tard, ceux relatifs à la variante C soient suspendus, cependant que la Hongrie demandait leur suspension comme condition préalable à des recherches sur l'environnement, en expliquant que la poursuite des travaux compromettrait l'issue des négociations. A cet égard, la Cour ne saurait perdre de vue que la Hongrie elle-même, en suspendant les travaux à Nagymaros et Dunakiliti, a contribué à la survenance d'une situation qui ne pouvait être favorable à la conduite de négociations fructueuses.

108. L'argument principal de la Hongrie lorsqu'elle invoque une violation substantielle du traité est la construction et la mise en service de la variante C. Comme la Cour l'a dit au paragraphe 79 ci-dessus, la Tchécoslovaquie n'a violé le traité que lorsqu'elle a détourné les eaux du Danube dans le canal de dérivation en octobre 1992. En construisant les ouvrages qui devaient conduire à la mise en service de la variante C, la Tchécoslovaquie n'a pas agi de façon illicite.

En conséquence, la Cour est d'avis que la notification par la Hongrie, le 19 mai 1992, de la terminaison du traité était prématurée. Il n'y avait pas encore eu de violation du traité par la Tchécoslovaquie; la Hongrie n'était donc pas en droit d'invoquer semblable violation du traité comme motif pour y mettre fin au moment où elle l'a fait.

109. A cet égard, il y a lieu de relever que, d'après la déclaration que la Hongrie a faite le 19 mai 1992, la terminaison du traité de 1977 devait prendre effet à compter du 25 mai 1992, soit six jours plus tard seulement. Les deux Parties s'accordent à reconnaître que les articles 65 à 67 de la convention de Vienne sur le droit des traités, s'ils ne codifient pas le droit coutumier, le reflètent du moins généralement et contiennent certains principes de procédure qui ont pour fondement l'obligation d'agir de bonne foi. Ainsi que la Cour l'a dit dans l'avis consultatif qu'elle a donné sur l'*Interprétation de l'accord du 25 mars 1951 entre l'OMS et l'Egypte* (affaire dans laquelle la convention de Vienne ne s'appliquait pas):

> « Les délais précis qui peuvent être nécessaires pour s'acquitter des obligations de consultation et de négociation et le préavis de dénonciation exact qui doit être donné varient forcément en fonction des nécessités de l'espèce. En principe, c'est donc aux parties qu'il appartient de déterminer dans chaque cas la durée de ces délais en procédant de bonne foi à des consultations et à des négociations. » (*C.I.J. Recueil 1980*, p. 96, par. 49.)

La terminaison du traité par la Hongrie devait prendre effet six jours

after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct. As was stated by the Permanent Court of International Justice:

> "It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." (*Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

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111. Finally, the Court will address Hungary's claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the

après sa notification. Or, à aucune de ces deux dates, la Hongrie n'avait subi de préjudice du fait d'actes de la Tchécoslovaquie. La Cour est donc amenée à confirmer sa conclusion selon laquelle la terminaison du traité par la Hongrie était prématurée.

110. La Cour ne saurait pas non plus perdre de vue que la Tchécoslovaquie a commis l'acte internationalement illicite consistant à mettre en service la variante C, à la suite du comportement illicite préalable de la Hongrie elle-même. Comme l'a dit la Cour permanente de Justice internationale:

> «C'est, du reste, un principe généralement reconnu par la jurisprudence arbitrale internationale, aussi bien que par les juridictions nationales, qu'une Partie ne saurait opposer à l'autre le fait de ne pas avoir rempli une obligation ou de ne pas s'être servi d'un moyen de recours, si la première, par un acte contraire au droit, a empêché la seconde de remplir l'obligation en question, ou d'avoir recours à la juridiction qui lui aurait été ouverte.» (*Usine de Chorzów, compétence, arrêt n° 8, 1927, C.P.J.I. série A n° 9*, p. 31.)

La Hongrie, par son comportement, avait porté atteinte à son droit de mettre fin au traité; il en serait demeuré ainsi même si la Tchécoslovaquie avait, au moment de la prétendue terminaison du traité, violé une disposition essentielle pour la réalisation de l'objet ou du but du traité.

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111. La Cour examinera enfin la prétention de la Hongrie selon laquelle cette dernière était en droit de mettre fin au traité de 1977, parce que les nouvelles exigences du droit international relatif à la protection de l'environnement s'opposaient à l'exécution du traité.

112. Aucune des Parties n'a prétendu que des normes impératives du droit de l'environnement soient nées depuis la conclusion du traité de 1977 et la Cour n'aura par suite pas à s'interroger sur la portée de l'article 64 de la convention de Vienne sur le droit des traités. En revanche, la Cour tient à relever que de nouvelles normes du droit de l'environnement, récemment apparues, sont pertinentes pour l'exécution du traité et que les parties pouvaient, d'un commun accord, en tenir compte en appliquant les articles 15, 19 et 20 du traité. Ces articles ne contiennent pas d'obligations spécifiques de faire, mais ils imposent aux parties, en s'acquittant de leurs obligations de veiller à ce que la qualité des eaux du Danube ne soit pas compromise et à ce que la protection de la nature soit assurée, de tenir compte des nouvelles normes en matière d'environnement lorsque ces parties conviennent des moyens à préciser dans le plan contractuel conjoint.

En insérant dans le traité ces dispositions évolutives, les parties ont reconnu la nécessité d'adapter éventuellement le projet. En conséquence,

Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*I.C.J. Reports 1996*, p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal non-compliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

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le traité n'est pas un instrument figé et est susceptible de s'adapter à de nouvelles normes du droit international. Au moyen des articles 15 et 19, de nouvelles normes en matière d'environnement peuvent être incorporées dans le plan contractuel conjoint.

La responsabilité d'agir de la sorte était une responsabilité conjointe. Les obligations énoncées aux articles 15, 19 et 20 sont, par définition, d'ordre général, et doivent être transformées en obligations spécifiques de faire, à l'issue d'un processus de consultation et de négociation. De ce fait leur mise en œuvre exige une disposition réciproque à discuter de bonne foi des risques réels et potentiels pour l'environnement.

Agir de la sorte est d'autant plus important que la Cour, dans son avis consultatif sur la *Licéité de la menace ou de l'emploi d'armes nucléaires*, a rappelé que «l'environnement n'est pas une abstraction, mais bien l'espace où vivent les êtres humains et dont dépendent la qualité de leur vie et leur santé, y compris pour les générations à venir» (*C.I.J. Recueil 1996*, p. 241, par. 29; voir aussi le paragraphe 53 ci-dessus).

La conscience que l'environnement est vulnérable et la reconnaissance de ce qu'il faut continuellement évaluer les risques écologiques se sont affirmées de plus en plus dans les années qui ont suivi la conclusion du traité. Ces nouvelles préoccupations ont rendu les articles 15, 19 et 20 du traité d'autant plus pertinents.

113. La Cour reconnaît que les Parties s'accordent sur la nécessité de se soucier sérieusement de l'environnement et de prendre les mesures de précaution qui s'imposent, mais elles sont fondamentalement en désaccord sur les conséquences qui en découlent pour le projet conjoint. Dans ces conditions, le recours à une tierce partie pourrait se révéler utile et permettre de trouver une solution, à condition que chacune des Parties fasse preuve de souplesse dans ses positions.

114. Enfin, la Hongrie a soutenu que par leur comportement les deux parties avaient rejeté le traité et qu'un traité bilatéral ne saurait survivre à son rejet par les deux parties. Bien qu'elle ait constaté que tant la Hongrie que la Tchécoslovaquie avaient manqué à leurs obligations découlant du traité de 1977, la Cour estime que ces comportements illicites réciproques n'ont pas mis fin au traité ni justifié qu'il y fût mis fin. La Cour établirait un précédent aux effets perturbateurs pour les relations conventionnelles et l'intégrité de la règle *pacta sunt servanda* si elle devait conclure qu'il peut être unilatéralement mis fin, au motif de manquements réciproques, à un traité en vigueur entre Etats, que les parties ont exécuté dans une très large mesure et à un coût considérable pendant des années. Il en serait à l'évidence autrement si les parties décidaient de mettre fin au traité d'un commun accord. Mais, en l'espèce, si la Hongrie a prétendu mettre fin au traité, la Tchécoslovaquie s'est constamment opposée à cette terminaison, déclarant qu'un tel acte serait dénué de tout effet juridique.

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115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(c)*, of the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

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116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, "There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party" and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that

> "the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project",

Hungary sought to distinguish between, on the one hand, rights and obligations such as "continuing property rights" under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized "as the successor to the Government of the CSFR" with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-

115. Au vu des conclusions auxquelles elle est parvenue ci-dessus, la Cour répond à la question qui lui a été posée à l'article 2, paragraphe 1, alinéa *c)*, du compromis (voir paragraphe 89) que la notification de terminaison faite par la Hongrie le 19 mai 1992 n'a pas eu pour effet juridique de mettre fin au traité de 1977 et aux instruments y afférents.

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116. Au paragraphe 2 de l'article 2 du compromis, la Cour a été priée de déterminer les conséquences juridiques, y compris les droits et obligations pour les Parties, de l'arrêt qu'elle rendra sur les questions énoncées au paragraphe 1. A l'article 5 du compromis, les Parties sont convenues d'engager des négociations sur les modalités d'exécution de l'arrêt, dès que la Cour l'aura rendu.

117. La Cour doit tout d'abord examiner la question de savoir si la Slovaquie est devenue partie au traité de 1977 en tant qu'Etat successeur de la Tchécoslovaquie. A titre d'argument subsidiaire, la Hongrie a en effet soutenu que, même s'il avait survécu à la notification de terminaison, le traité aurait en tout état de cause cessé d'être en vigueur en tant que traité le 31 décembre 1992, à la suite de la «disparition de l'une des parties». A cette date, la Tchécoslovaquie a cessé d'exister comme entité juridique et, le 1er janvier 1993, la République tchèque et la République slovaque ont vu le jour.

118. De l'avis de la Hongrie: «Aucune règle de droit international ne prévoit la succession automatique à un traité bilatéral après disparition de l'une des parties»; un tel traité ne saurait survivre que si un autre Etat y succède par accord exprès entre ledit Etat et la partie qui s'est maintenue. Or, bien qu'il soit affirmé au deuxième paragraphe du préambule du compromis que

> «la République slovaque est l'un des deux Etats successeurs de la République fédérative tchèque et slovaque et l'unique Etat successeur en ce qui concerne les droits et obligations relatifs au projet Gabčíkovo-Nagymaros»,

la Hongrie a entendu distinguer entre, d'une part, les droits et obligations établis par le traité de 1977 qui, tels «les droits de propriété ..., perdurent» et, d'autre part, le traité lui-même. Elle a soutenu qu'au cours des négociations qui ont abouti à la signature du compromis la Slovaquie avait proposé un texte dans lequel elle aurait été expressément reconnue comme «Etat successeur de la République fédérative tchèque et slovaque» au regard du traité de 1977, mais que la Hongrie avait rejeté un tel libellé. Elle a fait observer qu'elle n'avait jamais accepté la Slovaquie comme successeur au traité de 1977. La Hongrie s'est référée à des échanges diplomatiques dans lesquels les deux Parties s'étaient mutuellement soumis, en vue d'une négociation au cas par cas, les listes des traités bilaté-

by-case basis; and Hungary emphasized that no agreement was ever reached with regard to the 1977 Treaty.

119. Hungary claimed that there was no rule of succession which could operate in the present case to override the absence of consent.

Referring to Article 34 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, in which "a rule of automatic succession to all treaties is provided for", based on the principle of continuity, Hungary argued not only that it never signed or ratified the Convention, but that the "concept of automatic succession" contained in that Article was not and is not, and has never been accepted as, a statement of general international law.

Hungary further submitted that the 1977 Treaty did not create "obligations and rights . . . relating to the régime of a boundary" within the meaning of Article 11 of that Convention, and noted that the existing course of the boundary was unaffected by the Treaty. It also denied that the Treaty was a "localized" treaty, or that it created rights "considered as attaching to [the] territory" within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States. The 1977 Treaty was, Hungary insisted, simply a joint investment. Hungary's conclusion was that there is no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia.

120. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary's notification in May 1992, remains in force between itself, as successor State, and Hungary.

Slovakia acknowledged that there was no agreement on succession to the Treaty between itself and Hungary. It relied instead, in the first place, on the "general rule of continuity which applies in the case of dissolution"; it argued, secondly, that the Treaty is one "attaching to [the] territory" within the meaning of Article 12 of the 1978 Vienna Convention, and that it contains provisions relating to a boundary.

121. In support of its first argument Slovakia cited Article 34 of the 1978 Vienna Convention, which it claimed is a statement of customary international law, and which imposes the principle of automatic succession as the rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist. Slovakia maintained that State practice in cases of dissolution tends to support continuity as the rule to be followed with regard to bilateral treaties. Slovakia having succeeded to part of the territory of the former Czechoslovakia, this would be the rule applicable in the present case.

122. Slovakia's second argument rests on "the principle of *ipso jure* continuity of treaties of a territorial or localized character". This rule, Slovakia said, is embodied in Article 12 of the 1978 Convention, which in part provides as follows:

raux dont elles souhaitaient respectivement le maintien en vigueur entre elles; et la Hongrie de souligner qu'aucun accord n'était intervenu au sujet du traité de 1977.

119. La Hongrie a exposé qu'aucune règle de succession ne pouvait en l'espèce suppléer à ce défaut de consentement.

Se référant à l'article 34 de la convention de Vienne du 23 août 1978 sur la succession d'Etats en matière de traités qui prévoit «une règle de succession automatique à tous les traités» sur la base du principe de continuité, la Hongrie a fait valoir non seulement qu'elle n'avait jamais signé ou ratifié cette convention, mais aussi que «le principe de succession automatique» posé dans cet article n'était, ni alors ni aujourd'hui, l'énoncé du droit international général et qu'il n'avait jamais été reconnu comme tel.

La Hongrie a également soutenu que le traité de 1977 n'avait pas créé «[d']obligations et [de] droits ... se rapportant au régime d'une frontière» au sens de l'article 11 de cette convention et a relevé que le tracé actuel de la frontière n'a pas été modifié par le traité. Elle a aussi nié que le traité ait un caractère «local» ou qu'il crée des droits «considérés comme attachés [au] territoire», au sens de l'article 12 de la convention de 1978, et qui, en tant que tels, ne seraient pas affectés par une succession d'Etats. La Hongrie a soutenu que le traité de 1977 prévoyait simplement un investissement conjoint. Elle en a conclu qu'il n'existait aucune base sur laquelle le traité aurait pu survivre à la disparition de la Tchécoslovaquie et s'imposer ainsi dans les relations entre elle-même et la Slovaquie.

120. D'après la Slovaquie, le traité de 1977, qui n'a pas pris fin licitement avec la notification hongroise de mai 1992, demeure en vigueur entre elle-même, Etat successeur, et la Hongrie.

La Slovaquie a reconnu qu'aucun accord n'était intervenu entre elle et la Hongrie quant à la succession au traité. Mais elle a, en premier lieu, invoqué «la règle générale de continuité qui s'applique en cas de dissolution»; et elle a, en second lieu, prétendu que le traité était «attach[é] [au] territoire», au sens de l'article 12 de la convention de Vienne de 1978, et qu'il contenait des dispositions relatives à une frontière.

121. A l'appui de son premier argument, la Slovaquie a cité l'article 34 de la convention de Vienne de 1978, qui, d'après elle, est l'énoncé du droit international coutumier et fait de la succession automatique la règle applicable en cas de dissolution d'un Etat lorsque l'Etat prédécesseur a cessé d'exister. La Slovaquie a fait valoir que la pratique des Etats en cas de dissolution tendait à confirmer que la continuité était la règle à suivre en ce qui concerne les traités bilatéraux. La Slovaquie ayant succédé à une partie du territoire de l'ancienne Tchécoslovaquie, telle serait la règle applicable en l'espèce.

122. Le deuxième argument de la Slovaquie repose sur «le principe de la continuité *ipso jure* des traités de caractère territorial ou local». Selon la Slovaquie, cette règle est consacrée à l'article 12 de la convention de 1978 qui dispose notamment ce qui suit:

"*Article 12*
Other Territorial Regimes

. . . . . .

2. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory."

According to Slovakia, "[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law". The 1977 Treaty is said to fall within its scope because of its "specific characteristics . . . which place it in the category of treaties of a localized or territorial character". Slovakia also described the Treaty as one "which contains boundary provisions and lays down a specific territorial régime" which operates in the interest of all Danube riparian States, and as "a dispositive treaty, creating rights *in rem*, independently of the legal personality of its original signatories". Here, Slovakia relied on the recognition by the International Law Commission of the existence of a "special rule" whereby treaties "intended to establish an objective régime" must be considered as binding on a successor State (*Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, Vol. III, doc. A/CONF.80/16/Add.2, p. 34). Thus, in Slovakia's view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.

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123. The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Convention reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational régime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of other users of the Dan-

«*Article 12*
Autres régimes territoriaux

. . . . . .

2. Une succession d'Etats n'affecte pas en tant que telle:

a) les obligations se rapportant à l'usage de tout territoire, ou aux restrictions à son usage, établies par un traité au bénéfice d'un groupe d'Etats ou de tous les Etats et considérées comme attachées à ce territoire;

b) les droits établis par un traité au bénéfice d'un groupe d'Etats ou de tous les Etats et se rapportant à l'usage de tout territoire, ou aux restrictions à son usage, et considérés comme attachés à ce territoire.»

Pour la Slovaquie: «On peut voir dans [cet] article [aussi] l'une de ces dispositions de la convention de Vienne qui codifient le droit international coutumier.» Le traité de 1977 entrerait dans le champ d'application de cette règle en raison de ses «caractéristiques particulières ..., qui le placent dans la catégorie des traités de caractère local ou territorial». La Slovaquie a également affirmé que le traité «cont[enait] des dispositions établissant une frontière et ... établi[ssai]t un régime territorial particulier» dans l'intérêt de tous les Etats riverains du Danube; il s'agirait d'un «traité dispositif créant des droits réels, indépendamment de la personnalité juridique des Etats qui l'ont signé à l'origine». A cet égard, la Slovaquie s'est fondée sur la reconnaissance, par la Commission du droit international, de l'existence d'une «règle spéciale», en vertu de laquelle les traités «qui visent à créer des régimes objectifs» devaient être considérés comme liant l'Etat successeur (*Documents officiels de la Conférence des Nations Unies sur la succession d'Etats en matière de traités*, vol. III, doc. A/CONF.80/16/Add.2, p. 35). Ainsi, de l'avis de la Slovaquie, le traité de 1977 n'était pas de ceux qui auraient pu prendre fin du fait de la disparition de l'une des parties d'origine.

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123. La Cour ne juge pas nécessaire, aux fins de l'espèce, de discuter du point de savoir si l'article 34 de la convention de 1978 reflète ou non l'état du droit international coutumier. Pour son analyse actuelle, la nature et le caractère particuliers du traité de 1977 présentent davantage de pertinence. Un examen de ce traité confirme que ce dernier, outre qu'il prévoit incontestablement un investissement conjoint, porte principalement sur un projet de construction et d'exploitation conjointe d'un vaste complexe intégré et indivisible d'ouvrages et d'installations sur des parties bien définies des territoires respectifs de la Hongrie et de la Tchécoslovaquie, le long du Danube. Le traité a aussi établi le régime de navigation applicable à un tronçon important d'un cours d'eau international, notamment en faisant désormais passer le chenal principal de navigation internationale par le canal de dérivation. Ce faisant, il a inévitablement créé

ube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified "treaties of a territorial character" as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States (*Official Records of the United Nations Conference on the Succession of States in respect of Treaties*, Vol. III, doc. A/CONF.80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties" (*ibid.*, p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force (*ibid.*, pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

124. It might be added that Slovakia also contended that, while still a constituent part of Czechoslovakia, it played a role in the development of the Project, as it did later, in the most critical phase of negotiations with Hungary about the fate of the Project. The evidence shows that the Slovak Government passed resolutions prior to the signing of the 1977 Treaty in preparation for its implementation; and again, after signature, expressing its support for the Treaty. It was the Slovak Prime Minister who attended the meeting held in Budapest on 22 April 1991 as the Plenipotentiary of the Federal Government to discuss questions arising out of the Project. It was his successor as Prime Minister who notified his Hun-

une situation qui a une incidence sur les intérêts des autres utilisateurs du Danube. De plus, les intérêts d'Etats tiers ont été expressément reconnus à son article 18, aux termes duquel les parties se sont engagées à veiller à ce que «la navigation puisse se poursuivre de façon ininterrompue et dans des conditions de sécurité dans le chenal international», conformément aux obligations qui sont les leurs en vertu de la convention relative au régime de la navigation sur le Danube du 18 août 1948.

Dans son commentaire sur le projet d'articles relatifs à la succession d'Etats en matière de traités, adopté à sa vingt-sixième session, la Commission du droit international a précisé que tant la doctrine traditionnelle que les auteurs modernes considéraient qu'une succession d'Etats était sans effet sur «les traités territoriaux» (*Documents officiels de la Conférence des Nations Unies sur la succession d'Etats en matière de traités*, vol. III, doc. A/CONF.80/16/Add.2, p. 30, par. 2). Le projet d'article 12, qui reflète ce principe, a par la suite été repris tel quel dans la convention de Vienne de 1978. La Cour considère que l'article 12 traduit une règle de droit international coutumier; elle prend note de ce qu'aucune des Parties ne le conteste. En outre, la Commission a indiqué que «les traités concernant les droits sur les eaux ou la navigation fluviale sont généralement considérés comme pouvant être compris dans la catégorie des traités territoriaux» (*ibid.*, p. 37, par. 26). La Cour fait observer que l'article 12, en prévoyant seulement, sans se référer au traité lui-même, que les droits et obligations de caractère territorial établis par un traité ne sont pas affectés par une succession d'Etats, pourrait sembler aller dans le sens de la position de la Hongrie plutôt que dans celui de la position slovaque. Néanmoins, la Cour conclut que ce libellé a en fait été retenu pour tenir compte de ce que, en de nombreux cas, les traités qui avaient établi des frontières ou des régimes territoriaux n'étaient plus en vigueur (*ibid.*, p. 29-42). Ceux qui demeuraient en vigueur n'en devaient pas moins lier l'Etat successeur.

Compte tenu de tous ces éléments, la Cour estime qu'au vu de son contenu le traité de 1977 doit être considéré comme établissant un régime territorial au sens de l'article 12 de la convention de Vienne de 1978. Il a créé des droits et obligations «attachés» aux secteurs du Danube auxquels il se rapporte; ainsi, une succession d'Etats ne saurait avoir d'incidence sur le traité lui-même. La Cour en conclut que le traité de 1977 lie la Slovaquie depuis le 1er janvier 1993.

124. Il peut être ajouté que la Slovaquie a également fait valoir que, étant encore une partie constituante de la Tchécoslovaquie, elle a joué un rôle aussi bien dans la mise au point du projet qu'ultérieurement dans la phase la plus critique des négociations avec la Hongrie sur le sort de celui-ci. Il résulte du dossier que le Gouvernement slovaque a adopté des résolutions avant la signature du traité de 1977, pour en préparer l'application, puis, après la signature, pour exprimer son attachement à celui-ci. C'est le premier ministre slovaque qui a pris part à la réunion tenue à Budapest le 22 avril 1991 en tant que plénipotentiaire du gouvernement fédéral pour discuter des questions afférentes au projet. C'est son successeur au poste de

garian counterpart by letter on 30 July 1991 of the decision of the Government of the Slovak Republic, as well as of the Government of the Czech and Slovak Federal Republic, to proceed with the "provisional solution" (see paragraph 63 above); and who wrote again on 18 December 1991 to the Hungarian Minister without Portfolio, renewing an earlier suggestion that a joint commission be set up under the auspices of the European Communities to consider possible solutions. The Slovak Prime Minister also wrote to the Hungarian Prime Minister in May 1992 on the subject of the decision taken by the Hungarian Government to terminate the Treaty, informing him of resolutions passed by the Slovak Government in response.

It is not necessary, in the light of the conclusions reached in paragraph 123 above, for the Court to determine whether there are legal consequences to be drawn from the prominent part thus played by the Slovak Republic. Its role does, however, deserve mention.

* * *

125. The Court now turns to the other legal consequences arising from its Judgment.

As to this, Hungary argued that future relations between the Parties, as far as Variant C is concerned, are not governed by the 1977 Treaty. It claims that it is entitled, pursuant to the Convention of 1976 on the Regulation of Water Management Issues of Boundary Waters, to "50% of the natural flow of the Danube at the point at which it crosses the boundary below Čunovo" and considers that the Parties

> "are obliged to enter into negotiations in order to produce the result that the water conditions along the area from below Čunovo to below the confluence at Sap become jointly defined water conditions as required by Article 3 *(a)* of the 1976 Convention".

Hungary moreover indicated that any mutually accepted long-term discharge régime must be "capable of avoiding damage, including especially damage to biodiversity prohibited by the [1992 Rio Convention on Biological Diversity]". It added that "a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region" should be carried out.

126. Hungary also raised the question of financial accountability for the failure of the original project and stated that both Parties accept the fact that the other has "proprietary and financial interests in the residues of the original Project and that an accounting has to be carried out". Furthermore, it noted that:

> "Other elements of damage associated with Variant C on Hungarian territory also have to be brought into the accounting . . ., as well as electricity production since the diversion",

premier ministre qui a notifié à son homologue hongrois, par lettre du 30 juillet 1991, la décision du Gouvernement de la République slovaque et celle du Gouvernement de la République fédérative tchèque et slovaque de recourir à la «solution provisoire» (voir le paragraphe 63 ci-dessus); et c'est lui qui a de nouveau écrit, le 18 décembre 1991, au ministre hongrois sans portefeuille, pour réitérer la proposition de constituer, sous les auspices des Communautés européennes, un comité mixte chargé d'examiner les solutions possibles. Le premier ministre slovaque a également écrit au premier ministre hongrois en mai 1992 au sujet de la décision du Gouvernement hongrois de mettre fin au traité, l'informant des résolutions que le Gouvernement slovaque avait adoptées en réaction à cette décision.

Au vu des conclusions dégagées au paragraphe 123 ci-dessus, point n'est besoin pour la Cour de déterminer s'il y a lieu de tirer des conséquences juridiques du rôle marquant ainsi joué par la République slovaque. Il convenait toutefois de rappeler ce rôle.

* * *

125. La Cour en vient maintenant aux autres conséquences juridiques de son arrêt.

A cet égard, la Hongrie a fait valoir que les relations futures entre les Parties, en ce qui concerne la variante C, ne sont pas régies par le traité de 1977. Elle prétend avoir droit, en vertu de la convention de 1976 sur la réglementation en matière d'eaux frontières, à «cinquante pour cent du débit naturel du Danube au point où il traverse la frontière en aval de Čunovo» et considère que les Parties

> «sont tenues d'engager des négociations de façon à parvenir au résultat que les conditions concernant le régime des eaux de la zone en aval de Čunovo jusqu'à l'aval du confluent à Sap deviennent des conditions conjointement définies, comme le prescrit l'article 3 *a)* de la convention de 1976».

La Hongrie a en outre précisé qu'un régime de débit à long terme accepté d'un commun accord devait être «capable d'éviter des dommages, y compris en particulier des dommages à la biodiversité qu'interdit la [convention de Rio de 1992 sur la diversité biologique]». Elle a ajouté qu'une «évaluation conjointe de l'impact sur l'environnement ainsi que de l'avenir des ouvrages de la variante C dans le cadre du développement durable de la région» devrait être effectuée.

126. La Hongrie a également soulevé la question des responsabilités financières pour l'échec du projet initial et a indiqué que les deux Parties acceptent le fait que chacune a des «intérêts patrimoniaux et financiers dans ce qui reste du projet initial, et qu'il faudra procéder à une évaluation comptable». Elle a observé par ailleurs que:

> «D'autres éléments des dommages associés à la variante C en territoire hongrois devront également être pris en compte ..., de même que la production d'électricité depuis le détournement du fleuve»,

and that: "The overall situation is a complex one, and it may be most easily resolved by some form of lump sum settlement."

127. Hungary stated that Slovakia had incurred international responsibility and should make reparation for the damage caused to Hungary by the operation of Variant C. In that connection, it referred, in the context of reparation of the damage to the environment, to the rule of *restitutio in integrum*, and called for the re-establishment of "joint control by the two States over the installations maintained as they are now", and the "re-establishment of the flow of [the] waters to the level at which it stood prior to the unlawful diversion of the river". It also referred to reparation of the damage to the fauna, the flora, the soil, the sub-soil, the groundwater and the aquifer, the damages suffered by the Hungarian population on account of the increase in the uncertainties weighing on its future *(pretium doloris)*, and the damage arising from the unlawful use, in order to divert the Danube, of installations over which the two Parties exercised joint ownership.

Lastly, Hungary called for the "cessation of the continuous unlawful acts" and a "guarantee that the same actions will not be repeated", and asked the Court to order "the permanent suspension of the operation of Variant C".

128. Slovakia argued for its part that Hungary should put an end to its unlawful conduct and cease to impede the application of the 1977 Treaty, taking account of its "flexibility and of the important possibilities of development for which it provides, or even of such amendments as might be made to it by agreement between the Parties, further to future negotiations". It stated that joint operations could resume on a basis jointly agreed upon and emphasized the following:

> "whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future.
>
> . . . . . .
>
> Provided the bypass canal and the Gabčíkovo Power-station and Locks — both part of the original Treaty, and not part of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunakiliti and Čunovo, bearing Nagymaros in mind."

It indicated that the Gabčíkovo power plant would not operate in peak mode "if the evidence of environmental damage [was] clear and accepted by both Parties". Slovakia noted that the Parties appeared to agree that an accounting should be undertaken "so that, guided by the Court's findings on responsibility, the Parties can try to reach a global settlement". It

et que: «La situation générale est une situation complexe, et la façon la plus simple d'y apporter une solution serait par le règlement d'une somme forfaitaire.»

127. La Hongrie a indiqué que la Slovaquie avait engagé sa responsabilité internationale et devait réparer les dommages subis par la Hongrie du fait de la mise en œuvre de la variante C. Elle s'est référée à cet égard, dans le contexte de la réparation du dommage à l'environnement, à la règle de la *restitutio in integrum*, et a demandé que soient rétablis le «contrôle conjoint des deux Etats sur les installations conservées», ainsi que le «débit des eaux au niveau qui était le sien avant le détournement illicite du fleuve». Elle a également évoqué la réparation des dommages causés à la faune, à la flore, aux sols, aux sous-sols, à la nappe phréatique et à l'aquifère, des dommages subis par la population hongroise du fait de l'accroissement des incertitudes pesant sur son avenir *(pretium doloris)*, ainsi que des dommages engendrés par l'utilisation illégale, aux fins de détournement du Danube, des installations sur lesquelles les deux Parties exerçaient une propriété conjointe.

La Hongrie a enfin demandé la «cessation des faits illicites continus» et la «garantie de non-répétition des mêmes faits», la Cour étant ainsi appelée à ordonner «l'interruption définitive du fonctionnement de la variante C».

128. La Slovaquie a fait valoir pour sa part que la Hongrie devait mettre un terme à son comportement illicite et cesser de faire obstacle à l'application du traité de 1977, compte tenu de la «flexibilité [du traité] et des importantes possibilités d'évolution qu'il ménage, voire des modifications qui pourraient lui être apportées par accord entre les Parties à la suite de négociations futures». Elle a indiqué que des opérations conjointes pourraient redémarrer sur une base convenue d'un commun accord et souligné ce qui suit:

> «que l'ouvrage de Nagymaros soit construit tel qu'il avait été initialement prévu, ou qu'il soit construit ailleurs sous une autre forme, ou même qu'il ne soit pas construit du tout, c'est une question dont les Parties doivent décider, à un moment donné dans l'avenir.
>
> . . . . . .
>
> Pourvu que le canal de dérivation et la centrale hydro-électrique de Gabčíkovo et ses écluses — qui font tous partie du traité d'origine, et non pas de la variante C — demeurent opérationnels et économiquement viables et efficaces, la Slovaquie est prête à négocier au sujet du rôle futur de Dunakiliti et de Čunovo, tout en tenant compte de Nagymaros.»

Elle a précisé que la centrale de Gabčíkovo ne serait pas exploitée en régime de pointe «si la preuve d'un dommage à l'environnement apparaissait clairement et était reconnue par les deux Parties. La Slovaquie a observé que les Parties semblaient s'accorder sur la nécessité de procéder à une évaluation comptable, «de sorte que, guidées par les conclusions de

added that the Parties would have to agree on how the sums due are to be paid.

129. Slovakia stated that Hungary must make reparation for the deleterious consequences of its failures to comply with its obligations, "whether they relate to its unlawful suspensions and abandonments of works or to its formal repudiation of the Treaty as from May 1992", and that compensation should take the form of a *restitutio in integrum*. It indicated that "Unless the Parties come to some other arrangement by concluding an agreement, *restitutio in integrum* ought to take the form of a *return* by Hungary, *at a future time*, to its obligations under the Treaty" and that "For compensation to be 'full' . . ., to 'wipe out all the consequences of the illegal act' . . ., a payment of compensation must . . . *be added* to the *restitutio* . . ." Slovakia claims compensation which must include both interest and loss of profits and should cover the following heads of damage, which it offers by way of guidance:

(1) Losses caused to Slovakia in the Gabčíkovo sector: costs incurred from 1990 to 1992 by Czechoslovakia in protecting the structures of the G/N project and adjacent areas; the cost of maintaining the old bed of the River Danube pending the availability of the new navigation canal, from 1990 to 1992; losses to the Czechoslovak navigation authorities due to the unavailability of the bypass canal from 1990 to 1992; construction costs of Variant C (1990-1992).

(2) Losses caused to Slovakia in the Nagymaros sector: losses in the field of navigation and flood protection incurred since 1992 by Slovakia due to the failure of Hungary to proceed with the works.

(3) Loss of electricity production.

Slovakia also calls for Hungary to "give the appropriate guarantees that it will abstain from preventing the application of the Treaty and the continuous operation of the system". It argued from that standpoint that it is entitled "to be given a formal assurance that the internationally wrongful acts of Hungary will not recur", and it added that "the maintenance of the closure of the Danube at Čunovo constitutes a guarantee of that kind", unless Hungary gives an equivalent guarantee "within the framework of the negotiations that are to take place between the Parties".

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130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the *past* conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992 as well as its effects on the existence of the Treaty.

131. Now the Court has, on the basis of the foregoing findings, to

la Cour en matière de responsabilité, [elles] puissent s'efforcer de parvenir à un règlement global». Elle a ajouté que les Parties devraient s'entendre sur les modalités de paiement des sommes dues.

129. La Slovaquie a indiqué que la Hongrie devait réparer les conséquences dommageables de ses manquements, «qu'il s'agisse de ses suspensions et abandons illicites de travaux ou de sa répudiation formelle du traité à partir de mai 1992», et que la réparation devait prendre la forme d'une *restitutio in integrum*. Elle a précisé que cette dernière «devrait se traduire, sauf si les Parties en conviennent autrement par voie d'accord, par la *reprise* par la Hongrie, *à l'avenir*, de ses obligations conventionnelles», et dit que: «Pour que la réparation soit «intégrale» ..., pour qu'elle «efface toutes les conséquences de l'acte illicite» ..., une indemnisation doit ... *s'ajouter* à la *restitutio*...» L'indemnisation que la Slovaquie demande devrait inclure à la fois les intérêts et le manque à gagner et devrait couvrir les chefs de préjudice suivants, qu'elle a mentionnés à titre indicatif:

1) Pertes causées à la Slovaquie dans le secteur de Gabčíkovo: coûts encourus de 1990 à 1992 par la Tchécoslovaquie pour protéger les structures du projet G/N et des zones adjacentes; coût de l'entretien de l'ancien lit du Danube jusqu'à ce que l'on dispose du nouveau canal pour la navigation de 1990 à 1992; pertes encourues par les autorités tchécoslovaques de navigation en raison de l'impossibilité d'utiliser le canal de dérivation de 1990 à 1992; coûts de construction de la variante C (1990-1992).
2) Pertes causées à la Slovaquie dans le secteur de Nagymaros: pertes subies par la Slovaquie depuis 1992 dans le domaine de la navigation et de la protection contre les inondations du fait que la Hongrie n'a pas poursuivi les travaux.
3) Perte de la production d'électricité.

Selon la Slovaquie, la Hongrie doit en outre «donner des garanties appropriées de s'abstenir d'empêcher l'application du traité et le fonctionnement continu du système». Elle a fait valoir dans cette perspective qu'elle est en droit «d'obtenir l'assurance formelle que les faits internationalement illicites de la Hongrie ne se reproduiront pas», et a ajouté que «le maintien de la fermeture du Danube à Čunovo constitue une telle garantie», à moins qu'une assurance équivalente ne soit donnée par la Hongrie «dans le cadre des négociations à intervenir entre les Parties».

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130. La Cour fait observer que la partie de l'arrêt où elle répond aux questions posées au paragraphe 1 de l'article 2 du compromis revêt un caractère déclaratoire. Elle y traite du comportement *passé* des parties et détermine la licéité ou l'illicéité de ce comportement de 1989 à 1992, ainsi que ses effets sur l'existence du traité.

131. Il revient maintenant à la Cour, sur la base de ses conclusions

determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

* *

132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis*.

133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.

This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčíkovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Čunovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of

précédentes, d'établir quel devrait être le comportement des Parties *à l'avenir*. La présente partie de l'arrêt est plus normative que déclaratoire, parce qu'elle définit les droits et obligations des Parties. C'est à la lumière de cette définition que les Parties devront rechercher un accord sur les modalités d'exécution de l'arrêt, ainsi qu'elles en sont convenues à l'article 5 du compromis.

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132. A cet égard, il est d'une importance primordiale que la Cour ait constaté que le traité de 1977 est toujours en vigueur et régit par conséquent les relations entre les Parties. Ces relations sont certes aussi soumises aux règles des autres conventions pertinentes auxquelles les deux Etats sont parties, aux règles du droit international général et, en l'espèce, aux règles de la responsabilité des Etats; mais elles sont gouvernées avant tout par les règles applicables du traité de 1977 en tant que *lex specialis*.

133. La Cour ne saurait toutefois ignorer qu'aucune des parties n'a pleinement exécuté le traité depuis des années, ni d'ailleurs que les parties, par leurs actes et leurs omissions, ont contribué à créer la situation de fait qui prévaut aujourd'hui. En se prononçant sur les exigences auxquelles le comportement à venir des Parties devra satisfaire en droit, la Cour ne peut négliger de tenir compte de cette situation de fait et des possibilités et impossibilités pratiques qui en résultent.

Cela ne signifie pas que les faits — en l'occurrence, des faits qui découlent de comportements illicites — déterminent le droit. La Cour fait droit au principe *ex injuria jus non oritur* lorsqu'elle conclut que les relations juridiques créées par le traité de 1977 subsistent et ne sauraient en l'espèce être considérées comme annulées par un comportement illicite.

C'est pourquoi il est essentiel de replacer la situation de fait, telle qu'elle s'est développée depuis 1989, dans le contexte de la relation conventionnelle qui s'est maintenue et qui est appelée à évoluer, afin de réaliser son objet et son but dans toute la mesure du possible. Car ce n'est qu'à cette condition qu'il pourra être porté remède à la situation irrégulière due aux manquements des deux Parties à leurs obligations conventionnelles.

134. Ce qui aurait pu être une application correcte du droit en 1989 ou 1992, si l'affaire avait été soumise à la Cour à l'époque, pourrait représenter un mal-jugé en 1997. La Cour ne saurait ignorer le fait que la centrale de Gabčíkovo fonctionne depuis près de cinq ans, que le canal de dérivation qui alimente la centrale reçoit ses eaux d'un réservoir nettement plus petit formé par un barrage qui n'a pas été construit à Dunakiliti mais à Čunovo, et que la centrale est exploitée au fil de l'eau et non en régime de pointe comme il était prévu à l'origine. La Cour ne saurait pas davantage ne pas tenir compte de ce que non seulement l'ouvrage de Nagymaros n'a pas été construit, mais qu'il n'y a plus aucune raison de le construire puisque les deux Parties ont, dans les faits, écarté l'hypothèse d'une exploitation en régime de pointe.

135. Comme la Cour a déjà eu l'occasion de le souligner, le traité de 1977 ne prévoyait pas seulement un plan d'investissement conjoint pour

energy, but it was designed to serve other objectives as well: the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and obligations of result.

136. It could be said that that part of the obligations of performance which related to the construction of the System of Locks — in so far as they were not yet implemented before 1992 — have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Čunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabčíkovo and Nagymaros was prescribed by the Treaty itself. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak hour mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of

la production d'énergie, mais servait également d'autres objectifs: l'amélioration de la navigation sur le Danube, la maîtrise des crues, la régulation de l'évacuation des glaces et la protection de l'environnement naturel. Aucun de ces objectifs ne s'est vu accorder de priorité absolue par rapport aux autres, bien que le traité mette l'accent sur la construction d'un système d'écluses en vue de la production d'énergie. Aucun d'entre eux n'a perdu de son importance. Pour les atteindre, les parties ont accepté d'assumer des obligations de comportement, des obligations de faire et des obligations de résultat.

136. On pourrait dire que parmi les obligations de faire, celles ayant trait à la construction du système d'écluses — dans la mesure où elles n'avaient pas encore été exécutées avant 1992 — ont été dépassées par les événements. La Cour appliquerait le droit en perdant entièrement de vue la réalité si elle devait ordonner le plein rétablissement de ces obligations et la démolition des ouvrages de Čunovo, alors que les structures existantes peuvent adéquatement servir la réalisation des objectifs du traité.

137. C'est d'abord et avant tout aux Parties de décider si tel est bien le cas. Le traité de 1977 prévoyait que ses différents objectifs devraient être atteints par l'effet d'un programme intégré et consolidé, qui devait être précisé dans le plan contractuel conjoint. Ce dernier a été, jusqu'en 1989, fréquemment adapté et amendé pour mieux tenir compte des souhaits des parties. Ce plan a aussi été explicitement décrit comme le moyen de réaliser les objectifs que sont le maintien de la qualité de l'eau et la protection de l'environnement.

138. Le traité de 1977 n'a jamais prévu un système rigide, bien qu'il ait lui-même prescrit la construction d'un système d'écluses à Gabčíkovo et à Nagymaros. A cet égard, toutefois, il convient de prendre en considération les positions adoptées ultérieurement par les parties. Non seulement la Hongrie a insisté pour mettre fin aux travaux de construction à Nagymaros, mais la Tchécoslovaquie a affirmé à différentes reprises au cours des négociations qu'elle était disposée à envisager une limitation, voire l'abandon, de l'exploitation en régime de pointe. Dans cette dernière hypothèse, la construction du barrage de Nagymaros serait devenue inutile. Les parties ont donc reconnu en pratique que les termes exprès du traité lui-même étaient négociables.

139. La Cour est d'avis que les Parties sont juridiquement tenues, au cours des négociations qu'elles mèneront en application de l'article 5 du compromis, d'envisager dans le contexte du traité de 1977 de quelle façon elles peuvent servir au mieux les objectifs multiples du traité, en gardant à l'esprit qu'ils devraient tous être atteints.

140. Il est clair que les incidences du projet sur l'environnement et ses implications pour celui-ci seront nécessairement une question clef. Les nombreux rapports scientifiques présentés à la Cour par les Parties, même si leurs conclusions sont souvent contradictoires, fournissent amplement la preuve que ces incidences et ces implications sont considérables.

Aux fins de l'évaluation des risques écologiques, ce sont les normes actuelles qui doivent être prises en considération. Non seulement le libellé

Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the *North Sea Continental Shelf* cases:

> "[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" (*I.C.J. Reports 1969*, p. 47, para. 85).

142. What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and

des articles 15 et 19 le permet, mais il le prescrit même dans la mesure où ces articles mettent à la charge des parties une obligation continue, et donc nécessairement évolutive, de maintenir la qualité de l'eau du Danube et de protéger la nature.

La Cour ne perd pas de vue que, dans le domaine de la protection de l'environnement, la vigilance et la prévention s'imposent en raison du caractère souvent irréversible des dommages causés à l'environnement et des limites inhérentes au mécanisme même de réparation de ce type de dommages.

Au cours des âges, l'homme n'a cessé d'intervenir dans la nature pour des raisons économiques et autres. Dans le passé, il l'a souvent fait sans tenir compte des effets sur l'environnement. Grâce aux nouvelles perspectives qu'offre la science et à une conscience croissante des risques que la poursuite de ces interventions à un rythme inconsidéré et soutenu représenterait pour l'humanité — qu'il s'agisse des générations actuelles ou futures —, de nouvelles normes et exigences ont été mises au point, qui ont été énoncées dans un grand nombre d'instruments au cours des deux dernières décennies. Ces normes nouvelles doivent être prises en considération et ces exigences nouvelles convenablement appréciées non seulement lorsque des Etats envisagent de nouvelles activités, mais aussi lorsqu'ils poursuivent des activités qu'ils ont engagées dans le passé. Le concept de développement durable traduit bien cette nécessité de concilier développement économique et protection de l'environnement.

Aux fins de la présente espèce, cela signifie que les Parties devraient, ensemble, examiner à nouveau les effets sur l'environnement de l'exploitation de la centrale de Gabčíkovo. En particulier, elles doivent trouver une solution satisfaisante en ce qui concerne le volume d'eau à déverser dans l'ancien lit du Danube et dans les bras situés de part et d'autre du fleuve.

141. Il n'appartient pas à la Cour de déterminer quel sera le résultat final des négociations à mener par les Parties. Ce sont les Parties elles-mêmes qui doivent trouver d'un commun accord une solution qui tienne compte des objectifs du traité — qui doivent être atteints de façon conjointe et intégrée — de même que des normes du droit international de l'environnement et des principes du droit relatif aux cours d'eau internationaux. La Cour rappellera dans ce contexte ce qu'elle a dit dans les affaires du *Plateau continental de la mer du Nord*:

> «les parties ont l'obligation de se comporter de telle manière que la négociation ait un sens, ce qui n'est pas le cas lorsque l'une d'elles insiste sur sa propre position sans envisager aucune modification» (*C.I.J. Recueil 1969*, p. 47, par. 85).

142. Ce que la règle *pacta sunt servanda*, telle que reflétée à l'article 26 de la convention de Vienne de 1969 sur le droit des traités, exige en l'espèce des Parties, c'est de trouver d'un commun accord une solution dans le cadre de coopération que prévoit le traité.

L'article 26 associe deux éléments, qui sont d'égale importance. Il dispose que: «Tout traité en vigueur lie les parties et doit être exécuté par

must be performed by them in good faith." This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.

Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that contracting party in the jointly prescribed manner.

The Court is of the opinion that the works at Čunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Čunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a *de facto* status into a treaty-based régime.

It appears from various parts of the record that, given the current state

elles de bonne foi.» De l'avis de la Cour, ce dernier élément implique qu'au cas particulier c'est le but du traité, et l'intention dans laquelle les parties ont conclu celui-ci, qui doivent prévaloir sur son application littérale. Le principe de bonne foi oblige les Parties à l'appliquer de façon raisonnable et de telle sorte que son but puisse être atteint.

143. Au cours de ce différend, les deux Parties ont sollicité l'aide de la Commission des Communautés européennes. Du fait que les Parties ont adopté des positions diamétralement opposées sur le point de savoir ce que devait être le résultat des pourparlers trilatéraux qui étaient envisagés, ceux-ci ont échoué. Lorsque, une fois le présent arrêt rendu, les deux Parties engageront des négociations bilatérales sans conditions préalables, elles pourront bénéficier de l'assistance et de l'expertise d'une tierce partie. L'acceptation d'une telle aide par les Parties attesterait de la bonne foi marquant les négociations bilatérales qu'elles mèneront pour donner effet à l'arrêt de la Cour.

144. Le traité de 1977 ne prévoit pas seulement un programme d'investissement conjoint, il établit aussi un régime. Selon le traité, les principaux ouvrages du système d'écluses sont la propriété conjointe des parties; ils seront gérés en tant qu'unité unique coordonnée; et les bénéfices du projet seront partagés à parts égales.

Puisque la Cour a conclu que le traité est toujours en vigueur et qu'aux termes de celui-ci le régime conjoint en est un élément fondamental, elle est d'avis qu'à moins que les Parties n'en disposent autrement un tel régime devrait être rétabli.

145. Le paragraphe 1 de l'article 10 du traité dispose que les ouvrages du système d'écluses constituant la propriété commune des parties contractantes seront gérés, en tant qu'unité coordonnée et conformément aux procédures opérationnelles arrêtées d'un commun accord, par l'organisme de gestion agréé de la partie contractante sur le territoire de laquelle les ouvrages auront été construits. Le paragraphe 2 du même article énonce que les ouvrages du système d'écluses appartenant à l'une des parties contractantes seront gérés ou entretenus indépendamment par les organismes de cette partie selon des modalités arrêtées d'un commun accord.

La Cour estime que les ouvrages de Čunovo devraient devenir une unité exploitée conjointement au sens du paragraphe 1 de l'article 10, compte tenu de leur rôle central dans le fonctionnement de ce qui reste du projet et dans le régime de gestion des eaux. Le barrage de Čunovo a assumé le rôle qui avait été prévu à l'origine pour les ouvrages de Dunakiliti, et il devrait donc bénéficier d'un statut analogue.

146. La Cour conclut également que la variante C, qu'elle a estimé fonctionner d'une manière incompatible avec le traité, devrait être mise en conformité avec ce dernier. L'association de la Hongrie, sur un pied d'égalité, à l'exploitation, à la gestion et aux bénéfices de la variante C, aura pour effet que le statut de fait qui s'applique à cette dernière fera place à un régime conventionnel.

Il ressort des différents éléments du dossier qu'en l'état actuel des

of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which:

> "Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention." (General Assembly doc. A/51/869 of 11 April 1997.)

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148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case concerning the *Factory at Chorzów*:

> "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (*P.C.I.J., Series A, No. 17*, p. 47).

150. Reparation must, "as far as possible", wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out "as far as possible" if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What it is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Čunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.

informations soumises à la Cour la variante C semble pouvoir fonctionner d'une façon qui permette à la fois l'exploitation économique du système de production d'électricité et la satisfaction des préoccupations écologiques essentielles.

Régulariser la variante C en en faisant une partie intégrante d'un système d'ouvrages opérationnel unique et indivisible apparaît également nécessaire pour donner de nouveau effet à l'article 9 du traité, qui prévoit que les parties contractantes participeront, à parts égales, à l'utilisation et aux avantages du système d'écluses.

147. Le rétablissement du régime conjoint reflétera aussi de façon optimale le concept d'une utilisation conjointe des ressources en eau partagées pour atteindre les différents objectifs mentionnés dans le traité et ce, conformément au paragraphe 2 de l'article 5 de la convention sur le droit relatif aux utilisations des cours d'eau internationaux à des fins autres que la navigation, aux termes duquel:

> «Les Etats du cours d'eau participent à l'utilisation, à la mise en valeur et à la protection d'un cours d'eau international de manière équitable et raisonnable. Cette participation comporte à la fois le droit d'utiliser le cours d'eau et le devoir de coopérer à sa protection et à sa mise en valeur, comme prévu dans les présents articles.» (Assemblée générale, doc. A/51/869 du 11 avril 1997.)

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148. Jusqu'ici, la Cour a indiqué quels devraient être, d'après elle, les effets de sa décision suivant laquelle le traité de 1977 est toujours en vigueur. Elle en vient maintenant aux conséquences juridiques des actes internationalement illicites commis par les Parties.

149. Dans son arrêt du 13 septembre 1928 en l'affaire relative à l'*Usine de Chorzów*, la Cour permanente de Justice internationale a dit:

> «la réparation doit, autant que possible, effacer toutes les conséquences de l'acte illicite et rétablir l'état qui aurait vraisemblablement existé si ledit acte n'avait pas été commis» (*C.P.J.I. série A n° 17*, p. 47).

150. La réparation doit «autant que possible» effacer toutes les conséquences de l'acte illicite. En l'espèce, les conséquences des actes illicites commis par les deux Parties seront effacées «autant que possible» si ces dernières reprennent leur coopération pour l'utilisation des ressources en eau partagées du Danube et si le programme pluridimensionnel d'utilisation, de mise en valeur et de protection du cours d'eau, en tant qu'unité unique coordonnée, est réalisé de manière équitable et raisonnable. Ce que peuvent faire les Parties, c'est rétablir une gestion conjointe de ce qui reste du projet. A cette fin, il leur est loisible, d'un commun accord, de conserver les ouvrages de Čunovo, en apportant des changements dans le mode d'exploitation du système pour ce qui est de la répartition de l'eau et de l'électricité, et de ne pas construire les ouvrages de Nagymaros.

151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčíkovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.

It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčíkovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Čunovo complex, it must pay a proportionate share of the building and running costs.

* * *

151. La Cour a été priée par les deux Parties de déterminer les conséquences de son arrêt en ce qui est du paiement de dommages et intérêts. Aux termes du préambule du compromis, les Parties sont convenues que la Slovaquie est l'unique Etat successeur de la Tchécoslovaquie en ce qui concerne les droits et obligations relatifs au projet Gabčíkovo-Nagymaros. La Slovaquie peut donc être tenue de verser des indemnités, non seulement pour ses propres faits illicites, mais aussi pour ceux de la Tchécoslovaquie, et elle a le droit d'être indemnisée des dommages subis tant par la Tchécoslovaquie que par elle-même en raison du comportement illicite de la Hongrie.

152. La Cour n'a pas été priée à ce stade de déterminer le montant des dommages et intérêts dus, mais d'indiquer sur quelle base ils doivent être versés. Les deux Parties ont prétendu avoir subi des pertes financières considérables et elles demandent toutes deux à en être indemnisées.

Il est une règle bien établie du droit international, qu'un Etat lésé est en droit d'être indemnisé, par l'Etat auteur d'un fait internationalement illicite, des dommages résultant de celui-ci. Dans le présent arrêt, la Cour a conclu que les deux Parties avaient commis des actes internationalement illicites et elle a constaté que ceux-ci sont à l'origine des dommages subis par les Parties; en conséquence, la Hongrie et la Slovaquie sont toutes deux tenues de verser des indemnités et sont toutes deux en droit d'en recevoir.

La Slovaquie est donc en droit d'être indemnisée des dommages subis tant par la Tchécoslovaquie que par elle-même du fait de la décision hongroise de suspendre puis d'abandonner les travaux à Nagymaros et à Dunakiliti, car ces agissements ont occasionné le report de la mise en service de la centrale de Gabčíkovo et, une fois celle-ci mise en service, des changements dans son mode de fonctionnement.

La Hongrie est en droit d'être indemnisée des dommages qu'elle a subis du fait du détournement du Danube car la Tchécoslovaquie, en mettant en service la variante C, et la Slovaquie, en la maintenant en service, ont privé la Hongrie de sa part légitime de ressources en eau partagées et ont exploité ces ressources essentiellement à leur profit.

153. Toutefois, compte tenu de ce que les Parties ont commis des actes illicites croisés, la Cour tient à faire observer que la question de l'indemnisation pourrait être résolue de façon satisfaisante, dans le cadre d'un règlement d'ensemble, si chacune des Parties renonçait à toutes ses demandes et contre-demandes d'ordre financier ou les annulait.

154. La Cour tient en même temps à souligner que le règlement des comptes concernant la construction des ouvrages est une question distincte de celle de l'indemnisation et doit être effectué conformément au traité de 1977 et aux instruments y afférents. Si la Hongrie participe à l'exploitation du complexe de Čunovo et reçoit sa part de bénéfices, elle devra payer une part proportionnelle des coûts de construction et de fonctionnement.

* * *

155. For these reasons,

THE COURT,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. By fourteen votes to one,

Finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judge* Herczegh;

B. By nine votes to six,

Finds that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. By ten votes to five,

Finds that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution";

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

AGAINST: *Judges* Oda, Koroma, Vereshchetin, Parra-Aranguren; *Judge* ad hoc Skubiszewski;

D. By eleven votes to four,

Finds that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

IN FAVOUR: *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *President* Schwebel; *Judges* Herczegh, Fleischhauer, Rezek;

155. Par ces motifs,

LA COUR,

1) Vu le paragraphe 1 de l'article 2 du compromis,

A. Par quatorze voix contre une,

Dit que la Hongrie n'était pas en droit de suspendre puis d'abandonner, en 1989, les travaux relatifs au projet de Nagymaros ainsi qu'à la partie du projet de Gabčíkovo dont elle était responsable aux termes du traité du 16 septembre 1977 et des instruments y afférents;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: M. Herczegh, *juge*;

B. Par neuf voix contre six,

Dit que la Tchécoslovaquie était en droit de recourir, en novembre 1991, à la «solution provisoire» telle que décrite aux termes du compromis;

POUR: M. Weeramantry, *Vice-Président*; MM. Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: M. Schwebel, *Président*; MM. Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek, *juges*;

C. Par dix voix contre cinq,

Dit que la Tchécoslovaquie n'était pas en droit de mettre en service, à partir d'octobre 1992, cette «solution provisoire»;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek, *juges*;

CONTRE: MM. Oda, Koroma, Vereshchetin, Parra-Aranguren, *juges*; M. Skubiszewski, *juge* ad hoc;

D. Par onze voix contre quatre,

Dit que la notification, le 19 mai 1992, de la terminaison du traité du 16 septembre 1977 et des instruments y afférents par la Hongrie n'a pas eu pour effet juridique d'y mettre fin;

POUR: M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: M. Schwebel, *Président*; MM. Herczegh, Fleischhauer, Rezek, *juges*;

(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. By twelve votes to three,

Finds that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer, Rezek;

B. By thirteen votes to two,

Finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

C. By thirteen votes to two,

Finds that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer;

D. By twelve votes to three,

Finds that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Oda, Koroma, Vereshchetin;

2) Vu le paragraphe 2 de l'article 2 et l'article 5 du compromis,

A. Par douze voix contre trois,

Dit que la Slovaquie, en tant que successeur de la Tchécoslovaquie, est devenue partie au traité du 16 septembre 1977 à compter du 1er janvier 1993;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Herczegh, Fleischhauer, Rezek, *juges*;

B. Par treize voix contre deux,

Dit que la Hongrie et la Slovaquie doivent négocier de bonne foi en tenant compte de la situation existante et doivent prendre toutes mesures nécessaires à l'effet d'assurer la réalisation des objectifs du traité du 16 septembre 1977, selon des modalités dont elles conviendront;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Herczegh, Fleischhauer, *juges*;

C. Par treize voix contre deux,

Dit que, sauf si les Parties en conviennent autrement, un régime opérationnel conjoint doit être établi conformément au traité du 16 septembre 1977;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Herczegh, Fleischhauer, *juges*;

D. Par douze voix contre trois,

Dit que, sauf si les Parties en conviennent autrement, la Hongrie devra indemniser la Slovaquie pour les dommages subis par la Tchécoslovaquie et par la Slovaquie du fait de la suspension et de l'abandon par la Hongrie de travaux qui lui incombaient; et la Slovaquie devra indemniser la Hongrie pour les dommages subis par cette dernière du fait de la mise en service de la «solution provisoire» par la Tchécoslovaquie et de son maintien en service par la Slovaquie;

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Oda, Koroma, Vereshchetin, *juges*;

E. By thirteen votes to two,

Finds that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and 2 C of the present operative paragraph.

IN FAVOUR: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

AGAINST: *Judges* Herczegh, Fleischhauer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of September, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Hungary and the Government of the Slovak Republic, respectively.

(Signed) Stephen M. SCHWEBEL,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

President SCHWEBEL and Judge REZEK append declarations to the Judgment of the Court.

Vice-President WEERAMANTRY and Judges BEDJAOUI and KOROMA append separate opinions to the Judgment of the Court.

Judges ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, VERESHCHETIN and PARRA-ARANGUREN and Judge *ad hoc* SKUBISZEWSKI append dissenting opinions to the Judgment of the Court.

(Initialled) S.M.S.

(Initialled) E.V.O.

E. Par treize voix contre deux,

Dit que le règlement des comptes concernant la construction et le fonctionnement des ouvrages doit être effectué conformément aux dispositions pertinentes du traité du 16 septembre 1977 et des instruments y afférents, compte dûment tenu des mesures qui auront été prises par les Parties en application des points 2 B et 2 C du présent dispositif.

POUR: M. Schwebel, *Président*; M. Weeramantry, *Vice-Président*; MM. Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek, *juges*; M. Skubiszewski, *juge* ad hoc;

CONTRE: MM. Herczegh, Fleischhauer, *juges*.

Fait en anglais et en français, le texte anglais faisant foi, au Palais de la Paix, à La Haye, le vingt-cinq septembre mil neuf cent quatre-vingt-dix-sept, en trois exemplaires, dont l'un restera déposé aux archives de la Cour et les autres seront transmis respectivement au Gouvernement de la République de Hongrie et au Gouvernement de la République slovaque.

Le Président,
(Signé) Stephen M. SCHWEBEL.

Le Greffier,
(Signé) Eduardo VALENCIA-OSPINA.

M. SCHWEBEL, Président, et M. REZEK, juge, joignent des déclarations à l'arrêt.

M. WEERAMANTRY, Vice-Président, et MM. BEDJAOUI et KOROMA, juges, joignent à l'arrêt les exposés de leur opinion individuelle.

MM. ODA, RANJEVA, HERCZEGH, FLEISCHHAUER, VERESHCHETIN et PARRA-ARANGUREN, juges, et M. SKUBISZEWSKI, juge *ad hoc*, joignent à l'arrêt les exposés de leur opinion dissidente.

(Paraphé) S.M.S.
(Paraphé) E.V.O.

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Trail smelter case (United States, Canada)

16 April 1938 and 11 March 1941

VOLUME III pp. 1905-1982

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LX.

TRAIL SMELTER CASE [1].

PARTIES: United States of America, Canada.

SPECIAL AGREEMENT: Convention of Ottawa, April 15, 1935.

ARBITRATORS: Charles Warren (U.S.A.), Robert A. E. Greenshields (Canada), Jan Frans Hostie (Belgium).

AWARD: April 16, 1938, and March 11, 1941.

Canadian company.—Smelter operated in Canada.—Fumes.—Damages caused on United States territory.—Recourse to arbitration.—Date of damages.—Evidence.—Cause.—Effect.—Indirect and remote damage.—Violation of Sovereignty.—Interpretation of Special Agreement as to scope.—Preliminary correspondence.—Interest.—Future régime applicable.—Appointment of technical consultants.—Law applicable.—National law.—Matters of procedure.—Convention, Article IV.—Reference to American law.—Provisional decision.—Certain questions finally settled.—*Res judicata*.—Error in law.—Admissibility of revision.—Powers of tribunal.—Discovery of new facts.—Denial.—Costs of investigation.—Claim for indemnity.—Such costs no part of damage.—Claim for request to stop the nuisance.—Law applicable.—Coincidence of national and international laws.—Responsibility of States.—Air and water pollution.—Protection of sovereignty.—Institution of régime to prevent future damages.—Indemnity or compensation on account of decision or decisions rendered.

[1] For bibliography, index and tables, see end of this volume.

Special agreement.

CONVENTION FOR SETTLEMENT OF DIFFICULTIES ARISING FROM OPERATION OF SMELTER AT TRAIL, B.C. [1]

Signed at Ottawa, April 15, 1935; ratifications exchanged Aug. 3, 1935

The President of the United States of America, and His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, in respect of the Dominion of Canada,

Considering that the Government of the United States has complained to the Government of Canada that fumes discharged from the smelter of the Consolidated Mining and Smelting Company at Trail, British Columbia, have been causing damage in the State of Washington, and

Considering further that the International Joint Commission, established pursuant to the Boundary Waters Treaty of 1909, investigated problems arising from the operation of the smelter at Trail and rendered a report and recommendations thereon, dated February 28, 1931, and

Recognizing the desirability and necessity of effecting a permanent settlement,

Have decided to conclude a convention for the purposes aforesaid, and to that end have named as their respective plenipotentiaries:

The President of the United States of America:

PIERRE DE L. BOAL, Chargé d'Affaires ad interim of the United States of America at Ottawa;

His Majesty the King of Great Britain, Ireland and the British dominions beyond the Seas, Emperor of India, for the Dominion of Canada:

The Right Honorable RICHARD BEDFORD BENNETT, Prime Minister, President of the Privy Council and Secretary of State for External Affairs;

Who, after having communicated to each other their full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE I.

The Government of Canada will cause to be paid to the Secretary of State of the United States, to be deposited in the United States Treasury, within three months after ratifications of this convention have been exchanged, the sum of three hundred and fifty thousand dollars, United States currency, in payment of all damage which occurred in the United States, prior to the first day of January, 1932, as a result of the operation of the Trail Smelter.

ARTICLE II.

The Governments of the United States and of Canada, hereinafter referred to as "the Governments", mutually agree to constitute a tribunal hereinafter referred to as "the Tribunal", for the purpose of deciding the questions

[1] U. S. Treaty Series No. 893.

referred to it under the provisions of Article III. The Tribunal shall consist of a chairman and two national members.

The chairman shall be a jurist of repute who is neither a British subject nor a citizen of the United States. He shall be chosen by the Governments, or, in the event of failure to reach agreement within nine months after the exchange of ratifications of this convention, by the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague described in Article 49 of the Convention for the Pacific Settlement of International Disputes concluded at The Hague on October 18, 1907.

The two national members shall be jurists of repute who have not been associated, directly or indirectly, in the present controversy. One member shall be chosen by each of the Governments.

The Governments may each designate a scientist to assist the Tribunal.

ARTICLE III.

The Tribunal shall finally decide the questions, hereinafter referred to as "the Questions", set forth hereunder, namely:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding Question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

ARTICLE IV.

The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice, and shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned.

ARTICLE V.

The procedure in this adjudication shall be as follows:

1. Within nine months from the date of the exchange of ratifications of this agreement, the Agent for the Government of the United States shall present to the Agent for the Government of Canada a statement of the facts, together with the supporting evidence, on which the Government of the United States rests its complaint and petition.

2. Within a like period of nine months from the date on which this agreement becomes effective, as aforesaid, the Agent for the Government of Canada shall present to the Agent for the Government of the United States a statement of the facts, together with the supporting evidence, relied upon by the Government of Canada.

3. Within six months from the date on which the exchange of statements and evidence provided for in paragraphs 1 and 2 of this article has been com-

pleted, each Agent shall present in the manner prescribed by paragraphs 1 and 2 an answer to the statement of the other with any additional evidence and such argument as he may desire to submit.

ARTICLE VI.

When the development of the record is completed in accordance with Article V hereof the Governments shall forthwith cause to be forwarded to each member of the Tribunal a complete set of the statements, answers, evidence and arguments presented by their respective Agents to each other.

ARTICLE VII.

After the delivery of the record to the members of the Tribunal in accordance with Article VI the Tribunal shall convene at a time and place to be agreed upon by the two Governments for the purpose of deciding upon such further procedure as it may be deemed necessary to take. In determining upon such further procedure and arranging subsequent meetings, the Tribunal will consider the individual or joint requests of the Agents of the two Governments.

ARTICLE VIII.

The Tribunal shall hear such representations and shall receive and consider such evidence, oral or documentary, as may be presented by the Governments or by interested parties, and for that purpose shall have power to administer oaths. The Tribunal shall have authority to make such investigations as it may deem necessary and expedient, consistent with other provisions of this convention.

ARTICLE IX.

The Chairman shall preside at all hearings and other meetings of the Tribunal and shall rule upon all questions of evidence and procedure. In reaching a final determination of each or any of the Questions, the Chairman and the two members shall each have one vote, and, in the event of difference, the opinion of the majority shall prevail, and the dissent of the Chairman or member, as the case may be, shall be recorded. In the event that no two members of the Tribunal agree on a question, the Chairman shall make the decision.

ARTICLE X.

The Tribunal, in determining the first question and in deciding upon the indemnity, if any, which should be paid in respect to the years 1932 and 1933, shall give due regard to the results of investigations and inquiries made in subsequent years.

Investigators, whether appointed by or on behalf of the Governments, either jointly or severally, or the Tribunal, shall be permitted at all reasonable times to enter and view and carry on investigations upon any of the properties upon which damage is claimed to have occurred or to be occurring, and their reports may, either jointly or severally, be submitted to and received by the Tribunal for the purpose of enabling the Tribunal to decide upon any of the Questions

ARTICLE XI.

The Tribunal shall report to the Governments its final decisions, together with the reasons on which they are based, as soon as it has reached its conclusions in respect to the Questions, and within a period of three months after the conclusions of proceedings. Proceedings shall be deemed to have been concluded when the Agents of the two Governments jointly inform the Tribunal that they have nothing additional to present. Such period may be extended by agreement of the two Governments.

Upon receiving such report, the Governments may make arrangements for the disposition of claims for indemnity for damage, if any, which may occur subsequently to the period of time covered by such report.

ARTICLE XII.

The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal.

ARTICLE XIII.

Each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal and the expenses of its national member and scientific assistant.

All other expenses, which by their nature are a charge on both Governments, including the honorarium of the neutral member of the Tribunal, shall be borne by the two Governments in equal moieties.

ARTICLE XIV.

This agreement shall be ratified in accordance with the constitutional forms of the contracting parties and shall take effect immediately upon the exchange of ratifications, which shall take place at Ottawa as soon as possible.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this convention and have hereunto affixed their seals.

Done in duplicate at Ottawa this fifteenth day of April, in the year of our Lord, one thousand, nine hundred and thirty-five.

[*seal*] PIERRE DE L. BOAL.
[*seal*] R. B. BENNETT.

TRAIL SMELTER ARBITRAL TRIBUNAL.

DECISION

REPORTED ON APRIL 16, 1938, TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND TO THE GOVERNMENT OF THE DOMINION OF CANADA UNDER THE CONVENTION SIGNED APRIL 15, 1935.

This Tribunal is constituted under, and its powers are derived from and limited by, the Convention between the United States of America and the Dominion of Canada signed at Ottawa, April 15, 1935, duly ratified by the two parties, and ratifications exchanged at Ottawa, August 3, 1935 (hereinafter termed "the Convention").

By Article II of the Convention, each Government was to choose one member of the Tribunal, "a jurist of repute", and the two Governments were to choose jointly a Chairman who should be a "jurist of repute and neither a British subject nor a citizen of the United States".

The members of the Tribunal were chosen as follows: by the United States of America, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A. E. Greenshields of the Province of Quebec; by the two Governments jointly, Jan Frans Hostie of Belgium.

Article II, paragraph 4, of the Convention provided that "the Governments may each designate a scientist to assist the Tribunal"; and scientists were designated as follows: by the United States of America, Reginald S. Dean of Missouri; and by the Dominion of Canada, Robert E. Swain of California. The Tribunal desires to record its appreciation of the valuable assistance received by it from these scientists.

The duty imposed upon the Tribunal by the Convention was to "finally decide" the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

The Tribunal met in Washington, in the District of Columbia, on June 21, 22, 1937, for organization, adoption of rules of procedure and hearing of preliminary statements. From July 1 to July 6, it travelled over and inspected the area involved in the controversy in the northern part of Stevens County in the State of Washington and it also inspected the smelter plant of the Consolidated Mining and Smelting Company of Canada, Limited, at Trail in British Columbia. It held sessions for the reception and consideration of such evidence, oral and documentary, as was presented by the Governments or by interested parties, as provided in Article VIII, in Spokane in the State of Washington, from July 7 to July 29, 1937; in Washington, in the District of Columbia, on August 16, 17, 18, 19, 1937; in Ottawa, in the Province of Ontario, from August 23 to September 18, 1937; and it heard arguments of counsel in Ottawa from October 12 to October 19, 1937.

On January 2, 1938, the Agents of the two Governments jointly informed the Tribunal that they had nothing additional to present. Under the provisions of Article XI of the Convention, it then became the duty of the Tribunal "to report to the Governments its final decisions .... and within a period of three months after the conclusion of the proceedings", *i.e.*, on April 2, 1938.

After long consideration of the voluminous typewritten and printed record and of the transcript of evidence presented at the hearings, the Tribunal formally notified the Agents of the two Governments that, in its opinion, unless the time limit should be extended, the Tribunal would be forced to give a permanent decision on April 2, 1938, on the basis of data which it considered inadequate and unsatisfactory. Acting on the recommendation of the Tribunal and under the provisions of Article XI authorizing such extension, the two Governments by agreement extended the time for the report of final decision of the Tribunal to three months from October 1, 1940.

The Tribunal is prepared now to decide finally Question No. 1, propounded to it in Article III of the Convention; and it hereby reports its final decision on Question No. 1, its temporary decision on Questions No. 2 and No. 3, and provides for a temporary régime thereunder and for a final decision on these questions and on Question No. 4, within three months from October 1, 1940.

Wherever, in this decision, the Tribunal has referred to decisions of American courts or has followed American law, it has acted pursuant to Article IV as follows: "The Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America ...."

In all the consideration which the Tribunal has given to the problems presented to it, and in all the conclusions which it has reached, it has been guided by that primary purpose of the Convention expressed in the words of Article IV, that the Tribunal "shall give consideration to the desire of the high contracting parties to reach a solution just to all parties concerned", and further expressed in the opening paragraph of the Convention as to the "desirability and necessity of effecting a permanent settlement" of the controversy.

The controversy is between two Governments involving damage occurring in the territory of one of them (the United States of America) and alleged to be due to an agency situated in the territory of the other (the Dominion of Canada), for which damage the latter has assumed by the Convention an international responsibility. In this controversy, the Tribunal is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of "parties concerned", in Article IV and of

"interested parties", in Article VIII of the Convention and although the damage suffered by individuals may, in part, "afford a convenient scale for the calculation of the reparation due to the State" (see Jugdment No. 13, Permanent Court of International Justice, Series A, No. 17, pp. 27, 28).

PART ONE.

By way of introduction to the Tribunal's decision, a brief statement, in general terms, of the topographic and climatic conditions and economic history of the locality involved in the controversy may be useful.

The Columbia River has its source in the Dominion of Canada. At a place in British Columbia named Trail, it flows past a smelter located in a gorge, where zinc and lead are smelted in large quantities. From Trail, its course is easterly and then it swings in a long curve to the International Boundary Line, at which point it is running in a southwesterly direction; and its course south of the boundary continues in that general direction. The distance from Trail to the boundary line is about seven miles as the crow flies or about eleven miles, following the course of the river (and possibly a slightly shorter distance by following the contour of the valley). At Trail and continuing down to the boundary and for a considerable distance below the boundary, mountains rise on either side of the river in slopes of various angles to heights ranging from 3,000 to 4,500 feet above sea-level, or between 1,500 to 3,000 feet above the river. The width of the valley proper is between one and two miles. On both sides of the river are a series of bench lands at various heights.

More or less half way between Trail and the boundary is a place, on the east side of the river, known as Columbia Gardens; at the boundary on the American side of the line and on the east side of the river, is a place known as Boundary; and four or five miles south of the boundary on the east bank of the river is a farm named after its owner, Stroh farm. These three places are specially noted since they are the locations of automatic sulphur dioxide recorders installed by one or other of the Governments. The town of Northport is located on the east bank of the river, about nineteen miles from Trail by the river, and about thirteen miles as the crow flies, and automatic sulphur dioxide recorders have been installed here and at a point on the west bank northerly of Northport. It is to be noted that mountains extending more or less in an easterly and westerly direction rise to the south between Trail and the boundary.

Various creeks are tributary to the river in the region of Northport, as follows: Deep Creek flowing from southwest to northwest and entering the river slightly north of Northport; opposite Deep Creek and entering on the west side of the river and flowing from the northwest, Sheep Creek; north of Sheep Creek on the west side, Nigger Creek; south of Sheep Creek on the west side, Squaw Creek; south of Northport, on the east side, flowing from the southeast, Onion Creek.

About eight miles south of Northport, following the river, is the town of Marble; and about seventeen miles, the town of Bossburg. Three miles south of Bossburg is the town of Evans; and about nine miles, the town of Marcus. South of Marcus and about forty-one miles from the boundary line is the town of Kettle Falls which, in general, may be stated to be the southern limit of the area as to which evidence was presented. All the above towns are small in population and in area.

At Marble and to the south, various other creeks enter the river from the west side—Rattlesnake Creek, Crown Creek, Flat Creek, and Fifteen Mile Creek.

Up all the creeks above mentioned, there extend tributary valleys, differing in size.

While, as stated above, the width of the valley proper of the river is from one to two miles, the width of the valley measured at an altitude of 3,000 feet above sea-level, is approximately three miles at Trail, two and one-half miles at Boundary, four miles above Northport, three and one-half miles at Marble. Near Bossburg and southward the valley at the same altitude broadens out considerably.

As to climatic conditions, it may be stated that the region is, in general, a dry one though not what is termed "arid". The average annual precipitation at Northport from 1923 to 1936 inclusive averaged slightly below seventeen inches. It varied from a minimum of 9.60 inches in 1929 to a maximum of 26.04 inches in 1927. The average crop-year precipitation over the same period is slightly over sixteen inches, with a variation from a minimum of 10.10 inches in 1929 to a maximum of 24.01 in 1927. The rainfall in the growing-season months of April, May and June at Northport, has been in 1932, 5.43 inches; in 1933, 3.03 inches; in 1934, 2.74 inches; in 1933, 2.02 inches; in 1929, 4.44 inches. The average snowfall was reported in 1915 by United States Government agents as fifty-eight inches at Northport. The average humidity varies with some regularity from day to day. In June, 1937, at Northport, it had an average maximum of 74 per cent at 5 a.m. and an average minimum of 26 per cent at 5 p.m.

The range of temperature in the different months as it appears from the records of the years 1934, 1935, and 1936, at Northport was as follows: In the months of November, December, January and February, the lowest temperature was 1° (in January, 1936), and the highest was 60° (in November 1934); in the growing-season months of April, May, June and July, the lowest temperature was 12° (in April, 1936), and the highest was 110° (in July, 1934); in the remaining months of August, September, October and March, the lowest temperature was 8° (in October, 1935), and the highest was 102° (in August, 1934).

The direction of the surface wind is, in general, from the northeast down the river valley, but this varies at different times of day and in different seasons. The subject of winds is treated in detail in a later part of this decision and need not be considered further at this point.

The history of what may be termed the economic development of the area may be briefly stated as follows: Previous to 1892, there were few settlers in this area, but homesteading and location of farms received an impetus, particularly on the east side of the river, at the time when the construction of the Spokane and Northern Railway was undertaken, which was completed between the City of Spokane and Northport in 1892, and extended to Nelson in British Columbia in 1893. In 1892, the town of Northport was founded. The population of Northport, according to the United States Census in 1900, was 787; in 1910, it was 476; in 1920, it was 906; and in 1930, it was 391. The population of the area which may be termed, in general, the "Northport Area", according to the United States Census in 1910, was 1,448; in 1920, it was 2,142; and in 1930, it was 1,121. The population of this area as divided into the Census Precincts was as follows:

	1900	*1910*	*1920*	*1930*
Boundary	74	91	73	87
Northport	845	692	1,093	510
Nigger Creek	. . .	27	97	29
Frontier	. . .	103	71	22
Cummins	. . .	. . .	244	89
Doyle	. . .	187	280	195
Deep Creek	65	119	87	81
Flat Creek	52	126	137	71
Williams	71	103	60	37

(It is to be noted that the precincts immediately adjacent to the boundary line were Frontier, Nigger Creek and Boundary; and that Frontier and Nigger Creek Precincts are at the present time included in the Northport Precinct.)

The area of all land in farms in the above precincts, according to the United States Census of Agriculture in 1925 was 21,551 acres; in 1930, 28,641 acres; and in 1935, 24,772 acres. The area in crop land in 1925 was 3,474 acres; in 1930, 4,285 acres; and in 1933, 4,568 acres. The farm population in 1925 was 496; in 1930, 603; and in 1935, 466.

In the precincts nearest the boundary line, *viz.*, Boundary and Northport (including Frontier and Nigger Creek prior to 1935 Census), the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; and in 1935, 5,666 acres. The area in crop land in 1925 was 798 acres; in 1930, 1,227 acres; and in 1935, 963 acres. The farm population in 1925 was 149; in 1930, 193; and in 1935, 145.

About the year 1896, there was established in Northport a business which has been termed the "Breen Copper Smelter", operated by the LeRoi Mining and Smelting Company, and later carried on by the Northport Smelting and Refining Company which was chartered in 1901. This business employed at times from five hundred to seven hundred men, although, as compared with a modern smelter like the Trail Smelter, the extent of its operations was small. The principal value of the ores smelted by it was in copper, and the ores had a high sulphur content. For some years, the somewhat primitive method of "heap roasting" was employed which consisted of roasting the ore in open piles over woodfires, frequently called in mining parlance, "stink piles". Later, this process was changed. About seventy tons of sulphur were released per day. This Northport Smelting and Refining Company intermittently continued operations until 1908. From 1908 until 1915, its smelter lay idle. In March, 1916, during the Great War, operation was resumed for the purpose of smelting lead ore, and continued until March 5, 1921, when it ceased business and its plant was dismantled. About 30 tons of sulphur per day were emitted during this time. There is no doubt that damage was caused to some extent over a more or less restricted area by the operation of this smelter plant.

The record and evidence placed before the Tribunal does not disclose in detail claims for damage on account of fumigations which were made between 1896 and 1908, but it does appear that there was considerable litigation in Stevens County courts based on such claims. It also appears in evidence that prior to 1908, the company had purchased smoke easements from sixteen owners of land in the vicinity covering 2,330 acres. It further appears that from 1916 to 1921, claims for damages were made and suits

were brought in the courts, and additional smoke easements were purchased from thirty-four owners of land covering 5,556.7 acres. These various smoke easements extended to lands lying four or five miles north and three miles south and three miles east of Northport and on both sides of the river, and they extended as far as the boundary line.

In addition to the smelting business, there have been intermittent mining operations of lead and zinc in this locality, but they have not been a large factor in adding to the population.

The most important industry in the area in the past has been the lumber industry. It had its beginning with the building of the Spokane & Northern Railway. Several saw mills were constructed and operated, largely for the purpose of furnishing ties to the railway. In fact, the growing trees—yellow pine, Douglas fir, larch, and cedar—were the most valuable asset to be transformed into ready cash. In early days, the area was rather heavily wooded, but the timber has largely disappeared and the lumber business is now of small size. It appears from the record in 1929 that, within a radius covering some thirty-five thousand acres surrounding Northport, fifteen out of eighteen sawmills had been abandoned and only three of the small type were in operation. The causes of this condition are in dispute. A detailed description of the forest conditions is given in a later part of this decision and need not be further discussed here.

As to agricultural conditions, it may be said that farming is carried on in the valley and upon the benches and mountain slopes and in the tributary valleys. The soils are of a light, sandy nature, relatively low in organic matter, although in the tributary valleys the soil is more loamy and fertile. In some localities, particularly on the slopes, natural sub-irrigation affords sufficient moisture; but in other regions irrigation is desirable in order to produce favorable results. In a report made by Dr. F. C. Wyatt, head of the Soils Department of the University of Alberta, in 1929, it is stated that "taken as a unit, the crop range of these soils is wide and embraces the crops suited to the climate conditions. Under good cultural operations, yields are good." At the same time, it must be noted that a large portion of this area is not primarily suited to agriculture. In a report of the United States Department of Agriculture, in 1913, it is stated that "there is approximately one-third of the land in the Upper Columbia Basin unsuited for agricultural purposes, either because it is too stony, too rough, too steep, or a combination of these factors. To utilize this large proportion of land and to meet the wood needs of an increasing population, the Upper Columbia Basin is forced to consider seriously the problem of reforestation and conservation." Much of the farming land, especially on the benches, is land cleared from forest growth; most of the farms contain from an eighth to a quarter of a section (80-160 acres); and there are many smaller and some larger farms.

In general, the crops grown on the farms are alfalfa, timothy, clover, grain cut green for hay, barley, oats, wheat, and a small amount of potatoes. Wild hay is cut each year to some extent. The crops, in general, are grown for feed rather than for sale, though there is a certain amount of wheat and oats sold. Much of the soil is apparently well suited to the predominant crop of alfalfa, which is usually cut at present twice a year (with a small third crop on some farms). Much of the present alfalfa has been rooted for a number of years.

Milch cattle are raised to a certain extent and they are grazed on the wild grasses on the hills and mountains in the summer months, but the dairying

business depends on existence of sufficient land under cultivation as an adjunct to the dairy to provide adequate forage for the winter months.

In early days, it was believed that, owing to soil and climatic conditions, this locality was destined to become a fruit-growing region, and a few orchards were planted. For several reasons, of which it is claimed that fumigation is one, orchards have not thrived. In 1909-1910, the Upper Columbia Company purchased two large tracts, comprising about ten thousand acres, with the intention of developing the land for orchard purposes and selling of timber in the meantime, and it established a large orchard of about 900 acres in the town of Marble. The project, as early as 1917, proved a failure.

In 1896, a smelter was started under American auspices near the locality known as Trail. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian Company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on this continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased product resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air; and it is claimed by one Government (though denied by the other) that the added height of the stacks increased the area of damage in the United States. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1903. In other words, about 300-350 tons of sulphur were being emitted daily in 1930. (It is to be noted that one ton of sulphur is substantially the equivalent of two tons of sulphur dioxide or SO_2.)

From 1925, at least, to the end of 1931, damage occurred in the State of Washington, resulting from the sulphur dioxide emitted from the Trail Smelter.

As early as 1925 (and there is some evidence earlier) suggestions were made to the Trail Smelter that damage was being done to property in the northern part of Stevens County. The first formal complaint was made, in 1926, by one J. H. Stroh, whose farm (mentioned above) was located a few miles south of the boundary line. He was followed by others, and the Smelter Company took the matter up seriously and made a more or less thorough and complete investigation. This investigation convinced the Trail Smelter that damage had been and was being done, and it proceeded to negotiate with the property owners who had made complaints or claims with a view to settlement. Settlements were made with a number of farmers by the payment to them of different amounts. This condition of affairs seems to have lasted during a period of about two years. In June, 1928, the County Commissioners of Stevens County adopted a resolution relative to the fumigations; and on August 25, 1928, there was brought into existence an association known as the "Citizens' Protective Association". Due to the creation of this association or to other causes, no settlements were made thereafter between the Trail Smelter and individual claimants, as the articles of association contained a provision that "no member herein shall make any settlement for damages sought to be secured herein, unless the written consent of the majority of the Board of Directors shall have been first obtained".

It has been contended that either by virtue of the Constitution of the State of Washington or of a statute of that State, the Trail Smelter (a Canadian corporation) was unable to acquire ownership or smoke easements over real estate, in the State of Washington, in any manner. In regard to this statement, either as to the fact or as to the law, the Tribunal expresses no opinion and makes no ruling.

The subject of fumigations and damage claimed to result from them was first taken up officially by the Government of the United States in June, 1927, in a communication from the Consul General of the United States at Ottawa, addressed to the Government of the Dominion of Canada.

In December, 1927, the United States Government proposed to the Canadian Government that problems growing out of the operation of the Smelter at Trail should be referred to the International Joint Commission, United States and Canada, for investigation and report, pursuant to Article IX of the Convention of January 11, 1909, between the United States and Great Britain. Following an extensive correspondence between the two Governments, they joined in a reference of the matter to that Commission under date of August 7, 1928. It may be noted that Article IX of the Convention of January 11, 1909, provides that the high contracting parties might agree that "any other question or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada shall be referred from time to time to the International Joint Commission for examination and report. . . . Such reports shall not be regarded as decisions of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award."

The questions referred to the International Joint Commission were five in number, the first two of which may be noted: First, the extent to which property in the State of Washington has been damaged by fumes from Smelter at Trail, B.C.; second, the amount of indemnity which would compensate United States interests in the State of Washington for past damages.

The International Joint Commission sat at Northport to take evidence and to hear interested parties in October, 1928; in Washington, D.C., in April, 1929; at Nelson in British Columbia in November, 1929; and final sittings were held in Washington, D.C., on January 22 and February 12, 1930. Witnesses were heard; reports of the investigations made by scientists were put in evidence; counsel for both the United States and Canada were heard, and briefs submitted; and the whole matter was taken under advisement by the Commission. On February 28, 1931, the Report of the Commission was signed and delivered to the proper authorities. The report was unanimous and need not be considered in detail.

Paragraph 2 of the report, in part, reads as follows:

> In view of the anticipated reduction in sulphur fumes discharged from the Smelter at Trail during the present year, as hereinafter referred to, the Commission therefore has deemed it advisable to determine the amount of indemnity that will compensate United States interests in respect of such fumes, up to and including the first day of January, 1932. The Commission finds and determines that all past damages and all damages up to and including the first day of January next, is the sum of $350,000. Said sum, however, shall not include any damage occurring after January 1, 1932.

In paragraph 4 of the report, the Commission recommended a method of indemnifying persons in Washington State for damage which might be caused by operations of the Trail Smelter after the first of January, 1932, as follows:

> Upon the complaint of any persons claiming to have suffered damage by the operations of the company after the first of January, 1932, it is recommended by the Commission that in the event of any such claim not being adjusted by the company within a reasonable time, the Governments of the United States and Canada shall determine the amount of such damage, if any, and the amount so fixed shall be paid by the company forthwith.

This recommendation, apparently, did not commend itself to the interested parties. In any event, it does not appear that any claims were made after the first of January, 1932, as contemplated in paragraph 4 of the report.

In paragraph 5 of the report, the Commission recommended that the Consolidated Mining and Smelting Company of Canada, Limited, should proceed to erect and put in operation certain sulphuric acid units for the purpose of reducing the amount of sulphur discharged from the stacks. It appears, from the evidence in the present case, that the General Manager of the company had made certain representations before the Commission as to the intentions of the company in this respect. There is a conflict of testimony as to the exact scope of these representations, but it is unnecessary now to consider the matter further, since, whatever they were, the company proceeded after 1930 to make certain changes and additions. With the intention and purpose of lessening the sulphur contents in the smoke emissions at the stacks, the following installations (amongst others) have been made in the plant since 1931; three 112 tons sulphuric acid plants in 1931; ammonia and ammonium sulphate plant in 1931; two units for reduction and absorption of sulphur in the zinc smelter, in 1936 and 1937, and an absorption plant for gases from the lead roasters in June, 1937. In addition, in an attempt to lessen injurious fumigations, a new system of control over the emission of fumes during the crop-growing season has been in operation, particularly since May, 1934. It is to be noted that the chief sulphur contents are in the gases from the lead smelter, but that there is still a certain amount of sulphur content in the fumes from the zinc smelter. As a result of the above, as well as of depressed business conditions, the tons of sulphur emitted into the air from the plants fell from about 10,000 tons per month in 1930 to about 7,200 tons in 1931, and to 3,400 tons in 1932. The emission of sulphur rose in 1933 to 4,000 tons, and in 1934 to nearly 6,300 tons, and in 1935 to 6,800 tons. In 1936, it fell to 5,600 tons; and in January to July, 1937 inclusive, it was 4,750 tons.

Two years after the signing of the International Joint Commission's Report of February 28, 1931, the United States Government on February 17, 1933, made representations to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring, and diplomatic negotiations were renewed. Correspondence was exchanged between the two countries, and although that correspondence has its importance, it is sufficient here to say, that it resulted in the signing of the present Convention.

Consideration of the terms of that Convention is given more in detail in the later parts of the Tribunal's decision.

PART TWO.

The first question under Article III of the Convention which the Tribunal is required to decide is as follows:

> (1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor.

In the determination of the first part of this question, the Tribunal has been obliged to consider three points, *viz.*, the existence of injury, the cause of the injury, and the damage due to the injury.

The Tribunal has interpreted the word "occurred" as applicable to damage caused prior to January 1, 1932, in so far as the effect of the injury made itself felt after that date. The words "Trail Smelter" are interpreted as meaning the Consolidated Mining and Smelting Company of Canada, Limited, its successors and assigns.

In considering the second part of the question as to indemnity, the Tribunal has been mindful at all times of the principle of law which is set forth by the United States courts in dealing with cognate questions, particularly by the United States Supreme Court in Story Parchment Company *v.* Paterson Parchment Paper Company (1931), 282 U. S. 555 as follows: "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." (See also the decision of the Supreme Court of Michigan in Allison *v.* Chandler, 11 Michigan 542, quoted with approval by the United States Supreme Court, as follows: "But shall the injured party in an action of tort, which may happen to furnish no element of certainty, be allowed to recover no damages (or merely nominal), because he cannot show the exact amount with certainty, though he is ready to show, to the satisfaction of the jury, that he has suffered large damages by the injury? Certainty, it is true, would thus be attained; but it would be the certainty of injustice. . . . Juries are allowed to act upon probable and inferential, as well as direct and positive proof.")

The Tribunal has first considered the items of indemnity claimed by the United States in its Statement (p. 52) "on account of damage occurring since January 1, 1932, covering: (a) Damages in respect of cleared land and improvements thereon; (b) Damages in respect of uncleared land and improvements thereon; (c) Damages in respect of livestock; (d) Damages in respect of property in the town of Northport; (g) Damages in respect of business enterprises".

With respect to Item (a) and to Item (b), *viz.*, "Damages in respect of cleared land and improvements thereon", and "Damages in respect of uncleared land and improvements thereon", the Tribunal has reached the conclusion that damage due to fumigations has been proved to have occurred since January 1, 1932, and to the extent set forth hereafter.

Since the Tribunal has concluded that, on all the evidence, the existence of injury has been proved, it becomes necessary to consider next the cause of injury. This question resolves itself into two parts—first, the actual caus-

ing factor, and second, the manner in which the causing factor has operated. With reference to causation, the Tribunal desires to make the following preliminary general observations, as to some of the evidence produced before it.

(1) The very satisfactory data from the automatic sulphur dioxide recorders installed by each of the Governments, covering large portions of each year from 1931 to 1937, have been of great value in this controversy. These records have thrown much light upon the nature, the durations, and the concentrations of the fumigations involved; and they will prove of scientific value in any future controversy which may arise on the subject of fumigations.

(2) The experiments conducted by the United States at Wenatchee in the State of Washington and by Canada at Summerland in British Columbia, and the experiments conducted by scientists elsewhere, the results of which have been testified to at length before the Tribunal, have been of value with respect to the effects of sulphur dioxide fumigations on plant life and on the yield of crops. While the Canadian experiments were more extensive than the American, and were carried out under more satisfactory conditions, the Tribunal feels that the number of experiments was still too limited to warrant in all cases so positive conclusions as witnesses were inclined to draw from them; and on the question of the effect of fumigations on the yield of crops, it seems probable that more extensive experimentation would have been desirable, especially since, while the total number of experiments was large, the number devoted to establishing each type of result was in most cases rather small. Moreover, conditions in experimental fumigation plots can rarely exactly reproduce conditions in the field; and there was some evidence that injury occurred on various occasions to plant life in the field, under durations and degrees of concentration which never produced injury to plant life in the experimental plots.

(3) Valuable evidence as to the actual condition of crops in the field was given by experts on both sides, and by certain non-expert witnesses. Unfortunately, such field observations were not made continuously in any crop season or in all parts of the area of probable damage; and, even more unfortunately, they were not made simultaneously by the experts for the two countries, who acted separately and without comparing their conclusions with each other contemporaneously.

(4) The effects of sulphur dioxide fumigations upon the forest trees, especially upon the conifers, were testified to at great length by able experts, and their studies in the field and in the experimental plots, with reference to mortality, deterioration, retardation of ring growth and shoot growth, sulphur content of needles, production of cones and reproduction in general, have been of great value. As is usual in this type of case, though the poor condition of the trees was not controverted, experts were in disagreement as to the cause—witnesses for the United States generally finding the principal cause of injury to be sulphur dioxide fumigations, and witnesses for Canada generally attributing the injury principally to ravages of insects, diseases, winter and summer droughts, unwise methods of logging, and forest and ground fires. It is possible that each side laid somewhat too great emphasis on the causes for which it contended.

(5) Evidence was produced by both sides as to experimental tests of the sulphur contents of the soils and of the waters in the area. These tests, however, were, for the most part, too limited in number and in location to afford a satisfactory basis from which to draw absolutely positive conclusions.

In general, it may be said that the witnesses expressed contrary views and arrived at opposite conclusions, on most of the questions relating to cause of injury.

The Tribunal is of opinion that the witnesses were completely honest and sincere in their views and that the expert witnesses arrived at their conclusions as the integral result of their high technical skill. At the same time, it is apparent that remarks are very pertinent, such as were made by Judge Johnson in the United States District Court (Anderson *v.* American Smelting & Refining Co., 265 Federal Reporter 928) in 1919:

> Plaintiff's witnesses give it as their opinion and best judgment that SO_2 was the cause of the injuries appearing upon the plants in the field; defendants' witnesses in like manner express the opinion and give it as their best judgment that the injury observed was caused by something else other than SO_2. It must not be overlooked that witnesses who give opinion evidence are sometimes unconsciously influenced by their environment, and their evidence colored, if not determined, by their point of view. The weight to be given to such evidence must be determined in the light of the knowledge, the training, the power of observation and analysis, and in general the mental equipment, of each witness, assuming, as I do, that the witnesses of the respective parties were honest and intended to testify to the truth as they perceived it. . . . The expert witnesses called by plaintiffs, who made a survey of the affected area, made valuable observations; but seem to have assumed as a basis for their conclusions that leaf markings having the appearance of SO_2 injury were in fact SO_2 injury—an unwarranted generalization. . . . It is quite evident that the testimony of witnesses whose mental attitude is to account for every injury as produced by some other cause is no more convincing than the testimony of witnesses who attribute every injury similar in appearance to SO_2 injury to SO_2 as the sole and only cause. The expert witnesses of defendants manifested the same general mental attitude; that is to say, they were able to find a sufficient cause operating in any particular case other than SO_2, and therefore gave it as their opinion that such other cause was the real cause of the injury, or markings observed. The real value I find in the testimony of these opinion witnesses of the parties lies in their description of appearances and statement of the surrounding circumstances, rather than in their ultimate expressed opinions. I have no doubt of the accuracy of the experiments made by the expert and scientific witnesses called by the parties.

On the basis of the evidence, the United States contended that damage had been caused by the emission of sulphur dioxide fumes at the Trail Smelter in British Columbia, which fumes, proceeding down the valley of the Columbia River and otherwise, entered the United States. The Dominion of Canada contended that even if such fumes had entered the United States, they had caused no damage after January 1, 1932. The witnesses for both Governments appeared to be definitely of the opinion that the gas was carried from the Smelter by means of surface winds, and they based their views on this theory of the mechanism of gas distribution. The Tribunal finds itself unable to accept this theory. It has, therefore, looked for a more probable theory, and has adopted the following as permitting a more adequate correlation and interpretation of the facts which have been placed before it.

It appears from a careful study and comparison of recorder data furnished by the two Governments, that on numerous occasions fumigations occur practically simultaneously at points down the valley many miles apart—this being especially the fact during the growing season from April to October. It also appears from the data furnished by the different recorders, that the rate of gas attenuation down the river does not show a constant trend, but is more rapid in the first few miles below the boundary and more gradual further down the river. The Tribunal finds it impossible satisfactorily to account for the above conditions, on the basis of the theory presented to it. The Tribunal finds it further difficult to explain the times and durations of the fumigations on the basis of any probable surface-wind conditions.

The Tribunal is of opinion that the gases emerging from the stacks of the Trail Smelter find their way into the upper air currents, and are carried by these currents in a fairly continuous stream down the valley so long as the prevailing wind at that level is in that direction. The upper air conditions at Northport, as stated by the United States Weather Bureau in 1929 (quoted in Canadian Document A 1, page 9) are as follows :

> The 5 a.m. balloon runs show the prevailing direction, since the Weather Bureau was established in Northport, to be northeast to an altitude of 600 metres above the surface. The average velocity, up to 600 metres level, is from 2 to 5 miles per hour. Above the 600 metres level the prevailing direction is southwest and gradually shifts into the west-southwest and west. The average velocities gradually increase from 5 miles per hour to about 30 miles per hour at the highest elevation, about 700 metres.

It thus appears that the velocity and persistence of the upper air currents is greater than that of the surface winds. The Tribunal is of opinion that the fumigations which occur at various points along the valley are caused by the mixing with the surface atmosphere of this upper air stream, of which the height has yet to be ascertained more fully. This mixing follows well-recognized meteorological laws and is controlled mainly by two factors of major importance. These are: (a) differences in temperature between the air near the surface and that at higher levels—in other words, the temperature gradient of the atmosphere of the region; and (b) differences in the velocity of the upper air currents and of those near the ground.

A careful study of the time, duration, and intensity of the fumigations recorded at the various stations down the valley reveals a number of striking and significant facts. The first of these is the coincidence in point of time of the fumigations. The most frequent fumigations in the late spring, summer, and early autumn are diurnal, and occur during the early morning hours. These usually are of short duration. A characteristic curve expressing graphically this type of fumigation, rises rapidly to a maximum and then falls less rapidly but fairly sharply to a concentration below the sensitivity of the recorder. The dominant influence here is evidently the heating action of the rising sun on the atmosphere at the surface of the earth. This gives rise to temperature differences which may and often do lead to a mixing of the gas-carrying atmosphere with that near the surface. When this occurs with sufficient intensity, a fumigation is recorded at all stations at which the sulphur dioxide reaches a concentration that is not too low to be determined by the recorder. Obviously this effect of the rising sun may be

different on the east and the west side of the valley, but the possible bearing of this upon fumigations in the valley must await further study.

Another type of fumigation occurs with especial frequency during the winter months. These fumigations are not so definitely diurnal in character and are usually of longer duration. The Tribunal is of the opinion that these are due to the existence for a considerable period of a sufficient velocity of the gas-carrying air current to cause a mixing of this with the surface atmosphere. Whether or not this mixing is of sufficient extent to produce a fumigation will depend upon the rate at which the surface air is diluted by surface winds which serve to bring in air from outside the contaminated area. The fact that fumigations of this type are more common during the night, when the surface winds often subside completely, bears out this opinion. A fumigation with a lower velocity of the gas-carrying air current would then be possible.

The conclusions above together with a detailed study of the intensity of the fumigations at the various stations from Columbia Gardens down the valley, have led to deductions in regard to the rate of attenuation of concentration of sulphur dioxide with increasing distance from the Smelter which seem to be in accord both with the known facts and the present theory. The conclusion of the Tribunal on this phase of the question is that the concentration of sulphur dioxide falls off very rapidly from Trail to a point about 16 miles downstream from the Smelter, or 6 miles from the boundary line, measured by the general course of the river; and that at distances beyond this point, the concentration of sulphur dioxide is lower and falls off more gradually and less rapidly.

The attention of the Tribunal has been called to the fact that fumigations in the area of probable damage sometimes occur during rainy weather or other periods of high atmospheric humidity. It is possible that this is more than a mere coincidence and that such weather conditions are, in general, more favorable to a fumigation, but the Tribunal is not prepared at present to offer an opinion on this subject.

The above conclusions have a bearing both upon the cause and upon the degree of damage as well as upon the area of probable damage.

The Tribunal will now proceed to consider the different classes of damage to cleared and to uncleared land.

(1) With regard to cleared land used for crops, the Tribunal has found that damage through reduction in crop yield due to fumigation has occurred in varying degrees during each of the years, 1932 to 1936; and it has found no proof of damage in the year 1937.

It has found that damage has been confined to an area which differed from year to year but which did not (with the possible exception of a very small number of farms in particularly unfavorable locations) exceed in the year of most extensive damage the following limits: the two precincts of Boundary and Northport, with the possible exclusion of some properties located at the eastern end of Boundary Precinct and at the western end of Northport Precinct; those parts of Cummins and Doyle Precincts on or close to the benches of the river; the part of Marble Precinct, north of the southern limit of Sections 22, 23 and 24 of T. 39, R. 39, and the part of Flat Creek Precinct, located on or close to the benches of the river (all precints being as defined by the United States Census of Agriculture of 1935).

The properties owned by individual farmers alleged by the United States to have suffered damage are divided by the United States in its itemized schedule of damages, into three classes: (a) properties of "farmers residing

on their farms"; (b) properties of "farmers who do not reside on their farms"; (ab) properties of "farmers who were driven from their farms"; (c) properties of large owners of land. The Tribunal has not adopted this division.

The Tribunal has adopted as the measure of indemnity to be applied on account of damage in respect of cleared land used for crops, the measure of damage which the American courts apply in cases of nuisance or trespass of the type here involved, *viz.*, the amount of reduction in the value of use or rental value of the land caused by the fumigations. In the case of farm land, such reduction in the value of the use is, in general, the amount of the reduction of the crop yield arising from injury to crops, less cost of marketing the same, the latter factor being under the circumstances of this case of negligible importance. (See Ralston *v.* United Verde Copper Co., 37 Federal Reporter 2d, 180, and 46 Federal Reporter 2d, 1.) Failure of farmers to increase their seeded land in proportion to such increase in other localities, may also be taken into consideration.

The difference between probable yield in the absence of any fumigation and actual crop yield, varying as it does from year to year and from place to place, is necessarily a somewhat uncertain amount, incapable of absolute proof; and the Tribunal has been obliged to base its estimate of damage largely on the fumigation records, meteorological data, statistical data as to crop yields inside and outside the area of probable damage, and other Census records.

As regards the problems arising out of abandonment of properties by their owners, it is to be noted that practically all of such properties, listed in the questionnaire sent out by the former Agent for the United States, Mr. Metzger, appear to have been abandoned prior to the year 1932. However, in order to deal both with this problem and with the problem arising out of failure of farmers to increase their seeded land, the Tribunal, not having to adjudicate on individual claims, estimated, on the basis of the statistical data available, the average acreage on which it is reasonable to say that crops would have been seeded and harvested during the period under consideration but for the fumigations.

As regards the special category of cleared lands used for orchards, the Tribunal is of opinion that no damage to orchards by sulphur dioxide fumigation within the damaged area during the years in question has been proved.

In addition to indemnity which may be awarded for damage through reduction in the value of the use of cleared land measured by decrease in crop yield, it may be contended that special damage has occurred for which indemnity should be awarded by reason of impairment of the soil contents through increased acidity caused by sulphur dioxide fumigations acting directly on the soil or indirectly through increased sulphur content of the streams and other waters. Evidence has been given in support of this contention. The Tribunal is of opinion that such injury to the soil up to this date, due to increased acidity and affecting harmfully the production of crops or otherwise, has not been proved—with one exception, as follows: There is a small area of farming property adjacent to the boundary, west of the river, that was injured by serious increase of acidity of soil due to fumigations. Such injury, though caused, in part, prior to January 1, 1932, may have produced a continuing condition which cannot be considered as a loss for a limited time—in other words, in this respect the nuisance may be considered to have a more permanent effect, in which case, under American law (*Sedgwick on Damages* 9th Ed. (1920) Sections 932, 947), the measure of damage was not the mere reduction in the value of the use of the land but

the reduction in the value of the land itself. The Tribunal is of opinion that such injury to the soil itself can be cured by artificial means, and it has awarded indemnity with this fact in view on the basis of the data available.

In addition to indemnity which may be awarded for damage through reduction in the value of the use of cleared land measured by decrease in crop yield, the Tribunal, having in mind, within the area as determined above, a group of about forty farms in the vicinity of the boundary line, has awarded indemnity for special damage for reduction in value of the use or rental value by reason of the location of the farmers in respect to the fumigations. (See Baltimore and Potomac R. R. *v.* Fifth Baptist Church (1883), 108 U.S. 317.)

The Tribunal is of opinion that there is no justification, under doctrines of American law, for assessing damages to improvements separately from the land in the manner contended for by the United States. Any injury to improvements (other than physical injury) is to be compensated in the award of indemnity for general reduction in the value of the use or rental value of the property.

There is a contention, however, that special damage has been sustained by some owners of improvements on cleared land, in the way of rust and destruction of metal work. There was some slight evidence of such damage, and the Tribunal has included indemnity therefor in its final award; but since there is an entire absence of any evidence as to the extent or monetary amount of such injury, the indemnity cannot be considered as more than a nominal amount for each of such owners.

(2) With respect to damage to cleared land not used for crops and to all uncleared (other than uncleared land used for timber), the Tribunal has adopted as the measure of indemnity, the measure of damages applied by American courts, *viz.*, the amount of reduction in the value of the use or rental value of the land. The Tribunal is of opinion that the basis of estimate of damages contended for by the United States, *viz.*, applying to the value of uncleared land a ratio of loss measured by the reduced crop yield on cleared land, has no sanction in any decisions of American courts.

(A) As regards these lands in their use as pasture lands, the Tribunal is of opinion that there is no evidence of any marked susceptibility of wild grasses to fumigations, and very little evidence to prove the respective amounts of uncleared land devoted to wild grazing grass and barren or shrub land, or to prove the value thereof, which would be necessary in order to estimate the value of the reduction of the use of such land. The Tribunal, however, has awarded a small indemnity for damage to about 200 acres of such lands in the immediate neighborhood of the boundary.

It has been contended that the death of trees and shrubs due to fumigation has had an injurious effect on the water storage capacity of the soil and has even created some soil erosion. The Tribunal is of opinion that while there may have been some erosion of soil and impairment of water storage capacity in a limited area near the boundary, it is impossible to determine whether such damage has been due to fires or to mortality of trees and shrubs caused by fumigation.

(B) As regards uncleared land in its use as timberland, the Tribunal has found that damage due to fumigation has occurred to trees during the years 1932 to 1937 inclusive, in varying degrees, over areas varying not only from year to year but also from species to species. It has not seemed feasible to give a determination of the geographical extent of the damage except in so far as it may be stated broadly, that a territory coinciding in extent with the

Bayle cruises (hereinafter described) may be considered as an average area, although the contours of the actually damaged area do not coincide for any given species in any given year with that area and the intensity of the damage in a given year and for a given species varies, of course, greatly, according to location.

In comparing the area covered by the Bayle cruises with the Hedgcock maps of injury to conifers for the years under consideration, the Tribunal is of opinion that damage near the boundary line has occurred in a somewhat broader area than that covered by the Bayle cruises, but that on the other hand, injury, except to larch in 1936, seems to have been confined below Marble to the immediate vicinity of the river.

It is evident that for many years prior to January 1, 1932, much of the forests in the area included in the present Northport and Boundary Precincts had been in a poor condition. West and east of the Columbia River, there had been the scene of a number of serious fires; and the operations of the Northport Smelting and Refining Company and its predecessor from 1898 to 1901, from 1901 to 1908, and from 1916 to 1921, had undoubtedly had an effect, as is apparent from the decisions in suits in the courts of the State of Washington on claims for damages from fumigations in this area [1]. It is uncontroverted that heavy fumigations from the Trail Smelter which destroyed and injured trees occurred in 1930 and 1931; and there were also serious fumigations in earlier years. In the Canadian Document A 1, termed "The Deans' Report", being a report made to the International Joint Commission in September, 1929, it is stated (pp. 29, 31):

> Since a cruise of the timber in the Northport area has not been made by a forest engineer of either Government, this report does not make any recommendations for settlements of timber damage. However, a brief statement as to the timber situation is submitted.
>
> *Present condition.* Practically the entire region was covered with timber when it was first settled. Probably 90 per cent of the merchantable timber has now been removed. The timber on about one-third of the area has been cut only in part, that is to say only the more valuable species have been logged, and on a large part of the rest of the area that has been cut-over are stands too small to cut at time of logging. These so-called residual stands, together with the remaining virgin timber, make up the timber resources of the Northport area at the present time. Heavy toll of these has been taken this season by two large forest fires still smouldering as this report is being written. . . . Government forest pathologists are working to determine the zone of economic injury to timber, but their task, a difficult one at best, is incomplete. Much additional data must be collected and after that all must be compiled and analyzed, hence no attempt is made to submit a map with this report delimiting the zone of injury to forest trees. Admittedly, however, serious damage to timber has already taken place and reproduction is impaired.

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[1] See Henry W. Sterrett *v.* Northport Smelting and Refining Co. (1902), 30 Washington Reports 164; Edwin J. Rowe *v.* Northport Smelting and Refining Co. (1904), 35 Washington Reports 101; Charles N. Park *v.* Northport Smelting and Refining Co. (1907), 47 Washington Reports 597; John O. Johnson *v.* Northport Smelting and Refining Co. (1908), 50 Washington Reports 507. These cases were not cited by counsel for either side.

"The Deans' Report" further mentioned a cruise of timber made by the Consolidated Mining and Smelting Co., in 1927 and 1928, "by a forest engineer from British Columbia", and that "it is our opinion that the timber estimate and evaluation are quite satisfactory. However, before settlements are made for such smoke damage, the work should be checked by a forest engineer, preferably of the American Government since it was first done by a Canadian. . . . It is believed, however, that a satisfactory check can be made by one man and an assistant in about three months. . . . The check cruise should be made not later than the summer of 1930."

It is to be further noted that in the official document of the State of Washington entitled *Forest Statistics, Stevens County, Washington, Forest Survey Release No.* 5, *A June,* 1937. *Progress Release,* there appears a map entitled *Forest Survey, Stevens County, Washington,* 1935, on which four types of forest lands are depicted by varied colorings and linings, and most of the lands in the area now in question are described as—"Principally Non-Restocked Old Burns and Cut-Overs; Rocky and Subalpine Areas" and "Principally Immature Forest—Recent Burns and Cut-Overs". And these terms are defined as follows (page 23): "Woodland—that portion of the forest land neither immediately or potentially productive of commercial timber. Included in this classification are: subalpine—stands above the altitude range of merchantability; rocky, non-commercial—area too steep, sterile, or rocky to produce merchantable timber." This description of timber as inaccessible, from the standpoint of logging, is further confirmed by the report made by G. J. Bayle (the forest engineer referred to in "The Deans' Report") of cruises made by him prior to 1932 (Canadian Document C 4, pp. 5,6) to the effect that much of the timber is "far away from transportation", "of very little, if any, commercial value", "sale price would not bring the cost of operating", "scattered", "located on steep slopes". On page 9 of the *Forest Survey Release No.* 5, above referred to, it is further stated:

> As a consequence of the recent serious fires principally in the north portion of the county, 52,402 acres of timberland have recently been deforested, many of which are restocking. Also concentrated in the north end of the county are 77,650 deforested acres representing approximately 6 per cent of the timberland area on which the possibilities of natural regeneration are slight. Much of this latter deforestation is thought to be the effect of alleged smelter fume damage.

(a) The Tribunal has adopted as the measure of indemnity, to be applied on account of damage in respect of uncleared land used for merchantable timber, the measure of damages applied by American courts, *viz.*, that since the destruction of merchantable timber will generally impair the value of the land itself, the measure of damage should be the reduction in the value of the land itself due to such destruction of timber; but under the leading American decisions, however, the value of the merchantable timber destroyed is, in general, deemed to be substantially the equivalent of the reduction in the value of the land (see *Sedgwick on Damages,* 9th Ed. 1920, Section 937a). The Tribunal is unable to accept the method contended for by the United States of estimating damage to uncleared timberland by applying to the value of such land as stated by the farmers (after deducting value of the timber) a ratio of loss measured by the reduced crop yield on cleared land. The Tribunal is of opinion, here as elsewhere in this decision, that, in accordance with American law, it is not restricted to the method proposed by the

United States in the determination of amount of damages, so long as its findings remain within the amount of the claim presented to it.

As, in estimating damage to timberland which occurred since January 1, 1932, it was essential to establish the amount of timber in existence on January 1, 1932, an unnecessarily difficult task has been placed upon the Tribunal, owing to the fact that the United States did not make a timber cruise in 1930 (as recommended by "The Deans' Report"); and neither the United States nor the Dominion of Canada caused any timber cruise to be made as of January 1, 1932. The cruises by witnesses supporting the claim of the United States in respect of lands owned by the State of Washington were made in 1927-1928 and in 1937. The cruises by Bayle (a witness for the Dominion of Canada) were made, partially in 1927-1928 and partially in 1936 and 1937. The affidavits of landowners filed by United States claimants in 1929 contain only figures for a date prior to such filing. Since the Bayle cruise of 1927-1928 appears to be the most detailed and comprehensive evidence of timber in the area of probable damage, the Tribunal has used it as a basis for estimate of the amount and value of timber existing January 1, 1932, after making due allowance for the heavy destruction of timber by fire, fumigation, insects, and otherwise, which occurred between the making of such cruise of 1927-1928 and January 1, 1932, and after making allowance for trees which became of merchantable size between said dates. The Tribunal has also used the Bayle cruises of 1936 and 1937 as a basis for estimates of the amount and value of timber existing on January 1, 1932.

(b) With regard to damage due to destruction and impairment of growing timber (not of merchantable size), the Tribunal has adopted the measure of damages applied by American courts, *viz.*, the reduction in value of the land itself due to such destruction and impairment. Growing timberland has a value for firewood, fences, etc., as well as a value as a source of future merchantable timber. No evidence has been presented by the United States as to the locations or as to the total amounts of such growing timber existing on January 1, 1932, or as to its distribution into types of conifers—yellow pine, Douglas fir, larch or other trees. While some destruction or impairment, deterioration, and retardation of such growing timber has undoubtedly occurred since such date, it is impossible to estimate with any degree of accuracy the amount of damage. The Tribunal has, however, taken such damage into consideration in awarding indemnity for damage to land containing growing timber.

(c) With respect to damage due to the alleged lack of reproduction, the Tribunal has carefully considered the contentions presented. The contention made by the United States that fumigation prevents germination of seed is, in the opinion of the Tribunal, not sustained by the evidence. Although the experiments were far from conclusive, Hedgcock's studies tend to show, on the contrary, that, while seedlings were injured after germination owing to drought or to fumes, the actual germination did take place.

With regard to the contention made by the United States of damage due to failure of trees to produce seed as a result of fumigation, the Tribunal is of opinion that it is not proved that fumigation prevents trees from producing sufficient seeds, except in so far as the parent-trees may be destroyed or deteriorated themselves. This view is confirmed by the Hedgcock studies on cone production of yellow pine. There is a rather striking correlation between the percentage of good, fair, and poor trees found in the Hedgcock Census studies and the percentages of trees bearing a normal amount of cones, trees bearing few cones, and trees bearing no cones in the Hedgcock cone

production studies. In so far, however, as lack of cone production since January 1, 1932, is due to death or impairment of the parent-trees occurring before that date, the Tribunal is of opinion that such failure of reproduction both was caused and occurred prior to January 1, 1932, with one possible exception as follows: From standard American writings on forestry, it appears that seeds of Douglas fir and yellow pine rarely germinate more than one year after they are shed [1], but if a tree was killed by fumigation in 1931, germination from its seeds might occur in 1932. It appears, however, that Douglas fir and yellow pine only produce a good crop of seeds once in a number of years. Hence, the Tribunal concludes that the loss of possible reproduction from seeds which might have been produced by trees destroyed by fumigation in 1931 is too speculative a matter to justify any award of indemnity.

It is fairly obvious from the evidence produced by both sides that there is a general lack of reproduction of both yellow pine and Douglas fir over a fairly large area, and this is certainly due to some extent to fumigations. But, with the data at hand, it is impossible to ascertain to what extent this lack of reproduction is due to fumigations or to other causes such as fires occurring repeatedly in the same area or destruction by logging of the cone-bearing trees. It is further impossible to ascertain to what extent lack of reproduction due to fumigations can be traced to mortality or deterioration of the parent-trees which occurred since the first of January, 1932. It may be stated, in general terms, that the loss of reproduction due to the forest being depleted will only become effective when the amount of these trees per acre falls below a certain minimum [2]. But the data at hand do not enable the Tribunal to say where and to what extent a depletion below this minimum occurred through fumigations in the years under consideration. An even approximate appraisal of the damage is further complicated by the fact that there is evidence of reproduction of lodgepole pine, cedar, and larch, even close to the boundary and in the Columbia River Valley, at least in some locations. This substitution may not be due entirely to fumigations, as it appears from standard American works on conifers that reproduction of yellow pine is often patchy; that when yellow pine is substantially destroyed in a given area, it is generally supplanted by another species of trees; and that lodgepole pine in particular has a tendency to invade and take full possession of yellow pine territory when a fire has occurred. While the other species are inferior, their reproduction is, nevertheless, a factor which has to be taken into account; but here again quantitative data are entirely lacking. It is further to be noted that the amount of rainfall is an important factor in the reproduction of yellow pine, and that where the normal annual rainfall is but little more than eighteen inches, yellow pine does not appear to thrive. It appears in evidence that the annual precipitation at Northport, in a period of fourteen years from 1923 to 1936, averaged slightly below seventeen inches. With all these considerations in mind, the

[1] See "Life of Douglas Fir Seed in the Forest Floor", by Leo A. Isaac, Journal of Forestry. Vol. 23 (1935), pp. 61-66; "The Pine Trees in the Rocky Mountain Region", by G. B. Sudworth, United States Department of Agriculture Bulletin (1917); "Timber Growing and Logging Practice in the Douglas Fir Region", by T. T. Munger and W. B. Greely, United States Department of Agriculture Technical Bulletin (1927). As to yellow pine and rainfall, see "Western Yellow Pine in Oregon", by T. T. Munger, United States Department of Agriculture Technical Bulletin (1917).

[2] Applied Silviculture in the United States, by R. H. Westveld (1935).

Tribunal has, however, taken lack of reproduction into account to some extent in awarding indemnity for damage to uncleared land in use for timber.

On the basis of the foregoing statements as to damage and as to indemnity for damage with respect to cleared land and uncleared land, the Tribunal has awarded with respect to damage to cleared land and to uncleared land (other than uncleared land used for timber), an indemnity of sixty-two thousand dollars ($62,000); and with respect to damage to uncleared land used for timber an indemnity of sixteen thousand dollars ($16,000) —being a total indemnity of seventy-eight thousand dollars ($78,000). Such indemnity is for the period from January 1, 1932, to October 1, 1937.

There remain for consideration three others items of damage claimed in the United States Statement: (Item c) "Damages in respect of livestock"; (Item d) "Damages in respect of property in the town of Northport"; (Item g) "Damages in respect of business enterprises".

(3) With regard to "damages in respect of livestock", claimed by the United States, the Tribunal is of opinion that the United States has failed to prove that the presence of fumes from the Trail Smelter has injured either the livestock or the milk or wool productivity of livestock since January 1, 1932, through impaired quality of crop or grazing. So far as the injury to livestock is due to reduced yield of crop or grazing, the injury to livestock is due to reduced yield of crop or grazing, the injury is compensated for in the indemnity which is awarded herein for such reduction of yield.

(4) With regard to "damages in respect of property in the town of Northport", the same principles of law apply to assessment of indemnity to owners of urban land as apply to owners of farm and other cleared land, namely, that the measure of damage is the reduction in the value of the use or rental value of the property, due to fumigations. The Tribunal is of opinion that there is no proof of damage to such urban property; that even if there were such damage, there is no proof of facts sufficient to enable the Tribunal to estimate the reduction in the value of the use or rental value of such property; and that it cannot adopt the method contended for by the United States of calculating damages to urban property.

(5) With regard to "damages in respect of business enterprises", the counsel for the United States in his Answer and Argument (p. 412) stated: "The business men unquestionably have suffered loss of business and impairment of the value of good will because of the reduced economic status of the residents of the damaged area." The Tribunal is of opinion that damage of this nature "due to reduced economic status" of residents in the area is too indirect, remote, and uncertain to be appraised and not such for which an indemnity can be awarded. None of the cases cited by counsel (pp. 412-423) sustain the proposition that indemnity can be obtained for an injury to or reduction in a man's business due to inability of his customers or clients to buy, which inability or impoverishment is caused by a nuisance. Such damage, even if proved, is too indirect and remote to become the basis, in law, for an award of indemnity. The Tribunal is also of opinion that if damage to business enterprises has occurred since January 1, 1932, the burden of proof that such damages was due to fumes from the Trail Smelter has not been sustained and that an award of indemnity would be purely speculative.

(6) The United States in its Statement (pp. 49-50) alleges the discharge by the Trail Smelter, not only of "smoke, sulphurous fumes, gases", but

also of "waste materials", and says that "the Trail Smelter disposes of slag in such a manner that it reaches the Columbia River and enters the United States in that stream", with the result that the "waters of the Columbia River in Stevens County are injuriously affected", thereby. No evidence was produced on which the Tribunal could base any findings as regards damage, if any, of this nature. The Dominion of Canada has contended that this item of damage was not within the meaning of the words "damage caused by the Trail Smelter", as used in Article III of the Convention. It would seem that this contention is based on the fact that the preamble of the Convention refers exclusively to a complaint of the Government of the United States to the Government of Canada "that fumes discharged from the Smelter .... have been causing damage in the State of Washington" (see Answer of Canada, p. 8). Upon this contention and its legal validity, the Tribunal does not feel that it is incumbent upon it to pass at the present time.

(7) The United States in its Statement (p. 52) presents two further items of damages claimed by it, as follows: (Item e) which the United States terms "damages in respect of the wrong done the United States in violation of sovereignty"; and (Item f) which the United States terms "damages in respect of interest on $350,000 eventually accepted in satisfaction of damage to January 1, 1932, but not paid until November 2, 1935".

With respect to (Item e), the Tribunal finds it unnecessary to decide whether the facts proven did or did not constitute an infringement or violation of sovereignty of the United States under international law independently of the Convention, for the following reason: By the Convention, the high contracting parties have submitted to this Tribunal the questions of the existence of damage caused by the Trail Smelter in the State of Washington, and of the indemnity to be paid therefor, and the Dominion of Canada has assumed under Article XII, such undertakings as will ensure due compliance with the decision of this Tribunal. The Tribunal finds that the only question to be decided on this point is the interpretation of the Convention itself. The United States in its Statement (p. 59) itemizes under the claim of damage for "violation of sovereignty" only money expended "for the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail". The Tribunal is of opinion that it was not within the intention of the parties, as expressed in the words "damage caused by the Trail Smelter" in Article III of the Convention, to include such moneys expended. This interpretation is confirmed by a consideration of the proceedings and of the diplomatic correspondence leading up to the making of the Convention. Since the United States has not specified any other damage based on an alleged violation of its sovereignty, the Tribunal does not feel that it is incumbent upon it to decide whether, in law and in fact, indemnity for such damage could have been awarded if specifically alleged. Certainly, the present controversy does not involve any such type of facts as the persons appointed under the Convention of January 23, 1934, between the United States of America and the Dominion of Canada felt to justify them in awarding to Canada damages for violation of sovereignty in the *I'm Alone* award of January 5, 1935. And in other cases of international arbitration cited by the United States, damages awarded for expenses were awarded, not as compensation

for violation of national sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Government.

In his oral argument, the Agent for the United States, Mr. Sherley, claimed repayment of the aforesaid expenses of investigations on a further and separate ground, *viz.*, as an incident to damages, saying (Transcript, p. 5157): "Costs and interest are incident to the damage, the proof of the damage which occurs through a given act complained of", and again (Transcript, p. 5158): "The point is this, that it goes as an incident to the award of damage." The Tribunal is unable to accept this view. While in cases involving merely the question of damage to individual claimants, it may be appropriate for an international tribunal to award costs and expenses as an incident to other damages proven (see cases cited by the Agent for the United States in the Answer and Argument, pp. 431, 437, 453-465, and at the oral argument in Transcript, p. 5153), the Tribunal is of opinion that such costs and expenses should not be allowed in a case of arbitration and final settlement of a long pending controversy between two independent Governments, such as this case, where each Government has incurred expenses and where it is to the mutual advantage of the two Governments that a just conclusion and permanent disposition of an international controversy should be reached.

The Agent for the United States also cited cases of litigation in courts of the United States (Answer and Argument, p. 439, and Transcript, p. 5152), in which expenses incurred were ordered by the court to be paid. Such cases, the Tribunal is of opinion, are inapplicable here.

The Tribunal is, therefore, of opinion that neither as a separable item of damage nor as an incident to other damages should any award be made for that which the United States terms "violation of sovereignty".

(8) With respect to (Item f), "damages in respect of interest on $350,000 eventually accepted in satisfaction of damage to January 1, 1932, but not paid until November 2, 1935", the Tribunal is of opinion that no payment of such interest was contemplated by the Convention and that by payment within the term provided by Article I thereof, the Dominion of Canada has completely fulfilled all obligations with respect to the payment of the sum of $350,000. Hence, such interest cannot be allowed.

In conclusion, the Tribunal answers Question 1 in Article III, as follows: Damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and up to October 1, 1937, and the indemnity to be paid therefor is seventy-eight thousand dollars ($78,000), and is to be complete and final indemnity and compensation for all damage which occurred between such dates. Interest at the rate of six per centum per year will be allowed on the above sum of seventy-eight thousand dollars ($78,000) from the date of the filing of this report and decision until date of payment. This decision is not subject to alteration or modification by the Tribunal hereafter.

The fact of existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor, if any, the Tribunal will determine in its final decision.

PART THREE.

As to Question No. 2, in Article III of the Convention, which is as follows:

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

the Tribunal decides that until the date of the final decision provided for in Part Four of this present decision, the Trail Smelter shall refrain from causing damage in the State of Washington in the future to the extent set forth in such Part Four until October 1, 1940, and thereafter to such extent as the Tribunal shall require in the final decision provided for in Part Four.

PART FOUR.

As to Question No. 3, in Article III of the Convention, which is as follows:

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

the Tribunal is unable at the present time, with the information that has been placed before it, to determine upon a permanent régime, for the operation of the Trail Smelter. On the other hand, in view of the conclusions at which the Tribunal has arrived (as stated in an earlier part of this decision) with respect to the nature, the cause, and the course of the fumigations, and in view of the mass of data relative to sulphur emissions at the Trail Smelter, and relative to meteorological conditions and fumigations at various points down the Columbia River Valley, the Tribunal feels that the information now available does enable it to predict, with some degree of assurance, that a permanent régime based on a more adequate and intensive study and knowledge of meteorological conditions in the valley, and an extension and improvement of the methods of operation of the plant and its control in closer relation to such meteorological conditions, will effectively prevent future significant fumigations in the United States, without unreasonably restricting the output of the plant.

To enable it to establish a permanent régime based on the more adequate and intensive study and knowledge above referred to, the Tribunal establishes the following temporary régime.

(1) For the purpose of administering an experimental period, to continue to a date not later than October 1, 1940, the Tribunal will appoint two Technical Consultants, and in case of vacancy will appoint the successor. Such Technical Consultants to be appointed in the first place shall be Reginald S. Dean and Robert E. Swain, and they shall cease to act as Advisers to the Tribunal under the Convention during such trial period.

(2) The Tribunal directs that, before May 1, 1938, a consulting meteorologist, adequately trained in the installation and operation of the necessary type of equipment, be employed by the Trail Smelter, the appointment to be subject to the approval of the Technical Consultants. The Tribunal directs that, beginning May 1, 1938, such meteorological observations as may be deemed necessary by the Technical Consultants shall be made, under

their direction, by the meteorologist, the scientific staff of the Trail Smelter, or otherwise. The purpose of such observations shall be to determine, by means of captive balloons and otherwise, the weather conditions and the height, velocity, temperature, and other characteristics of the gas-carrying and other air currents and of the gas emissions from the stacks.

(3) The Tribunal further directs that beginning May 1, 1938, there shall be installed and put in operation and maintained by the Trail Smelter, for the purpose of providing information which can be used in determining present and prospective wind and other atmospheric conditions, and in making a prompt application of those observations to the control of the Trail Smelter plant operation:

(a) Such observation stations as the Technical Consultants deem necessary.

(b) Such equipment at the stacks as the Technical Consultants may find necessary to give adequate information of gas conditions and in connection with the stacks and stack effluents.

(c) Sulphur dioxide recorders, stationary and portable (the stationary recorders not to exceed three in number).

(d) The Technical Consultants shall have the direction of and authority over the location in both the United States and the Dominion of Canada, and over the installation, maintenance and operation of all apparatus provided for in Paragraph 2 and Paragraph 3. They may require from the meteorologist and from the Trail Smelter regular reports as to the operation of all such apparatus.

(e) The Technical Consultants may require regular reports from the Trail Smelter as to the methods of operation of its plant in such form and at such times as they shall direct; and the Trail Smelter shall conduct its smelting operations in conformity with the directions of the Technical Consultants and of the Tribunal, based on the result of the data obtained during the period hereinafter named; and the Technical Consultants and the Tribunal may change or modify at any time its or their instructions as to such operations.

(f) It is the intent and purpose of the Tribunal that the administration of the observations, experiments, and operations above provided for shall be as flexible as possible, and subject to change or modification by the Technical Consultants and by the Tribunal, to the end that conditions as they at any time may exist, may be changed as circumstances require.

(4) The Technical Consultants shall make report to the Tribunal at such dates and in such manner as it shall prescribe as to the results obtained and conclusions formed from the observations, experiments, and operations above provided for.

(5) The observations, experiments, and operations above provided for shall continue on a trial basis through the remainder of the crop-growing season of 1938, the crop-growing seasons of 1939 and 1940, and the winter seasons of 1938-1939 and 1939-1940 and until October 1, 1940, unless the Tribunal shall find it practicable or necessary to terminate such trial period at an earlier date.

(6) At the end of the trial period above provided for, or at the end of such shorter trial period as the Tribunal may find to be practicable or necessary, the Tribunal in a final decision will determine upon a permanent régime and upon the indemnity and compensation, if any, to be paid under the Convention. Such final decision, under the agreements for extension,

heretofore entered into by the two Governments under Article XI of the Convention, shall be reported to the Governments within three months after the date of the end of the trial period.

(7) The Tribunal shall meet at least once in the year 1939, to consider reports and to take such action as it may deem necessary.

(8) In case of disagreement between the Technical Consultants, they shall refer the matter to the Tribunal for its decision, and all persons and the Trail Smelter affected hereunder shall act in conformity with such decision.

(9) In order to lessen, as far as possible, the fumigations during the interval of time extending from May 1, 1938, to October 1, 1938 (during which time or during part of which time, it is possible that the observations and experiments above provided for may not be in full operation), the Tribunal directs that the Trail Smelter shall be operated with the following limitations on the sulphur emissions—it being understood that the Tribunal is not at present ready to make such limitations permanent, but feels that they will for the present probably reduce the chance or possibility of injury in the area of probable damage.

(a) For the periods April 25 to May 10 and June 22 to July 6, which are periods of greater sensitivity to sulphur dioxide for certain crops and trees in that area, not more than 100 tons per day of sulphur shall be emitted from the stacks of the Trail Smelter.

(b) As a further precaution, and for the entire period until October 1, 1938, the sulphur dioxide recorder at Columbia Gardens and the sulphur dioxide recorder at the Stroh farm (or any other point approved by the Technical Consultants) shall be continuously operated, and observations of relative humidity shall also be taken at both recorder stations. When, between the hours of sunrise and sunset, the sulphur dioxide concentration at Columbia Gardens exceeds one part per million for three consecutive 20-minute periods, and the relative humidity is 60 per cent or higher, the Trail Smelter shall be notified immediately; and the sulphur emission from the stacks of the plant maintained at 5 tons of sulphur per hour or less until the sulphur dioxide concentration at the Columbia Gardens recorder station falls to 0.5 part per million.

(c) This regulation may be suspended temporarily at any time by order of the Technical Consultants or of the Tribunal, if in its operation it shall interfere with any particular program of investigation which is in progress.

(10) For the carrying out of the temporary régime herein prescribed by the Tribunal, the Dominion of Canada shall undertake to provide for the payment of the following expenses thereof: (a) the Tribunal will fix the compensation of the Technical Consultants and of such clerical or other assistants as it may find necessary to employ; (b) statements of account shall be rendered by the Technical Consultants to the Tribunal and approved by the Chairman in writing; (c) the Dominion of Canada shall deposit to the credit of the Tribunal from time to time in a financial institution to be designated by the Chairman of the Tribunal, such sums as the Tribunal may find to be necessary for the payment of the compensation, travel, and other expenses of the Technical Consultants and of the clerical or other assistants; (d) written report will be made by the Tribunal to the Dominion of Canada of all the sums received and expended by it, and any sum not expended shall be refunded by the Tribunal to the Dominion of Canada at the conclusion of the trial period.

(11) The terms "Tribunal", and "Chairman", as used herein, shall be deemed to mean the Tribunal, and the Chairman, as it or they respectively may be constituted at any future time under the Convention.

The term "Trail Smelter", as used herein, shall be deemed to mean the Consolidated Mining and Smelting Company of Canada, Limited, or its successors and assigns.

Nothing in the above paragraphs of Part Four of this decision shall relieve the Dominion of Canada from any obligation now existing under the Convention with reference to indemnity or compensation, if any, which the Tribunal may find to be due for damage, if any, occurring during the period from October 1, 1937 (the date to which indemnity for damage is now awarded) to October 1, 1940, or to such earlier date at which the Tribunal may render its final decision.

(*Signed*)
JAN HOSTIE.

(*Signed*)
CHARLES WARREN.

(*Signed*)
R. A. E. GREENSHIELDS.

DECISION

REPORTED ON MARCH 11, 1941, TO THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND TO THE GOVERNMENT OF THE DOMINION OF CANADA, UNDER THE CONVENTION SIGNED APRIL 15, 1935.

This Tribunal is constituted under, and its powers are derived from and limited by, the Convention between the United States of America and the Dominion of Canada signed at Ottawa, April, 15, 1935, duly ratified by the two parties, and ratifications exchanged at Ottawa, August 3, 1935 (hereinafter termed "the Convention").

By Article II of the Convention, each Government was to choose one member of the Tribunal and the two Governments were to choose jointly a chairman who should be neither a British subject nor a citizen of the United States. The members of the Tribunal were chosen as follows: by the United States of America, Charles Warren of Massachusetts; by the Dominion of Canada, Robert A.E. Greenshields of the Province of Quebec; by the two Governments jointly, Jan Frans Hostie of Belgium.

Article II, paragraph 4, of the Convention provided that "the Governments may each designate a scientist to assist the Tribunal"; and scientists were designated as follows: by the United States of America, Reginald S. Dean of Missouri; and by the Dominion of Canada, Robert E. Swain of California. In November, 1940, Victor H. Gottschalk of Washington, D.C., was designated by the United States as alternate to Reginald S. Dean. The Tribunal desires to record its appreciation of the valuable assistance received by it from these scientists.

The Tribunal herewith reports its final decisions.

The controversy is between two Governments involving damage occurring, or having occurred, in the territory of one of them (the United States of America) and alleged to be due to an agency situated in the territory of the other (the Dominion of Canada). In this controversy, the Tribunal did not sit and is not sitting to pass upon claims presented by individuals or on behalf of one or more individuals by their Government, although individuals may come within the meaning of "parties concerned", in Article IV and of "interested parties", in Article VIII of the Convention and although the damage suffered by individuals did, in part, "afford a convenient scale for the calculation of the reparation due to the State" (see Judgment No. 13, Permanent Court of International Justice, Series A, No. 17, pp. 27, 28). (*Cf.* what was said by the Tribunal in the decision reported on April 16, 1938, as regards the problems arising out of abandonment of properties, Part Two, Clause (1).)

As between the two countries involved, each has an equal interest that if a nuisance is proved, the indemnity to damaged parties for proven damage shall be just and adequate and each has also an equal interest that unproven or unwarranted claims shall not be allowed. For, while the United States' interests may now be claimed to be injured by the operations of a Canadian corporation, it is equally possible that at some time in the future Canadian

interests might be claimed to be injured by an American corporation. As has well been said: "It would not be to the advantage of the two countries concerned that industrial effort should be prevented by exaggerating the interests of the agricultural community. Equally, it would not be to the advantage of the two countries that the agricultural community should be oppressed to advance the interest of industry."

Considerations like the above are reflected in the provisions of the Convention in Article IV, that "the desire of the high contracting parties" is "to reach a solution just to all parties concerned". And the phraseology of the questions submitted to the Tribunal clearly evinces a desire and an intention that, to some extent, in making its answers to the questions, the Tribunal should endeavor to adjust the conflicting interests by some "just solution" which would allow the continuance of the operation of the Trail Smelter but under such restrictions and limitations as would, as far as foreseeable, prevent damage in the United States, and as would enable indemnity to be obtained, if in spite of such restrictions and limitations, damage should occur in the future in the United States.

In arriving at its decision, the Tribunal has had always to bear in mind the further fact that in the preamble to the Convention, it is stated that it is concluded with the recognition of "the desirability and necessity of effecting a permanent settlement".

The duty imposed upon the Tribunal by the Convention was to "finally decide" the following questions:

(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor?

(2) In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

(3) In the light of the answer to the preceding question, what measures or régime, if any, should be adopted or maintained by the Trail Smelter?

(4) What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding questions?

The Tribunal met in Washington, in the District of Columbia, on June 21, 22, 1937, for organization, adoption of rules of procedure and hearing of preliminary statements. From July 1 to July 6, it travelled over and inspected the area involved in the controversy in the northern part of Stevens County in the State of Washington and it also inspected the smelter plant of the Consolidated Mining and Smelting Company of Canada, Limited, at Trail in British Columbia. It held sessions for the reception and consideration of such evidence, oral and documentary, as was presented by the Governments or by interested parties, as provided in Article VIII, in Spokane in the State of Washington, from July 7 to July 29, 1937; in Washington, in the district of Columbia, on August 16, 17, 18, 19, 1937; in Ottawa, in the Province of Ontario, from August 23 to September 18, 1937; and it heard arguments of counsel in Ottawa from October 12 to October 19, 1937.

On January 2, 1938, the Agents of the two Governments jointly informed the Tribunal that they had nothing additional to present. Under the provisions of Article XI of the Convention, it then became the duty of the

Tribunal "to report to the Governments its final decisions . . . . within a period of three months after the conclusion of the proceedings", *i.e.* on April 2, 1938.

After long consideration of the voluminous typewritten and printed record and of the transcript of evidence presented at the hearings, the Tribunal formally notified the Agents of two the Governments that, in its opinion, unless the time limit should be extended, the Tribunal would be forced to give a permanent decision on April 2, 1938, on the basis of data which it considered inadequate and unsatisfactory. Acting on the recommendation of the Tribunal and under the provisions of Article XI authorizing such extension, the two Governments by agreement extended the time for the report of final decision of the Tribunal to three months from October 1, 1940.

On April 16, 1938, the Tribunal reported its "final decision" on Question No. 1, as well as its temporary decisions on Questions No. 2 and No. 3, and provided for a temporary régime thereunder. The decision reported on April 16, 1938, will be referred to hereinafter as the "previous decision".

Concerning Question No. 1, in the statement presented by the Agent for the Government of the United States, claims for damages of $1,849,156.16 with interest of $250,855.01—total $2,100,011.17—were presented, divided into seven categories, in respect of (*a*) cleared land and improvements; (*b*) of uncleared land and improvements; (*c*) live stock; (*d*) property in the town of Northport; (*e*) wrong done the United States in violation of sovereignty, measured by cost of investigation from January 1, 1932, to June 30, 1936; (*f*) interest on $350,000 accepted in satisfaction of damage to January 1, 1932, but not paid on that date; (*g*) business enterprises. The area claimed to be damaged contained "more than 140,000 acres", including the town of Northport.

The Tribunal disallowed the claims of the United States with reference to items (*c*), (*d*), (*e*), (*f*) and (*g*) but allowed them, in part, with respect to the remaining items (*a*) and (*b*).

In conclusion (end of Part Two of the previous decision), the Tribunal answered Question No. 1 as follows:

> Damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and up to October 1, 1937, and the indemnity to be paid therefor is seventy-eight thousand dollars ($78,000), and is to be complete and final indemnity and compensation for all damage which occurred between such dates. Interest at the rate of six per centum per year will be allowed on the above sum of seventy-eight thousand dollars ($78,000) from the date of the filing of this report and decision until date of payment. This decision is not subject to alteration or modification by the Tribunal hereafter. The fact of existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor, if any, the Tribunal will determine in its final decision

Answering Questions No. 2 and No. 3, the Tribunal decided that, until a final decision should be made, the Trail Smelter should be subject to a temporary régime (described more in detail in Part Four of the present decision) and a trial period was established to a date not later than October 1, 1940, in order to enable the Tribunal to establish a permanent régime based on a "more adequate and intensive study", since the Tribunal felt that the information that had been placed before it did not enable it to determine at that time with sufficient certainty upon a permanent régime.

In order to supervise the conduct of the temporary régime and in accordance with Part Four, Clause (1) of the previous decision, the Tribunal appointed two Technical Consultants, Dr. R. S. Dean and Professor R. E. Swain. As further provided in said Part Four (Clause 7), the Tribunal met at Washington, D.C., with these Technical Consultants from April 24, 1939, to May 1, 1939, to consider reports of the latter and determine the further course to be followed during the trial period (see Part Four of the present decision).

It had been provided in the previous decision that a final decision on the outstanding questions would be rendered within three months from the termination of the trial period therein prescribed, *i.e.*, from October 1, 1940, unless the trial period was ended sooner. The trial period was not terminated before October 1, 1940. As the Tribunal deemed it necessary after the intervening period of two and a half years to receive supplementary statements from the Governments and to hear counsel again before determining upon a permanent régime, a hearing was set for October 1, 1940. Owing, however, to disruption of postal communications and other circumstances, the supplementary statement of the United States was not transmitted to the Dominion of Canada until September 25, 1940, and the public meeting was, in consequence, postponed.

The Tribunal met at Boston, Massachusetts, on September 26 and 27, 1940, for adoption of additional rules of procedure. It met at Montreal, P.Q., with its scientific advisers, from December 5 to December 8, 1940, to consider the Final Report they had rendered in their capacity as Technical Consultants (see Part Four of this decision). It held its public meeting and heard arguments of counsel in Montreal, from December 9 to December 12, 1940.

The period within which the Tribunal shall report its final decisions was extended by agreement of the two Governments until March 12, 1941.

I.

By way of introduction to the Tribunal's decision, a brief statement, in general terms, of the topographic and climatic conditions and economic history of the locality involved in the controversy may be useful.

The Columbia River has its source in the Dominion of Canada. At a place in British Columbia named Trail, it flows past a smelter located in a gorge, where zinc and lead are smelted in large quantities. From Trail, its course is easterly and then it swings in a long curve to the international boundary line, at which point it is running in a southwesterly direction; and its course south of the boundary continues in that general direction. The distance from Trail to the boundary line is about seven miles as the crow flies or about eleven miles, following the course of the river (and possibly a slightly shorter distance by following the contour of the valley). At Trail and continuing down to the boundary and for a considerable distance below the boundary, mountains rise on either side of the river in slopes of various angles to heights ranging from 3,000 to 4,500 feet above sea-level, or between 1,500 to 3,000 feet above the river. The width of the valley proper is between one and two miles. On both sides of the river are a series of bench lands at various heights.

More or less half way between Trail and the boundary is a place, on the east side of the river, known as Columbia Gardens; at the boundary, on the east side of the river and on the south side of its affluent, the Pend-d'Oreille,

are two places respectively known as Waneta and Boundary; the former is on the Canadian side of the boundary, the latter on the American side; four or five miles south of the boundary, and on the west side of the river, is a farm, named after its owner, Fowler Farm (Section 22, T. 40, R. 40), and on the east side of the river, another farm, Stroh Farm, about five miles south of the boundary.

The town of Northport is located on the east bank of the river, about nineteen miles from Trail by the river, and about thirteen miles as the crow flies. It is to be noted that mountains extending more or less in an easterly and westerly direction rise to the south between Trail and the boundary.

Various creeks are tributary to the river in the region of Northport, as follows: Deep Creek flowing from southeast to northwest and entering the river slightly north of Northport; opposite Deep Creek and entering on the west side of the river and flowing from the northwest, Sheep Creek; north of Sheep Creek on the west side, Nigger Creek; south of Sheep Creek on the west side, Squaw Creek; south of Northport, on the east side, flowing from the southeast, Onion Creek.

About eight miles south of Northport, following the river, is the town of Marble; and about seventeen miles, the town of Bossburg. Three miles south of Bossburg is the town of Evans; and about nine miles, the town of Marcus. South of Marcus and about forty-one miles from the boundary line is the town of Kettle Falls which, in general, may be stated to be the southern limit of the area as to which evidence was presented. All the above towns are small in population and in area.

At Marble and to the south, various other creeks enter the river from the west side--Rattlesnake Creek, Crown Creek, Flat Creek, and Fifteen Mile Creek.

Up all the creeks above mentioned, there extend tributary valleys, differing in size.

While, as stated above, the width of the valley proper of the river is from one to two miles, the width of the valley measured at an altitude of 3,000 feet above sea-level, is approximately three miles at Trail, two and one-half miles at Boundary, four miles above Northport, three and one-half miles at Marble. Near Bossburg and southward, the valley at the same altitude broadens out considerably.

As to climatic conditions, it may be stated that the region is, in general, a dry one though not what is termed "arid". The average annual precipitation at Northport from 1923 to 1940 inclusive averaged somewhat above seventeen inches. It varied from a minimum of 9.60 inches in 1929 to a maximum of 26.04 inches in 1927. The rainfall in the growing-season months of April, May and June at Northport, has been in 1938, 2.30 inches; in 1939, 3.78 inches, and in 1940, 3.24 inches. The average humidity varies with some regularity from day to day. In June, 1937, at Northport, it had an average maximum of 74% at 5 a.m. and an average minimum of 26% at 5 p.m.

The range of temperature in the different months as it appears from the records of the years 1934 to 1940 inclusive, at Northport was as follows: in the months of November, December, January and February, the lowest temperature was -19° (in January, 1937), and the highest was 60° (in November, 1934); in the growing-season months of April, May, June and July, the lowest temperature was 12° (in April, 1936), and the highest was 110° (in July, 1934); in the remaining months of August, September, October and March, the lowest temperature was 8° (in October, 1935 and March, 1939), and the highest was 104° (in September, 1938).

The direction of the surface wind is, in general, from the northeast down the river valley, but this varies at different times of day and in different seasons. The subject of winds is further treated in Part Four of this decision and, in detail, in the Final Report of the Technical Consultants.

The history of what may be termed the economic development of the area may be briefly stated as follows: Previous to 1892, there were few settlers in this area, but homesteading and location of farms received an impetus, particularly on the east side of the river, at the time when the construction of the Spokane and Northern Railway was undertaken, which was completed between the City of Spokane and Northport in 1892, and extended to Nelson in British Columbia in 1893. In 1892, the town of Northport was founded. In 1900, the population of this town was 787. It fell in 1910 to 476 but rose again, in 1920, to 906. In 1930, it had fallen to 391. The population of the precincts nearest the boundary line, *viz.*, Boundary and Northport (including Frontier and Nigger Creek Precincts prior to 1931) was 919 in 1900; 913 in 1910; 1,304 in 1920; 648 in 1930 and 651 in 1940. In these precincts, the area of all land in farms in 1925 was 5,292 acres; in 1930, 8,040 acres; in 1935, 5,666 acres and in 1940, 7,175 acres. The area in crop-land in 1925 was 798 acres; in 1930, 1,227 acres; in 1935, 963 acres and in 1940, about 900 acres[1]. In two other precincts east of the river and south of the boundary, Cummins and Doyle, the population in 1940 was 293, the area in farms was 6,884 acres and the area in crop-land was about 1,738 acres [2].

About the year 1896, there was established in Northport a business which has been termed the "Breen Copper Smelter", operated by the LeRoi Mining and Smelting Company, and later carried on by the Northport Smelting and Refining Company which was chartered in 1901. This business employed at times from five hundred to seven hundred men, although as compared with a modern smelter like the Trail Smelter, the extent of its operations was small. The principal value of the ores smelted by it was in copper, and the ores had a high sulphur content. For some years, the somewhat primitive method of "heap roasting" was employed which consisted of roasting the ore in open piles over woodfires, frequently called in mining parlance, "stink piles". Later, this process was changed. About seventy tons of sulphur were released per day. This Northport Smelting and Refining Company intermittently continued operations until 1908. From 1908 until 1915, its smelter lay idle. In March, 1916, operation was resumed for the purpose of smelting lead ore, and continued until March 5, 1921, when it ceased business and its plant was dismantled. About 30 tons of sulphur per day were emitted during this time. There is no doubt that damage was caused to some extent over a more or less restricted area by the operation of this smelter plant.

In addition to the smelting business, there have been intermittent mining operations of lead and zinc in this locality, but they have not been a large factor in adding to the population.

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[1] For the Precinct of Boundary, the acreage of crop-land, idle or fallow, was omitted from the reports received by the Tribunal of the 1940 Census figures, the statement being made that it was "omitted to avoid disclosure of individual operations".

[2] For the Precinct of Cummins, the acreage of crop failure and of crop-land, idle or fallow, is only approximately correct, the census figures making similar omissions and for the same reason.

The most important industry in the area formerly was the lumber industry. It had its beginning with the building of the Spokane and Northern Railway. Several saw mills were constructed and operated, largely for the purpose of furnishing ties to the railway. In fact, the growing trees—yellow pine, Douglas fir, larch, and cedar—were the most valuable asset to be transformed into ready cash. In early days, the area was rather heavily wooded, but the timber has largely disappeared and the lumber business is now of small size. On about 57,000 acres on which timber cruises were made in 1927-1928 and in 1936 in the general area, it may be doubtful whether there is today more than 40,000 thousands of board feet of merchantable timber.

As to agricultural conditions, it may be said that farming is carried on in the valley and upon the benches and mountain slopes and in the tributary valleys. The soils are of a light, sandy nature, relatively low in organic matter, although in the tributary valleys the soil is more loamy and fertile. In some localities, particularly on the slopes, natural sub-irrigation affords sufficient moisture; but in other regions irrigation is desirable in order to produce favorable results. In a report made by Dr. F. C. Wyatt, head of the Soils Department of the University of Alberta, in 1929, it is stated that "taken as a unit, the crop range of these soils is wide and embraces the crops suited to the climate conditions. Under good cultural operations, yields are good." At the same time, it must be noted that a large portion of this area is not primarily suited to agriculture. In a report of the United States Department of Agriculture, in 1913, it is stated that "there is approximately one-third of the land in the Upper Columbia Basin unsuited for agricultural purposes, either because it is too stony, too rough, too steep, or a combination of these factors. To utilize this large proportion of land and to meet the wood needs of an increasing population, the Upper Columbia Basin is forced to consider seriously the problem of reforestation and conservation." Much of the farming land, especially on the benches, is land cleared from forest growth; most of the farms contain from an eighth to a quarter of a section (80-160 acres); and there are many smaller and some larger farms.

In general, the crops grown on the farms are alfalfa, timothy, clover, grain cut green for hay, barley, oats, wheat, and a small amount of potatoes. Wild hay is cut each year to some extent. The crops, in general, are grown for feed rather than for sale, though there is a certain amount of wheat and oats sold. Much of the soil is apparently well suited to the predominant crop of alfalfa, which is usually cut at present twice a year(with a small third crop on some farms). Much of the present alfalfa has been rooted for a number of years.

Milch cattle are raised to a certain extent and they are grazed on the wild grasses on the hills and mountains in the summer months, but the dairying business depends on existence of sufficient land under cultivation as an adjunct to the dairy to provide adequate forage for the winter months.

In early days, it was believed that, owing to soil and climatic conditions, this locality was destined to become a fruit-growing region, and a few orchards were planted. For several reasons, of which it is claimed that fumigation is one, orchards have not thrived. In 1909-1910, the Upper Columbia Company purchased two large tracts, comprising about ten thousand acres, with the intention of developing the land for orchard purposes and selling of timber in the meantime, and it established a large orchard of about 900 acres in the town of Marble. The project, as early 1917, proved a failure.

II.

In 1896, a smelter was started under American auspices near the locality known as Trail, B.C. In 1906, the Consolidated Mining and Smelting Company of Canada, Limited, obtained a charter of incorporation from the Canadian authorities, and that company acquired the smelter plant at Trail as it then existed. Since that time, the Canadian company, without interruption, has operated the Smelter, and from time to time has greatly added to the plant until it has become one of the best and largest equipped smelting plants on the American continent. In 1925 and 1927, two stacks of the plant were erected to 409 feet in height and the Smelter greatly increased its daily smelting of zinc and lead ores. This increased production resulted in more sulphur dioxide fumes and higher concentrations being emitted into the air. In 1916, about 5,000 tons of sulphur per month were emitted; in 1924, about 4,700 tons; in 1926, about 9,000 tons—an amount which rose near to 10,000 tons per month in 1930. In other words, about 300-350 tons of sulphur were being emitted daily in 1930. (It is to be noted that one ton of sulphur is substantially the equivalent of two tons of sulphur dioxide or SO_2.)

From 1925, at least, to 1937, damage occurred in the State of Washington, resulting from the sulphur dioxide emitted from the Trail Smelter as stated in the previous decision.

The subject of fumigations and damage claimed to result from them was referred by the two Governments on August 7, 1928, to the International Joint Commission, United States and Canada, under Article IX of the Convention of January 11, 1909, between the United States and Great Britain, providing that the high contracting parties might agree that "any other question or matters of difference arising between them involving the rights, obligations or interests of either in relation to the other, or to the inhabitants of the other, along the common frontier between the United States and the Dominion of Canada shall be referred from time to time to the International Joint Commission for examination and report. Such reports shall not be regarded as decisions of the question or matters so submitted either on the facts or on the law, and shall not, in any way, have the character of an arbitral award."

The questions referred to the International Joint Commission were five in number, the first two of which may be noted: first, the extent to which property in the State of Washington has been damaged by fumes from the Smelter at Trail B.C.; second, the amount of indemnity which would compensate United States' interests in the State of Washington for past damages.

The International Joint Commission sat at Northport, at Nelson, B.C., and in Washington, D.C., in 1928, 1929 and 1930, and on February 28, 1931, rendered a unanimous report which need not be considered in detail.

After outlining the plans of the Trail Smelter for extracting sulphur from the fumes, the report recommended (Part I, Paragraphs (*a*) and (*c*)) that "the company be required to proceed as expeditiously as may be reasonably possible with the works above referred to and also to erect with due dispatch such further sulphuric acid units and take such further or other action as may be necessary, if any, to reduce the amount and concentration of SO_2 fumes drifting from its said plant into the United States until it has reduced the amount by some means to a point where it will do no damage in the United States".

The same Part I, Paragraph (*g*) gave a definition of "damage":

> The word "damage", as used in this document shall mean and include such damage as the Governments of the United States and Canada may deem appreciable, and for the purposes of paragraphs (*a*) and (*c*) hereof, shall not include occasional damage that may be caused by SO_2 fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions. Provided, however, that any damage in the State of Washington howsoever caused by said fumes on or after January 1, 1932, shall be the subject of indemnity by the company to any interests so damaged. . . .

Paragraph 2 read, in part, as follows:

> In view of the anticipated reduction in sulphur fumes discharged from the smelter at Trail during the present year, as hereinafter referred to, the Commission therefore has deemed it advisable to determine the amount of indemnity that will compensate United States interests in respect to such fumes, up to and including the first day of January, 1932. The Commission finds and determines that all past damages and all damages up to and including the first day of January next, is the sum of $350,000. Said sum, however, shall not include any damage occurring after January 1, 1932.

This report failed to secure the acceptance of both Governments. A sum of $350,000 has, however, been paid by the Dominion of Canada to the United States.

Two years after the filing of the above report, the United States Government, on February 17, 1933, made representations to the Canadian Government that existing conditions were entirely unsatisfactory and that damage was still occurring and diplomatic negotiations were entered into which resulted in the signing of the present Convention.

The Consolidated Mining and Smelting Company of Canada, Limited, proceeded after 1930 to make certain changes and additions in its plant, with the intention and purpose of lessening the sulphur contents of the fumes, and in an attempt to lessen injurious fumigations, a new system of control over the emission of fumes during the crop growing season came into operation about 1934. To the three sulphuric acid plants in operation since 1932, two others have recently been added. The total capacity is now of 600 tons of sulphuric acid per day, permitting, if these units could run continually at capacity, the fixing of approximately 200 tons of sulphur per day. In addition, from 1936, units for the production of elemental sulphur have been put into operation. There are at present three such units with a total capacity of 140 tons of sulphur per day. The capacity of absorption of sulphur dioxide is now 600 tons of sulphur dioxide per day (300 tons from the zinc plant gases and 300 tons from the lead plant gases). As a result, the maximum possible recovery of sulphur dioxide, with all units in full operation has been brought to a figure which is about equal to the amount of that gas produced by smelting operations at the plant in 1939. However, the normal shutdown of operating units for repairs, the power supply, ammonia available, and the general market situation are factors which influence the amount of sulphur dioxide treated.

In 1939, 360 tons, and in 1940, 416 tons, of sulphur per day were oxidized to sulphur dioxide in the metallurgical processes at the plant. Of the above,

for 1939, 253 tons, and for 1940, 289 tons per day, of the sulphur which was oxidized to sulphur dioxide was utilized. One hundred and seven tons

NORTHPORT

(FUMIGATIONS IN HOURS AND MINUTES AT THE CONCENTRATIONS NOTED IN FIRST COLUMN)

1938	April		May		June		July		August		Sept.	
Concentrations p.p.m.	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	6	0	0	0	0	20	5	50	10	40	28	20
.26-.50	0	50	0	0	0	0	1	40	3	0	6	0
above .50	0	10	0	0	0	0	0	0	0	5	0	20
Maximum p.p.m.	.66		.08		.15		.33		.61		.51	
1939												
.11-.25	1	40	10	0	9	20	5	20	5	0	25	0
.26-.50	0	0	0	0	2	0	0	0	2	0	3	40
above .50	0	0	0	0	0	0	0	0	0	0	0	0
Maximum p.p.m.	.16		.21		.30		.24		.33		.36	
1940												
.11-.25	16	20	32	40	5	40	9	20	10	0	23	10
.26-.50	2	0	0	0	0	0	0	0	0	0	0	0
above .50	0	0	0	0	0	0	0	0	0	0	0	0
Maximum p.p.m.	.37		.23		.22		.19		.17		.23	

WANETA

(FUMIGATIONS IN HOURS AND MINUTES AT THE CONCENTRATIONS NOTED IN FIRST COLUMN)

1938	June		July		August		September	
Concentrations p.p.m.	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	13	0	18	40	20	40	56	30
.26-.50	0	50	1	20	3	20	5	20
above .50	0	20	0	0	5	0	0	20
Maximum p.p.m.	.52		.30		1.63		.75	

1939	April		May		June		July		August		Sept.	
	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	11	55	10	0	20	20	10	40	13	20	16	50
.26-.50	4	40	5	40	8	20	5	0	6	20	9	20
above .50	0	20	0	0	1	20	0	0	0	40	1	40
Maximum p.p.m.	.52		.46		.79		.39		.56		.59	

1940	June		July		August		September	
	h.	m.	h.	m.	h.	m.	h.	m.
.11-.25	5	20	18	20	27	20	28	0
.26-.50	0	0	6	40	4	40	8	40
above .50	0	0	0	0	0	40	0	0
Maximum p.p.m.	.15		.49		.64		.42	

and 127 tons of sulphur per day for those two years, respectively, were emitted as sulphur dioxide to the atmosphere.

The tons of sulphur emitted into the air from the Trail Smelter fell from about 10,000 tons per month in 1930 to about 7,200 tons in 1931 and 3,400 tons in 1932 as a result both of sulphur dioxide beginning to be absorbed and of depressed business conditions. As depression receded, this monthly average rose in 1933 to 4,000 tons, in 1934 to nearly 6,300 tons and in 1935 to 6,800 tons. In 1936, however, it had fallen to 5,600 tons; in 1937, it further fell to 4,850 tons; in 1938, still further to 4,230 tons to reach 3,250 tons in 1939. It rose again, however, to 3,875 tons in 1940.

During the period since January 1, 1932, automatic recorders for registering the presence of sulphur dioxide in the air, as well as the length of fumigations and the maximum concentration in parts per million (p.p.m.) and one hundredth of parts per million, were maintained by the United States on the east side of the river at Northport from 1932 to 1937; and at Boundary in 1932, 1933, and in parts of 1934 and 1935; at Evans, south of Northport, from 1932 to 1934 and parts of 1935; and at Marble, in 1932 and 1933 and part of 1934; and the United States had at various times in 1939 and 1940 a portable recorder at Fowler Farm. The Dominion of Canada maintained recorders at Stroh Farm from 1932 to 1937 and from January to May 1938, and at a point opposite Northport on the west side of the River from 1937 to 1940—both of these recorders being in United States territory; and in Canadian territory, at Waneta, June to December, 1938, January to March, 1939, and June to December 1940, and at Columbia Gardens from May 1937 to December 1940.

Data compiled from the Northport recorder during the growing seasons from April to September, 1938, 1939, and 1940, and from the Waneta recorder during the growing seasons while it was operated from June to September 1938 and 1940, and April to September, 1939, show the number of hours and minutes in each month during which fumes were present at the various concentrations of .11 to .25, .26 to .50, and above .50.

PART TWO.

The first question under Article III of the Convention is: "(1) Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and, if so, what indemnity should be paid therefor."

This question has been answered by the Tribunal in its previous decision, as to the period from January 1, 1932 to October 1, 1937, as set forth above.

Concerning this question, three claims are now propounded by the United States.

I.

The Tribunal is requested to "reconsider its decision with respect to expenditures incurred by the United States during the period January 1, 1932, to June 30, 1936". It is claimed that "in this respect the United States is entitled to be indemnified in the sum of $89,655, with interest at the rate of five per centum per annum from the end of each fiscal year in which the several amounts were expended to the date of the Tribunal's final decision".

This claim was dealt with in the previous decision (Part Two, Clause (7)) and was disallowed.

The indemnity found by the Tribunal to be due for damage which had occurred since the first day of January, 1932, up to October 1, 1937, *i.e.*, $78,000, was paid by the Dominion of Canada to the United States and received by the latter without reservations. (Record, Vol. 56, p. 6468.) The decision of the Tribunal in respect of damage up to October 1, 1937, was thus complied with in conformity with Article XII of the Convention. If it were not, in itself, final in this respect, the decision would have assumed a character of finality through this action of the parties.

But this finality was inherent in the decision. Article XI of the Convention says: "The Tribunal shall report to the Governments its final decisions .... as soon as it has reached its conclusions in respect to the questions...." and Article XII of the Convention, "The Governments undertake to take such action as may be necessary in order to ensure due performance of the obligations undertaken hereunder, in compliance with the decision of the Tribunal."

There can be no doubt that the Tribunal intended to give a final answer to Question I for the period up to October 1, 1937. This is made abundantly clear by the passage quoted above, in particular by the words: "This decision is not subject to alteration or modification by the Tribunal hereafter."

It might be argued that the words "as soon as it reached its conclusions in respect to the questions" show that the "final decisions" mentioned in Article XI of the Convention were not to be final until all the questions should have been answered.

In proceeding as it did the Tribunal did not act exclusively on its own interpretation of the Convention. It stated to the Governments its intention of granting damages for the period down to October 1, 1937, whilst ordering further investigations before establishing a permanent régime. It is with this understanding that both Governments, by an exchange of letters between the Minister of the United States at Ottawa and the Secretary of State of the Dominion of Canada (March 14, 1938, March 22, 1938), concurred in the extension of time requested.

This interpretation of Article XI of the Convention, moreover, is not in contradiction with the intention of the parties as expressed in the Convention. It was not foreseen at the time that further investigations might be needed, after the hearings had been ended, as proved to be the case. But the duty was imposed upon the Tribunal to reach a solution just to all parties concerned. This result could not have been achieved if the Tribunal had been forced to give a permanent decision as to a régime on the basis of data which it and both its scientific advisers considered inadequate and unsatisfactory. And, on the other hand, it is obvious that equity would not have been served if the Tribunal, having come to the conclusion that damage had occurred after January 1, 1937, had withheld its decision granting damages for more than two and one half years.

The Tribunal will now consider whether its decision concerning Question No. 1, up to October 1, 1937, constitutes *res judicata*.

As Dr. James Brown Scott (*Hague Court Reports*, p. XXI) expressed it: ".... in the absence of an agreement of the contending countries excluding the law of nations, laying down specifically the law to be applied, international law is the law of an international tribunal". In deciding in conformity with international law an international tribunal may, and, in fact, frequently does apply national law; but an international tribunal will not depart from the rules of international law in favor of divergent rules of

national law unless, in refusing to do so, it would undoubtedly go counter to the expressed intention of the treaties whereupon its powers are based. This would particularly seem to be the case in matters of procedure. In this respect attention should be paid to the rules of procedure adopted by this Tribunal with the concurrence of both Agents on June 22, 1937, wherein it is said (Article 16): "With regard to any matter as to which express provision is not made in these rules, the Tribunal shall proceed as international law, justice and equity may require." Undoubtedly such provisions could not prevail against the Convention, but they show, at least, how, in the common opinion of the Tribunal and of the Agents, Article IV of the Convention was understood at the time. According to the latter, the Tribunal shall apply the law and practice followed in dealing with cognate questions in the United States of America as well as international law and practice. This text does not bind the Tribunal to apply national law and practice to the exclusion of international law and practice.

It is further to be noted that the words "the law and practice followed in the United States" are qualified by "in dealing with cognate questions". Unless these latter words are disregarded, they mean a limitation of the reference to national law. What this limitation is, becomes apparent when one refers to the questions set forth in the previous article. These questions are questions of damage caused by smelter fumes, of indemnity therefor, of measures or régime to be adopted or maintained by the Smelter with or without indemnity or compensation. They may be questions of law or questions of practice. The practice followed, for instance, in injunctions dealing with problems of smelter fumes may be followed in so far as the nature of an arbitral tribunal permits. But general questions of law and practice, such as the authority of the *res judicata* and the exceptions thereto, are not "cognate questions" to those of Article III.

This interpretation is confirmed by the correspondence exchanged between parties, as far as it is part of the record. On February 22, 1934, the Canadian Government declared (letter of the Secretary of State for External Affairs to the Minister of the United States at Ottawa) that it "would be entirely satisfied to refer the Tribunal to the principles of law as recognized and applied by the courts of the United States of America in such matters". Now, the matters referred to in that sentence are determined by the preceding sentences:

> The use of the word "injury" is likely to cause misunderstanding which should be removed when the actual terms of the issue are settled for inclusion in the Convention. In order to avoid such misunderstanding, it would seem to be desirable to use the word "damage" in place of "injury" and further, either to define the word actually used by a definition to be incorporated in the Convention or else by reference to the general principles of the law which are applied by the courts in the two countries in dealing with cognate matters.

This passage shows that the "cognate questions" parties had in mind in drafting the Convention were primarily those questions which in cases between private parties, find their answer in the law of nuisances.

That the sanctity of *res judicata* attaches to a final decision of an international tribunal is an essential and settled rule of international law.

If it is true that international relations based on law and justice require arbitral or judicial adjudication of international disputes, it is equally true

that such adjudication must, in principle, remain unchallenged, if it is to be effective to that end.

Numerous and important decisions of arbitral tribunals and of the Permanent Court of International Justice show that this is, in effect, a principle of international law. It will be sufficient, at this stage, to refer to some of the more recent decisions.

In the decisions of an arbitral tribunal constituted under the statute of the Permanent Court of Arbitration concerning the Pious Funds of California (October 14, 1902, *Hague Court Reports*, 1916, p. 3) the question was whether the claim of the United States on behalf of the Archbishop of San Francisco and the Bishop of Monterey was governed by the principle of *res judicata* by virtue of the arbitral award of Sir Edward Thornton. This question was answered in the affirmative.

The Fabiani case (French-Venezuelan Claims Commission, Ralston's Report, Decision of Umpire Plumley, p. 110) is of particular interest for the present case.

There had been an award by the President of the Swiss Confederation allowing part of a claim by France on behalf of Fabiani against Venezuela and disallowing the rest. As the terms of reference to the second arbitral tribunal were broader than to the first, it was contended by the claimants "that of the sums denied allowance by the honorable Arbitrator of Bern there are certain portions so disposed of by him as to be still in force against the respondent Government under the general terms of the protocol constituting this Commission". The first Arbitrator had eliminated all claims based on alleged arbitrary acts (*faits du prince*) of executive authorities as not being included in the matter submitted to his jurisdiction which he found limited by treaty to "denial of justice", a concept which he interpreted as confined to acts and omissions of judicial authorities. It was argued, on behalf of claimants, that "the doctrine and jurisprudence are for a long time unanimous upon this incontestable principle that a declaration of incompetency can never produce the effect of *res judicata* upon the foundation of the law". Umpire Plumley rejected these contentions. "In the interest of peace", a limitation had been imposed upon diplomatic action by a treaty the meaning whereof had been "finally and conclusively" settled "as applied to the Fabiani controversy" by the first award. The definition of denial of justice and the determination of the responsibility of the respondent Government were not questions of jurisdiction. And the Umpire concluded that "the compromise arranged between the honorable Governments . . . . followed by the award of the honorable President of the Swiss Confederation . . . . were 'acting together' a complete, final and conclusive disposition of the entire controversy on behalf of Fabiani".

Again in the case of the claim of the Orinoco Steamship Company between the United States and Venezuela, an arbitral tribunal constituted under the statute of the Permanent Court of Arbitration (October 25, 1910, *American Journal of International Law*, V, p. 230) emphasized the importance in international disputes of the principle of *res judicata*. The first question for the arbitral tribunal to decide was whether the decision previously rendered by an umpire in this case "in view of all the circumstances and under the principles of international law" was "not void, and whether it must be considered to be so conclusive as to preclude a re-examination of the case on its merits". As we will presently see, the tribunal held that the decision was partially void for excess of power. This, however, was rigidly limited and the principle affirmed as follows: ". . . . it is assuredly in the interest of peace

and the development of the institution of international arbitration so essential to the well-being of nations, that, in principle, such a decision be accepted, respected and carried out by the parties without reservation".

In three successive advisory opinions, regarding the delimitation of the Polish Czechoslovak frontier (Question of Jaworzina, No. 8, Series B, p. 38), the delimitation of the Albanian frontier at the Monastery of Saint Naoum (No. 9, Series B, p. 21, 22), and the Polish Postal service in the Free City of Danzig (No. 11, Series B, p. 24), the Permanent Court of International Justice based its appreciation of the legal effects of international decisions of an arbitral character on the underlying principle of *res judicata*.

This principle was affirmed in the judgment of the Court on the claim of Belgium against Greece on behalf of the *Société Commerciale de Belgique* (Series A/B, No. 78, p. 174), wherein the Court said: ". . . . since the arbitral awards to which these submissions relate are, according to the arbitration clause under which they were made, 'final and without appeal', and since the Court has received no mandate from the parties in regard to them, it can neither confirm nor annul them either wholly or in part".

In the well-known case of Frelinghuysen *v.* Key (110 U.S. 63, 71, 72), the Supreme Court of the United States, speaking of an award of the United States Mexican Claims Commission, under the Convention of July 4, 1868, whereby (Art. V) parties agreed, *inter alia*, to consider the result of the proceedings as a "full, perfect, and final settlement of every claim", said: "As between the United States and Mexico, the awards are final and conclusive until set aside by agreement between the two Governments or otherwise."

There is no doubt that in the present case, there is *res judicata*. The three traditional elements for identification: parties, object and cause (Permanent Court of International Justice, Judgment 11, Series A, No. 13, Dissenting Opinion by M. Anzilotti, p. 23) are the same. (*Cf.* Permanent Court of International Justice, Series B, No. 11, p. 30.)

Under the Statute of the Permanent Court of International Justice whereby (Article 59) "The decision of the Court has no binding force except between the parties and in respect of that particular case", the Permanent Court of International Justice, in an interpretative judgment (Judgment No. 11, Series A, No. 13, pp. 18, 20—Chorzów Case), expressed the opinion that the force of *res judicata* was inherent even in what was an incidental decision on a preliminary point, the ownership of the Oberschlesische Company. The minority judge, M. Anzilotti, pointed out that "under a generally accepted rule which is derived from the very conception of *res judicata*, decisions on incidental or preliminary questions which have been rendered with the sole object of adjudicating upon the parties' claims are not binding in another case" (same decision, p. 26). Later on, in the same case (Judgment 13, Series A, No. 17, Dissenting Opinion of M. Ehrlich, pp. 75, 76), M. Ehrlich, the dissenting national judge appointed by Poland, adopted this statement. But M. Anzilotti (Judgment 11, Series A, No. 13, Dissenting Opinion, p. 27) did not expressly answer in the negative the question which he formulated, namely: "Does this general rule also cover the case of an action for indemnity following upon a declaratory judgment in which the preliminary question has been decided?" It is true that, when the case came up again on the question of indemnity (Judgment 13, Series A, No. 17, pp. 31, 32), the Court seems to have avoided—as M. Ehrlich pointed out—the assertion that there was *res judicata* and reserved the effect of its incidental decision "as regards the right of ownership

under municipal law". But the Court said: ". . . . it is impossible that the Oberschlesische's right to the Chorzów factory should be looked upon differently for the purposes of that judgment (the previous Judgment No. 7 wherein it was decided that the attitude of the Polish Government in respect of the Oberschlesische was not in conformity with international law) and in relation to the claim for reparation based on the same judgment", thus admitting in effect (M. Anzilotti now concurring) that it was bound by its previous decision.

In the present case, the decision was not preliminary or incidental. Neither was it a decision on a question of jurisdiction. There is some authority (Tiedemann *v.* Poland, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, Tome VII (1928), p. 702), in support of the contention that a decision upon the question of jurisdiction only, may, under certain circumstances, be reversed by the same court; and it might be argued, as, in fact, was done by France in the Fabiani case, that a decision merely denying jurisdiction can never constitute *res judicata* as regards the merits of the case at issue. But assuming the first contention to be correct as the second undoubtedly is, that would not affect the issue in the present case. Here, as in the Fabiani case, the decision was not one denying jurisdiction.

The United States does not contend that the previous decision is void for excess of power, but asks for reconsideration and revision, as far as the costs of investigation are concerned, on account of a material error of law (Record, p. 6540).

In the absence of agreement between parties, the first question concerning a request tending to revision of a decision constituting *res judicata*, is: can such a request ever be granted in international law, unless special powers to do so have been expressly given to the tribunal?

The Convention for the Pacific Settlement of Disputes signed at The Hague, October 18, 1907 (Article 83) says: "The parties can reserve in the compromis the right to demand the revision of the award." In that case only, does the article apply. But, on the other hand, the Statute of the Permanent Court of International Justice (Article 61) does not require the grant of such special powers to the Court.

In the Jaworzina case (Advisory Opinions, Series B, No. 8, p. 37), the Permanent Court of International Justice expressed the opinion that the Conference of Ambassadors, which had acted in a quasi-arbitral capacity, did not retain the power to modify its decision, as it had fulfilled the task entrusted to it by giving the latter. In the case of Saint Naoum Monastery, however (Advisory Opinions, Series B, No. 9, p. 21), the Court seemed less positive as to the possibility of a revision in the absence of an express reservation to that effect.

Arbitral decisions do not give to the question an unanimous answer. Thus, in the United States Mexican Mixed Claims Commission of 1868, whilst Umpire Lieber, on a motion for rehearing, re-examined the case, Umpire Thornton, in the Weil, LaAbra, and other cases, refused a rehearing, *inter alia* on the ground that the provisions of the Convention in effect debarred him from rehearing cases which he had already decided (Moore, *International Arbitrations*, 1329, 1357). In the single case of Schreck, however, he granted a request of one of the Agents to reconsider his decision. The case also of A. A. Green (Moore, *International Arbitrations*, 1358) was reconsidered by the Umpire and that of G. Moore (Moore, *International Arbitrations*, 1357) by the two Commissioners. In the Lazare case (Haiti *v.* United States), the Arbitrator, Mr. Justice Strong, refused a rehearing, "solely for

the reason", that in his opinion, his "power over the award was at an end" when it "had passed from his hands and been filed in the State Department". (Moore, *International Arbitrations*, 1793.) In the Sabotage cases, before the American-German Mixed Claims Commission, the Umpire, Mr. Justice Roberts, granted a rehearing, although there was no express provision in the agreement empowering the Commission to do so (December 15, 1933, Documents, p. 1122, *American Journal of International Law*, 1940, pp. 154, 164).

Whether final, in part, or not, the previous decision did not give final answers to all the questions. The Tribunal, by that decision, did not become *functus officio*. Part of its task was yet before it when the request for revision was presented. Under those circumstances, the difficulties and uncertainties do not arise that might present themselves where an arbitral tribunal, having completed its task and finally adjourned, would be requested to reconsider its decision.

The Tribunal, therefore, decides that, at this stage, at least, the Convention does not deny it the power to grant a revision. (*Cf.* D. V. Sandifer, *Evidence before International Tribunals*, 1939, p. 299.)

The second question is whether revision should be granted; and this question subdivides itself into two separate parts: first, whether the petition for revision should be entertained, and second, if entertained, whether the previous decision should be revised in view of the considerations presented by the United States.

It is the rule under the Hague Convention for the Pacific Settlement of Disputes (Article 83) that the question whether a revision should be entertained must be dealt with separately. Such is also the rule according to Article 61 of the Statute of the Permanent Court of International Justice. It is true that, in the case of the Orinoco Steamship Company, the arbitral tribunal did not consider separately the question whether the previous award was void and the question of the merits; but the decision, in that respect, does not seem to conform to the compromis which clearly separated the two questions.

In the Sabotage cases and in other cases before the Mixed Claims Commission, United States and Germany, a contrary practice had prevailed. But when the question of revision came to a head, the Umpire, Mr. Justice Roberts (decision of December 15, 1933, Documents, p. 1115; *American Journal of International Law*, 1940, pp. 157-158), said: "I am convinced as the matter is now viewed in retrospect that it would have been fairer to both the parties, definitely to pass in the first instance upon the question of the Commission's power. . . . Orderly procedure would have required that these issues be decided by the Umpire before the filing of the tendered evidence. The American Agent has . . . . filed a very large quantity of evidence which . . . . I have thought it improper to examine." As the position apparently required further elucidation, a motion was presented to determine "whether the next hearing shall be merely of a preliminary nature" (Documents, p. 1159). The Umpire decided that it should, saying: "Germany insists that the preliminary question be determined separately. I am of opinion this is her right."

The Tribunal is of opinion that this procedure should be followed.

As said above, the petition is founded upon an alleged error in law. It is contended by the United States that the Tribunal erred in the interpretation of the Convention when it decided that the monies expended for the investigation undertaken by the United States Government of the problems created in the United States by the operation of the Smelter at Trail could not be

included within the "damage caused by the Trail Smelter" (Article III (1) of the Convention, Record, p. 6030). Statements by the Tribunal that the controversy did not involve "any such type of facts as the persons appointed" in the *I'm Alone* case "felt to justify them in awarding to Canada damages for violation of sovereignty" and that in cases where a private claim was espoused "damages awarded for expenses were awarded, not as compensation for violation of national sovereignty, but as compensation for expenses incurred by individual claimants in prosecuting their claims for wrongful acts by the offending Government" were also challenged, although petitioner added that possibly these further statements might be regarded as dicta. (Record, p. 6040.) It was further argued that the solution adopted by the Tribunal was not a "solution just to all parties concerned", as required by Article IV of the Convention.

According to the Hague Convention (Article 83), a request tending to the revision of an award can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence upon the award and which at the time the discussion was closed was unknown to the Tribunal and to the party demanding the revision.

It is noteworthy that, at the first Hague Conference, the United States Delegation submitted a proposal whereby every party was entitled to a second hearing before the same judges within a certain period of time "if it declares that it can call new witnesses or raise questions of law not raised or decided at the first hearing". This proposal was, however, considered as weakening unduly the principle of *res judicata*. The text, as it now stands, was adopted as a compromise between the American view and the views of those who, such as de Martens, were opposed to any revision. The Statute of the Permanent Court of International Justice (Article 61) substantially coincides with the Hague Convention: "An application for revision of a judgment can be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the court and also to the party claiming revision, always provided that such ignorance was not due to negligence." In presenting this text, the report of the Advisory Committee of Jurists (*Procès-Verbaux*, p. 744) said very aptly: "The right of revision is a very important right and affects adversely in the matter of *res judicata* a point which for the sake of international peace should be considered as finally settled. Justice, however, has certain legitimate requirements." These requirements were provided for in the text which enables the court to bring its decision in harmony with justice in cases where, through no fault of the claimant, essential facts remained undisclosed or where fraud was subsequently discovered. No error of law is considered as a possible basis for revision, either by the Hague Convention or by the Statute of the Permanent Court of International Justice.

The Permanent Court of International Justice left open, in the Saint Naoum case (Series B, p. 21), the question whether, in the absence of express provision, an award could be revised "in the event of the existence of an essential error being proved or of new facts being relied on".

Except for those cases where a second hearing before the same or another Tribunal was agreed upon between the Governments or their Agents in the case, there are few cases of awards where rehearing or revision was granted.

In the Green case, quoted above (Moore, *International Arbitrations*, 1358), the Umpire granted a rehearing because certain evidence which was before the Commissioners was not transmitted to him. In the case of George

Moore, also quoted above (Moore, *International Arbitrations*, 1357), a new document was produced. In the latter case, the Commissioners stated that it was their practice to grant revision where new evidence was such as ought undoubtedly to produce a change in the minds of the Commission except where there might be some gross laches or injustice would probably be done to the defendant Government. In the single case of Schreck, also quoted above (Moore, *International Arbitrations*, 1357), Umpire Thornton reconsidered his decision at the request of the Agent of the claimant Government and, in this case, the revision was granted because he found that he had clearly committed an error in law. Because a claimant was born in Mexico, he had taken for granted that he had Mexican nationality. "The Agent of the United States produced the appropriate law of Mexico, by which it appeared that the assumption was clearly erroneous."

In the case of the Orinoco S. S. Company where, it will be remembered, the question before the arbitral tribunal was whether the award in a previous arbitration was void, the defendant State, Venezuela, argued that the decision was not void as the compromis was valid, there had been no excess of power, nor alleged corruption of the judges, nor any "essential error" in the decision.

There were several claims the rejection of which by the Umpire in the first arbitration, Mr. Barge, was considered separately. The main claim had been disallowed on three grounds: the first was the interpretation of a contract between the Venezuelan Government and a concessionaire; the second was a so-called Calvo clause and the third was lack of compliance both with the contract and with Venezuelan law in omitting to notify to the Venezuelan Government the cession of the contract.

Under the terms of reference, the first arbitrators were to decide "on a basis of absolute equity without regard to objections of a technical nature or to the provisions of local legislations". It was clearly apparent from the circumstances of the case that the second and third grounds were entirely irreconcilable with these terms. Nevertheless, the second arbitral tribunal did not upset the findings of Umpire Barge as regards the main claim. The second award said: .

> Whereas the appreciation of the facts of the case and the interpretation of the documents were within the competence of the Umpire and, as his decisions, when based on such interpretation, are not subject to revision by this Tribunal, whose duty it is, not to say if the case has been well or ill judged, but whether the award must be annulled; that if an arbitral decision could be disputed on the ground of erroneous appreciation, appeal and revision, which the Conventions of The Hague of 1899 and 1907 made it their object to avert, would be the general rule.

Other and much smaller claims, however, had been disallowed exclusively on grounds two and three. Here the decision was considered void for excess of power.

The Sabotage cases were re-opened on the allegation that the decisions had been induced by fraud and the decisions were revised when this was proved. This obviously falls within the limits set up both by the Hague Convention and by the Statute of the Permanent Court of International Justice. The following passage of the decision of the Umpire, Mr. Justice Roberts, relied upon by the petitioner in this case, is therefore in the nature of a dictum:

> I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does

not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to re-open and correct a decision to accord with the facts and the applicable legal rules.

This statement may be entirely justified by circumstances special to the Mixed Claims Commission, in particular by the practice followed *ab initio* by this Commission, apparently with the concurrence, until the Sabotage cases reached their last stages, of the Umpire, the Commissioners and the Agents, but in so far as it does not refer to the correction of possible errors arising from a slip or accidental omission, it does not express the opinion generally prevailing as to the position in international law, stated for instance in the following passage of a recent decision: ".... in order to justify revision it is not enough that there has taken place an error on a point of law or in the appreciation of a fact, or in both. It is only lack of knowledge on the part of the judge and of one of the parties of a material and decisive fact which may in law give rise to the revision of a judgment" (de Neuflize *v.* Disconto Gesellschaft, *Recueil des Décisions des Tribunaux Arbitraux Mixtes*, t. VII, 1928, 629) [1].

A mere error in law is no sufficient ground for a petition tending to revision.

The formula "essential error" originated in a text voted by the International Law Institute in 1876. From its inception, its very authors were divided as to its meaning. It is thought significant that the arbitral tribunal in the Orinoco case avoided it; the Permanent Court in the Saint Naoum case alluded to it. The Government of the Kingdom of the Serbs, Croats and Slovenes alleged essential error both in law and in fact (Series C, No. 5, II, p. 57, Pleadings by Mr. Spalaikovitch), but what the Court had in mind in the passage quoted above (see p. 36 of the present decision), was only a possible error in fact. The paragraph where this passage appears begins with the words: "This decision has also been criticized on the ground that it was based on erroneous information or adopted without regard to certain essential facts."

The Tribunal is of opinion that the proper criterion lies in a distinction not between "essential" errors in law and other such errors, but between "manifest" errors, such as that in the Schreck case or such as would be committed by a tribunal that would overlook a relevant treaty or base its decision on an agreement admittedly terminated, and other errors in law. At least, this is as far as it might be permissible to go on the strength of precedents and practice. The error of interpretation of the Convention alleged by the petitioner in revision is not such a "manifest" error. Further criticisms need not be considered. The assumption that they are justified would not suffice to upset the decision.

For these reasons, the Tribunal is of opinion that the petition must be denied.

II (*a*).

The Tribunal is requested to say that damage has occurred in the State of Washington since October 1, 1937, as a consequence of the emission of sulphur dioxide by the smelters of the Consolidated Mining and Smelting

[1] This decision refers to the rules of procedure of the Franco-German Mixed Arbitral Tribunals but these rules themselves are expressive of the opinion generally prevailing as to the position in international law.

Company at Trail, B.C., and that an indemnity in the sum of $34,807 should be paid therefor.

It is alleged that acute damage has been suffered, in 1938-1940, in an area of approximately 6,000 acres and secondary damage, during the same period, in an area of approximately 27,000 acres. It is also alleged that damage has been suffered in the town of Northport, situated in the latter area. On the basis of investigations made in 1939 and 1940, the area of acute damage is claimed to extend on the western bank of the Columbia River to a point approximately due north of the mouth of Deep Creek, the average width of this area on this bank being about 1½ miles, and on the eastern bank of the river, to a point somewhat to the south of the northern limit of Section 20, T. 40, R. 41, the width of this area on that bank varying from approximately 1¼ miles at the border to ¼ mile at its lower end. The area of secondary damage is claimed to extend on both banks of the river to about one mile below Northport; it extends laterally, at the boundary, westward to the western limit of Section 2, T. 40, R. 40, and eastward to the eastern limit of Section 1, T. 40, R. 41; it extends along Cedar Creek above Section 14, T. 40, R. 41, along Nigger Creek to the middle of Section 9, T. 40, R. 40, along Little Sheep Creek to the middle of Section 10, T. 40, R. 39, along Big Sheep Creek to the western limit of Section 15, T. 40, R. 39, and along Deep Creek, to the southeastern corner of Section 14, T. 39, R. 40. It is to be noted that the area of damage alleged by the United States in its original statement of case was about 144,000 acres.

Damage is claimed, as to the area of acute damage, on the basis of $0.8525 per acre, on all lands whether cleared or not cleared and whether used for crops, timber or other purposes. It is equally claimed, as to the area of secondary damage, on the basis of $1.0511, on all lands. It is alleged that damage occurred, in 1932-1937, in the area of acute damage to the extent of $17,050; in the area of secondary damage, to the extent of $189,200 and in the town of Northport, to the extent of $8,750. The damage for 1938-1940 is supposed to be 0.3 of the first amount in the area of acute damage, and 0.15 of the second and the third amount, respectively, in the area of secondary damage and in the town of Northport.

The request for an indemnity in the sum of $34,807 is based on the final paragraph of Part Two of the previous decision, quoted above, where it is said that the Tribunal would determine in its final decision the fact of the existence of damage, if any, occurring after October 1, 1937, and the indemnity to be paid therefor.

The present report covers the period until October 1, 1940.

The Tribunal has considered not only the pertinent evidence (including data from the recorders located by the United States and by Canada) introduced at the hearings at Washington, D.C., Spokane and Ottawa in 1937, but also the following: (*a*) the Reports of the Technical Consultants appointed by the Tribunal to superintend the experimental period from April 16, 1938, to October 1, 1940, as well as their reports of the personal investigations in the area at various times within that period; (*b*) the candid reports of his investigations in the area in 1939 and 1940 by the scientist for the United States, Mr. Griffin; (*c*) the monthly sulphur balance sheets of the operations of the Smelter; (*d*) all data from the recorders located at Columbia Gardens, Waneta, Northport, and Fowler's Farm; (*e*) the census data and all other evidence produced before it.

The Tribunal has examined carefully the records of all fumigations specifically alleged by the United States as having caused or been likely to cause

damage, as well as the records of all other fumigations which may be considered likely to have caused damage. In connection with each such instance, it has taken into detailed consideration, with a view of determining the fact or probability of damage, the length of the fumigation, the intensity of concentration, the combination of length and intensity, the frequency of fumigation, the time of day of occurrence, the conditions of humidity or drouth, the season of the year, the altitude and geographical locations of place subjected to fumigation, the reports as to personal surveys and investigations and all other pertinent factors.

As a result, it has come to the conclusion that the United States has failed to prove that any fumigation between October 1, 1937, and October 1, 1940, has caused injury to crops, trees or otherwise.

II (*b*).

The Tribunal is finally requested as to Question I to find with respect to expenditures incurred by the United States during the period July 1, 1936, to September 1, 1940, that the United States is entitled to be indemnified in the sum of $38,657.79 with interest at the rate of five per centum per annum from the end of each fiscal year in which the several amounts were expended to the date of the Tribunal's final decision.

So far as claim is made for indemnity for costs of investigations undertaken between July 1, 1936, and October 1, 1937, it cannot be allowed for the reasons stated above with reference to costs of investigations from January 1, 1932, to June 30, 1936. The Tribunal, therefore, will now consider the question of the costs of investigations made since October 1, 1937.

Under Article XIV, the Convention took effect immediately upon exchange of ratifications. Ratifications were exchanged at Ottawa on August 3, 1935. Thus, the Convention was in force at the beginning of the period covered by this claim. Under the Convention (Article XIII) each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal. Whatever may have been the nature of the expenditures previously incurred, the Tribunal finds that monies expended by the United States in the investigation, preparation and proof of its case after the Convention providing for arbitral adjudication, including the aforesaid provision of Article XIII, had been concluded and had entered into force, were in the nature of expenses of the presentation of the case. An indemnity cannot be granted without reasonable proof of the existence of an injury, of its cause and of the damage due to it. The presentation of a claim for damages includes, by necessary implication, the collection in the field of the data and the preparation required for their presentation as evidence in support of the statement of facts provided for in Article V of the Convention.

It is argued that where injury has been caused and the continuance of this injury is reasonably feared, investigation is needed and that the cost of this investigation is as much damageable consequence of the injury as damage to crops and trees. It is argued that the indemnity provided for in Question No. 1 necessarily comprises monies spent on such investigation.

There is a fundamental difference between expenditure incurred in mending the damageable consequences of an injury and monies spent in ascertaining the existence, the cause and the extent of the latter.

These are not part of the damage, any more than other costs involved in seeking and obtaining a judicial or arbitral remedy, such as the fees of

counsel, the travelling expenses of witnesses, etc. In effect, it would be quite impossible to frame a logical distinction between the costs of preparing expert reports and the cost of preparing the statements and answers provided for in the procedure. Obviously, the fact that these expenditures may be incurred by different agencies of the same government does not constitute a basis for such a logical distinction.

The Convention does not warrant the inclusion of the cost of investigations under the heading of damage. On the contrary, apart from Article XIII, both the text of the Convention and the history of its conclusion disprove any intention of including them therein.

The damage for which indemnity should be paid is the damage caused by the Trail Smelter in the State of Washington. Investigations in the field took place there and it happens that experiments were conducted in that State. But these investigations were conducted by Federal agencies. The "damage"—assuming *ex hypothesi* that monies spent on the salaries and expenditures of the investigators should be so termed—was therefore caused, not in one State in particular, but in the entire territory of the Union.

The word "damage" is used in several passages of the Convention. It may not have everywhere the same meaning but different meanings should not be given to it in different passages without some foundation either in the text itself or on its history. It first occurs in the preamble where it is said that "fumes discharged from the Smelter .... have been causing damage in the State of Washington". It then appears in Article I, where it is said that the $350,000 to be paid to the United States will be "in payment of all damage which occurred in the United States .... as a result of the operation of the Trail Smelter". In Article III itself, the word appears twice. The Tribunal is asked "whether damage caused by the Trail Smelter in the State of Washington has occurred" and "whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent". Article X secures to qualified investigators access to the properties "upon which damage is claimed to have occurred or to be occurring". Finally, Article XI deals with "indemnity for damage .... which may occur subsequently to the period of time covered by the report of the Tribunal".

The underlying trend of thought strongly suggests that, in all these passages, the word "damage" has the same meaning, although in Article X, its scope is limited to damage to property by the context.

The preamble states that the damage complained of is damage caused by fumes in the State of Washington and there is every reason to admit that this, and this alone, is what is meant by the same word when it is used again in the text of the Convention.

Although no part of the report of the Joint Commission was formally adopted by both Governments, there is no doubt that, when the sum of $350,000 mentioned in Article I was agreed upon, parties had in mind the indemnity suggested by that Commission. It was, at least, in fact, a partial acceptance of the latter's suggestions. (See letters of the Minister of the United States at Ottawa to the Secretary of State for External Affairs of Canada, of January 30, 1934, and of the latter to the former of February 17, 1934.) There is also no doubt that, in the sum of $350,000 suggested by the Commission, no costs of investigation were included. This is conclusively proved by Paragraphs 2 and 3 of the Report of the International Joint Commission where it is recommended that this sum should be held by the Treasury of the United States as a trust fund to be distributed to the persons

"damaged by.... fumes" by an appointee of the Governor of the State of Washington and where it is said that no allowance was included for indemnity for damage to the lands of the Government of the United States. If, with that report before them, parties intended to include costs of investigations in the word "damage", as used in Article III, they would no doubt have expressed their intention more precisely.

It was argued in this connection on behalf of the United States that, whilst the terms of reference to the International Joint Commission spoke of the "extent to which property in the State of Washington has been damaged", the terms of reference to the arbitral Tribunal do not contain the same limitation to property. It is, however, to be noted that, whilst no indemnity was actually claimed for damage to the health of the inhabitants, the existence of such damage was asserted by interested parties at the time. (See letter of the Minister of the United States at Ottawa to the Secretary of State for External Affairs of Canada, of January 30, 1934.) The difference in the terms of reference may further be accounted for by the circumstance that the case was presented to this Tribunal, not as a sum of individual claims for damage to private properties, espoused by the Government, but as a single claim for damage to the national territory.

If, under the Convention, the monies spent by the United States on investigations cannot be looked upon as damage, no indemnity can be claimed therefor, under the latter, even if such expenses could not properly be included in the "expenses of the presentation and conduct" of the case. If there were a gap in the Convention, the claim ought to be disallowed, as it is unsupported by international practice.

When a State espouses a private claim on behalf of one of its nationals, expenses which the latter may have incurred in prosecuting or endeavoring to establish his claim prior to the espousal are sometimes included and, under appropriate conditions, may legitimately be included in the claim. They are costs, incidental to damage, incurred by the national in seeking local remedy or redress, as it is, as a rule, his duty to do, if, on account of injury suffered abroad, he wants to avail himself of the diplomatic protection of his State. The Tribunal, however, has not been informed of any case in which a Government has sought before an international jurisdiction or been allowed by an international award or judgment indemnity for expenses by it in preparing the proof for presenting a national claim or private claims which it had espoused; and counsel for the United States, on being requested to cite any precedent for such an adjudication, have stated that they know of no precedent. Cases cited were instances in which expenses allowed had been incurred by the injured national, and all except one prior to the presentation of the claim by the Government [1].

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[1] Santa Clara Estates Company, British Venezuelan Commission of 1903 (Ralston's Report, pp. 397, 402); Orinoco Steamship Company (United States) *v.* Venezuela (Ralston's Report, p. 107); United States-Venezuelan Arbitration at The Hague, 1909, p. 249 (Foreign Relations of the United States, 1911, p. 752); Compagnie Générale des Asphaltes de France, British-Venezuelan Arbitration (Ralston's Report, pp. 331, 340); H. J. Randolph Hemming under the Special Agreement of August 18, 1910 (Nielsen's Report, pp. 620, 622); Shufeldt (United States *v.* Guatemala), Department of State Arbitration Series No. 3, p. 881; Mather and Glover *v.* Mexico (Moore, International Arbitrations, pp. 3231-3232); Patrick H. Cootey *v.* Mexico (Moore, International Arbitrations, pp. 2769-2970); The Louisa (Moore, International Arbitrations,

In the absence of authority established by settled precedents, the Tribunal is of opinion that, where an arbitral tribunal is requested to award the expenses of a Government incurred in preparing proof to support its claim, particularly a claim for damage to the national territory, the intent to enable the Tribunal to do so should appear, either from the express language of the instrument which sets up the arbitral tribunal or as a necessary implication from its provision. Neither such express language nor implication is present in this case.

It is to be noted from the above, that even if the Tribunal had the power to re-open the case as to the expenditures by the United States from January 1, 1932, to October 1, 1937, the Tribunal would have reached the same conclusion as to such expenditures and would have been obliged to affirm its decision made in the Report filed on April 16, 1938.

Since the Tribunal has, in its previous decision, answered Question No. 1 with respect to the period from the first day of January, 1932, to the first day of October, 1937, it now anwers Question No. 1 with respect to the period from the first day of October, 1937, to the first day of October, 1940, as follows:

(1) No damage caused by the Trail Smelter in the State of Washington has occurred since the first day of October, 1937, and prior to the first day of October, 1940, and hence no indemnity shall be paid therefor.

PART THREE.

The second question under Article III of the Convention is as follows:

> In the event of the answer to the first part of the preceding question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

Damage has occurred since January 1, 1932, as fully set forth in the previous decision. To that extent, the first part of the preceding question has thus been answered in the affirmative.

As has been said above, the report of the International Joint Commission (1 (*g*)) contained a definition of the word "damage" excluding "occasional damage that may be caused by SO_2 fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions", as far, at least, as the duty of the Smelter to reduce the presence of that gas in the air was concerned.

The correspondence between the two Governments during the interval between that report and the conclusion of the Convention shows that the problem thus raised was what parties had primarily in mind in drafting Question No. 2. Whilst Canada wished for the adoption of the report, the United States stated that it could not acquiesce in the proposal to limit consideration of damage to damage as defined in the report (letter of the Minister of the United States of America at Ottawa to the Secretary of State for External Affairs of the Dominion of Canada, January 30, 1934). The view was expressed that "so long as fumigations occur in the State of Wash-

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p. 4325); Dr. John Baldwin *v.* Mexico (Moore, International Arbitrations, pp. 3235-3240); Robert H. May *v.* Guatemala (Foreign Relations of the United States, 1900, p. 674); Salvador Commercial Company *v.* Guatemala (Foreign Relations of the United States, 1902. pp. 859-873).

ington with such frequency, duration and intensity as to cause injury", the conditions afforded "grounds of complaint on the part of the United States, regardless of the remedial works.... and regardless of the effect of those works" (same letter).

The first problem which arises is whether the question should be answered on the basis of the law followed in the United States or on the basis of international law. The Tribunal, however, finds that this problem need not be solved here as the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law.

Particularly in reaching its conclusions as regards this question as well as the next, the Tribunal has given consideration to the desire of the high contracting parties "to reach a solution just to all parties concerned".

As Professor Eagleton puts in (*Responsibility of States in International Law*, 1928, p. 80): "A State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction." A great number of such general pronouncements by leading authorities concerning the duty of a State to respect other States and their territory have been presented to the Tribunal. These and many others have been carefully examined. International decisions, in various matters, from the Alabama case onward, and also earlier ones, are based on the same general principle, and, indeed, this principle, as such, has not been questioned by Canada. But the real difficulty often arises rather when it comes to determine what, *pro subjecta materie*, is deemed to constitute an injurious act.

A case concerning, as the present one does, territorial relations, decided by the Federal Court of Switzerland between the Cantons of Soleure and Argovia, may serve to illustrate the relativity of the rule. Soleure brought a suit against her sister State to enjoin use of a shooting establishment which endangered her territory. The court, in granting the injunction, said: "This right (sovereignty) excludes.... not only the usurpation and exercise of sovereign rights (of another State).... but also an actual encroachment which might prejudice the natural use of the territory and the free movement of its inhabitants." As a result of the decision, Argovia made plans for the improvement of the existing installations. These, however, were considered as insufficient protection by Soleure. The Canton of Argovia then moved the Federal Court to decree that the shooting be again permitted after completion of the projected improvements. This motion was granted. "The demand of the Government of Soleure", said the court, "that all endangerment be absolutely abolished apparently goes too far." The court found that all risk whatever had not been eliminated, as the region was flat and absolutely safe shooting ranges were only found in mountain valleys; that there was a federal duty for the communes to provide facilities for military target practice and that "no more precautions may be demanded for shooting ranges near the boundaries of two Cantons than are required for shooting ranges in the interior of a Canton". (R. O. 26 I, p. 450, 451; R. O. 41, I, p. 137; see D. Schindler, "The Administration of Justice in the Swiss Federal Court in Intercantonal Disputes", *American Journal of International Law*, Vol. 15 (1921), pp. 172-174.)

No case of air pollution dealt with by an international tribunal has been brought to the attention of the Tribunal nor does the Tribunal know of any such case. The nearest analogy is that of water pollution. But, here also, no decision of an international tribunal has been cited or has been found.

There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field of international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between States of the Union or with other controversies concerning the quasi-sovereign rights of such States, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States.

In the suit of the State of Missouri *v.* the State of Illinois (200 U.S. 496, 521) concerning the pollution, within the boundaries of Illinois, of the Illinois River, an affluent of the Mississippi flowing into the latter where it forms the boundary between that State and Missouri, an injunction was refused. "Before this court ought to intervene", said the court, "the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all considerations on the other side. (See Kansas *v.* Colorado, 185 U.S. 125.)" The court found that the practice complained of was general along the shores of the Mississippi River at that time, that it was followed by Missouri itself and that thus a standard was set up by the defendant which the claimant was entitled to invoke.

As the claims of public health became more exacting and methods for removing impurities from the water were perfected, complaints ceased. It is significant that Missouri sided with Illinois when the other riparians of the Great Lakes' system sought to enjoin it to desist from diverting the waters of that system into that of the Illinois and Mississippi for the very purpose of disposing of the Chicago sewage.

In the more recent suit of the State of New York against the State of New Jersey (256 U.S. 296, 309), concerning the pollution of New York Bay, the injunction was also refused for lack of proof, some experts believing that the plans which were in dispute would result in the presence of "offensive odors and unsightly deposits", other equally reliable experts testifying that they were confidently of the opinion that the waters would be sufficiently purified. The court, referring to Missouri *v.* Illinois, said: ".... the burden upon the State of New York of sustaining the allegations of its bill is much greater than that imposed upon a complainant in an ordinary suit between private parties. Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence."

What the Supreme Court says there of its power under the Constitution equally applies to the extraordinary power granted this Tribunal under the Convention. What is true between States of the Union is, at least, equally true concerning the relations between the United States and the Dominion of Canada.

In another recent case concerning water pollution (283 U.S. 473), the complainant was successful. The City of New York was enjoined, at the request of the State of New Jersey, to desist, within a reasonable time limit, from the practice of disposing of sewage by dumping it into the sea, a practice which was injurious to the coastal waters of New Jersey in the vicinity of her bathing resorts.

In the matter of air pollution itself, the leading decisions are those of the Supreme Court in the State of Georgia *v.* Tennessee Copper Company and

Ducktown Sulphur, Copper and Iron Company, Limited. Although dealing with a suit against private companies, the decisions were on questions cognate to those here at issue. Georgia stated that it had in vain sought relief from the State of Tennessee, on whose territory the smelters were located, and the court defined the nature of the suit by saying: "This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity, the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."

On the question whether an injunction should be granted or not, the court said (206 U.S. 230):

> It (the State) has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air.... It is not lightly to be presumed to give up quasi-sovereign rights for pay and .... if that be its choice, it may insist that an infraction of them shall be stopped. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account.... it is a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale by sulphurous acid gas, that the forests on its mountains, be they better or worse, and whatever domestic destruction they may have suffered, should not be further destroyed or threatened by the act of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.... Whether Georgia, by insisting upon this claim, is doing more harm than good to her own citizens, is for her to determine. The possible disaster to those outside the State must be accepted as a consequence of her standing upon her extreme rights.

Later on, however, when the court actually framed an injunction, in the case of the Ducktown Company (237 U.S. 474, 477) (an agreement on the basis of an annual compensation was reached with the most important of the two smelters, the Tennessee Copper Company), they did not go beyond a decree "adequate to diminish materially the present probability of damage to its (Georgia's) citizens".

Great progress in the control of fumes has been made by science in the last few years and this progress should be taken into account.

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

The decisions of the Supreme Court of the United States which are the basis of these conclusions are decisions in equity and a solution inspired by them, together with the régime hereinafter prescribed, will, in the opinion of the Tribunal, be "just to all parties concerned", as long, at least, as the present conditions in the Columbia River Valley continue to prevail.

Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. Apart from the undertakings in the Convention, it is,

therefore, the duty of the Government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.

The Tribunal, therefore, answers Question No. 2 as follows: (2) So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required to refrain from causing any damage through fumes in the State of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals. The indemnity for such damage should be fixed in such manner as the Governments, acting under Article XI of the Convention, should agree upon.

PART FOUR.

The third question under Article III of the Convention is as follows: "In the light of the answer to the preceding question, what measures or régime, if any, should be adopted and maintained by the Trail Smelter?"

Answering this question in the light of the preceding one, since the Tribunal has, in its previous decision, found that damage caused by the Trail Smelter has occurred in the State of Washington since January 1, 1932, and since the Tribunal is of opinion that damage may occur in the future unless the operations of the Smelter shall be subject to some control, in order to avoid damage occurring, the Tribunal now decides that a régime or measure of control shall be applied to the operations of the Smelter and shall remain in full force unless and until modified in accordance with the provisions hereinafter set forth in Section 3, Paragraph VI of the present part of this decision.

SECTION 1.

The Tribunal in its previous decision, deferred the establishment of a permanent régime until more adequate knowledge had been obtained concerning the influence of the various factors involved in fumigations resulting from the operations of the Trail Smelter.

For the purpose of administering an experimental period, to continue to a date not later than October 1, 1940, during which studies could be made of the meteorological conditions in the Columbia River Valley, and of the extension and improvements of the methods for controlling smelter operations in closer relation to such meteorological conditions, the Tribunal, as said before, appointed two Technical Consultants, who directed the observations, experiments and operations through the remainder of the crop-growing season of 1938, the crop-growing seasons of 1939 and 1940 and the winter seasons of 1938-1939 and 1939-1940. The Tribunal appointed as Technical Consultants the two scientists who had been designated by the Governments to assist the Tribunal, Dr. R. S. Dean and Professor R. E. Swain.

The previous decision directed that during the trial period, a consulting meteorologist, to be appointed with the approval of the Technical Consultants, should be employed by the Trail Smelter. On May 4, 1938, Dr. J. Patterson was thus appointed. On May 1, 1939, Dr. Patterson resigned to take up meteorological service in the Canadian Air Force, and Dr. E. W. Hewson was given leave from the Dominion Meteorological Service and appointed in his stead.

The previous decision further directed the installation, operation and maintenance of such observation stations, of such equipment at the stacks and of such sulphur dioxide recorders (the permanent recorders not to exceed three in number) as the Technical Consultants would deem necessary.

The Technical Consultants were empowered to require regular reports from the Trail Smelter as to the methods of operation of its plant and the latter was to conduct its smelting operations in conformity with the directions of the Technical Consultants and of the Tribunal; these instructions could and, in fact, were modified from time to time on the result of the data obtained.

As further provided in the previous decision, the Technical Consultants regularly reported to the Tribunal which, as said before, met in 1939 to consult verbally with them about the temporary régime.

The previous decision finally prescribed that the Dominion of Canada should undertake to provide for the payment of the expenses resulting from this temporary régime.

On May 4, 1938, the Tribunal authorized and directed the employment of Dr. John P. Nielsen, an American citizen, engaged for three years in post-graduate work at Stanford University, in chemistry and plant physiology, as an assistant to the Technical Consultants; Dr. Nielsen continued in this capacity until October 1, 1938.

Through the authority vested in it by the Tribunal, this technical staff was enabled to study the influence of meteorological conditions on dispersion of the sulphurous gases emitted from the stacks of the smelter. This involved the establishment, operation, and maintenance of standard and newly designed meteorological instruments and of sulphur-dioxide recorders at carefully chosen localities in the United States and the Dominion of Canada, and the design and construction of portable instruments of various types for the observation of conditions at numerous surface locations in the Columbia River Valley and in the atmosphere over the valley. Observations on height, velocity, temperature, sulphur dioxide content, and other characteristics of the gas-carrying air currents, were made with the aid of captive balloons, pilot balloons and airplane flights. These observations were begun in May, 1938, and after information as to the inter-relation between meteorological conditions and sulphur-dioxide distribution had been obtained, the observations were continued throughout several experimental régimes of smelter operation during 1939 and 1940.

Periodic examination of crops and timber in the area claimed to be affected were made at suitable times by members of the technical staff.

The full details of the projects undertaken, the methods of study used, and the results obtained may be found in the final report entitled *Meteorological Investigations near Trail, B.C.*, 1938-1940, *by Reginald S. Dean and Robert E. Swain* (an elaborate document of 374 pages accompanied by numerous scientific charts, graphs and photographs, copies of which have been filed with the two Governments and have been made a part of the record by the Tribunal).

The Tribunal expresses the hope that the two Governments may see fit to make this valuable report available to scientists and smelter operators generally, either by printing or other form of reproduction.

SECTION 2.

(*a*)

The investigations during the experimental period make it clear that in the carrying out of a régime, automatic recorders should be located and maintained for the purpose of aiding in control of the emission of fumes at the Smelter and to provide data for observation of the effect of the controls on fumigations.

The investigations carried out by the Technical Consultants have confirmed the idea that the dissipation of the sulphur dioxide gas emitted from the Smelter takes place by eddy-current diffusion. The form of the attenuation curve for sulphur dioxide with distance from the Smelter is, therefore, determined by this mechanism of gas dispersion.

Analysis of the recorder data collected since May, 1938, confirms the conclusion of the Tribunal stated in its previous decision to the effect that "the concentration of sulphur dioxide falls off very rapidly from Trail to a point about 16 miles downstream from the Smelter, or 6 miles from the boundary line, measured by the general course of the river; and that at distances beyond this point, the concentration of sulphur-dioxide is lower and falls off more gradually and less rapidly". The position of the knee in this attenuation curve is somewhat affected by wind velocity and direction, and by other factors.

From an examination of the recorded data, it appears that the Columbia Gardens recorder located 6 miles below the Smelter, is above the knee of the attenuation curve. The Waneta recorder, 10 miles below the Smelter, is still in the region of very rapid decrease of sulphur dioxide while the Northport recorder, 19 miles below the Smelter, is well below the knee of the curve. There is very little variation in the average ratio of concentrations between the various recorders. For example, the average ratio for the years 1932 to 1935, between Columbia Gardens and Northport, was 1 to .31, while the average ratio for the experimental period from May, 1938, to November, 1940, was 1 to .39. The individual variations from this ratio are relatively small. The ratio between Columbia Gardens and Waneta for the period 1932 to 1935 was .6 and that for the period May 1938, to November 1940, was .75. The individual variations of the ratio between Columbia Gardens and Waneta are, however, much greater than those between Columbia Gardens and Northport. It is accordingly found that the Columbia Gardens recorder and the Northport recorder give as complete a picture of the attenuation of sulphur dioxide with distance as can be obtained with any reasonable number of recorders.

It may be fairly assumed that the sulphur dioxide concentration at Columbia Gardens will fall off quite rapidly with distance away from the Smelter, and that a concentration very close to that recorded at Northport will be reached several miles above Northport. Concentrations recorded at intermediate points are functions of a number of variables other than distance from the Smelter. It may be generally assumed that the concentration in the neighborhood of the border will be from .6 to .75 of that recorded at Columbia Gardens. Individual variations, however, are likely to be somewhat greater than this, and in unusual instances concentrations near the border may be substantially equal to those at Columbia Gardens.

Although as a result of the investigations carried out by the Technical Consultants, the conclusion might be warranted that the Waneta recorder could be discontinued, it has, nevertheless, been decided to have it main-

tained for a limited period of further investigations, particularly as it was removed from its present location during one winter season of the trial period. As an alternative to Waneta, a location suggested by the United States, Gunderson Farm (on the west bank of the river in Section 12, T. 40, R. 40), was considered. The difficulties inherent in servicing a recorder in that location, particularly in winter time, would not be compensated, it was thought, by any appreciable advantages. It was further considered that Waneta—a location practically identical to that of Boundary which the United States' scientists had selected in the past—jutting out as it does almost into the middle of the Columbia Valley where it swerves to the west, is one of the best sites that could be chosen for a recorder in that vicinity. The Tribunal, having gone into the matter with great care, is convinced that this choice is not adversely affected by the vicinity of the narrow gorge of the Pend-d'Oreille River.

(*b*)

The year is divided into two parts, which correspond approximately with the summer and winter seasons: *viz.*, the growing season which extends from April 1 through the summer to September 30, and the non-growing season which extends from October 1 through the winter to April 1. Atmospheric conditions in the Columbia River Valley during the summer vary widely from those in the winter. During the summer, or growing season, the air is generally in active movement with little tendency toward extended periods of calm, and smoke from the Smelter is rapidly dispersed by the frequent changes in wind direction and velocity and the higher degree of atmospheric turbulence. During the winter, or non-growing season, calm conditions may prevail for several days and smoke from the Smelter may be dispersed only very slowly.

In general, a similar variation in atmospheric stability occurs during the day. The air through the early morning hours until about nine o'clock is not subject to very rapid movement, but from around ten o'clock in the morning until late at night there is usually more wind and turbulence, with the exception of a quiet spell which often occurs during the late afternoon.

During the growing season, there is furthermore a marked diurnal variation of wind changes whose maximum frequency occurs at noon for the general direction from north to south and at seven o'clock in the evening for the general direction from south to north. This diurnal variation of wind changes does not occur so frequently during the non-growing season.

During the growing season, the descent of sulphur dioxide to the earth's surface is more likely to occur at some hours than at others. At about nine to ten o'clock in the morning, there is usually a very pronounced maximum of fumigations, and this morning fumigation occurs with such regularity that it has been the practice of the Smoke Control Office at the Smelter for some time to cut down the emission of sulphur to the atmosphere during the early morning hours and to keep it down until from eight to eleven o'clock in the morning. The amount and duration of the cut are determined after an analysis of the wind velocity and direction, and of the conditions of turbulence or diffusion of the smoke. This is a fundamental feature of the program of smoke control, and the main reason for its success is that it prevents accumulations of sulphur dioxide which tend to descend from higher elevations when the early morning sun disturbs the thermal balance by heating the earth's surface. This early morning diurnal fumigation reaches

all recorders in the valley almost simultaneously, the intensity being usually highest near the Smelter. The concentration of sulphur dioxide during this type of fumigation rises as a rule very rapidly to a maximum in a few minutes and then drops off exponentially, only traces often remaining after two or three hours. A similar diurnal fumigation, usually of shorter duration, is occasionally observed in the early evening due to a disturbance of the thermal balance as the sun sets.

Sulphur dioxide sampling by airplane has indicated that in calm weather and especially in the early morning hours, the effluent gases hold to a fairly well-defined pattern in the early stages of their dispersion. The gases rise about 400 feet above the top of the two high stacks, then level out and spread horizontally along the main axis of the prevailing wind movement. During the relatively quiet conditions frequently found in the early morning, an atmospheric stratum carrying fairly high concentrations of sulphur dioxide and spreading over a large area may be formed.

With the rising of the sun, the radiational heating of the atmosphere near the surface may disturb the thermal balance, resulting in the descent of the sulphur dioxide which had accumulated in the upper layers at approximately 2,400 feet elevation above mean sea level, and extending either upstream or down-stream from the Smelter, depending on wind direction. This readily explains the simultaneous appearance of sulphur dioxide at various distances from the Smelter.

During the non-growing season, the non-diurnal type of fumigation predominates. In this type, the sulphur dioxide leaving the stacks is carried along the valley in a general drift of air, diffusing more or less uniformly as it advances. From two to eight hours are usually required for the smoke to get from Trail to Northport when the drift is down river. Such fumigations are not recorded simultaneously on the various recorders but the gas is first noted nearest the Smelter and then in succession at the other recorders. The concentration at a given recorder often shows very little variation as long as it lasts, which might be for several days depending entirely upon wind velocity and direction.

It is an interesting fact that the agricultural growing season and the non-growing season coincide almost exactly with the periods in which diurnal and non-diurnal fumigations respectively, are dominant. The transition from diurnal to non-diurnal fumigations and *vice versa* occurs in September and April. Diurnal fumigations sometimes occur during the non-growing season but with much less frequency and regularity than during the growing season, and at a later hour because of the later sunrise in winter. Similarly, the non-diurnal type sometimes occurs during the growing season. Its manifestations are then the same as during the winter, the chief difference being that it rarely lasts as long.

Sulphur dioxide recorders can be used to assist in smoke control during both the growing and non-growing season. They are more useful in the latter season, however, because in a non-diurnal fumigation, the gas usually appears at Columbia Gardens some time before it reaches Northport, and high concentrations recorded at the former location serve as warnings that more sulphur dioxide is being emitted than can adequately be dispersed under the prevailing atmospheric conditions. This information may lead to a decrease in the amount of sulphur dioxide emitted from the Smelter in time to avoid serious consequences. With the diurnal type of fumigations, on the other hand, high concentrations of sulphur dioxide may descend from the upper atmosphere to the surface with little or no warning, and the

only adequate protection against this type of fumigation is to prevent accumulations of large amounts of sulphur dioxide, either up or down stream, at or just before the periods when diurnal fumigations may be expected.

(*c*)

Observations over a period of years have indicated that there is little likelihood of gas being carried across the international boundary if the wind in the gas-carrying levels, approximately 2,400 feet above mean seal level, is in a direction not included in the 135° angle opening to the westward starting with north, and has a velocity sufficient to insure that no serious accumulation of smoke occurs. A recording cup anemometer and an anemovane suspended 300 feet above the surface, 1,900 feet above mean sea level, from a cable between the tops of the zinc stack and a neighboring lower stack, indicate the velocity and direction of the wind reliably except when the velocity or direction of the wind at this level differs from that in the gas-carrying level 500 feet or more higher. An attempt has been made to use the geostrophic wind forecasts made by the Weather Bureau at Vancouver for predicting the velocity and direction of the wind at these higher levels, but the results, although promising, have not yet been sufficiently certain to warrant the use of geostrophic winds as a factor in smoke control. (For further details, see Report of the Technical Consultants.)

(*d*)

A very significant factor in determining how much sulphur dioxide can safely be emitted by the Smelter is the rate of eddy current diffusion. When the rate of diffusion is low, smoke may accumulate in parts of the valley. Such accumulations frequently occur up-stream from the Smelter when there is a light up-river breeze.

The main factors governing the rate of diffusion of sulphur dioxide are the turbulence and lapse rate of the air. Turbulence is used instead of the more homely term gustiness to express the action of eddy currents in the air stream. Turbulence, therefore, is expressed in terms of changes in wind velocity over definite intervals of time, and may be measured by observations on standard anemometers, as has been done during the early stages of these meteorological studies. It has been found, however, that different observers using this method of measurement were not in agreement when the changes in velocity occurred rapidly and were of great intensity. It was furthermore found that the sensitivity of standard anemometers was not sufficient to give the desired precision. A number of modifications have been made which have led finally to the design and construction of an instrument called the Bridled Cup Indicator, which is more sensitive than any of the other instruments used, and is also free from personal error in the reading of the instrumental record.

(*e*)

There are several limitations to the application of the turbulence criterion. On a number of occasions, marked fumigations have occurred when the instrument showed that the turbulence was good or excellent. On every occasion of that sort which has been studied, pilot balloon observations revealed that there was a strong down-river wind from the surface of the

valley floor to about 2,500 feet above mean sea level. At about 4,000 feet, however, the height to which the valley sides reached, conditions were calm or very nearly so. Ordinarily, with good turbulence, the sulphur dioxide would be rapidly diffused upward and rise above the sides of the valley without difficulty. The non-turbulent condition at 4,000 feet associated with the calm layer acts effectively as a blanket, preventing the escape of the gas through the top of the valley. The turbulence in the lower layers serves then only to distribute the sulphur dioxide more or less uniformly in the valley. There is no exit through the top, and the gas moves down the valley with no lateral diffusion, in much the same way as if it were flowing along in a giant pipe. This type does not occur very frequently, but when it does, the sulphur dioxide recorder at Columbia Gardens must be used to prevent the building up of high concentrations in the valley. That is the type of fumigation which can be controlled most readily by means of such a recorder.

(*f*)

Another difficulty with the turbulence condition is that, especially during the daytime in summer, the turbulence recorder may indicate very little turbulence, but the diffusion may nevertheless be quite satisfactory. That is because turbulence does not cover all aspects of diffusion and some other factors, such as the lapse rate, must be taken into account.

Lapse rate, which is the technical term for the change of temperature in any given unit interval of height, is inter-related with wind velocity and turbulence, but each may contribute separately in the slow carrying upward of smoke by means of convection currents. Unfortunately, the measurement of lapse rate and its application in smoke control have not yet been fully developed. (For further details, see Final Report of the Technical Consultants.)

(*g*)

The behavior of the air in the valley is influenced also by other general meteorological conditions. For example, experience has shown that when the relative humidity of the air is high, particularly during periods of rain or snow, caution must be used in emitting sulphur dioxide to the atmosphere. Again, when the barometer is steady, weather conditions such as wind direction and velocity, diffusion conditions, etc., are not liable to change. Similarly, unfavorable conditions are likely to persist until the barometer changes noticeably. This suggests a generalization which will be found to hold not only for barometric changes but also for most of the other factors that have been found to influence sulphur dioxide distribution; that fumigations occur chiefly during the period of disturbance that accompanies transitional stages in meteorological conditions.

(*h*)

It has been found by the Technical Consultants that meteorological conditions at the Smelter sometimes prevail under which the instrumental readings at the level where the instruments now are or may be located do not fully reflect the degree of turbulence in the atmosphere at the higher gas-carrying levels. Under those conditions, it is possible that visual observations by trained observers may sometimes determine the turbulence more accurately. Where by such visual observations the conclusion shall be

reached that the turbulence at higher levels is definitely better than at the level of the instruments, the load can sometimes be safely increased from the maximum allowable as determined by the instruments under the régime herein prescribed. Conversely, where by such visual observations the conclusion shall be reached that the turbulence at higher levels is definitely worse than at the level of the instruments, it will be the duty of the Smelter (and to its advantage in lessening risk of injurious fumigation) to reduce the load from the maximum allowable as determined by the instruments under the régime herein prescribed.

The Tribunal in the régime has taken into consideration this factor of visual observations, to a limited extent and in the non-growing season only. If further experience shall show in the future that more use can be made of this factor, the clause of the régime providing for a method of its alteration may be utilized for a future development of this factor provided it shall appear that it can be done without risk of injury to territory south of the boundary.

(*i*)

The Tribunal is of opinion that the régime should be given an uninterrupted test through at least two growing periods and one non-growing period. It is equally of opinion that thereafter opportunity should be given for amendment or suspension of the régime, if conditions should warrant or require. Should it appear at any time that the expectations of the Tribunal are not fulfilled, the régime prescribed in Section 3 (*infra*) can be amended according to Paragraph VI thereof. This same paragraph may become operative if scientific advance in the control of fumes should make it possible and desirable to improve upon the methods of control hereinafter prescribed; and should further progress in the reduction of the sulphur content of the fumes make the régime, as now prescribed, appear as unduly burdensome in view of the end defined in the answer to Question No. 2, this same paragraph can be invoked in order to amend the régime accordingly. Further, under this paragraph, the régime may be suspended if the elimination of sulphur dioxide from the fumes should reach a stage where such a step could clearly be taken without undue risks to the United States' interests.

Since the Tribunal has the power to establish a régime, it must equally possess the power to provide for alteration, modification or suspension of such régime. It would clearly not be a "solution just to all parties concerned" if its action in prescribing a régime should be unchangeable and incapable of being made responsive to future conditions.

(*j*)

The foregoing paragraphs are the result of an extended investigation of meteorological and other conditions which have been found to be of significance in smoke behavior and control in the Trail area. The attempt made to solve the sulphur dioxide problem presented to the Tribunal has finally found expression in a régime which is now prescribed as a measure of control.

The investigations made during the past three years on the application of meteorological observations to the solution of this problem at Trail have built up a fund of significant and important facts. This is probably the most thorough study ever made of any area subject to atmospheric pollution by industrial smoke. Some factors, such as atmospheric turbulence and

the movement of the upper air currents have been applied for the first time to the question of smoke control. All factors of possible significance, including wind directions and velocity, atmospheric temperatures, lapse rates, turbulence, geostrophic winds, barometric pressures, sunlight and humidity, along with atmospheric sulphur dioxide concentrations, have been studied. As said above, many observations have been made on the movements and sulphur dioxide concentrations of the air at higher levels by means of pilot and captive balloons and by airplane, by night and by day. Progress has been made in breaking up the long winter fumigations and in reducing their intensity. In carrying finally over to the non-growing season with a few minor modifications a régime of demonstrated efficiency for the growing season, there is a sound basis for confidence that the winter fumigations will be kept under control at a level well below the threshold of possible injury to vegetation. Likewise, for the growing season a régime has been formulated which should throttle at the source the expected diurnal fumigations to a point where they will not yield concentrations below the international boundary sufficient to cause injury to plant life. This is the goal which this Tribunal has set out to accomplish.

The Tribunal has carefully considered the suggestions made by the United States for a régime by which a prefixed sum would be due whenever the concentrations recorded would exceed a certain intensity for a certain period of time or a certain greater intensity for any twenty minute period.

It has been unable to adopt this suggestion. In its opinion, and in that of its scientific advisers, such a régime would unduly and unnecessarily hamper the operations of the Trail Smelter and would not constitute a "solution fair to all parties concerned".

SECTION 3.

In order to prevent the occurrence of sulphur dioxide in the atmosphere in amounts, both as to concentration, duration and frequency, capable of causing damage in the State of Washington, the operation of the Smelter and the maximum emission of sulphur dioxide from its stacks shall be regulated as provided in the following régime.

I. Instruments.

A. The instruments for recording meteorological conditions shall be as follows:

(*a*) Wind Direction and Wind Velocity shall be indicated by any of the standard instruments used for such purposes to provide a continuous record and shall be observed and transcribed for use of the Smoke Control Office at least once every hour.

(*b*) Wind Turbulence shall be measured by the Bridled Cup Turbulence Indicator. This instrument consists of a light horizontal wheel around whose periphery are twenty-two equally-spaced curved surfaces cut from one-eighth inch aluminium sheet and shaped to the same-sized blades or cups. This wind-sensitive wheel is attached to an aluminium sleeve rigidly screwed to one end of a three-eighth inch vertical steel shaft supported by almost frictionless bearings at the top and bottom of the instrument frame. The shaft of the wheel is bridled to prevent continuous rotation and is so

constrained that its angle of rotation is directly proportional to the square of the wind velocity. One complete revolution of the anemometer shaft corresponds to a wind velocity of 36 miles per hour and, with eighteen equally spaced contact points on the commutator, one make and one break in the circuit is equivalent to a change in wind velocity of two miles per hour, recorded on a standard anemograph. (For further detail, see the Final Report of the Technical Consultants, p 209.)

The instruments noted in (*a*) and (*b*) above, shall be located at the present site near the zinc stack of the Smelter or at some other location not less favorable for such observations.

(*c*) Atmospheric temperature and barometric pressure shall be determined by the standard instruments in use for such meteorological observations.

B. Sulphur dioxide concentrations shall be determined by the standard recorders, which provide automatically an accurate and continuous record of such concentrations.

One recorder shall be located at Columbia Gardens, as at present installed with arrangements for the automatic transcription of its record to the Smoke Control Office at the Smelter. A second recorder shall be maintained at the present site near Northport. A third recorder shall be maintained at the present site near Waneta, which recorder may be discontinued after December 31, 1942.

II. Documents.

The sulphur dioxide concentrations indicated by the prescribed recorders shall be reduced to tabular form and kept on file at the Smelter. The original instrumental recordings of all meteorological data herein required to be made shall be preserved by the Smelter.

A summary of Smelter operation covering the daily sulphur balances shall be compiled monthly and copies sent to the Governments of the United States and of the Dominion of Canada.

III. Stacks.

Sulphur dioxide shall be discharged into the atmosphere from smelting operations of the zinc and lead plants at a height no lower than that of the present stacks.

In case of the cooling of the stacks by a lengthy shut down, gases containing sulphur dioxide shall not be emitted until the stacks have been heated to normal operating temperatures by hot gases free of sulphur dioxide.

IV. Maximum Permissible Sulphur Emission.

The following two tables and general restrictions give the maximum hourly permissible emission of sulphur dioxide expressed as tons per hour of contained sulphur.

GROWING SEASON

	Turbulence Bad		Turbulence Fair		Turbulence Good		Turbulence Excellent
	(1) Wind not favorable	(2) Wind favorable	(3) Wind not favorable	(4) Wind favorable	(5) Wind not favorable	(6) Wind favorable	(7) Wind not favorable and favorable
Midnight to 3 a.m. . .	2	6	6	9	9	11	11
3 a.m. to 3 hrs. after sunrise	0	2	4	4	4	6	6
3 hrs. after sunrise to 3 hrs. before sunset	2	6	6	9	9	11	11
3 hrs. before sunset to sunset	2	5	5	7	7	9	9
Sunset to midnight . .	3	7	6	9	9	11	11

NON-GROWING SEASON

	Turbulence Bad		Turbulence Fair		Turbulence Good		Turbulence Excellent
	(1) Wind not favorable	(2) Wind favorable	(3) Wind not favorable	(4) Wind favorable	(5) Wind not favorable	(6) Wind favorable	(7) Wind not favorable and favorable
Midnight to 3 a.m. . .	2	8	6	11	9	11	11
3 a.m. to 3 hrs. after sunrise	0	4	4	6	4	6	6
3 hrs. after sunrise to 3 hrs. before sunset	2	8	6	11	9	11	11
3 hrs. before sunset to sunset	2	7	5	9	7	9	9
Sunset to midnight . .	3	9	6	11	9	11	11

General Restrictions and Provisions.

(*a*) If the Columbia Gardens recorder indicates 0.3 part per million or more of sulphur dioxide for two consecutive twenty minute periods during the growing season, and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.

If the Columbia Gardens recorder indicates 0.5 part per million or more of sulphur dioxide for three consecutive twenty minute periods during the non-growing season and the wind direction is not favorable, emission shall be reduced by four tons of sulphur per hour or shut down completely when the turbulence is bad, until the recorder shows 0.2 part per million or less of sulphur dioxide for three consecutive twenty minute periods.

(*b*) In case of rain or snow, the emission of sulphur shall be reduced by two (2) tons per hour. This regulation shall be put into effect immediately when precipitation can be observed from the Smelter and shall be continued in effect for twenty (20) minutes after such precipitation has ceased.

(*c*) If the slag retreatment furnace is not in operation the emission of sulphur shall be reduced by two (2) tons per hour.

(*d*) If the instrumental reading shows turbulence excellent, good or fair, but visual observations made by trained observers clearly indicate that there is poor diffusion, the emission of sulphur shall be reduced to the figures given in column (1) if wind is not favorable, or column (2) if wind is favorable.

(*e*) When more than one of the restricting conditions provided for in (*a*), (*b*), (*c*), and (*d*) occur simultaneously, the highest reduction shall apply.

(*f*) If, during the non-growing season, the instrumental reading shows turbulence fair and wind not favorable but visual observations by trained observers clearly indicate that there is excellent diffusion, the maximum permissible emission of sulphur may be increased to the figures in column (5). The general restrictions under (*a*), (*b*), (*c*) and (*e*), however, shall be applicable.

Whenever the Smelter shall avail itself of the foregoing provisions, the circumstances shall be fully recorded and copy of such record shall be sent to the two Governments within one month.

(*g*) Nothing shall relieve the Smelter from the duty of reducing the maximum sulphur emission below the amount permissible according to the tables and the preceding general restrictions and provisions, as the circumstances may require for the prudent operation of the plant.

V. Definition of Terms and Conditions

(a) Wind Direction and Velocity—The following directions of wind shall be considered favorable provided they show a velocity of five miles per hour or more and have persisted for thirty minutes at the point of observation, namely north, east, south, southwest, and intermediate directions, that is any direction not included in the one hundred and thirty-five (135) degree angle opening to the westward starting with north.

All winds not included in the above definition shall be considered not favorable.

(b) Turbulence—The following definitions are made of bad, fair, good, and excellent turbulence. The figures given are in terms of the Bridled Cup Turbulence Indicator for a period of one half hour:

Bad Turbulence	0-74
Fair Turbulence	75-149
Good Turbulence	150-349
Excellent Turbulence	350 and above

If at any time another instrument should be found to be better adapted to the measurement of turbulence, and should be accepted for such measure-

ment by agreement of the two Governments, the scale of this instrument shall be calibrated by comparison with the Bridled Cup Turbulence Indicator.

VI. Amendment or Suspension of the Régime.

If at any time after December 31, 1942, either Government shall request an amendment or suspension of the régime herein prescribed and the other Government shall decline to agree to such request, there shall be appointed by each Government, within one month after the making or receipt respectively of such request, a scientist of repute; and the two scientists so appointed shall constitute a Commission for the purpose of considering and acting upon such request. If the Commission within three months after appointment fail to agree upon a decision, they shall appoint jointly a third scientist who shall be Chairman of the Commission; and thereupon the opinion of the majority, or in the absence of any majority opinion, the opinion of the Chairman shall be decisive; the opinion shall be rendered within one month after the choice of the Chairman. If the two scientists shall fail to agree upon a third scientist within the prescribed time, upon the request of either, he shall be appointed within one month from such failure by the President of the American Chemical Society, a scientific body having a membership both in the United States, Canada, Great Britain and other countries.

Any of the periods of time herein prescribed may be extended by agreement between the two Governments.

The Commission of two, or three scientists as the case may be, may take such action in compliance with or in denial of the request above referred to, either in whole or in part, as it deems appropriate for the avoidance or prevention of damage occurring in the State of Washington. The decision of the Commission shall be final, and the Governments shall take such action as may be necessary to ensure due conformity with the decision, in accordance with the provisions of Article XII of the Convention.

The compensation of the scientists appointed and their reasonable expenditures shall be paid by the Government which shall have requested a decision; if both Governments shall have made a request for decision, such expenses shall be shared equally by both Governments; provided, however, that if the Commission in response to the request of the United States shall find that notwithstanding compliance with the régime in force damage has occurred through fumes in the State of Washington, then the above expenses shall be paid by the Dominion of Canada.

SECTION 4.

While the Tribunal refrains from making the following suggestion a part of the régime prescribed, it is strongly of the opinion that it would be to the clear advantage of the Dominion of Canada, if during the interval between the date of filing of this Final Report and December 31, 1942, the Dominion of Canada would continue, at its own expense, the maintenance of experimental and observational work by two scientists similar to that which was established by the Tribunal under its previous decision, and has been in operation during the trial period since 1938. It seems probable that a continuance of investigations until at least December 31, 1942, would provide additional valuable data both for the purpose of testing the effective operation of the régime now prescribed and for the purpose of obtaining information as to the possibility or necessity of improvements in it.

The value of this trial period has been acknowledged by each Government. In the memorandum submitted by the Canadian Agent, under date of December 28, 1940, while commenting on the expense involved, it is stated (p. 8):

> The Canadian Government is not disposed to question in the least the value of the trial period of three years or to underestimate the great benefits that have been derived from the investigations carried on by the Tribunal through its Technical Consultants.

The Agent for Canada at the hearing on December 11, 1940 (Transcript, p. 6318) stated:

> We have had the benefit of an admirable piece of research in fumigations conducted by the Technical Consultants, and we have had the advantage of all of their studies of meteorological conditions. . . .

The Counsel for Canada (Mr. Tilley), in a colloquy with the American Member of the Tribunal at the hearing on December 12, 1940 (Transcript, pp. 6493-6494) said:

> JUDGE WARREN: We stated very frankly to the Agents that we were prepared in March (1938) to render a final decision but that we thought it would be highly unsatisfactory to both parties to do so unless we had some experimentation.
>
> Mr. TILLEY: There is no doubt about that—quite properly, if I may say so, with deference.
>
> JUDGE WARREN: We were trying to do this for the benefit of both parties. We were prepared to answer the questions.
>
> Mr. TILLEY: Nothing could have been more in the interests of the parties concerned than what you did.

In the memorandum submitted by the United States Agent, under date of January 7, 1949, while explaining the reasons for the inability of the United States to offer concrete suggestions in relation to a proposed régime, other than the régime suggested by the United States, it is stated (p. 11):

> It should be understood that the drafting of this Memorandum has not been undertaken in an attempt to minimize the importance of the excellent work performed by meteorologists of the Government of Canada under the direction of the Technical Consultants and their undoubtedly meritorious contribution. . . .

The Counsel for the United States (Mr. Raftis) at the hearing on December 9, stated (Transcript of Record, p. 6080, p. 6089):

> I will say at the outset that I believe the meteorological studies which we (were?) conducted have been very helpful. They have been undoubtedly gone into at considerable length with a definite effort to put the finger on the problem which has been confronting us now for some fifteen years. . . . As I say, I think these studies have been most helpful, because up to that time we had more or less only to leave to conjecture what happened when these gases left the stacks; we did not know through any definite experiments what became of this gas problem.

The scientist employed by the United States, Mr. S. W. Griffin, in his report submitted November 30, 1940, relating to the Final Report of the Technical Consultants, stated (p. 3):

> Regarding the investigations of the Canadian meteorologists in working out the complicated air movements which take place over this irregular terrain, there can be no doubt of the value of their contribution in adding much to the knowledge, both of a fundamental and detailed character, to that which previously existed.
>
> (p. 5) It remains to be determined whether or not the three year period of experimentation may eventually bring about a permanent abeyance of harmful sulphur dioxide fumigations, south of the international boundary. However this may be, there can be little doubt that the knowledge gained in some of the researches described in the report is sufficiently fundamental in character and broad in application that, if published, the work should be of interest and value to any smelter management engaged in processes which pollute the air with sulphur dioxide.

PART FIVE.

The fourth question under Article III of the Convention is as follows:

> What indemnity or compensation, if any, should be paid on account of any decision or decisions rendered by the Tribunal pursuant to the next two preceding Questions?

The Tribunal is of opinion that the prescribed régime will probably remove the causes of the present controversy and, as said before, will probably result in preventing any damage of a material nature occurring in the State of Washington in the future.

But since the desirable and expected result of the régime or measure of control hereby required to be adopted and maintained by the Smelter may not occur, and since in its answer to Question No. 2, the Tribunal has required the Smelter to refrain from causing damage in the State of Washington in the future, as set forth therein, the Tribunal answers Question No. 4 and decides that on account of decisions rendered by the Tribunal in its answers to Question No. 2 and Question No. 3 there shall be paid as follows: (*a*) if any damage as defined under Question No. 2 shall have occurred since October 1, 1940, or shall occur in the future, whether through failure on the part of the Smelter to comply with the regulations herein prescribed or notwithstanding the maintenance of the régime, an indemnity shall be paid for such damage but only when and if the two Governments shall make arrangements for the disposition of claims for indemnity under the provisions of Article XI of the Convention; (*b*) if as a consequence of the decision of the Tribunal in its answers to Question No. 2 and Question No. 3, the United States shall find it necessary to maintain in the future an agent or agents in the area in order to ascertain whether damage shall have occurred in spite of the régime prescribed herein, the reasonable cost of such investigations not in excess of $7,500 in any one year shall be paid to the United States as a compensation, but only if and when the two Governments determine under Article XI of the Convention that damage has occurred in the year in question, due to the operation of the Smelter, and "disposition of claims for indemnity for damage" has been made by the two Governments; but in no case shall the aforesaid compensation be payable in excess of the indemnity

for damage; and further it is understood that such payment is hereby directed by the Tribunal only as a compensation to be paid on account of the answers of the Tribunal to Question No. 2 and Question No. 3 (as provided for in Question No. 4) and *not* as any part of indemnity for the damage to be ascertained and to be determined upon by the two Governments under Article XI of the Convention.

PART SIX.

Since further investigations in the future may be possible under the provisions of Part Four and of Part Five of this decision, the Tribunal finds it necessary to include in its report, the following provision:

Investigators appointed by or on behalf of either Government, whether jointly or severally, and the members of the Commission provided for in Paragraph VI of Section 3 of Part Four of this decision, shall be permitted at all reasonable times to inspect the operations of the Smelter and to enter upon and inspect any of the properties in the State of Washington which may be claimed to be affected by fumes. This provision shall also apply to any localities where instruments are operated under the present régime or under any amended régime. Wherever under the present régime or any amended régime, instruments have to be maintained and operated by the Smelter on the territory of the United States, the Government of the United States shall undertake to secure for the Government of the Dominion of Canada the facilities reasonably required to that effect.

The Tribunal expresses the strong hope that any investigations which the Governments may undertake in the future, in connection with the matters dealt with in this decision, shall be conducted jointly.

(*Signed*) JAN HOSTIE.
(*Signed*) CHARLES WARREN.
(*Signed*) R. A. E. GREENSHIELDS.

ANNEX.

I. *Letter from the Members of the Tribunal to the Secretary of State of the United States and Secretary of State for External Affairs of Canada, May* 6, 1941.

TRAIL SMELTER ARBITRAL TRIBUNAL.
UNITED STATES AND CANADA.

710 MILLS BUILDING,
WASHINGTON, D.C.
May 6, 1941.

SIR:

The Trail Smelter Arbitral Tribunal has received from its scientific advisers in that case, a letter dated April 28, 1941, copy of which is herewith enclosed. The members of the Tribunal think that it is their duty in transmitting this letter to both Governments, to declare that the statement contained therein is the correct interpretation of Clause IV, Section 3 of Part Four of the Decision reported on March 11, 1941.

Respectfully yours,

JAN HOSTIE.
CHARLES WARREN.
R. A. E. GREENSHIELDS.

II. *Letter from the Technical Consultants to the Chairman of the Trail Smelter Arbitral Tribunal, April* 26, 1941.

REGINALD S. DEAN.

1529 ARLINGTON DRIVE,
SALT LAKE CITY, UTAH.
April 28, 1941.

DR. JAN F. HOSTIE,
Trail Smelter Arbitral Tribunal,
710 Mills Building,
Washington, D.C.

DEAR DOCTOR HOSTIE:

A critical reading of the text of Part IV, Section 3 (IV) of the decision of the Tribunal reported on March 11, 1941, reveals a situation which, after careful consideration, we feel should be brought to your attention. Under the heading "Maximum Permissible Sulphur Emission" it is stated that the two tables and the general restrictions which follow give the maximum hourly permissible emission of sulphur dioxide expressed as tons per hour of contained sulphur.

If a strict interpretation were placed on this statement as it stands, it would lead often to a complete shut-down of all operations at the Smelter. For example, if the turbulence is bad and the wind not favorable, no sulphur may be emitted. Of course, it was intended that these stipulations were to govern Dwight and Lloyd roasting operations. Small amounts of sulphur dioxide will necessarily escape from the blast furnace and other operations in the Smelter, but these have never been specifically designated in any of the régimes which we have laid down, simply because they are insignificant in amount. In the orderly administration of this final régime, all who have been connected with the previous régimes would not fall within the above stipulation. If, however, the strictest possible interpretation were insisted upon the results would not only be disastrous to the Smelter, but clearly outside of the intended scope of the régime. Tail gases have been recognized all along as a normal part of the smelting operation.

The situation would be fully clarified if the following changes were made in the statement on page 74, Section 3 (IV): The following two tables and general restrictions give the maximum hourly permissible emission of untreated sulphur dioxide from the roasting plants expressed as tons per hour of contained sulphur.

I regret that such a possible interpretation of the régime was not noted by us when it was being formulated. It is brought to your attention now in order to put on record this possible misinterpretation of the régime as it is now worded.

Yours sincerely,

ROBERT E. SWAIN,
R. S. DEAN,
Technical Consultants.

A. – TREATY ON THE EUROPEAN UNION

Article 13

1. The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.

The Union's institutions shall be:

– the European Parliament,

– the European Council,

– the Council,

– the European Commission (hereinafter referred to as 'the Commission'),

– the Court of Justice of the European Union,

– the European Central Bank,

– the Court of Auditors.

2. Each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them. The institutions shall practice mutual sincere cooperation.

3. The provisions relating to the European Central Bank and the Court of Auditors and detailed provisions on the other institutions are set out in the Treaty on the Functioning of the European Union.

4. The European Parliament, the Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity.

Article 19

1. The Court of Justice of the European Union shall include the Court of Justice, the General Court and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed.

Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.

2. The Court of Justice shall consist of one judge from each Member State. It shall be assisted by Advocates-General.

The General Court shall include at least one judge per Member State.

The Judges and the Advocates-General of the Court of Justice and the Judges of the General Court shall be chosen from persons whose independence is beyond doubt and who satisfy the

conditions set out in Articles 253 and 254 of the Treaty on the Functioning of the European Union. They shall be appointed by common accord of the governments of the Member States for six years. Retiring Judges and Advocates-General may be reappointed.

3. The Court of Justice of the European Union shall, in accordance with the Treaties:

(a) rule on actions brought by a Member State, an institution or a natural or legal person;

(b) give preliminary rulings, at the request of courts or tribunals of the Member States, on the interpretation of Union law or the validity of acts adopted by the institutions;

(c) rule in other cases provided for in the Treaties.

B. – TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION

Article 108
(ex Article 88 TEC)

1. The Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market.

2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.

If the State concerned does not comply with this decision within the prescribed time, the Commission or any other interested State may, in derogation from the provisions of Articles 258 and 259, refer the matter to the Court of Justice of the European Union direct.

On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the internal market, in derogation from the provisions of Article 107 or from the regulations provided for in Article 109, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known.

If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the internal market having regard to Article 107, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision.

4. The Commission may adopt regulations relating to the categories of State aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by paragraph 3 of this Article.

Article 218
(ex Article 300 TEC)

1. Without prejudice to the specific provisions laid down in Article 207, agreements between the Union and third countries or international organisations shall be negotiated and concluded in accordance with the following procedure.

2. The Council shall authorise the opening of negotiations, adopt negotiating directives, authorise the signing of agreements and conclude them.

3. The Commission, or the High Representative of the Union for Foreign Affairs and Security Policy where the agreement envisaged relates exclusively or principally to the common foreign and security policy, shall submit recommendations to the Council, which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

4. The Council may address directives to the negotiator and designate a special committee in consultation with which the negotiations must be conducted.

5. The Council, on a proposal by the negotiator, shall adopt a decision authorising the signing of the agreement and, if necessary, its provisional application before entry into force.

6. The Council, on a proposal by the negotiator, shall adopt a decision concluding the agreement.

Except where agreements relate exclusively to the common foreign and security policy, the Council shall adopt the decision concluding the agreement:

(a) after obtaining the consent of the European Parliament in the following cases:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

(iv) agreements with important budgetary implications for the Union;

(v) agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative procedure where consent by the European Parliament is required.

The European Parliament and the Council may, in an urgent situation, agree upon a time-limit for consent.

(b) after consulting the European Parliament in other cases. The European Parliament shall deliver its opinion within a time-limit which the Council may set depending on the urgency of the matter. In the absence of an opinion within that time-limit, the Council may act.

7. When concluding an agreement, the Council may, by way of derogation from paragraphs 5, 6 and 9, authorise the negotiator to approve on the Union's behalf modifications to the agreement where it provides for them to be adopted by a simplified procedure or by a body set up by the agreement. The Council may attach specific conditions to such authorisation.

8. The Council shall act by a qualified majority throughout the procedure.

However, it shall act unanimously when the agreement covers a field for which unanimity is required for the adoption of a Union act as well as for association agreements and the agreements referred to in Article 212 with the States which are candidates for accession. The

Council shall also act unanimously for the agreement on accession of the Union to the European Convention for the protection of Human Rights and Fundamental Freedoms; the decision concluding this agreement shall enter into force after it has been approved by the Member States in accordance with their respective constitutional requirements.

9. The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.

10. The European Parliament shall be immediately and fully informed at all stages of the procedure.

11. A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

Article 251
(ex Article 221 TEC)

The Court of Justice shall sit in chambers or in a Grand Chamber, in accordance with the rules laid down for that purpose in the Statute of the Court of Justice of the European Union.

When provided for in the Statute, the Court of Justice may also sit as a full Court.

Article 252
(ex Article 222 TEC)

The Court of Justice shall be assisted by eight Advocates-General. Should the Court of Justice so request, the Council, acting unanimously, may increase the number of Advocates-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his involvement.

Article 253
(ex Article 223 TEC)

The Judges and Advocates-General of the Court of Justice shall be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence; they shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255.

Every three years there shall be a partial replacement of the Judges and Advocates-General, in accordance with the conditions laid down in the Statute of the Court of Justice of the European Union.

The Judges shall elect the President of the Court of Justice from among their number for a term of three years. He may be re-elected.

Retiring Judges and Advocates-General may be reappointed.

The Court of Justice shall appoint its Registrar and lay down the rules governing his service.

The Court of Justice shall establish its Rules of Procedure. Those Rules shall require the approval of the Council.

Article 254
(ex Article 224 TEC)

The number of Judges of the General Court shall be determined by the Statute of the Court of Justice of the European Union. The Statute may provide for the General Court to be assisted by Advocates-General.

The members of the General Court shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to high judicial office. They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255. The membership shall be partially renewed every three years. Retiring members shall be eligible for reappointment.

The Judges shall elect the President of the General Court from among their number for a term of three years. He may be re-elected.

The General Court shall appoint its Registrar and lay down the rules governing his service.

The General Court shall establish its Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the Statute of the Court of Justice of the European Union provides otherwise, the provisions of the Treaties relating to the Court of Justice shall apply to the General Court.

Article 255

A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

Article 256
(ex Article 225 TEC)

1. The General Court shall have jurisdiction to hear and determine at first instance actions or proceedings referred to in Articles 263, 265, 268, 270 and 272, with the exception of those

assigned to a specialised court set up under Article 257 and those reserved in the Statute for the Court of Justice. The Statute may provide for the General Court to have jurisdiction for other classes of action or proceeding.

Decisions given by the General Court under this paragraph may be subject to a right of appeal to the Court of Justice on points of law only, under the conditions and within the limits laid down by the Statute.

2. The General Court shall have jurisdiction to hear and determine actions or proceedings brought against decisions of the specialised courts.

Decisions given by the General Court under this paragraph may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

3. The General Court shall have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267, in specific areas laid down by the Statute.

Where the General Court considers that the case requires a decision of principle likely to affect the unity or consistency of Union law, it may refer the case to the Court of Justice for a ruling.

Decisions given by the General Court on questions referred for a preliminary ruling may exceptionally be subject to review by the Court of Justice, under the conditions and within the limits laid down by the Statute, where there is a serious risk of the unity or consistency of Union law being affected.

Article 257
(ex Article 225A TEC)

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish specialised courts attached to the General Court to hear and determine at first instance certain classes of action or proceeding brought in specific areas. The European Parliament and the Council shall act by means of regulations either on a proposal from the Commission after consultation of the Court of Justice or at the request of the Court of Justice after consultation of the Commission.

The regulation establishing a specialised court shall lay down the rules on the organisation of the court and the extent of the jurisdiction conferred upon it.

Decisions given by specialised courts may be subject to a right of appeal on points of law only or, when provided for in the regulation establishing the specialised court, a right of appeal also on matters of fact, before the General Court.

The members of the specialised courts shall be chosen from persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office. They shall be appointed by the Council, acting unanimously.

The specialised courts shall establish their Rules of Procedure in agreement with the Court of Justice. Those Rules shall require the approval of the Council.

Unless the regulation establishing the specialised court provides otherwise, the provisions of the Treaties relating to the Court of Justice of the European Union and the provisions of the Statute of the Court of Justice of the European Union shall apply to the specialised courts. Title I of the Statute and Article 64 thereof shall in any case apply to the specialised courts.

Article 258
(ex Article 226 TEC)

If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.

Article 259
(ex Article 227 TEC)

A Member State which considers that another Member State has failed to fulfil an obligation under the Treaties may bring the matter before the Court of Justice of the European Union.

Before a Member State brings an action against another Member State for an alleged infringement of an obligation under the Treaties, it shall bring the matter before the Commission.

The Commission shall deliver a reasoned opinion after each of the States concerned has been given the opportunity to submit its own case and its observations on the other party's case both orally and in writing.

If the Commission has not delivered an opinion within three months of the date on which the matter was brought before it, the absence of such opinion shall not prevent the matter from being brought before the Court.

Article 260
(ex Article 228 TEC)

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations. It shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it.

This procedure shall be without prejudice to Article 259.

3. When the Commission brings a case before the Court pursuant to Article 258 on the grounds that the Member State concerned has failed to fulfil its obligation to notify measures transposing a directive adopted under a legislative procedure, it may, when it deems appropriate, specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

If the Court finds that there is an infringement it may impose a lump sum or penalty payment on the Member State concerned not exceeding the amount specified by the Commission. The payment obligation shall take effect on the date set by the Court in its judgment.

Article 261
(ex Article 229 TEC)

Regulations adopted jointly by the European Parliament and the Council, and by the Council, pursuant to the provisions of the Treaties, may give the Court of Justice of the European Union unlimited jurisdiction with regard to the penalties provided for in such regulations.

Article 262
(ex Article 229 A TEC)

Without prejudice to the other provisions of the Treaties, the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament, may adopt provisions to confer jurisdiction, to the extent that it shall determine, on the Court of Justice of the European Union in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. These provisions shall enter into force after their approval by the Member States in accordance with their respective constitutional requirements.

Article 263
(ex Article 230 TEC)

The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

Article 264
(ex Article 231 TEC)

If the action is well founded, the Court of Justice of the European Union shall declare the act concerned to be void.

However, the Court shall, if it considers this necessary, state which of the effects of the act which it has declared void shall be considered as definitive.

Article 265
(ex Article 232 TEC)

Should the European Parliament, the European Council, the Council, the Commission or the European Central Bank, in infringement of the Treaties, fail to act, the Member States and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. This Article shall apply, under the same conditions, to bodies, offices and agencies of the Union which fail to act.

The action shall be admissible only if the institution, body, office or agency concerned has first been called upon to act. If, within two months of being so called upon, the institution, body, office or agency concerned has not defined its position, the action may be brought within a further period of two months.

Any natural or legal person may, under the conditions laid down in the preceding paragraphs, complain to the Court that an institution, body, office or agency of the Union has failed to address to that person any act other than a recommendation or an opinion.

Article 266
(ex Article 233 TEC)

The institution whose act has been declared void or whose failure to act has been declared contrary to the Treaties shall be required to take the necessary measures to comply with the judgment of the Court of Justice of the European Union.

This obligation shall not affect any obligation which may result from the application of the second paragraph of Article 340.

Article 267
(ex Article 234 TEC)

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

Article 268
(ex Article 235 TEC)

The Court of Justice of the European Union shall have jurisdiction in disputes relating to compensation for damage provided for in the second and third paragraphs of Article 340.

Article 269

The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.

Such a request must be made within one month from the date of such determination. The Court shall rule within one month from the date of the request.

Article 270
(ex Article 236 TEC)

The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.

Article 271
(ex Article 237 TEC)

The Court of Justice of the European Union shall, within the limits hereinafter laid down, have jurisdiction in disputes concerning:

(a) the fulfilment by Member States of obligations under the Statute of the European Investment Bank. In this connection, the Board of Directors of the Bank shall enjoy the powers conferred upon the Commission by Article 258;

(b) measures adopted by the Board of Governors of the European Investment Bank. In this connection, any Member State, the Commission or the Board of Directors of the Bank may institute proceedings under the conditions laid down in Article 263;

(c) measures adopted by the Board of Directors of the European Investment Bank. Proceedings against such measures may be instituted only by Member States or by the Commission, under the conditions laid down in Article 263, and solely on the grounds of non-compliance with the procedure provided for in Article 19(2), (5), (6) and (7) of the Statute of the Bank;

(d) the fulfilment by national central banks of obligations under the Treaties and the Statute of the ESCB and of the ECB. In this connection the powers of the Governing Council of the European Central Bank in respect of national central banks shall be the same as those conferred upon the Commission in respect of Member States by Article 258. If the Court finds that a national central bank has failed to fulfil an obligation under the Treaties, that bank shall be required to take the necessary measures to comply with the judgment of the Court.

Article 272
(ex Article 238 TEC)

The Court of Justice of the European Union shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Union, whether that contract be governed by public or private law.

Article 273
(ex Article 239 TEC)

The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties.

Article 274
(ex Article 240 TEC)

Save where jurisdiction is conferred on the Court of Justice of the European Union by the Treaties, disputes to which the Union is a party shall not on that ground be excluded from the jurisdiction of the courts or tribunals of the Member States.

Article 275

The Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.

Article 276

In exercising its powers regarding the provisions of Chapters 4 and 5 of Title V of Part Three relating to the area of freedom, security and justice, the Court of Justice of the European Union shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law-enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

Article 277
(ex Article 241 TEC)

Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph, in order to invoke before the Court of Justice of the European Union the inapplicability of that act.

Article 278
(ex Article 242 TEC)

Actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 279
(ex Article 243 TEC)

The Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures.

Article 280
(ex Article 244 TEC)

The judgments of the Court of Justice of the European Union shall be enforceable under the conditions laid down in Article 299.

Article 281
(ex Article 245 TEC)

The Statute of the Court of Justice of the European Union shall be laid down in a separate Protocol.

The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may amend the provisions of the Statute, with the exception of Title I and Article 64. The European Parliament and the Council shall act either at the request of the Court of Justice and after consultation of the Commission, or on a proposal from the Commission and after consultation of the Court of Justice.

Article 299
(ex Article 256 TEC)

Acts of the Council, the Commission or the European Central Bank which impose a pecuniary obligation on persons other than States, shall be enforceable.

Enforcement shall be governed by the rules of civil procedure in force in the State in the territory of which it is carried out. The order for its enforcement shall be appended to the decision, without other formality than verification of the authenticity of the decision, by the national authority which the government of each Member State shall designate for this purpose and shall make known to the Commission and to the Court of Justice of the European Union.

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority. Enforcement may be suspended only by a decision of the Court. However, the courts of the country concerned shall have jurisdiction over complaints that enforcement is being carried out in an irregular manner.

Article 340
(ex Article 288 TEC)

The contractual liability of the Union shall be governed by the law applicable to the contract in question.

In the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

Notwithstanding the second paragraph, the European Central Bank shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by it or by its servants in the performance of their duties.

The personal liability of its servants towards the Union shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.

C. – TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY

Article 12

Member States, persons or undertakings shall have the right, on application to the Commission, to obtain non-exclusive licences under patents, provisionally protected patent rights, utility models or patent applications owned by the Community, where they are able to make effective use of the inventions covered thereby.

Under the same conditions, the Commission shall grant sublicences under patents, provisionally protected patent rights, utility models or patent applications, where the Community holds contractual licences conferring power to do so.

The Commission shall grant such licences or sublicences on terms to be agreed with the licensees and shall furnish all the information required for their use. These terms shall relate in particular to suitable remuneration and, where appropriate, to the right of the licensee to grant sublicences to third parties and to the obligation to treat the information as a trade secret.

Failing agreement on the terms referred to in the third paragraph, the licensees may bring the matter before the Court of Justice of the European Union so that appropriate terms may be fixed.

Article 18

An Arbitration Committee is hereby established for the purposes provided for in this Section. The Council shall appoint the members and lay down the Rules of Procedure of this Committee, acting on a proposal from the Court of Justice of the European Union.

An appeal, having suspensory effect, may be brought by the parties before the Court of Justice of the European Union against a decision of the Arbitration Committee within one month of notification thereof. The Court of Justice of the European Union shall confine its examination to the formal validity of the decision and to the interpretation of the provisions of this Treaty by the Arbitration Committee.

The final decisions of the Arbitration Committee shall have the force of res judicata between the parties concerned. They shall be enforceable as provided in Article 164.

Article 21

If the proprietor does not propose that the matter be referred to the Arbitration Committee, the Commission may call upon the Member State concerned or its appropriate authorities to grant the licence or cause it to be granted.

If, having heard the proprietor's case, the Member State, or its appropriate authorities, considers that the conditions of Article 17 have not been complied with, it shall notify the Commission of its refusal to grant the licence or to cause it to be granted.

If it refuses to grant the licence or to cause it to be granted, or if, within four months of the date of the request, no information is forthcoming with regard to the granting of the licence, the Commission shall have two months in which to bring the matter before the Court of Justice of the European Union.

The proprietor must be heard in the proceedings before the Court of Justice of the European Union.

If the judgment of the Court of Justice of the European Union establishes that the conditions of Article 17 have been complied with, the Member State concerned, or its appropriate authorities, shall take such measures as enforcement of that judgment may require.

Article 81

The Commission may send inspectors into the territories of Member States. Before sending an inspector on his first assignment in the territory of a Member State, the Commission shall consult the State concerned; such consultation shall suffice to cover all future assignments of this inspector.

On presentation of a document establishing their authority, inspectors shall at all times have access to all places and data and to all persons who, by reason of their occupation, deal with materials, equipment or installations subject to the safeguards provided for in this Chapter, to the extent necessary in order to apply such safeguards to ores, source materials and special fissile materials and to ensure compliance with the provisions of Article 77. Should the State concerned so request, inspectors appointed by the Commission shall be accompanied by representatives of the authorities of that State; however, the inspectors shall not thereby be delayed or otherwise impeded in the performance of their duties.

If the carrying out of an inspection is opposed, the Commission shall apply to the President of the Court of Justice of the European Union for an order to ensure that the inspection be carried out compulsorily. The President of the Court of Justice of the European Union shall give a decision within three days.

If there is danger in delay, the Commission may itself issue a written order, in the form of a decision, to proceed with the inspection. This order shall be submitted without delay to the President of the Court of Justice of the European Union for subsequent approval.

After the order or decision has been issued, the authorities of the State concerned shall ensure that the inspectors have access to the places specified in the order or decision.

Article 82

Inspectors shall be recruited by the Commission.

They shall be responsible for obtaining and verifying the records referred to in Article 79. They shall report any infringement to the Commission.

The Commission may issue a directive calling upon the Member State concerned to take, by a time limit set by the Commission, all measures necessary to bring such infringement to an end; it shall inform the Council thereof.

If the Member State does not comply with the Commission directive by the time limit set, the Commission or any Member State concerned may, in derogation from Articles 226 and 227 of the Treaty on the Functioning of the European Union, refer the matter to the Court of Justice of the European Union direct.

Article 83

1. In the event of an infringement on the part of persons or undertakings of the obligations imposed on them by this Chapter, the Commission may impose sanctions on such persons or undertakings.

These sanctions shall be in order of severity:

(a) a warning;

(b) the withdrawal of special benefits such as financial or technical assistance;

(c) the placing of the undertaking for a period not exceeding four months under the administration of a person or board appointed by common accord of the Commission and the State having jurisdiction over the undertaking;

(d) total or partial withdrawal of source materials or special fissile materials.

2. Decisions taken by the Commission in implementation of paragraph 1 and requiring the surrender of materials shall be enforceable. They may be enforced in the territories of Member States in accordance with Article 164.

By way of derogation from Article 157, appeals brought before the Court of Justice of the European Union against decisions of the Commission which impose any of the sanctions provided for in paragraph 1 shall have suspensory effect. The Court of Justice of the European Union may, however, on application by the Commission or by any Member State concerned, order that the decision be enforced forthwith.

There shall be an appropriate legal procedure to ensure the protection of interests that have been prejudiced.

3. The Commission may make any recommendations to Member States concerning laws or regulations which are designed to ensure compliance in their territories with the obligations arising under this Chapter.

4. Member States shall ensure that sanctions are enforced and, where necessary, that the infringements are remedied by those committing them.

Article 103

Member States shall communicate to the Commission draft agreements or contracts with a third State, an international organisation or a national of a third State to the extent that such agreements or contracts concern matters within the purview of this Treaty.

If a draft agreement or contract contains clauses which impede the application of this Treaty, the Commission shall, within one month of receipt of such communication, make its comments known to the State concerned.

The State shall not conclude the proposed agreement or contract until it has satisfied the objections of the Commission or complied with a ruling by the Court of Justice of the European

Union, adjudicating urgently upon an application from the State, on the compatibility of the proposed clauses with the provisions of this Treaty. An application may be made to the Court of Justice of the European Union at any time after the State has received the comments of the Commission.

Article 104

No person or undertaking concluding or renewing an agreement or contract with a third State, an international organisation the date of their accession, may invoke that agreement or contract in order to evade the obligations imposed by this Treaty.

Each Member State shall take such measures as it considers necessary in order to communicate to the Commission, at the request of the latter, all information relating to agreements or contracts concluded after the dates referred to in the first paragraph, within the scope of this Treaty, by a person or undertaking with a third State, an international organisation or a national of a third State. The Commission may require such communication only for the purpose of verifying that such agreements or contracts do not contain clauses impeding the implementation of this Treaty.

On application by the Commission, the Court of Justice of the European Union shall give a ruling on the compatibility of such agreements or contracts with the provisions of this Treaty.

Article 105

The provisions of this Treaty shall not be invoked so as to prevent the implementation of agreements or contracts concluded before 1 January 1958 or, for acceding States, before the date of their accession, by a Member State, a person or an undertaking with a third State, an international organisation or a national of a third State where such agreements or contracts have been communicated to the Commission not later than 30 days after the aforesaid dates.

Agreements or contracts concluded between 25 March 1957 and 1 January 1958 or, for acceding States, between the signature of the instrument of accession and the date of their accession, by a person or an undertaking with a third State, an international organisation or a national of a third State shall not, however, be invoked as grounds for failure to implement this Treaty if, in the opinion of the Court of Justice of the European Union, ruling on an application from the Commission, one of the decisive reasons on the part of either of the parties in concluding the agreement or contract was an intention to evade the provisions of this Treaty.

Article 106a

1. Article 7, Articles 9 to 9F, Article 48(2) to (5), and Articles 49 and 49A of the Treaty on European Union, Article 16A, Articles 190 to 201b, Articles 204 to 211a, Article 213, Articles 215 to 236, Articles 238, 239 and 240, Articles 241 to 245, Articles 246 to 262, Articles 268 to 277, Articles 279 to 280 and Articles 283, 290 and 292 of the Treaty on the Functioning of the European Union, and the Protocol on Transitional Provisions, shall apply to this Treaty.

2. Within the framework of this Treaty, the references to the Union, to the ‘Treaty on European Union’, to the ‘Treaty on the Functioning of the European Union’ or to the ‘Treaties’ in the provisions referred to in paragraph 1 and those in the protocols annexed both to those Treaties and to this Treaty shall be taken, respectively, as references to the European Atomic Energy Community and to this Treaty.

3. The provisions of the Treaty on European Union and of the Treaty on the Functioning of the European Union shall not derogate from the provisions of this Treaty.

Article 144

The Court of Justice of the European Union shall have unlimited jurisdiction in:

(a) proceedings instituted under Article 12 to have the appropriate terms fixed for the granting by the Commission of licences or sub licences;

(b) proceedings instituted by persons or undertakings against sanctions imposed on them by the Commission under Article 83.

Article 145

If the Commission considers that a person or undertaking has committed an infringement of this Treaty to which the provisions of Article 83 do not apply, it shall call upon the Member State having jurisdiction over that person or undertaking to cause sanctions to be imposed in respect of the infringement in accordance with its national law.

If the State concerned does not comply with such a request within the period laid down by the Commission, the latter may bring an action before the Court of Justice of the European Union to have the infringement of which the person or undertaking is accused established.

Article 157

Save as otherwise provided in this Treaty, actions brought before the Court of Justice of the European Union shall not have suspensory effect. The Court of Justice of the European Union may, however, if it considers that circumstances so require, order that application of the contested act be suspended.

Article 188

The contractual liability of the Community shall be governed by the law applicable to the contract in question.

In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The personal liability of its servants towards the Community shall be governed by the provisions laid down in the Staff Regulations or in the Conditions of Employment applicable to them.

STATUTE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

THE HIGH CONTRACTING PARTIES,

DESIRING to lay down the Statute of the Court of Justice of the European Union provided for in Article 281 of the Treaty on the Functioning of the European Union,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community:

Article 1

The Court of Justice of the European Union shall be constituted and shall function in accordance with the provisions of the Treaties, of the Treaty establishing the European Atomic Energy Community (EAEC Treaty) and of this Statute.

TITLE I

JUDGES AND ADVOCATES-GENERAL

Article 2

Before taking up his duties each Judge shall, before the Court of Justice sitting in open court, take an oath to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 3

The Judges shall be immune from legal proceedings. After they have ceased to hold office, they shall continue to enjoy immunity in respect of acts performed by them in their official capacity, including words spoken or written.

The Court of Justice, sitting as a full Court, may waive the immunity. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Where immunity has been waived and criminal proceedings are instituted against a Judge, he shall be tried, in any of the Member States, only by the court competent to judge the members of the highest national judiciary.

Articles 11 to 14 and Article 17 of the Protocol on the privileges and immunities of the European Union shall apply to the Judges, Advocates-General, Registrar and Assistant Rapporteurs of the Court of Justice of the European Union, without prejudice to the provisions relating to immunity from legal proceedings of Judges which are set out in the preceding paragraphs.

Article 4

The Judges may not hold any political or administrative office.

They may not engage in any occupation, whether gainful or not, unless exemption is exceptionally granted by the Council, acting by a simple majority.

When taking up their duties, they shall give a solemn undertaking that, both during and after their term of office, they will respect the obligations arising therefrom, in particular the duty to behave with integrity and discretion as regards the acceptance, after they have ceased to hold office, of certain appointments or benefits.

Any doubt on this point shall be settled by decision of the Court of Justice. If the decision concerns a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

Article 5

Apart from normal replacement, or death, the duties of a Judge shall end when he resigns.

Where a Judge resigns, his letter of resignation shall be addressed to the President of the Court of Justice for transmission to the President of the Council. Upon this notification a vacancy shall arise on the bench.

Save where Article 6 applies, a Judge shall continue to hold office until his successor takes up his duties.

Article 6

A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, in the unanimous opinion of the Judges and Advocates-General of the Court of Justice, he no longer fulfils the requisite conditions or meets the obligations arising from his office. The Judge concerned shall not take part in any such deliberations. If the person concerned is a member of the General Court or of a specialised court, the Court shall decide after consulting the court concerned.

The Registrar of the Court shall communicate the decision of the Court to the President of the European Parliament and to the President of the Commission and shall notify it to the President of the Council.

In the case of a decision depriving a Judge of his office, a vacancy shall arise on the bench upon this latter notification.

Article 7

A Judge who is to replace a member of the Court whose term of office has not expired shall be appointed for the remainder of his predecessor's term.

Article 8

The provisions of Articles 2 to 7 shall apply to the Advocates-General.

TITLE II

ORGANISATION OF THE COURT OF JUSTICE

Article 9

When, every three years, the Judges are partially replaced, 14 and 13 Judges shall be replaced alternately.

When, every three years, the Advocates-General are partially replaced, four Advocates-General shall be replaced on each occasion.

Article 10

The Registrar shall take an oath before the Court of Justice to perform his duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court of Justice.

Article 11

The Court of Justice shall arrange for replacement of the Registrar on occasions when he is prevented from attending the Court of Justice.

Article 12

Officials and other servants shall be attached to the Court of Justice to enable it to function. They shall be responsible to the Registrar under the authority of the President.

Article 13

At the request of the Court of Justice, the European Parliament and the Council may, acting in accordance with the ordinary legislative procedure, provide for the appointment of Assistant Rapporteurs and lay down the rules governing their service. The Assistant Rapporteurs may be required, under conditions laid down in the Rules of Procedure, to participate in preparatory inquiries in cases pending before the Court and to cooperate with the Judge who acts as Rapporteur.

The Assistant Rapporteurs shall be chosen from persons whose independence is beyond doubt and who possess the necessary legal qualifications; they shall be appointed by the Council, acting by a simple majority. They shall take an oath before the Court to perform their duties impartially and conscientiously and to preserve the secrecy of the deliberations of the Court.

Article 14

The Judges, the Advocates-General and the Registrar shall be required to reside at the place where the Court of Justice has its seat.

Article 15

The Court of Justice shall remain permanently in session. The duration of the judicial vacations shall be determined by the Court with due regard to the needs of its business.

Article 16

The Court of Justice shall form chambers consisting of three and five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The Grand Chamber shall consist of 13 Judges. It shall be presided over by the President of the Court. The Presidents of the chambers of five Judges and other Judges appointed in accordance with the conditions laid down in the Rules of Procedure shall also form part of the Grand Chamber.

The Court shall sit in a Grand Chamber when a Member State or an institution of the Union that is party to the proceedings so requests.

The Court shall sit as a full Court where cases are brought before it pursuant to Article 228(2), Article 245(2), Article 247 or Article 286(6) of the Treaty on the Functioning of the European Union.

Moreover, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate-General, to refer the case to the full Court.

Article 17

Decisions of the Court of Justice shall be valid only when an uneven number of its members is sitting in the deliberations.

Decisions of the chambers consisting of either three or five Judges shall be valid only if they are taken by three Judges.

Decisions of the Grand Chamber shall be valid only if nine Judges are sitting.

Decisions of the full Court shall be valid only if 15 Judges are sitting.

In the event of one of the Judges of a chamber being prevented from attending, a Judge of another chamber may be called upon to sit in accordance with conditions laid down in the Rules of Procedure.

Article 18

No Judge or Advocate-General may take part in the disposal of any case in which he has previously taken part as agent or adviser or has acted for one of the parties, or in which he has been called upon to pronounce as a member of a court or tribunal, of a commission of inquiry or in any other capacity.

If, for some special reason, any Judge or Advocate-General considers that he should not take part in the judgment or examination of a particular case, he shall so inform the President. If, for some special reason, the President considers that any Judge or Advocate-General should not sit or make submissions in a particular case, he shall notify him accordingly.

Any difficulty arising as to the application of this Article shall be settled by decision of the Court of Justice.

A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.

TITLE III

PROCEDURE BEFORE THE COURT OF JUSTICE

Article 19

The Member States and the institutions of the Union shall be represented before the Court of Justice by an agent appointed for each case; the agent may be assisted by an adviser or by a lawyer.

The States, other than the Member States, which are parties to the Agreement on the European Economic Area and also the EFTA Surveillance Authority referred to in that Agreement shall be represented in same manner.

Other parties must be represented by a lawyer.

Only a lawyer authorised to practise before a court of a Member State or of another State which is a party to the Agreement on the European Economic Area may represent or assist a party before the Court.

Such agents, advisers and lawyers shall, when they appear before the Court, enjoy the rights and immunities necessary to the independent exercise of their duties, under conditions laid down in the Rules of Procedure.

As regards such advisers and lawyers who appear before it, the Court shall have the powers normally accorded to courts of law, under conditions laid down in the Rules of Procedure.

University teachers being nationals of a Member State whose law accords them a right of audience shall have the same rights before the Court as are accorded by this Article to lawyers.

Article 20

The procedure before the Court of Justice shall consist of two parts: written and oral.

The written procedure shall consist of the communication to the parties and to the institutions of the Union whose decisions are in dispute, of applications, statements of case, defences and observations, and of replies, if any, as well as of all papers and documents in support or of certified copies of them.

Communications shall be made by the Registrar in the order and within the time laid down in the Rules of Procedure.

The oral procedure shall consist of the reading of the report presented by a Judge acting as Rapporteur, the hearing by the Court of agents, advisers and lawyers and of the submissions of the Advocate-General, as well as the hearing, if any, of witnesses and experts.

Where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate-General, that the case shall be determined without a submission from the Advocate-General.

Article 21

A case shall be brought before the Court of Justice by a written application addressed to the Registrar. The application shall contain the applicant's name and permanent address and the description of the signatory, the name of the party or names of the parties against whom the application is made, the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which the application is based.

The application shall be accompanied, where appropriate, by the measure the annulment of which is sought or, in the circumstances referred to in Article 265 of the Treaty on the Functioning of the European Union, by documentary evidence of the date on which an institution was, in accordance with those Articles, requested to act. If the documents are not submitted with the application, the Registrar shall ask the party concerned to produce them within a reasonable period, but in that event the rights of the party shall not lapse even if such documents are produced after the time limit for bringing proceedings.

Article 22

A case governed by Article 18 of the EAEC Treaty shall be brought before the Court of Justice by an appeal addressed to the Registrar. The appeal shall contain the name and permanent address of the applicant and the description of the signatory, a reference to the decision against which the appeal is brought, the names of the respondents, the subject-matter of the dispute, the submissions and a brief statement of the grounds on which the appeal is based.

The appeal shall be accompanied by a certified copy of the decision of the Arbitration Committee which is contested.

If the Court rejects the appeal, the decision of the Arbitration Committee shall become final.

If the Court annuls the decision of the Arbitration Committee, the matter may be re-opened, where appropriate, on the initiative of one of the parties in the case, before the Arbitration Committee. The latter shall conform to any decisions on points of law given by the Court.

Article 23

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the court or tribunal of a Member State which suspends its proceedings and refers a case to the Court of Justice shall be notified to the Court by the court or tribunal concerned. The decision shall then be notified by the Registrar of the Court to the parties, to the Member States and to the Commission, and to the institution, body, office or agency of the Union which adopted the act the validity or interpretation of which is in dispute.

Within two months of this notification, the parties, the Member States, the Commission and, where appropriate, the institution, body, office or agency which adopted the act the validity or interpretation of which is in dispute, shall be entitled to submit statements of case or written observations to the Court.

In the cases governed by Article 267 of the Treaty on the Functioning of the European Union, the decision of the national court or tribunal shall, moreover, be notified by the Registrar of the Court to the States, other than the Member States, which are parties to the Agreement on the European Economic Area and also to the EFTA Surveillance Authority referred to in that Agreement which may, within two months of notification, where one of the fields of application of that agreement is concerned, submit statements of case or written observations to the Court.

Where an agreement relating to a specific subject matter, concluded by the Council and one or more non-member States, provides that those States are to be entitled to submit statements of case or written observations where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of the agreement, the decision of the national court or tribunal containing that question shall also be notified to the non-member States concerned. Within two months from such notification, those States may lodge at the Court statements of case or written observations.

Article 23a (*)

The Rules of Procedure may provide for an expedited or accelerated procedure and, for references for a preliminary ruling relating to the area of freedom, security and justice, an urgent procedure.

Those procedures may provide, in respect of the submission of statements of case or written observations, for a shorter period than that provided for by Article 23, and, in derogation from the fourth paragraph of Article 20, for the case to be determined without a submission from the Advocate General.

In addition, the urgent procedure may provide for restriction of the parties and other interested persons mentioned in Article 23, authorised to submit statements of case or written observations and, in cases of extreme urgency, for the written stage of the procedure to be omitted.

Article 24

The Court of Justice may require the parties to produce all documents and to supply all information which the Court considers desirable. Formal note shall be taken of any refusal.

The Court may also require the Member States and institutions, bodies, offices and agencies not being parties to the case to supply all information which the Court considers necessary for the proceedings.

Article 25

The Court of Justice may at any time entrust any individual, body, authority, committee or other organisation it chooses with the task of giving an expert opinion.

Article 26

Witnesses may be heard under conditions laid down in the Rules of Procedure.

(*) Article inserted by Decision 2008/79/EC, Euratom (OJ L 24, 29.1.2008, p. 42).

Article 27

With respect to defaulting witnesses the Court of Justice shall have the powers generally granted to courts and tribunals and may impose pecuniary penalties under conditions laid down in the Rules of Procedure.

Article 28

Witnesses and experts may be heard on oath taken in the form laid down in the Rules of Procedure or in the manner laid down by the law of the country of the witness or expert.

Article 29

The Court of Justice may order that a witness or expert be heard by the judicial authority of his place of permanent residence.

The order shall be sent for implementation to the competent judicial authority under conditions laid down in the Rules of Procedure. The documents drawn up in compliance with the letters rogatory shall be returned to the Court under the same conditions.

The Court shall defray the expenses, without prejudice to the right to charge them, where appropriate, to the parties.

Article 30

A Member State shall treat any violation of an oath by a witness or expert in the same manner as if the offence had been committed before one of its courts with jurisdiction in civil proceedings. At the instance of the Court of Justice, the Member State concerned shall prosecute the offender before its competent court.

Article 31

The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.

Article 32

During the hearings the Court of Justice may examine the experts, the witnesses and the parties themselves. The latter, however, may address the Court of Justice only through their representatives.

Article 33

Minutes shall be made of each hearing and signed by the President and the Registrar.

Article 34

The case list shall be established by the President.

Article 35

The deliberations of the Court of Justice shall be and shall remain secret.

Article 36

Judgments shall state the reasons on which they are based. They shall contain the names of the Judges who took part in the deliberations.

Article 37

Judgments shall be signed by the President and the Registrar. They shall be read in open court.

Article 38

The Court of Justice shall adjudicate upon costs.

Article 39

The President of the Court of Justice may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Statute and which shall be laid down in the Rules of Procedure, adjudicate upon applications to suspend execution, as provided for in Article 278 of the Treaty on the Functioning of the European Union and Article 157 of the EAEC Treaty, or to prescribe interim measures pursuant to Article 279 of the Treaty on the Functioning of the European Union, or to suspend enforcement in accordance with the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or the third paragraph of Article 164 of the EAEC Treaty.

Should the President be prevented from attending, his place shall be taken by another Judge under conditions laid down in the Rules of Procedure.

The ruling of the President or of the Judge replacing him shall be provisional and shall in no way prejudice the decision of the Court on the substance of the case.

Article 40

Member States and institutions of the Union may intervene in cases before the Court of Justice.

The same right shall be open to the bodies, offices and agencies of the Union and to any other person which can establish an interest in the result of a case submitted to the Court. Natural or legal persons shall not intervene in cases between Member States, between institutions of the Union or between Member States and institutions of the Union.

Without prejudice to the second paragraph, the States, other than the Member States, which are parties to the Agreement on the European Economic Area, and also the EFTA Surveillance Authority referred to in that Agreement, may intervene in cases before the Court where one of the fields of application of that Agreement is concerned.

An application to intervene shall be limited to supporting the form of order sought by one of the parties.

Article 41

Where the defending party, after having been duly summoned, fails to file written submissions in defence, judgment shall be given against that party by default. An objection may be lodged against the judgment within one month of it being notified. The objection shall not have the effect of staying enforcement of the judgment by default unless the Court of Justice decides otherwise.

Article 42

Member States, institutions, bodies, offices and agencies of the Union and any other natural or legal persons may, in cases and under conditions to be determined by the Rules of Procedure, institute third-party proceedings to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights.

Article 43

If the meaning or scope of a judgment is in doubt, the Court of Justice shall construe it on application by any party or any institution of the Union establishing an interest therein.

Article 44

An application for revision of a judgment may be made to the Court of Justice only on discovery of a fact which is of such a nature as to be a decisive factor, and which, when the judgment was given, was unknown to the Court and to the party claiming the revision.

The revision shall be opened by a judgment of the Court expressly recording the existence of a new fact, recognising that it is of such a character as to lay the case open to revision and declaring the application admissible on this ground.

No application for revision may be made after the lapse of 10 years from the date of the judgment.

Article 45

Periods of grace based on considerations of distance shall be determined by the Rules of Procedure.

No right shall be prejudiced in consequence of the expiry of a time limit if the party concerned proves the existence of unforeseeable circumstances or of *force majeure*.

Article 46

Proceedings against the Union in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court of Justice or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Union. In the latter event the proceedings must be instituted within the period of two months provided for in Article 263 of the Treaty on the Functioning of the European Union; the provisions of the second paragraph of Article 265 of the Treaty on the Functioning of the European Union shall apply where appropriate.

This Article shall also apply to proceedings against the European Central Bank regarding non-contractual liability.

TITLE IV

GENERAL COURT

Article 47

The first paragraph of Article 9, Articles 14 and 15, the first, second, fourth and fifth paragraphs of Article 17 and Article 18 shall apply to the General Court and its members.

The fourth paragraph of Article 3 and Articles 10, 11 and 14 shall apply to the Registrar of the General Court *mutatis mutandis*.

Article 48

The General Court shall consist of 27 Judges.

Article 49

The Members of the General Court may be called upon to perform the task of an Advocate-General.

It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on certain cases brought before the General Court in order to assist the General Court in the performance of its task.

The criteria for selecting such cases, as well as the procedures for designating the Advocates-General, shall be laid down in the Rules of Procedure of the General Court.

A Member called upon to perform the task of Advocate-General in a case may not take part in the judgment of the case.

Article 50

The General Court shall sit in chambers of three or five Judges. The Judges shall elect the Presidents of the chambers from among their number. The Presidents of the chambers of five Judges shall be elected for three years. They may be re-elected once.

The composition of the chambers and the assignment of cases to them shall be governed by the Rules of Procedure. In certain cases governed by the Rules of Procedure, the General Court may sit as a full court or be constituted by a single Judge.

The Rules of Procedure may also provide that the General Court may sit in a Grand Chamber in cases and under the conditions specified therein.

Article 51

By way of derogation from the rule laid down in Article 256(1) of the Treaty on the Functioning of the European Union, jurisdiction shall be reserved to the Court of Justice in the actions referred

to in Articles 263 and 265 of the Treaty on the Functioning of the European Union when they are brought by a Member State against:

(a) an act of or failure to act by the European Parliament or the Council, or by those institutions acting jointly, except for:

– decisions taken by the Council under the third subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union;

– acts of the Council adopted pursuant to a Council regulation concerning measures to protect trade within the meaning of Article 207 of the Treaty on the Functioning of the European Union;

– acts of the Council by which the Council exercises implementing powers in accordance with the second paragraph of Article 291 of the Treaty on the Functioning of the European Union;

(b) against an act of or failure to act by the Commission under the first paragraph of Article 331 of the Treaty on the Functioning of the European Union.

Jurisdiction shall also be reserved to the Court of Justice in the actions referred to in the same Articles when they are brought by an institution of the Union against an act of or failure to act by the European Parliament, the Council, both those institutions acting jointly, or the Commission, or brought by an institution of the Union against an act of or failure to act by the European Central Bank.

Article 52

The President of the Court of Justice and the President of the General Court shall determine, by common accord, the conditions under which officials and other servants attached to the Court of Justice shall render their services to the General Court to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the General Court under the authority of the President of the General Court.

Article 53

The procedure before the General Court shall be governed by Title III.

Such further and more detailed provisions as may be necessary shall be laid down in its Rules of Procedure. The Rules of Procedure may derogate from the fourth paragraph of Article 40 and from Article 41 in order to take account of the specific features of litigation in the field of intellectual property.

Notwithstanding the fourth paragraph of Article 20, the Advocate-General may make his reasoned submissions in writing.

Article 54

Where an application or other procedural document addressed to the General Court is lodged by mistake with the Registrar of the Court of Justice, it shall be transmitted immediately by that Registrar to the Registrar of the General Court; likewise, where an application or other

procedural document addressed to the Court of Justice is lodged by mistake with the Registrar of the General Court, it shall be transmitted immediately by that Registrar to the Registrar of the Court of Justice.

Where the General Court finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice has jurisdiction, it shall refer that action to the Court of Justice; likewise, where the Court of Justice finds that an action falls within the jurisdiction of the General Court, it shall refer that action to the General Court, whereupon that Court may not decline jurisdiction.

Where the Court of Justice and the General Court are seised of cases in which the same relief is sought, the same issue of interpretation is raised or the validity of the same act is called in question, the General Court may, after hearing the parties, stay the proceedings before it until such time as the Court of Justice has delivered judgment or, where the action is one brought pursuant to Article 263 of the Treaty on the Functioning of the European Union, may decline jurisdiction so as to allow the Court of Justice to rule on such actions. In the same circumstances, the Court of Justice may also decide to stay the proceedings before it; in that event, the proceedings before the General Court shall continue.

Where a Member State and an institution of the Union are challenging the same act, the General Court shall decline jurisdiction so that the Court of Justice may rule on those applications.

Article 55

Final decisions of the General Court, decisions disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility, shall be notified by the Registrar of the General Court to all parties as well as all Member States and the institutions of the Union even if they did not intervene in the case before the General Court.

Article 56

An appeal may be brought before the Court of Justice, within two months of the notification of the decision appealed against, against final decisions of the General Court and decisions of that Court disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the General Court directly affects them.

With the exception of cases relating to disputes between the Union and its servants, an appeal may also be brought by Member States and institutions of the Union which did not intervene in the proceedings before the General Court. Such Member States and institutions shall be in the same position as Member States or institutions which intervened at first instance.

Article 57

Any person whose application to intervene has been dismissed by the General Court may appeal to the Court of Justice within two weeks from the notification of the decision dismissing the application.

The parties to the proceedings may appeal to the Court of Justice against any decision of the General Court made pursuant to Article 278 or Article 279 or the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or Article 157 or the third paragraph of Article 164 of the EAEC Treaty within two months from their notification.

The appeal referred to in the first two paragraphs of this Article shall be heard and determined under the procedure referred to in Article 39.

Article 58

An appeal to the Court of Justice shall be limited to points of law. It shall lie on the grounds of lack of competence of the General Court, a breach of procedure before it which adversely affects the interests of the appellant as well as the infringement of Union law by the General Court.

No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

Article 59

Where an appeal is brought against a decision of the General Court, the procedure before the Court of Justice shall consist of a written part and an oral part. In accordance with conditions laid down in the Rules of Procedure, the Court of Justice, having heard the Advocate-General and the parties, may dispense with the oral procedure.

Article 60

Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal shall not have suspensory effect.

By way of derogation from Article 280 of the Treaty on the Functioning of the European Union, decisions of the General Court declaring a regulation to be void shall take effect only as from the date of expiry of the period referred to in the first paragraph of Article 56 of this Statute or, if an appeal shall have been brought within that period, as from the date of dismissal of the appeal, without prejudice, however, to the right of a party to apply to the Court of Justice, pursuant to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, for the suspension of the effects of the regulation which has been declared void or for the prescription of any other interim measure.

Article 61

If the appeal is well founded, the Court of Justice shall quash the decision of the General Court. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

Where a case is referred back to the General Court, that Court shall be bound by the decision of the Court of Justice on points of law.

When an appeal brought by a Member State or an institution of the Union, which did not intervene in the proceedings before the General Court, is well founded, the Court of Justice may,

if it considers this necessary, state which of the effects of the decision of the General Court which has been quashed shall be considered as definitive in respect of the parties to the litigation.

Article 62

In the cases provided for in Article 256(2) and (3) of the Treaty on the Functioning of the European Union, where the First Advocate-General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court.

The proposal must be made within one month of delivery of the decision by the General Court. Within one month of receiving the proposal made by the First Advocate-General, the Court of Justice shall decide whether or not the decision should be reviewed.

Article 62a

The Court of Justice shall give a ruling on the questions which are subject to review by means of an urgent procedure on the basis of the file forwarded to it by the General Court.

Those referred to in Article 23 of this Statute and, in the cases provided for in Article 256(2) of the EC Treaty, the parties to the proceedings before the General Court shall be entitled to lodge statements or written observations with the Court of Justice relating to questions which are subject to review within a period prescribed for that purpose.

The Court of Justice may decide to open the oral procedure before giving a ruling.

Article 62b

In the cases provided for in Article 256(2) of the Treaty on the Functioning of the European Union, without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union, proposals for review and decisions to open the review procedure shall not have suspensory effect. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, it shall refer the case back to the General Court which shall be bound by the points of law decided by the Court of Justice; the Court of Justice may state which of the effects of the decision of the General Court are to be considered as definitive in respect of the parties to the litigation. If, however, having regard to the result of the review, the outcome of the proceedings flows from the findings of fact on which the decision of the General Court was based, the Court of Justice shall give final judgment.

In the cases provided for in Article 256(3) of the Treaty on the Functioning of the European Union, in the absence of proposals for review or decisions to open the review procedure, the answer(s) given by the General Court to the questions submitted to it shall take effect upon expiry of the periods prescribed for that purpose in the second paragraph of Article 62. Should a review procedure be opened, the answer(s) subject to review shall take effect following that procedure, unless the Court of Justice decides otherwise. If the Court of Justice finds that the decision of the General Court affects the unity or consistency of Union law, the answer given by the Court of Justice to the questions subject to review shall be substituted for that given by the General Court.

TITLE IV*a*

JUDICIAL PANELS

Article 62c

The provisions relating to the jurisdiction, composition, organisation and procedure of the judicial panels established under Article 257 of the Treaty on the Functioning of the European Union are set out in an Annex to this Statute.

TITLE V

FINAL PROVISIONS

Article 63

The Rules of Procedure of the Court of Justice and of the General Court shall contain any provisions necessary for applying and, where required, supplementing this Statute.

Article 64

The rules governing the language arrangements applicable at the Court of Justice of the European Union shall be laid down by a regulation of the Council acting unanimously. This regulation shall be adopted either at the request of the Court of Justice and after consultation of the Commission and the European Parliament, or on a proposal from the Commission and after consultation of the Court of Justice and of the European Parliament.

Until those rules have been adopted, the provisions of the Rules of Procedure of the Court of Justice and of the Rules of Procedure of the General Court governing language arrangements shall continue to apply. By way of derogation from Articles 253 and 254 of the Treaty on the Functioning of the European Union, those provisions may only be amended or repealed with the unanimous consent of the Council.

ANNEX I

THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL

Article 1

The European Union Civil Service Tribunal (hereafter ‘the Civil Service Tribunal’) shall exercise at first instance jurisdiction in disputes between the Union and its servants referred to in Article 270 of the Treaty on the Functioning of the European Union, including disputes between all bodies or agencies and their servants in respect of which jurisdiction is conferred on the Court of Justice of the European Union.

Article 2

The Civil Service Tribunal shall consist of seven judges. Should the Court of Justice so request, the Council, acting by a qualified majority, may increase the number of judges.

The judges shall be appointed for a period of six years. Retiring judges may be reappointed.

Any vacancy shall be filled by the appointment of a new judge for a period of six years.

Article 3

1. The judges shall be appointed by the Council, acting in accordance with the fourth paragraph of Article 257 of the Treaty on the Functioning of the European Union, after consulting the committee provided for by this Article. When appointing judges, the Council shall ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented.

2. Any person who is a Union citizen and fulfils the conditions laid down in the fourth paragraph of Article 257 of the Treaty on the Functioning of the European Union may submit an application. The Council, acting on a recommendation from the Court of Justice, shall determine the conditions and the arrangements governing the submission and processing of such applications.

3. A committee shall be set up comprising seven persons chosen from among former members of the Court of Justice and the General Court and lawyers of recognised competence. The committee's membership and operating rules shall be determined by the Council, acting on a recommendation by the President of the Court of Justice.

4. The committee shall give an opinion on candidates' suitability to perform the duties of judge at the Civil Service Tribunal. The committee shall append to its opinion a list of candidates having the most suitable high-level experience. Such list shall contain the names of at least twice as many candidates as there are judges to be appointed by the Council.

Article 4

1. The judges shall elect the President of the Civil Service Tribunal from among their number for a term of three years. He may be re-elected.

2. The Civil Service Tribunal shall sit in chambers of three judges. It may, in certain cases determined by its rules of procedure, sit in full court or in a chamber of five judges or of a single judge.

3. The President of the Civil Service Tribunal shall preside over the full court and the chamber of five judges. The Presidents of the chambers of three judges shall be designated as provided in paragraph 1. If the President of the Civil Service Tribunal is assigned to a chamber of three judges, he shall preside over that chamber.

4. The jurisdiction of and quorum for the full court as well as the composition of the chambers and the assignment of cases to them shall be governed by the rules of procedure.

Article 5

Articles 2 to 6, 14, 15, the first, second and fifth paragraphs of Article 17, and Article 18 of the Statute of the Court of Justice of the European Union shall apply to the Civil Service Tribunal and its members.

The oath referred to in Article 2 of the Statute shall be taken before the Court of Justice, and the decisions referred to in Articles 3, 4 and 6 thereof shall be adopted by the Court of Justice after consulting the Civil Service Tribunal.

Article 6

1. The Civil Service Tribunal shall be supported by the departments of the Court of Justice and of the General Court. The President of the Court of Justice or, in appropriate cases, the President of the General Court, shall determine by common accord with the President of the Civil Service Tribunal the conditions under which officials and other servants attached to the Court of Justice or the General Court shall render their services to the Civil Service Tribunal to enable it to function. Certain officials or other servants shall be responsible to the Registrar of the Civil Service Tribunal under the authority of the President of that Tribunal.

2. The Civil Service Tribunal shall appoint its Registrar and lay down the rules governing his service. The fourth paragraph of Article 3 and Articles 10, 11 and 14 of the Statute of the Court of Justice of the European Union shall apply to the Registrar of the Tribunal.

Article 7

1. The procedure before the Civil Service Tribunal shall be governed by Title III of the Statute of the Court of Justice of the European Union, with the exception of Articles 22 and 23. Such further and more detailed provisions as may be necessary shall be laid down in the rules of procedure.

2. The provisions concerning the General Court's language arrangements shall apply to the Civil Service Tribunal.

3. The written stage of the procedure shall comprise the presentation of the application and of the statement of defence, unless the Civil Service Tribunal decides that a second exchange of written pleadings is necessary. Where there is such second exchange, the Civil Service Tribunal may, with the agreement of the parties, decide to proceed to judgment without an oral procedure.

4. At all stages of the procedure, including the time when the application is filed, the Civil Service Tribunal may examine the possibilities of an amicable settlement of the dispute and may try to facilitate such settlement.

5. The Civil Service Tribunal shall rule on the costs of a case. Subject to the specific provisions of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs should the court so decide.

Article 8

1. Where an application or other procedural document addressed to the Civil Service Tribunal is lodged by mistake with the Registrar of the Court of Justice or General Court, it shall be transmitted immediately by that Registrar to the Registrar of the Civil Service Tribunal. Likewise, where an application or other procedural document addressed to the Court of Justice or to the General Court is lodged by mistake with the Registrar of the Civil Service Tribunal, it shall be transmitted immediately by that Registrar to the Registrar of the Court of Justice or General Court.

2. Where the Civil Service Tribunal finds that it does not have jurisdiction to hear and determine an action in respect of which the Court of Justice or the General Court has jurisdiction, it shall refer that action to the Court of Justice or to the General Court. Likewise, where the Court of Justice or the General Court finds that an action falls within the jurisdiction of the Civil Service Tribunal, the Court seised shall refer that action to the Civil Service Tribunal, whereupon that Tribunal may not decline jurisdiction.

3. Where the Civil Service Tribunal and the General Court are seised of cases in which the same issue of interpretation is raised or the validity of the same act is called in question, the Civil Service Tribunal, after hearing the parties, may stay the proceedings until the judgment of the General Court has been delivered.

Where the Civil Service Tribunal and the General Court are seised of cases in which the same relief is sought, the Civil Service Tribunal shall decline jurisdiction so that the General Court may act on those cases.

Article 9

An appeal may be brought before the General Court, within two months of notification of the decision appealed against, against final decisions of the Civil Service Tribunal and decisions of that Tribunal disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of jurisdiction or inadmissibility.

Such an appeal may be brought by any party which has been unsuccessful, in whole or in part, in its submissions. However, interveners other than the Member States and the institutions of the Union may bring such an appeal only where the decision of the Civil Service Tribunal directly affects them.

Article 10

1. Any person whose application to intervene has been dismissed by the Civil Service Tribunal may appeal to the General Court within two weeks of notification of the decision dismissing the application.

2. The parties to the proceedings may appeal to the General Court against any decision of the Civil Service Tribunal made pursuant to Article 278 or Article 279 or the fourth paragraph of Article 299 of the Treaty on the Functioning of the European Union or Article 157 or the third paragraph of Article 164 of the EAEC Treaty within two months of its notification.

3. The President of the General Court may, by way of summary procedure, which may, in so far as necessary, differ from some of the rules contained in this Annex and which shall be laid down in the rules of procedure of the General Court, adjudicate upon appeals brought in accordance with paragraphs 1 and 2.

Article 11

1. An appeal to the General Court shall be limited to points of law. It shall lie on the grounds of lack of jurisdiction of the Civil Service Tribunal, a breach of procedure before it which adversely affects the interests of the appellant, as well as the infringement of Union law by the Tribunal.

2. No appeal shall lie regarding only the amount of the costs or the party ordered to pay them.

Article 12

1. Without prejudice to Articles 278 and 279 of the Treaty on the Functioning of the European Union or Article 157 of the EAEC Treaty, an appeal before the General Court shall not have suspensory effect.

2. Where an appeal is brought against a decision of the Civil Service Tribunal, the procedure before the General Court shall consist of a written part and an oral part. In accordance with conditions laid down in the rules of procedure, the General Court, having heard the parties, may dispense with the oral procedure.

Article 13

1. If the appeal is well founded, the General Court shall quash the decision of the Civil Service Tribunal and itself give judgment in the matter. It shall refer the case back to the Civil Service Tribunal for judgment where the state of the proceedings does not permit a decision by the Court.

2. Where a case is referred back to the Civil Service Tribunal, the Tribunal shall be bound by the decision of the General Court on points of law.

PROTOCOL (No 2)

ON THE APPLICATION OF THE PRINCIPLES OF SUBSIDIARITY AND PROPORTIONALITY

Article 8

The Court of Justice of the European Union shall have jurisdiction in actions on grounds of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.

In accordance with the rules laid down in the said Article, the Committee of the Regions may also bring such actions against legislative acts for the adoption of which the Treaty on the Functioning of the European Union provides that it be consulted.

PROTOCOL (No 7)
ON THE PRIVILEGES AND IMMUNITIES OF THE EUROPEAN UNION

Article 1

The premises and buildings of the Union shall be inviolable. They shall be exempt from search, requisition, confiscation or expropriation. The property and assets of the Union shall not be the subject of any administrative or legal measure of constraint without the authorisation of the Court of Justice.

PROTOCOL (No 36)

ON TRANSITIONAL PROVISIONS

TITLE VII

TRANSITIONAL PROVISIONS CONCERNING ACTS ADOPTED ON THE BASIS OF TITLES V AND VI OF THE TREATY ON EUROPEAN UNION PRIOR TO THE ENTRY INTO FORCE OF THE TREATY OF LISBON

Article 10

1. As a transitional measure, and with respect to acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which have been adopted before the entry into force of the Treaty of Lisbon, the powers of the institutions shall be the following at the date of entry into force of that Treaty: the powers of the Commission under Article 258 of the Treaty on the Functioning of the European Union shall not be applicable and the powers of the Court of Justice of the European Union under Title VI of the Treaty on European Union, in the version in force before the entry into force of the Treaty of Lisbon, shall remain the same, including where they have been accepted under Article 35(2) of the said Treaty on European Union.

2. The amendment of an act referred to in paragraph 1 shall entail the applicability of the powers of the institutions referred to in that paragraph as set out in the Treaties with respect to the amended act for those Member States to which that amended act shall apply.

3. In any case, the transitional measure mentioned in paragraph 1 shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon.

4. At the latest six months before the expiry of the transitional period referred to in paragraph 3, the United Kingdom may notify to the Council that it does not accept, with respect to the acts referred to in paragraph 1, the powers of the institutions referred to in paragraph 1 as set out in the Treaties. In case the United Kingdom has made that notification, all acts referred to in paragraph 1 shall cease to apply to it as from the date of expiry of the transitional period referred to in paragraph 3. This subparagraph shall not apply with respect to the amended acts which are applicable to the United Kingdom as referred to in paragraph 2.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the necessary consequential and transitional arrangements. The United Kingdom shall not participate in the adoption of this decision. A qualified majority of the Council shall be defined in accordance with Article 238(3)(a) of the Treaty on the Functioning of the European Union.

The Council, acting by a qualified majority on a proposal from the Commission, may also adopt a decision determining that the United Kingdom shall bear the direct financial consequences, if any, necessarily and unavoidably incurred as a result of the cessation of its participation in those acts.

[*Article 35* (text prior to the entry into force of the Treaty of Lisbon): 1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and

decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or

(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

4. Any Member State, whether or not it has made a declaration pursuant to paragraph 2, shall be entitled to submit statements of case or written observations to the Court in cases which arise under paragraph 1.

5. The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

6. The Court of Justice shall have jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The proceedings provided for in this paragraph shall be instituted within two months of the publication of the measure.

7. The Court of Justice shall have jurisdiction to rule on any dispute between Member States regarding the interpretation or the application of acts adopted under Article 34(2) whenever such dispute cannot be settled by the Council within six months of its being referred to the Council by one of its members. The Court shall also have jurisdiction to rule on any dispute between Member States and the Commission regarding the interpretation or the application of conventions established under Article 34(2)(d).]

Jurisdiction of the Court of Justice to give preliminary rulings on police and judicial cooperation in criminal matters

Member State	Declaration under Article 35(2) EU	Option chosen (point (a) or point (b) of Article 35(3) EU)	Reservation pursuant to Declaration No 10 annexed to the Amsterdam Final Act (Declaration on Article 35 EU (formerly Article K.7))	Information published in OJ [1]	Provisions of national law adopted further to the reservation pursuant to Declaration No 10
Germany	yes	point (b)	yes	1999 L 114, p. 56 1999 C 120, p. 24	Gesetz betreffend die Anrufung des Gerichtshofs der Europäischen Gemeinschaften im Wege des Vorabentscheidungsverfahrens auf dem Gebiet der polizeilichen Zusammenarbeit und der justitiellen Zusammenarbeit in Strafsachen nach Art. 35 des EU-Vertrages (EuGH-Gesetz) vom 6. 8. 1998 BGBl. 1998 I, p.2035
Austria	yes	point (b)	yes	1999 L 114, p. 56 1999 C 120, p. 24	Bundesgesetz über die Einholung von Vorabentscheidungen des Gerichtshofs der Europäischen Gemeinschaften auf dem Gebiet der polizeilichen Zusammenarbeit und der justitiellen Zusammenarbeit in Strafsachen BGBl. I N°89/1999
Belgium	yes	point (b)	yes	1999 L 114, p. 56 1999 C 120, p. 24	*
Bulgaria	*				
Cyprus	*				
Denmark	no	–	–	–	–
Spain	yes	point (a)	yes	1999 L 114, p. 56 1999 C 120, p. 24	Ley Orgánica 9/1998, de 16 de diciembre BOE 17 de diciembre 1998, núm. 301/1998 [pág. 42266]
Estonia	*				
Finland	yes	point (b)	no	1999 L 114, p. 56 1999 C 120, p. 24	–
France	yes	point (b)	yes	2005 L 327, p. 19	Décret n° 2000-668 du 10 juillet

*. No official information available

[1] A summary report on the declarations concerning acceptance was published, in identical terms, in OJ 2008 L 70, p. 23, and OJ 2008 C 69, p. 1.

				2005 C 318, p. 1	2000 Journal Officiel de la République française du 19.07.00, p. 11073
Greece	yes	point (b)	no	no 1999 L 114, p. 5 1999 C 120, p. 24	–
Hungary	yes	point (b) [2]	no	2005 L 327, p. 19 2005 C 318, p. 1 2008 L 70, p. 23 2008 C 69, p. 1	–
Ireland	no	–	–	–	–
Italy	yes	point (b)	yes	1999 L 114, p. 56 1999 C 120, p. 24	**
Latvia	yes	point (b)	no	2008 L 70, p. 23 2008 C 69, p. 1	*
Lithuania	yes	point (b)	no	2008 L 70, p. 23 2008 C 69, p. 1	–
Luxembourg	yes	point (b)	yes	1999 L 114, p. 56 1999 C 120, p. 24	*
Malta	*				
Netherlands	yes	point (b)	yes	1999 L 114, p. 56 1999 C 120, p. 24	*
Poland	*				
Portugal	yes	point (b)	no	1999 L 114, p. 56 1999 C 120, p. 24	–
Czech Republic	yes	point (b)	yes	2003 L 236, p. 980	§ 109 odst. 1 písm. d) OSŘ ve znění zákona č. 555/2004 Sb. Parlamentu České republiky, kterým se mění zákon č. 99/1963 Sb., občanský soudní řád, ve znění pozdějších předpisů, zákon č. 150/2002 Sb., soudní řád správní, ve znění pozdějších předpisů, zákon č. 549/1991 Sb., o soudních poplatcích, ve znění pozdějších předpisů, a zákon č. 85/1996 Sb., o advokacii, ve znění pozdějších předpisů
Romania	*				
United Kingdom	no	–	–	–	–

[2] According to the information published in OJ 2008 L 70, p. 23, and OJ 2008 C 69, p. 1, the Republic of Hungary has withdrawn its previous declaration (see OJ 2005 L 327, p. 19, and 2005 C 318, p. 1) that it accepted the jurisdiction of the Court of Justice of the European Communities in accordance with the arrangements laid down in Article 35(2) and (3)(a) of the Treaty on European Union and has declared that it accepts the jurisdiction of the Court of Justice of the European Communities in accordance with the arrangements laid down in Article 35(2) and (3)(b) of the Treaty on European Union. This is consistent with Decision (Kormányhatározat) 2088/2003 (V.15) of the Hungarian Government, according to which the Republic of Hungary accepts the jurisdiction of the Court of Justice in accordance with the arrangements laid down in Article 35(3)(b) EU.

Slovakia	*				
Slovenia	yes	point (b)	yes	2008 L 70, p. 23 2008 C 69, p. 1	*
Sweden	yes	point (b)	no	1999 L 114, p. 56 1999 C 120, p. 24	

II

(Non-legislative acts)

RULES OF PROCEDURE

RULES OF PROCEDURE OF THE COURT OF JUSTICE

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RULES OF PROCEDURE OF THE COURT OF JUSTICE

THE COURT OF JUSTICE

Having regard to the Treaty on European Union, and in particular Article 19 thereof,

Having regard to the Treaty on the Functioning of the European Union, and in particular the sixth paragraph of Article 253 thereof,

Having regard to the Treaty establishing the European Atomic Energy Community, and in particular Article 106a(1) thereof,

Having regard to the Protocol on the Statute of the Court of Justice of the European Union, and in particular Article 63 and the second paragraph of Article 64 thereof,

Whereas:

(1) Despite having been amended on several occasions over the years, the Rules of Procedure of the Court of Justice have remained fundamentally unchanged in structure since their original adoption on 4 March 1953. The Rules of Procedure of 19 June 1991, which are currently in force, still reflect the initial preponderance of direct actions, whereas in fact the majority of such actions now fall within the jurisdiction of the General Court, and references for a preliminary ruling from the courts and tribunals of the Member States represent, quantitatively, the primary category of cases brought before the Court. That fact should be taken into account and the structure and content of the Rules of Procedure of the Court adapted, in consequence, to changes in its caseload.

(2) While references for a preliminary ruling should be given their proper place in the Rules of Procedure, it is also appropriate to draw a clearer distinction between the rules that apply to all types of action and those that are specific to each type, to be contained in separate titles. In the interests of clarification, procedural provisions common to all cases brought before the Court should, therefore, all be contained in an initial title.

(3) In the light of experience gained in the course of implementing the various procedures, it is also necessary to supplement or to clarify, for the benefit of litigants as well as of national courts and tribunals, the rules that apply to each procedure. The rules in question concern, in particular, the concepts of party to the main proceedings, intervener and party to the proceedings before the General Court, or, in preliminary rulings, the rules governing the bringing of matters before the Court and the content of the order for reference. With regard to appeals against decisions of the General Court, a clearer distinction must also be drawn between appeals and cross-appeals in consequence of the service of an appeal on the cross-appellant.

(4) Conversely, the excessive complexity of certain procedures, such as the review procedure, has come to light on their implementation. Accordingly, they should be simplified by providing, inter alia, for a Chamber of five Judges to be designated for a period of one year to be responsible for ruling both on the First Advocate General's proposal to review and on the questions to be reviewed.

(5) Similarly, the procedural arrangements for dealing with requests for Opinions should be eased by aligning them with those that apply to other cases and by providing, in consequence, for a single Advocate General to be involved in dealing with the request for an Opinion. In the interests of making the Rules easier to understand, all the particular procedures currently to be found in a number of separate titles and chapters of the Rules of Procedure should also be brought together in a single title.

(6) In order to maintain the Court's capacity, in the face of an ever-increasing caseload, to dispose within a reasonable period of time of the cases brought before it, it is also necessary to continue the efforts made to reduce the duration of proceedings before the Court, in particular by extending the opportunities for the Court to rule by reasoned order, simplifying the rules relating to the intervention of the States and institutions referred to in the first and third paragraphs of Article 40 of the Statute and providing for the Court to be able to rule without a hearing if it considers that it has sufficient information on the basis of all the written observations lodged in a case.

(7) In the interests of making the Rules applied by the Court easier to understand, lastly, certain rules which are outdated or not applied should be deleted, every paragraph of the present Rules numbered, each article given a specific heading summarising its content and the terminology harmonised.

With the Council's approval given on 24 September 2012.

HAS ADOPTED THESE RULES OF PROCEDURE:

INTRODUCTORY PROVISIONS

Article 1

Definitions

1. In these Rules:

(a) provisions of the Treaty on European Union are referred to by the number of the article concerned followed by 'TEU',

(b) provisions of the Treaty on the Functioning of the European Union are referred to by the number of the article concerned followed by 'TFEU',

(c) provisions of the Treaty establishing the European Atomic Energy Community are referred to by the number of the article concerned followed by 'TEAEC',

(d) 'Statute' means the Protocol on the Statute of the Court of Justice of the European Union,

(e) 'EEA Agreement' means the Agreement on the European Economic Area, [1]

(f) 'Council Regulation No 1' means Council Regulation No 1 of 15 April 1958 determining the languages to be used by the European Economic Community. [2]

2. For the purposes of these Rules:

(a) 'institutions' means the institutions of the European Union referred to in Article 13(1) TEU and bodies, offices and agencies established by the Treaties, or by an act adopted in implementation thereof, which may be parties before the Court,

(b) 'EFTA Surveillance Authority' means the surveillance authority referred to in the EEA Agreement,

(c) 'interested persons referred to in Article 23 of the Statute' means all the parties, States, institutions, bodies, offices and agencies authorised, pursuant to that Article, to submit statements of case or observations in the context of a reference for a preliminary ruling.

Article 2

Purport of these Rules

These Rules implement and supplement, so far as necessary, the relevant provisions of the EU, FEU and EAEC Treaties, and the Statute.

TITLE I

ORGANISATION OF THE COURT

Chapter 1

JUDGES AND ADVOCATES GENERAL

Article 3

Commencement of the term of office of Judges and Advocates General

The term of office of a Judge or Advocate General shall begin on the date fixed for that purpose in the instrument of appointment. In the absence of any provisions in that instrument regarding the date of commencement of the term of office, that term shall begin on the date of publication of the instrument in the *Official Journal of the European Union*.

Article 4

Taking of the oath

Before taking up his duties, a Judge or Advocate General shall, at the first public sitting of the Court which he attends after his appointment, take the following oath provided for in Article 2 of the Statute:

'I swear that I will perform my duties impartially and conscientiously; I swear that I will preserve the secrecy of the deliberations of the Court.'

Article 5

Solemn undertaking

Immediately after taking the oath, a Judge or Advocate General shall sign a declaration by which he gives the solemn undertaking provided for in the third paragraph of Article 4 of the Statute.

Article 6

Depriving a Judge or Advocate General of his office

1. Where the Court is called upon, pursuant to Article 6 of the Statute, to decide whether a Judge or Advocate General no longer fulfils the requisite conditions or no longer meets the obligations arising from his office, the President shall invite the Judge or Advocate General concerned to make representations.

2. The Court shall give a decision in the absence of the Registrar.

Article 7

Order of seniority

1. The seniority of Judges and Advocates General shall be calculated without distinction according to the date on which they took up their duties.

2. Where there is equal seniority on that basis, the order of seniority shall be determined by age.

3. Judges and Advocates General whose terms of office are renewed shall retain their former seniority.

Chapter 2

PRESIDENCY OF THE COURT, CONSTITUTION OF THE CHAMBERS AND DESIGNATION OF THE FIRST ADVOCATE GENERAL

Article 8

Election of the President and of the Vice-President of the Court

1. The Judges shall, immediately after the partial replacement provided for in the second paragraph of Article 253 TFEU, elect one of their number as President of the Court for a term of three years.

2. If the office of the President falls vacant before the normal date of expiry of the term thereof, the Court shall elect a successor for the remainder of the term.

3. The elections provided for in this Article shall be by secret ballot. The Judge obtaining the votes of more than half the Judges of the Court shall be elected. If no Judge obtains that majority, further ballots shall be held until that majority is attained.

[1] OJ L 1, 3.1.1994, p. 27.
[2] OJ, English Special Edition 1952-1958 (I), p. 59.

4. The Judges shall then elect one of their number as Vice-President of the Court for a term of three years, in accordance with the procedures laid down in the preceding paragraph. Paragraph 2 shall apply if the office of the Vice-President of the Court falls vacant before the normal date of expiry of the term thereof.

5. The names of the President and Vice-President elected in accordance with this Article shall be published in the *Official Journal of the European Union*.

Article 9

Responsibilities of the President of the Court

1. The President shall represent the Court.

2. The President shall direct the judicial business of the Court. He shall preside at general meetings of the Members of the Court and at hearings before and deliberations of the full Court and the Grand Chamber.

3. The President shall ensure the proper functioning of the services of the Court.

Article 10

Responsibilities of the Vice-President of the Court

1. The Vice-President shall assist the President of the Court in the performance of his duties and shall take the President's place when the latter is prevented from acting.

2. He shall take the President's place, at his request, in performing the duties referred to in Article 9(1) and (3) of these Rules.

3. The Court shall, by decision, specify the conditions under which the Vice-President shall take the place of the President of the Court in the performance of his judicial duties. That decision shall be published in the *Official Journal of the European Union*.

Article 11

Constitution of Chambers

1. The Court shall set up Chambers of five and three Judges in accordance with Article 16 of the Statute and shall decide which Judges shall be attached to them.

2. The Court shall designate the Chambers of five Judges which, for a period of one year, shall be responsible for cases of the kind referred to in Article 107 and Articles 193 and 194.

3. In respect of cases assigned to a formation of the Court in accordance with Article 60, the word 'Court' in these Rules shall mean that formation.

4. In respect of cases assigned to a Chamber of five or three Judges, the powers of the President of the Court shall be exercised by the President of the Chamber.

5. The composition of the Chambers and the designation of the Chambers responsible for cases of the kind referred to in Article 107 and Articles 193 and 194 shall be published in the *Official Journal of the European Union*.

Article 12

Election of Presidents of Chambers

1. The Judges shall, immediately after the election of the President and Vice-President of the Court, elect the Presidents of the Chambers of five Judges for a term of three years.

2. The Judges shall then elect the Presidents of the Chambers of three Judges for a term of one year.

3. The provisions of Article 8(2) and (3) shall apply.

4. The names of the Presidents of Chambers elected in accordance with this Article shall be published in the *Official Journal of the European Union*.

Article 13

Where the President and Vice-President of the Court are prevented from acting

When the President and the Vice-President of the Court are prevented from acting, the functions of President shall be exercised by one of the Presidents of the Chambers of five Judges or, failing that, by one of the Presidents of the Chambers of three Judges or, failing that, by one of the other Judges, according to the order of seniority laid down in Article 7.

Article 14

Designation of the First Advocate General

1. The Court shall, after hearing the Advocates General, designate a First Advocate General for a period of one year.

2. If the office of the First Advocate General falls vacant before the normal date of expiry of the term thereof, the Court shall designate a successor for the remainder of the term.

3. The name of the First Advocate General designated in accordance with this Article shall be published in the *Official Journal of the European Union*.

Chapter 3

ASSIGNMENT OF CASES TO JUDGE-RAPPORTEURS AND ADVOCATES GENERAL

Article 15

Designation of the Judge-Rapporteur

1. As soon as possible after the document initiating proceedings has been lodged, the President of the Court shall designate a Judge to act as Rapporteur in the case.

2. For cases of the kind referred to in Article 107 and Articles 193 and 194, the Judge-Rapporteur shall be selected from among the Judges of the Chamber designated in accordance with Article 11(2), on a proposal from the President of that Chamber. If, pursuant to Article 109, the Chamber decides that the reference is not to be dealt with under the urgent procedure, the President of the Court may reassign the case to a Judge-Rapporteur attached to another Chamber.

3. The President of the Court shall take the necessary steps if a Judge-Rapporteur is prevented from acting.

Article 16

Designation of the Advocate General

1. The First Advocate General shall assign each case to an Advocate General.

2. The First Advocate General shall take the necessary steps if an Advocate General is prevented from acting.

Chapter 4

ASSISTANT RAPPORTEURS

Article 17

Assistant Rapporteurs

1. Where the Court is of the opinion that the consideration of and preparatory inquiries in cases before it so require, it shall, pursuant to Article 13 of the Statute, propose the appointment of Assistant Rapporteurs.

2. Assistant Rapporteurs shall in particular:

(a) assist the President of the Court in interim proceedings and

(b) assist the Judge-Rapporteurs in their work.

3. In the performance of their duties the Assistant Rapporteurs shall be responsible to the President of the Court, the President of a Chamber or a Judge-Rapporteur, as the case may be.

4. Before taking up his duties, an Assistant Rapporteur shall take before the Court the oath set out in Article 4 of these Rules.

Chapter 5

REGISTRY

Article 18

Appointment of the Registrar

1. The Court shall appoint the Registrar.

2. When the post of Registrar is vacant, an advertisement shall be published in the *Official Journal of the European Union*. Interested persons shall be invited to submit their applications within a time-limit of not less than three weeks, accompanied by full details of their nationality, university degrees, knowledge of languages, present and past occupations, and experience, if any, in judicial and international fields.

3. The vote, in which the Judges and the Advocates General shall take part, shall take place in accordance with the procedure laid down in Article 8(3) of these Rules.

4. The Registrar shall be appointed for a term of six years. He may be reappointed. The Court may decide to renew the term of office of the incumbent Registrar without availing itself of the procedure laid down in paragraph 2 of this Article.

5. The Registrar shall take the oath set out in Article 4 and sign the declaration provided for in Article 5.

6. The Registrar may be deprived of his office only if he no longer fulfils the requisite conditions or no longer meets the obligations arising from his office. The Court shall take its decision after giving the Registrar an opportunity to make representations.

7. If the office of Registrar falls vacant before the normal date of expiry of the term thereof, the Court shall appoint a new Registrar for a term of six years.

8. The name of the Registrar elected in accordance with this Article shall be published in the *Official Journal of the European Union*.

Article 19

Deputy Registrar

The Court may, in accordance with the procedure laid down in respect of the Registrar, appoint a Deputy Registrar to assist the Registrar and to take his place if he is prevented from acting.

Article 20

Responsibilities of the Registrar

1. The Registrar shall be responsible, under the authority of the President of the Court, for the acceptance, transmission and custody of all documents and for effecting service as provided for by these Rules.

2. The Registrar shall assist the Members of the Court in all their official functions.

3. The Registrar shall have custody of the seals and shall be responsible for the records. He shall be in charge of the publications of the Court and, in particular, the European Court Reports.

4. The Registrar shall direct the services of the Court under the authority of the President of the Court. He shall be responsible for the management of the staff and the administration, and for the preparation and implementation of the budget.

Article 21

Keeping of the register

1. There shall be kept in the Registry, under the responsibility of the Registrar, a register in which all procedural documents and supporting items and documents lodged shall be entered in the order in which they are submitted.

2. When a document has been registered, the Registrar shall make a note to that effect on the original and, if a party so requests, on any copy submitted for the purpose.

3. Entries in the register and the notes provided for in the preceding paragraph shall be authentic.

4. A notice shall be published in the *Official Journal of the European Union* indicating the date of registration of an application initiating proceedings, the names of the parties, the form of order sought by the applicant and a summary of the pleas in law and of the main supporting arguments or, as the case may be, the date of lodging of a request for a preliminary ruling, the identity of the referring court or tribunal and the parties to the main proceedings, and the questions referred to the Court.

Article 22

Consultation of the register and of judgments and orders

1. Anyone may consult the register at the Registry and may obtain copies or extracts on payment of a charge on a scale fixed by the Court on a proposal from the Registrar.

2. The parties to a case may, on payment of the appropriate charge, obtain certified copies of procedural documents.

3. Anyone may, on payment of the appropriate charge, also obtain certified copies of judgments and orders.

Chapter 6

THE WORKING OF THE COURT

Article 23

Location of the sittings of the Court

The Court may choose to hold one or more specific sittings in a place other than that in which it has its seat.

Article 24

Calendar of the Court's judicial business

1. The judicial year shall begin on 7 October of each calendar year and end on 6 October of the following year.

2. The judicial vacations shall be determined by the Court.

3. In a case of urgency, the President may convene the Judges and the Advocates General during the judicial vacations.

4. The Court shall observe the official holidays of the place in which it has its seat.

5. The Court may, in proper circumstances, grant leave of absence to any Judge or Advocate General.

6. The dates of the judicial vacations and the list of official holidays shall be published annually in the *Official Journal of the European Union*.

Article 25

General meeting

Decisions concerning administrative issues or the action to be taken upon the proposals contained in the preliminary report referred to in Article 59 of these Rules shall be taken by the Court at the general meeting in which all the Judges and Advocates General shall take part and have a vote. The Registrar shall be present, unless the Court decides to the contrary.

Article 26

Drawing-up of minutes

Where the Court sits without the Registrar being present it shall, if necessary, instruct the most junior Judge for the purposes of Article 7 of these Rules to draw up minutes, which shall be signed by that Judge and by the President.

Chapter 7

FORMATIONS OF THE COURT

Section 1. Composition of the formations of the Court

Article 27

Composition of the Grand Chamber

1. The Grand Chamber shall, for each case, be composed of the President and the Vice-President of the Court, three Presidents of Chambers of five Judges, the Judge-Rapporteur and the number of Judges necessary to reach 15. The last-mentioned Judges and the three Presidents of Chambers of five Judges shall be designated from the lists referred to in paragraphs 3 and 4 of this Article, following the order laid down therein. The starting-point on each of those lists, in every case assigned to the Grand Chamber, shall be the name of the Judge immediately following the last Judge designated from the list concerned for the preceding case assigned to that formation of the Court.

2. After the election of the President and the Vice-President of the Court, and then of the Presidents of the Chambers of five Judges, a list of the Presidents of Chambers of five Judges and a list of the other Judges shall be drawn up for the purposes of determining the composition of the Grand Chamber.

3. The list of the Presidents of Chambers of five Judges shall be drawn up according to the order laid down in Article 7 of these Rules.

4. The list of the other Judges shall be drawn up according to the order laid down in Article 7 of these Rules, alternating with the reverse order: the first Judge on that list shall be the first according to the order laid down in that Article, the second Judge shall be the last according to that order, the third Judge shall be the second according to that order, the fourth Judge the penultimate according to that order, and so on.

5. The lists referred to in paragraphs 3 and 4 shall be published in the *Official Journal of the European Union*.

6. In cases which are assigned to the Grand Chamber between the beginning of a calendar year in which there is a partial replacement of Judges and the moment when that replacement has taken place, two substitute Judges may be designated to complete the formation of the Court for so long as the attainment of the quorum referred to in the third paragraph of Article 17 of the Statute is in doubt. Those substitute Judges shall be the two Judges appearing on the list referred to in paragraph 4 immediately after the last Judge designated for the composition of the Grand Chamber in the case.

7. The substitute Judges shall replace, in the order of the list referred to in paragraph 4, such Judges as are unable to take part in the determination of the case.

Article 28

Composition of the Chambers of five and of three Judges

1. The Chambers of five Judges and of three Judges shall, for each case, be composed of the President of the Chamber, the Judge-Rapporteur and the number of Judges required to attain the number of five and three Judges respectively. Those last-mentioned Judges shall be designated from the lists referred to in paragraphs 2 and 3, following the order laid down therein. The starting-point on those lists, in every case assigned to a Chamber, shall be the name of the Judge immediately following the last Judge designated from the list for the preceding case assigned to the Chamber concerned.

2. For the composition of the Chambers of five Judges, after the election of the Presidents of those Chambers lists shall be drawn up including all the Judges attached to the Chamber concerned, with the exception of its President. The lists shall be drawn up in the same way as the list referred to in Article 27(4).

3. For the composition of the Chambers of three Judges, after the election of the Presidents of those Chambers lists shall be drawn up including all the Judges attached to the Chamber concerned, with the exception of its President. The lists shall be drawn up according to the order laid down in Article 7.

4. The lists referred to in paragraphs 2 and 3 shall be published in the *Official Journal of the European Union*.

Article 29

Composition of Chambers where cases are related or referred back

1. Where the Court considers that a number of cases must be heard and determined together by one and the same formation of the Court, the composition of that formation shall be that fixed for the case in respect of which the preliminary report was examined first.

2. Where a Chamber to which a case has been assigned requests the Court, pursuant to Article 60(3) of these Rules, to assign the case to a formation composed of a greater number of Judges, that formation shall include the members of the Chamber which has referred the case back.

Article 30

Where a President of a Chamber is prevented from acting

1. When the President of a Chamber of five Judges is prevented from acting, the functions of President of the Chamber shall be exercised by a President of a Chamber of three Judges, where necessary according to the order laid down in Article 7 of these Rules, or, if that formation of the Court does not include a President of a Chamber of three Judges, by one of the other Judges according to the order laid down in Article 7.

2. When the President of a Chamber of three Judges is prevented from acting, the functions of President of the Chamber shall be exercised by a Judge of that formation of the Court according to the order laid down in Article 7.

Article 31

Where a member of the formation of the Court is prevented from acting

1. When a member of the Grand Chamber is prevented from acting, he shall be replaced by another Judge according to the order of the list referred to in Article 27(4).

2. When a member of a Chamber of five Judges is prevented from acting, he shall be replaced by another Judge of that Chamber, according to the order of the list referred to in Article 28(2). If it is not possible to replace the Judge prevented from acting by a Judge of the same Chamber, the President of that Chamber shall so inform the President of the Court who may designate another Judge to complete the Chamber.

3. When a member of a Chamber of three Judges is prevented from acting, he shall be replaced by another Judge of that Chamber, according to the order of the list referred to in Article 28(3). If it is not possible to replace the Judge prevented from acting by a Judge of the same Chamber, the President of that Chamber shall so inform the President of the Court who may designate another Judge to complete the Chamber.

Section 2. Deliberations

Article 32

Procedures concerning deliberations

1. The deliberations of the Court shall be and shall remain secret.

2. When a hearing has taken place, only those Judges who participated in that hearing and, where relevant, the Assistant Rapporteur responsible for the consideration of the case shall take part in the deliberations.

3. Every Judge taking part in the deliberations shall state his opinion and the reasons for it.

4. The conclusions reached by the majority of the Judges after final discussion shall determine the decision of the Court.

Article 33

Number of Judges taking part in the deliberations

Where, by reason of a Judge being prevented from acting, there is an even number of Judges, the most junior Judge for the purposes of Article 7 of these Rules shall abstain from taking part in the deliberations unless he is the Judge-Rapporteur. In that case the Judge immediately senior to him shall abstain from taking part in the deliberations.

Article 34

Quorum of the Grand Chamber

1. If, for a case assigned to the Grand Chamber, it is not possible to attain the quorum referred to in the third paragraph of Article 17 of the Statute, the President of the Court shall designate one or more other Judges according to the order of the list referred to in Article 27(4) of these Rules.

2. If a hearing has taken place before that designation, the Court shall re-hear oral argument from the parties and the Opinion of the Advocate General.

Article 35

Quorum of the Chambers of five and of three Judges

1. If, for a case assigned to a Chamber of five or of three Judges, it is not possible to attain the quorum referred to in the second paragraph of Article 17 of the Statute, the President of the Court shall designate one or more other Judges according to the order of the list referred to in Article 28(2) or (3), respectively, of these Rules. If it is not possible to replace the Judge prevented from acting by a Judge of the same Chamber, the President of that Chamber shall so inform the President of the Court forthwith who shall designate another Judge to complete the Chamber.

2. Article 34(2) shall apply, *mutatis mutandis*, to the Chambers of five and of three Judges.

Chapter 8

LANGUAGES

Article 36

Language of a case

The language of a case shall be Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish or Swedish.

Article 37

Determination of the language of a case

1. In direct actions, the language of a case shall be chosen by the applicant, except that:

(a) where the defendant is a Member State, the language of the case shall be the official language of that State; where that State has more than one official language, the applicant may choose between them;

(b) at the joint request of the parties, the use of another of the languages mentioned in Article 36 for all or part of the proceedings may be authorised;

(c) at the request of one of the parties, and after the opposite party and the Advocate General have been heard, the use of another of the languages mentioned in Article 36 may be authorised as the language of the case for all or part of the proceedings by way of derogation from subparagraphs (a) and (b); such a request may not be submitted by one of the institutions of the European Union.

2. Without prejudice to the provisions of paragraph 1(b) and (c), and of Article 38(4) and (5) of these Rules,

(a) in appeals against decisions of the General Court as referred to in Articles 56 and 57 of the Statute, the language of the case shall be the language of the decision of the General Court against which the appeal is brought;

(b) where, in accordance with the second paragraph of Article 62 of the Statute, the Court decides to review a decision of the General Court, the language of the case shall be the language of the decision of the General Court which is the subject of review;

(c) in the case of challenges concerning the costs to be recovered, applications to set aside judgments by default, third-party proceedings and applications for interpretation or revision of a judgment or for the Court to remedy a failure to adjudicate, the language of the case shall be the language of the decision to which those applications or challenges relate.

3. In preliminary ruling proceedings, the language of the case shall be the language of the referring court or tribunal. At the duly substantiated request of one of the parties to the main proceedings, and after the other party to the main proceedings and the Advocate General have been heard, the use of another of the languages mentioned in Article 36 may be authorised for the oral part of the procedure. Where granted, such authorisation shall apply in respect of all the interested persons referred to in Article 23 of the Statute.

4. Requests as above may be decided on by the President; the latter may, and where he wishes to accede to a request without the agreement of all the parties must, refer the request to the Court.

Article 38

Use of the language of the case

1. The language of the case shall in particular be used in the written and oral pleadings of the parties, including the items and documents produced or annexed to them, and also in the minutes and decisions of the Court.

2. Any item or document produced or annexed that is expressed in another language must be accompanied by a translation into the language of the case.

3. However, in the case of substantial items or lengthy documents, translations may be confined to extracts. At any time the Court may, of its own motion or at the request of one of the parties, call for a complete or fuller translation.

4. Notwithstanding the foregoing provisions, a Member State shall be entitled to use its official language when taking part in preliminary ruling proceedings, when intervening in a case before the Court or when bringing a matter before the Court pursuant to Article 259 TFEU. This provision shall apply both to written documents and to oral statements. The Registrar shall arrange in each instance for translation into the language of the case.

5. The States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, may be authorised to use one of the languages mentioned in Article 36, other than the language of the case, when they take part in preliminary ruling proceedings or intervene in a case before the Court. This provision shall apply both to written documents and to oral statements. The Registrar shall arrange in each instance for translation into the language of the case.

6. Non-Member States taking part in preliminary ruling proceedings pursuant to the fourth paragraph of Article 23 of the Statute may be authorised to use one of the languages mentioned in Article 36 other than the language of the case. This provision shall apply both to written documents and to oral statements. The Registrar shall arrange in each instance for translation into the language of the case.

7. Where a witness or expert states that he is unable adequately to express himself in one of the languages referred to in Article 36, the Court may authorise him to give his evidence in another language. The Registrar shall arrange for translation into the language of the case.

8. The President and the Vice-President of the Court and also the Presidents of Chambers in conducting oral proceedings, Judges and Advocates General in putting questions and Advocates General in delivering their Opinions may use one of the languages referred to in Article 36 other than the language of the case. The Registrar shall arrange for translation into the language of the case.

Article 39

Responsibility of the Registrar concerning language arrangements

The Registrar shall, at the request of any Judge, of the Advocate General or of a party, arrange for anything said or written in the course of the proceedings before the Court to be translated into the languages chosen from those referred to in Article 36.

Article 40

Languages of the publications of the Court

Publications of the Court shall be issued in the languages referred to in Article 1 of Council Regulation No 1.

Article 41

Authentic texts

The texts of documents drawn up in the language of the case or, where applicable, in another language authorised pursuant to Articles 37 or 38 of these Rules shall be authentic.

Article 42

Language service of the Court

The Court shall set up a language service staffed by experts with adequate legal training and a thorough knowledge of several official languages of the European Union.

TITLE II

COMMON PROCEDURAL PROVISIONS

Chapter 1

RIGHTS AND OBLIGATIONS OF AGENTS, ADVISERS AND LAWYERS

Article 43

Privileges, immunities and facilities

1. Agents, advisers and lawyers who appear before the Court or before any judicial authority to which the Court has addressed letters rogatory shall enjoy immunity in respect of words spoken or written by them concerning the case or the parties.

2. Agents, advisers and lawyers shall also enjoy the following privileges and facilities:

(a) any papers and documents relating to the proceedings shall be exempt from both search and seizure. In the event of a dispute, the customs officials or police may seal those papers and documents; they shall then be immediately forwarded to the Court for inspection in the presence of the Registrar and of the person concerned;

(b) agents, advisers and lawyers shall be entitled to travel in the course of duty without hindrance.

Article 44

Status of the parties' representatives

1. In order to qualify for the privileges, immunities and facilities specified in Article 43, persons entitled to them shall furnish proof of their status as follows:

(a) agents shall produce an official document issued by the party for whom they act, who shall immediately serve a copy thereof on the Registrar;

(b) lawyers shall produce a certificate that they are authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement, and, where the party which they represent is a legal person governed by private law, an authority to act issued by that person;

(c) advisers shall produce an authority to act issued by the party whom they are assisting.

2. The Registrar of the Court shall issue them with a certificate, as required. The validity of this certificate shall be limited to a specified period, which may be extended or curtailed according to the duration of the proceedings.

Article 45

Waiver of immunity

1. The privileges, immunities and facilities specified in Article 43 of these Rules are granted exclusively in the interests of the proper conduct of proceedings.

2. The Court may waive immunity where it considers that the proper conduct of proceedings will not be hindered thereby.

Article 46

Exclusion from the proceedings

1. If the Court considers that the conduct of an agent, adviser or lawyer before the Court is incompatible with the dignity of the Court or with the requirements of the proper administration of justice, or that such agent, adviser or lawyer is using his rights for purposes other than those for which they were granted, it shall inform the person concerned. If the Court informs the competent authorities to whom the person concerned is answerable, a copy of the letter sent to those authorities shall be forwarded to the person concerned.

2. On the same grounds, the Court may at any time, having heard the person concerned and the Advocate General, decide to exclude an agent, adviser or lawyer from the proceedings by reasoned order. That order shall have immediate effect.

3. Where an agent, adviser or lawyer is excluded from the proceedings, the proceedings shall be suspended for a period fixed by the President in order to allow the party concerned to appoint another agent, adviser or lawyer.

4. Decisions taken under this Article may be rescinded.

Article 47

University teachers and parties to the main proceedings

1. The provisions of this Chapter shall apply to university teachers who have a right of audience before the Court in accordance with Article 19 of the Statute.

2. They shall also apply, in the context of references for a preliminary ruling, to the parties to the main proceedings where, in accordance with the national rules of procedure applicable, those parties are permitted to bring or defend court proceedings without being represented by a lawyer, and to persons authorised under those rules to represent them.

Chapter 2

SERVICE

Article 48

Methods of service

1. Where these Rules require that a document be served on a person, the Registrar shall ensure that service is effected at that person's address for service either by the dispatch of a copy of the document by registered post with a form for acknowledgement of receipt or by personal delivery of the copy against a receipt. The Registrar shall prepare and certify the copies of documents to be served, save where the parties themselves supply the copies in accordance with Article 57(2) of these Rules.

2. Where the addressee has agreed that service is to be effected on him by telefax or any other technical means of communication, any procedural document, including a judgment or order of the Court, may be served by the transmission of a copy of the document by such means.

3. Where, for technical reasons or on account of the nature or length of the document, such transmission is impossible or impracticable, the document shall be served, if the addressee has not specified an address for service, at his address in accordance with the procedures laid down in paragraph 1 of this Article. The addressee shall be so informed by telefax or any other technical means of communication. Service shall then be deemed to have been effected on the addressee by registered post on the 10th day following the lodging of the registered letter at the post office of the place in which the Court has its seat, unless it is shown by the acknowledgement of receipt that the letter was received on a different date or the addressee informs the Registrar, within three weeks of being informed by telefax or any other technical means of communication, that the document to be served has not reached him.

4. The Court may, by decision, determine the criteria for a procedural document to be served by electronic means. That decision shall be published in the *Official Journal of the European Union*.

Chapter 3

TIME-LIMITS

Article 49

Calculation of time-limits

1. Any procedural time-limit prescribed by the Treaties, the Statute or these Rules shall be calculated as follows:

(a) where a time-limit expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the time-limit in question;

(b) a time-limit expressed in weeks, months or years shall end with the expiry of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day during which the event or action from which the time-limit is to be calculated occurred or took place. If, in a time-limit expressed in months or years, the day on which it should expire does not occur in the last month, the time-limit shall end with the expiry of the last day of that month;

(c) where a time-limit is expressed in months and days, it shall first be calculated in whole months, then in days;

(d) time-limits shall include Saturdays, Sundays and the official holidays referred to in Article 24(6) of these Rules;

(e) time-limits shall not be suspended during the judicial vacations.

2. If the time-limit would otherwise end on a Saturday, Sunday or an official holiday, it shall be extended until the end of the first subsequent working day.

Article 50

Proceedings against a measure adopted by an institution

Where the time-limit allowed for initiating proceedings against a measure adopted by an institution runs from the publication of that measure, that time-limit shall be calculated, for the purposes of Article 49(1)(a), from the end of the 14th day after publication of the measure in the *Official Journal of the European Union*.

Article 51

Extension on account of distance

The procedural time-limits shall be extended on account of distance by a single period of 10 days.

Article 52

Setting and extension of time-limits

1. Any time-limit prescribed by the Court pursuant to these Rules may be extended.

2. The President and the Presidents of Chambers may delegate to the Registrar power of signature for the purposes of setting certain time-limits which, pursuant to these Rules, it falls to them to prescribe, or of extending such time-limits.

Chapter 4

DIFFERENT PROCEDURES FOR DEALING WITH CASES

Article 53

Procedures for dealing with cases

1. Without prejudice to the special provisions laid down in the Statute or in these Rules, the procedure before the Court shall consist of a written part and an oral part.

2. Where it is clear that the Court has no jurisdiction to hear and determine a case or where a request or an application is manifestly inadmissible, the Court may, after hearing the Advocate General, at any time decide to give a decision by reasoned order without taking further steps in the proceedings.

3. The President may in special circumstances decide that a case be given priority over others.

4. A case may be dealt with under an expedited procedure in accordance with the conditions provided by these Rules.

5. A reference for a preliminary ruling may be dealt with under an urgent procedure in accordance with the conditions provided by these Rules.

Article 54

Joinder

1. Two or more cases of the same type concerning the same subject-matter may at any time be joined, on account of the connection between them, for the purposes of the written or oral part of the procedure or of the judgment which closes the proceedings.

2. A decision on whether cases should be joined shall be taken by the President after hearing the Judge-Rapporteur and the Advocate General, if the cases concerned have already been assigned, and, save in the case of references for a preliminary ruling, after also hearing the parties. The President may refer the decision on this matter to the Court.

3. Joined cases may be disjoined, in accordance with the provisions of paragraph 2.

Article 55

Stay of proceedings

1. The proceedings may be stayed:

(a) in the circumstances specified in the third paragraph of Article 54 of the Statute, by order of the Court, made after hearing the Advocate General;

(b) in all other cases, by decision of the President adopted after hearing the Judge-Rapporteur and the Advocate General and, save in the case of references for a preliminary ruling, the parties.

2. The proceedings may be resumed by order or decision, following the same procedure.

3. The orders or decisions referred to in paragraphs 1 and 2 shall be served on the parties or interested persons referred to in Article 23 of the Statute.

4. The stay of proceedings shall take effect on the date indicated in the order or decision of stay or, in the absence of such indication, on the date of that order or decision.

5. While proceedings are stayed time shall cease to run for the parties or interested persons referred to in Article 23 of the Statute for the purposes of procedural time-limits.

6. Where the order or decision of stay does not fix the length of stay, it shall end on the date indicated in the order or decision of resumption or, in the absence of such indication, on the date of the order or decision of resumption.

7. From the date of resumption of proceedings following a stay, the suspended procedural time-limits shall be replaced by new time-limits and time shall begin to run from the date of that resumption.

Article 56

Deferment of the determination of a case

After hearing the Judge-Rapporteur, the Advocate General and the parties, the President may in special circumstances, either of his own motion or at the request of one of the parties, defer a case to be dealt with at a later date.

Chapter 5

WRITTEN PART OF THE PROCEDURE

Article 57

Lodging of procedural documents

1. The original of every procedural document must bear the handwritten signature of the party's agent or lawyer or, in the case of observations submitted in the context of preliminary ruling proceedings, that of the party to the main proceedings or his representative, if the national rules of procedure applicable to those main proceedings so permit.

2. The original, accompanied by all annexes referred to therein, shall be submitted together with five copies for the Court and, in the case of proceedings other than preliminary ruling proceedings, a copy for every other party to the proceedings. Copies shall be certified by the party lodging them.

3. The institutions shall in addition produce, within time-limits laid down by the Court, translations of any procedural document into the other languages provided for by Article 1 of Council Regulation No 1. The preceding paragraph of this Article shall apply.

4. To every procedural document there shall be annexed a file containing the items and documents relied on in support of it, together with a schedule listing them.

5. Where in view of the length of an item or document only extracts from it are annexed to the procedural document, the whole item or document or a full copy of it shall be lodged at the Registry.

6. All procedural documents shall bear a date. In the calculation of procedural time-limits, only the date and time of lodgment of the original at the Registry shall be taken into account.

7. Without prejudice to the provisions of paragraphs 1 to 6, the date on and time at which a copy of the signed original of a procedural document, including the schedule of items and documents referred to in paragraph 4, is received at the Registry by telefax or any other technical means of communication available to the Court shall be deemed to be the date and time of lodgment for the purposes of compliance with the procedural time-limits, provided that the signed original of the procedural document, accompanied by the annexes and copies referred to in paragraph 2, is lodged at the Registry no later than 10 days thereafter.

8. Without prejudice to paragraphs 3 to 6, the Court may, by decision, determine the criteria for a procedural document sent to the Registry by electronic means to be deemed to be the original of that document. That decision shall be published in the *Official Journal of the European Union*.

Article 58

Length of procedural documents

Without prejudice to any special provisions laid down in these Rules, the Court may, by decision, set the maximum length of written pleadings or observations lodged before it. That decision shall be published in the *Official Journal of the European Union*.

Chapter 6

THE PRELIMINARY REPORT AND ASSIGNMENT OF CASES TO FORMATIONS OF THE COURT

Article 59

Preliminary report

1. When the written part of the procedure is closed, the President shall fix a date on which the Judge-Rapporteur is to present a preliminary report to the general meeting of the Court.

2. The preliminary report shall contain proposals as to whether particular measures of organisation of procedure, measures of inquiry or, if appropriate, requests to the referring court or tribunal for clarification should be undertaken, and as to the formation to which the case should be

assigned. It shall also contain the Judge-Rapporteur's proposals, if any, as to whether to dispense with a hearing and as to whether to dispense with an Opinion of the Advocate General pursuant to the fifth paragraph of Article 20 of the Statute.

3. The Court shall decide, after hearing the Advocate General, what action to take on the proposals of the Judge-Rapporteur.

Article 60

Assignment of cases to formations of the Court

1. The Court shall assign to the Chambers of five and of three Judges any case brought before it in so far as the difficulty or importance of the case or particular circumstances are not such as to require that it should be assigned to the Grand Chamber, unless a Member State or an institution of the European Union participating in the proceedings has requested that the case be assigned to the Grand Chamber, pursuant to the third paragraph of Article 16 of the Statute.

2. The Court shall sit as a full Court where cases are brought before it pursuant to the provisions referred to in the fourth paragraph of Article 16 of the Statute. It may assign a case to the full Court where, in accordance with the fifth paragraph of Article 16 of the Statute, it considers that the case is of exceptional importance.

3. The formation to which a case has been assigned may, at any stage of the proceedings, request the Court to assign the case to a formation composed of a greater number of Judges.

4. Where the oral part of the procedure is opened without an inquiry, the President of the formation determining the case shall fix the opening date.

Chapter 7

MEASURES OF ORGANISATION OF PROCEDURE AND MEASURES OF INQUIRY

Section 1. Measures of organisation of procedure

Article 61

Measures of organisation prescribed by the Court

1. In addition to the measures which may be prescribed in accordance with Article 24 of the Statute, the Court may invite the parties or the interested persons referred to in Article 23 of the Statute to answer certain questions in writing, within the time-limit laid down by the Court, or at the hearing. The written replies shall be communicated to the other parties or the interested persons referred to in Article 23 of the Statute.

2. Where a hearing is organised, the Court shall, in so far as possible, invite the participants in that hearing to concentrate in their oral pleadings on one or more specified issues.

Article 62

Measures of organisation prescribed by the Judge-Rapporteur or the Advocate General

1. The Judge-Rapporteur or the Advocate General may request the parties or the interested persons referred to in Article 23 of the Statute to submit within a specified time-limit all such information relating to the facts, and all such documents or other particulars, as they may consider relevant. The replies and documents provided shall be communicated to the other parties or the interested persons referred to in Article 23 of the Statute.

2. The Judge-Rapporteur or the Advocate General may also send to the parties or the interested persons referred to in Article 23 of the Statute questions to be answered at the hearing.

Section 2. Measures of inquiry

Article 63

Decision on measures of inquiry

1. The Court shall decide in its general meeting whether a measure of inquiry is necessary.

2. Where the case has already been assigned to a formation of the Court, the decision shall be taken by that formation.

Article 64

Determination of measures of inquiry

1. The Court, after hearing the Advocate General, shall prescribe the measures of inquiry that it considers appropriate by means of an order setting out the facts to be proved.

2. Without prejudice to Articles 24 and 25 of the Statute, the following measures of inquiry may be adopted:

(a) the personal appearance of the parties;

(b) a request for information and production of documents;

(c) oral testimony;

(d) the commissioning of an expert's report;

(e) an inspection of the place or thing in question.

3. Evidence may be submitted in rebuttal and previous evidence may be amplified.

Article 65

Participation in measures of inquiry

1. Where the formation of the Court does not undertake the inquiry itself, it shall entrust the task of so doing to the Judge-Rapporteur.

2. The Advocate General shall take part in the measures of inquiry.

3. The parties shall be entitled to attend the measures of inquiry.

Article 66

Oral testimony

1. The Court may, either of its own motion or at the request of one of the parties, and after hearing the Advocate General, order that certain facts be proved by witnesses.

2. A request by a party for the examination of a witness shall state precisely about what facts and for what reasons the witness should be examined.

3. The Court shall rule by reasoned order on the request referred to in the preceding paragraph. If the request is granted, the order shall set out the facts to be established and state which witnesses are to be heard in respect of each of those facts.

4. Witnesses shall be summoned by the Court, where appropriate after lodgment of the security provided for in Article 73(1) of these Rules.

Article 67

Examination of witnesses

1. After the identity of the witness has been established, the President shall inform him that he will be required to vouch the truth of his evidence in the manner laid down in these Rules.

2. The witness shall give his evidence to the Court, the parties having been given notice to attend. After the witness has given his evidence the President may, at the request of one of the parties or of his own motion, put questions to him.

3. The other Judges and the Advocate General may do likewise.

4. Subject to the control of the President, questions may be put to witnesses by the representatives of the parties.

Article 68

Witnesses' oath

1. After giving his evidence, the witness shall take the following oath:

'I swear that I have spoken the truth, the whole truth and nothing but the truth.'

2. The Court may, after hearing the parties, exempt a witness from taking the oath.

Article 69

Pecuniary penalties

1. Witnesses who have been duly summoned shall obey the summons and attend for examination.

2. If, without good reason, a witness who has been duly summoned fails to appear before the Court, the Court may impose upon him a pecuniary penalty not exceeding EUR 5 000 and may order that a further summons be served on the witness at his own expense.

3. The same penalty may be imposed upon a witness who, without good reason, refuses to give evidence or to take the oath.

Article 70

Expert's report

1. The Court may order that an expert's report be obtained. The order appointing the expert shall define his task and set a time-limit within which he is to submit his report.

2. After the expert has submitted his report and that report has been served on the parties, the Court may order that the expert be examined, the parties having been given notice to attend. At the request of one of the parties or of his own motion, the President may put questions to the expert.

3. The other Judges and the Advocate General may do likewise.

4. Subject to the control of the President, questions may be put to the expert by the representatives of the parties.

Article 71

Expert's oath

1. After making his report, the expert shall take the following oath:

'I swear that I have conscientiously and impartially carried out my task.'

2. The Court may, after hearing the parties, exempt the expert from taking the oath.

Article 72

Objection to a witness or expert

1. If one of the parties objects to a witness or an expert on the ground that he is not a competent or proper person to act as a witness or expert or for any other reason, or if a witness or expert refuses to give evidence or to take the oath, the matter shall be resolved by the Court.

2. An objection to a witness or an expert shall be raised within two weeks after service of the order summoning the witness or appointing the expert; the statement of objection must set out the grounds of objection and indicate the nature of any evidence offered.

Article 73

Witnesses' and experts' costs

1. Where the Court orders the examination of witnesses or an expert's report, it may request the parties or one of them to lodge security for the witnesses' costs or the costs of the expert's report.

2. Witnesses and experts shall be entitled to reimbursement of their travel and subsistence expenses. The cashier of the Court may make an advance payment towards these expenses.

3. Witnesses shall be entitled to compensation for loss of earnings, and experts to fees for their services. The cashier of the Court shall pay witnesses and experts these sums after they have carried out their respective duties or tasks.

Article 74

Minutes of inquiry hearings

1. The Registrar shall draw up minutes of every inquiry hearing. The minutes shall be signed by the President and by the Registrar. They shall constitute an official record.

2. In the case of the examination of witnesses or experts, the minutes shall be signed by the President or by the Judge-Rapporteur responsible for conducting the examination of the witness or expert, and by the Registrar. Before the minutes are thus signed, the witness or expert must be given an opportunity to check the content of the minutes and to sign them.

3. The minutes shall be served on the parties.

Article 75

Opening of the oral part of the procedure after the inquiry

1. Unless the Court decides to prescribe a time-limit within which the parties may submit written observations, the President shall fix the date for the opening of the oral part of the procedure after the measures of inquiry have been completed.

2. Where a time-limit has been prescribed for the submission of written observations, the President shall fix the date for the opening of the oral part of the procedure after that time-limit has expired.

Chapter 8

ORAL PART OF THE PROCEDURE

Article 76

Hearing

1. Any reasoned requests for a hearing shall be submitted within three weeks after service on the parties or the interested persons referred to in Article 23 of the Statute of notification of the close of the written part of the procedure. That time-limit may be extended by the President.

2. On a proposal from the Judge-Rapporteur and after hearing the Advocate General, the Court may decide not to hold a hearing if it considers, on reading the written pleadings or observations lodged during the written part of the procedure, that it has sufficient information to give a ruling.

3. The preceding paragraph shall not apply where a request for a hearing, stating reasons, has been submitted by an interested person referred to in Article 23 of the Statute who did not participate in the written part of the procedure.

Article 77

Joint hearing

If the similarities between two or more cases of the same type so permit, the Court may decide to organise a joint hearing of those cases.

Article 78

Conduct of oral proceedings

Oral proceedings shall be opened and directed by the President, who shall be responsible for the proper conduct of the hearing.

Article 79

Cases heard in camera

1. For serious reasons related, in particular, to the security of the Member States or to the protection of minors, the Court may decide to hear a case *in camera*.

2. The oral proceedings in cases heard *in camera* shall not be published.

Article 80

Questions

The members of the formation of the Court and the Advocate General may in the course of the hearing put questions to the agents, advisers or lawyers of the parties and, in the circumstances referred to in Article 47(2) of these Rules, to the parties to the main proceedings or to their representatives.

Article 81

Close of the hearing

After the parties or the interested persons referred to in Article 23 of the Statute have presented oral argument, the President shall declare the hearing closed.

Article 82

Delivery of the Opinion of the Advocate General

1. Where a hearing takes place, the Opinion of the Advocate General shall be delivered after the close of that hearing.

2. The President shall declare the oral part of the procedure closed after the Advocate General has delivered his Opinion.

Article 83

Opening or reopening of the oral part of the procedure

The Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute.

Article 84

Minutes of hearings

1. The Registrar shall draw up minutes of every hearing. The minutes shall be signed by the President and by the Registrar. They shall constitute an official record.

2. The parties and interested persons referred to in Article 23 of the Statute may inspect the minutes at the Registry and obtain copies.

Article 85

Recording of the hearing

The President may, on a duly substantiated request, authorise a party or an interested person referred to in Article 23 of the Statute who has participated in the written or oral part of the proceedings to listen, on the Court's premises, to the soundtrack of the hearing in the language used by the speaker during that hearing.

Chapter 9

JUDGMENTS AND ORDERS

Article 86

Date of delivery of a judgment

The parties or interested persons referred to in Article 23 of the Statute shall be informed of the date of delivery of a judgment.

Article 87

Content of a judgment

A judgment shall contain:

(a) a statement that it is the judgment of the Court,

(b) an indication as to the formation of the Court,

(c) the date of delivery,

(d) the names of the President and of the Judges who took part in the deliberations, with an indication as to the name of the Judge-Rapporteur,

(e) the name of the Advocate General,

(f) the name of the Registrar,

(g) a description of the parties or of the interested persons referred to in Article 23 of the Statute who participated in the proceedings,

(h) the names of their representatives,

(i) in the case of direct actions and appeals, a statement of the forms of order sought by the parties,

(j) where applicable, the date of the hearing,

(k) a statement that the Advocate General has been heard and, where applicable, the date of his Opinion,

(l) a summary of the facts,

(m) the grounds for the decision,

(n) the operative part of the judgment, including, where appropriate, the decision as to costs.

Article 88

Delivery and service of the judgment

1. The judgment shall be delivered in open court.

2. The original of the judgment, signed by the President, by the Judges who took part in the deliberations and by the Registrar, shall be sealed and deposited at the Registry; certified copies of the judgment shall be served on the parties and, where applicable, the referring court or tribunal, the interested persons referred to in Article 23 of the Statute and the General Court.

Article 89

Content of an order

1. An order shall contain:

(a) a statement that it is the order of the Court,

(b) an indication as to the formation of the Court,

(c) the date of its adoption,

(d) an indication as to the legal basis of the order,

(e) the names of the President and, where applicable, the Judges who took part in the deliberations, with an indication as to the name of the Judge-Rapporteur,

(f) the name of the Advocate General,

(g) the name of the Registrar,

(h) a description of the parties or of the parties to the main proceedings,

(i) the names of their representatives,

(j) a statement that the Advocate General has been heard,

(k) the operative part of the order, including, where appropriate, the decision as to costs.

2. Where, in accordance with these Rules, an order must be reasoned, it shall in addition contain:

(a) in the case of direct actions and appeals, a statement of the forms of order sought by the parties,

(b) a summary of the facts,

(c) the grounds for the decision.

Article 90

Signature and service of the order

The original of the order, signed by the President and by the Registrar, shall be sealed and deposited at the Registry; certified copies of the order shall be served on the parties and, where applicable, the referring court or tribunal, the interested persons referred to in Article 23 of the Statute and the General Court.

Article 91

Binding nature of judgments and orders

1. A judgment shall be binding from the date of its delivery.

2. An order shall be binding from the date of its service.

Article 92

Publication in the Official Journal of the European Union

A notice containing the date and the operative part of the judgment or order of the Court which closes the proceedings shall be published in the *Official Journal of the European Union*.

TITLE III

REFERENCES FOR A PRELIMINARY RULING

Chapter 1

GENERAL PROVISIONS

Article 93

Scope

The procedure shall be governed by the provisions of this Title:

(a) in the cases covered by Article 23 of the Statute,

(b) as regards references for interpretation which may be provided for by agreements to which the European Union or the Member States are parties.

Article 94

Content of the request for a preliminary ruling

In addition to the text of the questions referred to the Court for a preliminary ruling, the request for a preliminary ruling shall contain:

(a) a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions are based;

(b) the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law;

(c) a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

Article 95

Anonymity

1. Where anonymity has been granted by the referring court or tribunal, the Court shall respect that anonymity in the proceedings pending before it.

2. At the request of the referring court or tribunal, at the duly reasoned request of a party to the main proceedings or of its own motion, the Court may also, if it considers it necessary, render anonymous one or more persons or entities concerned by the case.

Article 96

Participation in preliminary ruling proceedings

1. Pursuant to Article 23 of the Statute, the following shall be authorised to submit observations to the Court:

(a) the parties to the main proceedings,

(b) the Member States,

(c) the European Commission,

(d) the institution which adopted the act the validity or interpretation of which is in dispute,

(e) the States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, where a question concerning one of the fields of application of that Agreement is referred to the Court for a preliminary ruling,

(f) non-Member States which are parties to an agreement relating to a specific subject-matter, concluded with the Council, where the agreement so provides and where a court or tribunal of a Member State refers to the Court of Justice for a preliminary ruling a question falling within the scope of that agreement.

2. Non-participation in the written part of the procedure does not preclude participation in the oral part of the procedure.

Article 97

Parties to the main proceedings

1. The parties to the main proceedings are those who are determined as such by the referring court or tribunal in accordance with national rules of procedure.

2. Where the referring court or tribunal informs the Court that a new party has been admitted to the main proceedings, when the proceedings before the Court are already pending, that party must accept the case as he finds it at the time when the Court was so informed. That party shall receive a copy of every procedural document already served on the interested persons referred to in Article 23 of the Statute.

3. As regards the representation and attendance of the parties to the main proceedings, the Court shall take account of the rules of procedure in force before the court or tribunal which made the reference. In the event of any doubt as to whether a person may under national law represent a party to the main proceedings, the Court may obtain information from the referring court or tribunal on the rules of procedure applicable.

Article 98

Translation and service of the request for a preliminary ruling

1. The requests for a preliminary ruling referred to in this Title shall be served on the Member States in the original version, accompanied by a translation into the official language of the State to which they are being addressed. Where appropriate, on account of the length of the request, such translation shall be replaced by the translation into the official language of the State to which it is addressed of a summary of that request, which will serve as a basis for the position to be adopted by that State. The summary shall include the full text of the question or questions referred for a preliminary ruling. That summary shall contain, in particular, in so far as that information appears in the request for a preliminary ruling, the subject-matter of the main proceedings, the essential arguments of the parties to those proceedings, a succinct presentation of the reasons for the reference for a preliminary ruling and the case-law and the provisions of national law and European Union law relied on.

2. In the cases covered by the third paragraph of Article 23 of the Statute, the requests for a preliminary ruling shall be served on the States, other than the Member States, which are parties to the EEA Agreement and also on the EFTA Surveillance Authority in the original version, accompanied by a translation of the request, or where appropriate of a summary, into one of the languages referred to in Article 36, to be chosen by the addressee.

3. Where a non-Member State has the right to take part in preliminary ruling proceedings pursuant to the fourth paragraph of Article 23 of the Statute, the original version of the request for a preliminary ruling shall be served on it accompanied by a translation of the request, or where appropriate of a summary, into one of the languages referred to in Article 36, to be chosen by the non-Member State concerned.

Article 99

Reply by reasoned order

Where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide to rule by reasoned order.

Article 100

Circumstances in which the Court remains seised

1. The Court shall remain seised of a request for a preliminary ruling for as long as it is not withdrawn by the court or tribunal which made that request to the Court. The withdrawal of a request may be taken into account until notice of the date of delivery of the judgment has been served on the interested persons referred to in Article 23 of the Statute.

2. However, the Court may at any time declare that the conditions of its jurisdiction are no longer fulfilled.

Article 101

Request for clarification

1. Without prejudice to the measures of organisation of procedure and measures of inquiry provided for in these Rules, the Court may, after hearing the Advocate General, request clarification from the referring court or tribunal within a time-limit prescribed by the Court.

2. The reply of the referring court or tribunal to that request shall be served on the interested persons referred to in Article 23 of the Statute.

Article 102

Costs of the preliminary ruling proceedings

It shall be for the referring court or tribunal to decide as to the costs of the preliminary ruling proceedings.

Article 103

Rectification of judgments and orders

1. Clerical mistakes, errors in calculation and obvious inaccuracies affecting judgments or orders may be rectified by the Court, of its own motion or at the request of an interested person referred to in Article 23 of the Statute made within two weeks after delivery of the judgment or service of the order.

2. The Court shall take its decision after hearing the Advocate General.

3. The original of the rectification order shall be annexed to the original of the rectified decision. A note of this order shall be made in the margin of the original of the rectified decision.

Article 104

Interpretation of preliminary rulings

1. Article 158 of these Rules relating to the interpretation of judgments and orders shall not apply to decisions given in reply to a request for a preliminary ruling.

2. It shall be for the national courts or tribunals to assess whether they consider that sufficient guidance is given by a preliminary ruling, or whether it appears to them that a further reference to the Court is required.

Chapter 2

EXPEDITED PRELIMINARY RULING PROCEDURE

Article 105

Expedited procedure

1. At the request of the referring court or tribunal or, exceptionally, of his own motion, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the Judge-Rapporteur and the Advocate General, decide that a reference for a preliminary ruling is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules.

2. In that event, the President shall immediately fix the date for the hearing, which shall be communicated to the interested persons referred to in Article 23 of the Statute when the request for a preliminary ruling is served.

3. The interested persons referred to in the preceding paragraph may lodge statements of case or written observations within a time-limit prescribed by the President, which shall not be less than 15 days. The President may request those interested persons to restrict the matters addressed in their statement of case or written observations to the essential points of law raised by the request for a preliminary ruling.

4. The statements of case or written observations, if any, shall be communicated to all the interested persons referred to in Article 23 of the Statute prior to the hearing.

5. The Court shall rule after hearing the Advocate General.

Article 106

Transmission of procedural documents

1. The procedural documents referred to in the preceding Article shall be deemed to have been lodged on the transmission to the Registry, by telefax or any other technical means of communication available to the Court, of a copy of the signed original and the items and documents relied on in support of it, together with the schedule referred to in Article 57(4). The original of the document and the annexes referred to above shall be sent to the Registry immediately.

2. Where the preceding Article requires that a document be served on or communicated to a person, such service or communication may be effected by transmission of a copy of the document by telefax or any other technical means of communication available to the Court and the addressee.

Chapter 3

URGENT PRELIMINARY RULING PROCEDURE

Article 107

Scope of the urgent preliminary ruling procedure

1. A reference for a preliminary ruling which raises one or more questions in the areas covered by Title V of Part Three of the Treaty on the Functioning of the European Union may, at the request of the referring court or tribunal or, exceptionally, of the Court's own motion, be dealt with under an urgent procedure derogating from the provisions of these Rules.

2. The referring court or tribunal shall set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure and shall, in so far as possible, indicate the answer that it proposes to the questions referred.

3. If the referring court or tribunal has not submitted a request for the urgent procedure to be applied, the President of the Court may, if the application of that procedure appears, prima facie, to be required, ask the Chamber referred to in Article 108 to consider whether it is necessary to deal with the reference under that procedure.

Article 108

Decision as to urgency

1. The decision to deal with a reference for a preliminary ruling under the urgent procedure shall be taken by the designated Chamber, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General. The composition of that Chamber shall be determined in accordance with Article 28(2) on the day on which the case is assigned to the Judge-Rapporteur if the application of the urgent procedure is requested by the referring court or tribunal, or, if the application of that procedure is considered at the request of the President of the Court, on the day on which that request is made.

2. If the case is connected with a pending case assigned to a Judge-Rapporteur who is not a member of the designated Chamber, that Chamber may propose to the President of the Court that the case be assigned to that Judge-Rapporteur. Where the case is reassigned to that Judge-Rapporteur, the Chamber of five Judges which includes him shall carry out the duties of the designated Chamber in respect of that case. Article 29(1) shall apply.

Article 109

Written part of the urgent procedure

1. A request for a preliminary ruling shall, where the referring court or tribunal has requested the application of the urgent procedure or where the President has requested the designated Chamber to consider whether it is necessary to deal with the reference under that procedure, be served forthwith by the Registrar on the parties to the main proceedings, on the Member State from which the reference is made, on the European Commission and on the institution which adopted the act the validity or interpretation of which is in dispute.

2. The decision as to whether or not to deal with the reference for a preliminary ruling under the urgent procedure shall be served immediately on the referring court or tribunal and on the parties, Member State and institutions referred to in

the preceding paragraph. The decision to deal with the reference under the urgent procedure shall prescribe the time-limit within which those parties or entities may lodge statements of case or written observations. The decision may specify the matters of law to which such statements of case or written observations must relate and may specify the maximum length of those documents.

3. Where a request for a preliminary ruling refers to an administrative procedure or judicial proceedings conducted in a Member State other than that from which the reference is made, the Court may invite that first Member State to provide all relevant information in writing or at the hearing.

4. As soon as the service referred to in paragraph 1 above has been effected, the request for a preliminary ruling shall also be communicated to the interested persons referred to in Article 23 of the Statute, other than the persons served, and the decision whether or not to deal with the reference for a preliminary ruling under the urgent procedure shall be communicated to those interested persons as soon as the service referred to in paragraph 2 has been effected.

5. The interested persons referred to in Article 23 of the Statute shall be informed as soon as possible of the likely date of the hearing.

6. Where the reference is not to be dealt with under the urgent procedure, the proceedings shall continue in accordance with the provisions of Article 23 of the Statute and the applicable provisions of these Rules.

Article 110

Service and information following the close of the written part of the procedure

1. Where a reference for a preliminary ruling is to be dealt with under the urgent procedure, the request for a preliminary ruling and the statements of case or written observations which have been lodged shall be served on the interested persons referred to in Article 23 of the Statute other than the parties and entities referred to in Article 109(1). The request for a preliminary ruling shall be accompanied by a translation, where appropriate of a summary, in accordance with Article 98.

2. The statements of case or written observations which have been lodged shall also be served on the parties and other interested persons referred to in Article 109(1).

3. The date of the hearing shall be communicated to the interested persons referred to in Article 23 of the Statute at the same time as the documents referred to in the preceding paragraphs are served.

Article 111

Omission of the written part of the procedure

The designated Chamber may, in cases of extreme urgency, decide to omit the written part of the procedure referred to in Article 109(2).

Article 112

Decision on the substance

The designated Chamber shall rule after hearing the Advocate General.

Article 113

Formation of the Court

1. The designated Chamber may decide to sit in a formation of three Judges. In that event, it shall be composed of the President of the designated Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(2) on the date on which the composition of the designated Chamber is determined in accordance with Article 108(1).

2. The designated Chamber may also request the Court to assign the case to a formation composed of a greater number of Judges. The urgent procedure shall continue before the new formation of the Court, where necessary after the reopening of the oral part of the procedure.

Article 114

Transmission of procedural documents

Procedural documents shall be transmitted in accordance with Article 106.

Chapter 4

LEGAL AID

Article 115

Application for legal aid

1. A party to the main proceedings who is wholly or in part unable to meet the costs of the proceedings before the Court may at any time apply for legal aid.

2. The application shall be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent national authority attesting to his financial situation.

3. If the applicant has already obtained legal aid before the referring court or tribunal, he shall produce the decision of that court or tribunal and specify what is covered by the sums already granted.

Article 116

Decision on the application for legal aid

1. As soon as the application for legal aid has been lodged it shall be assigned by the President to the Judge-Rapporteur responsible for the case in the context of which the application has been made.

2. The decision to grant legal aid, in full or in part, or to refuse it shall be taken, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, by the Chamber of three Judges to which the Judge-Rapporteur is assigned. The formation of the Court shall, in that event, be composed of the President of that Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(3) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.

3. If the Judge-Rapporteur is not a member of a Chamber of three Judges, the decision shall be taken, under the same conditions, by the Chamber of five Judges to which he is assigned. In addition to the Judge-Rapporteur, the formation of the Court shall be composed of four Judges designated from the list referred to in Article 28(2) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.

4. The formation of the Court shall give its decision by way of order. Where the application for legal aid is refused in whole or in part, the order shall state the reasons for that refusal.

Article 117

Sums to be advanced as legal aid

Where legal aid is granted, the cashier of the Court shall be responsible, where applicable within the limits set by the formation of the Court, for costs involved in the assistance and representation of the applicant before the Court. At the request of the applicant or his representative, an advance on those costs may be paid.

Article 118

Withdrawal of legal aid

The formation of the Court which gave a decision on the application for legal aid may at any time, either of its own motion or on request, withdraw that legal aid if the circumstances which led to its being granted alter during the proceedings.

TITLE IV

DIRECT ACTIONS

Chapter 1

REPRESENTATION OF THE PARTIES

Article 119

Obligation to be represented

1. A party may be represented only by his agent or lawyer.

2. Agents and lawyers must lodge at the Registry an official document or an authority to act issued by the party whom they represent.

3. The lawyer acting for a party must also lodge at the Registry a certificate that he is authorised to practise before a court of a Member State or of another State which is a party to the EEA Agreement.

4. If those documents are not lodged, the Registrar shall prescribe a reasonable time-limit within which the party concerned is to produce them. If the applicant fails to produce the required documents within the time-limit prescribed, the Court shall, after hearing the Judge-Rapporteur and the Advocate General, decide whether the non-compliance with that procedural requirement renders the application or written pleading formally inadmissible.

Chapter 2

WRITTEN PART OF THE PROCEDURE

Article 120

Content of the application

An application of the kind referred to in Article 21 of the Statute shall state:

(a) the name and address of the applicant;

(b) the name of the party against whom the application is made;

(c) the subject-matter of the proceedings, the pleas in law and arguments relied on and a summary of those pleas in law;

(d) the form of order sought by the applicant;

(e) where appropriate, any evidence produced or offered.

Article 121

Information relating to service

1. For the purpose of the proceedings, the application shall state an address for service. It shall indicate the name of the person who is authorised and has expressed willingness to accept service.

2. In addition to, or instead of, specifying an address for service as referred to in paragraph 1, the application may state that the lawyer or agent agrees that service is to be effected on him by telefax or any other technical means of communication.

3. If the application does not comply with the requirements referred to in paragraphs 1 or 2, all service on the party concerned for the purpose of the proceedings shall be effected, for so long as the defect has not been cured, by registered letter addressed to the agent or lawyer of that party. By way of derogation from Article 48, service shall then be deemed to be duly effected by the lodging of the registered letter at the post office of the place in which the Court has its seat.

Article 122

Annexes to the application

1. The application shall be accompanied, where appropriate, by the documents specified in the second paragraph of Article 21 of the Statute.

2. An application submitted under Article 273 TFEU shall be accompanied by a copy of the special agreement concluded between the Member States concerned.

3. If an application does not comply with the requirements set out in paragraphs 1 or 2 of this Article, the Registrar shall prescribe a reasonable time-limit within which the applicant is to produce the abovementioned documents. If the applicant fails to put the application in order, the Court shall, after hearing the Judge-Rapporteur and the Advocate General, decide whether the non-compliance with these conditions renders the application formally inadmissible.

Article 123

Service of the application

The application shall be served on the defendant. In cases where Article 119(4) or Article 122(3) applies, service shall be effected as soon as the application has been put in order or the Court has declared it admissible notwithstanding the failure to observe the requirements set out in those two Articles.

Article 124

Content of the defence

1. Within two months after service on him of the application, the defendant shall lodge a defence, stating:

(a) the name and address of the defendant;

(b) the pleas in law and arguments relied on;

(c) the form of order sought by the defendant;

(d) where appropriate, any evidence produced or offered.

2. Article 121 shall apply to the defence.

3. The time-limit laid down in paragraph 1 may exceptionally be extended by the President at the duly reasoned request of the defendant.

Article 125

Transmission of documents

Where the European Parliament, the Council or the European Commission is not a party to a case, the Court shall send to them copies of the application and of the defence, without the annexes thereto, to enable them to assess whether the inapplicability of one of their acts is being invoked under Article 277 TFEU.

Article 126

Reply and rejoinder

1. The application initiating proceedings and the defence may be supplemented by a reply from the applicant and by a rejoinder from the defendant.

2. The President shall prescribe the time-limits within which those procedural documents are to be produced. He may specify the matters to which the reply or the rejoinder should relate.

Chapter 3

PLEAS IN LAW AND EVIDENCE

Article 127

New pleas in law

1. No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure.

2. Without prejudice to the decision to be taken on the admissibility of the plea in law, the President may, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, prescribe a time-limit within which the other party may respond to that plea.

Article 128

Evidence produced or offered

1. In reply or rejoinder a party may produce or offer further evidence in support of his arguments. The party must give reasons for the delay in submitting such evidence.

2. The parties may, exceptionally, produce or offer further evidence after the close of the written part of the procedure. They must give reasons for the delay in submitting such evidence. The President may, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, prescribe a time-limit within which the other party may comment on such evidence.

Chapter 4

INTERVENTION

Article 129

Object and effects of the intervention

1. The intervention shall be limited to supporting, in whole or in part, the form of order sought by one of the parties. It shall not confer the same procedural rights as those conferred on the parties and, in particular, shall not give rise to any right to request that a hearing be held.

2. The intervention shall be ancillary to the main proceedings. It shall become devoid of purpose if the case is removed from the register of the Court as a result of a party's discontinuance or withdrawal from the proceedings or of an agreement between the parties, or where the application is declared inadmissible.

3. The intervener must accept the case as he finds it at the time of his intervention.

4. Consideration may be given to an application to intervene which is made after the expiry of the time-limit prescribed in Article 130 but before the decision to open the oral part of the procedure provided for in Article 60(4). In that event, if the President allows the intervention, the intervener may submit his observations during the hearing, if it takes place.

Article 130

Application to intervene

1. An application to intervene must be submitted within six weeks of the publication of the notice referred to in Article 21(4).

2. The application to intervene shall contain:

(a) a description of the case;

(b) a description of the main parties;

(c) the name and address of the intervener;

(d) the form of order sought, in support of which the intervener is applying for leave to intervene;

(e) a statement of the circumstances establishing the right to intervene, where the application is submitted pursuant to the second or third paragraph of Article 40 of the Statute.

3. The intervener shall be represented in accordance with Article 19 of the Statute.

4. Articles 119, 121 and 122 of these Rules shall apply.

Article 131

Decision on applications to intervene

1. The application to intervene shall be served on the parties in order to obtain any written or oral observations they may wish to make on that application.

2. Where the application is submitted pursuant to the first or third paragraph of Article 40 of the Statute, the intervention shall be allowed by decision of the President and the intervener shall receive a copy of every procedural document served on the parties, provided that those parties have not, within 10 days after the service referred to in paragraph 1 has been effected, put forward observations on the application to intervene or identified secret or confidential items or documents which, if communicated to the intervener, the parties claim would be prejudicial to them.

3. In any other case, the President shall decide on the application to intervene by order or shall refer the application to the Court.

4. If the application to intervene is granted, the intervener shall receive a copy of every procedural document served on the parties, save, where applicable, for the secret or confidential items or documents excluded from such communication pursuant to paragraph 3.

Article 132

Submission of statements

1. The intervener may submit a statement in intervention within one month after communication of the procedural documents referred to in the preceding Article. That time-limit may be extended by the President at the duly reasoned request of the intervener.

2. The statement in intervention shall contain:

(a) the form of order sought by the intervener in support, in whole or in part, of the form of order sought by one of the parties;

(b) the pleas in law and arguments relied on by the intervener;

(c) where appropriate, any evidence produced or offered.

3. After the statement in intervention has been lodged, the President shall, where necessary, prescribe a time-limit within which the parties may reply to that statement.

Chapter 5

EXPEDITED PROCEDURE

Article 133

Decision relating to the expedited procedure

1. At the request of the applicant or the defendant, the President of the Court may, where the nature of the case requires that it be dealt with within a short time, after hearing the other party, the Judge-Rapporteur and the Advocate General, decide that a case is to be determined pursuant to an expedited procedure derogating from the provisions of these Rules.

2. The request for a case to be determined pursuant to an expedited procedure must be made by a separate document submitted at the same time as the application initiating proceedings or the defence, as the case may be, is lodged.

3. Exceptionally the President may also take such a decision of his own motion, after hearing the parties, the Judge-Rapporteur and the Advocate General.

Article 134

Written part of the procedure

1. Under the expedited procedure, the application initiating proceedings and the defence may be supplemented by a reply and a rejoinder only if the President, after hearing the Judge-Rapporteur and the Advocate General, considers this to be necessary.

2. An intervener may submit a statement in intervention only if the President, after hearing the Judge-Rapporteur and the Advocate General, considers this to be necessary.

Article 135

Oral part of the procedure

1. Once the defence has been submitted or, if the decision to determine the case pursuant to an expedited procedure is not made until after that pleading has been lodged, once that decision has been taken, the President shall fix a date for the hearing, which shall be communicated forthwith to the parties. He may postpone the date of the hearing where it is necessary to undertake measures of inquiry or where measures of organisation of procedure so require.

2. Without prejudice to Articles 127 and 128, a party may supplement his arguments and produce or offer evidence during the oral part of the procedure. The party must, however, give reasons for the delay in producing such further arguments or evidence.

Article 136

Decision on the substance

The Court shall give its ruling after hearing the Advocate General.

Chapter 6

COSTS

Article 137

Decision as to costs

A decision as to costs shall be given in the judgment or order which closes the proceedings.

Article 138

General rules as to allocation of costs

1. The unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings.

2. Where there is more than one unsuccessful party the Court shall decide how the costs are to be shared.

3. Where each party succeeds on some and fails on other heads, the parties shall bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

Article 139

Unreasonable or vexatious costs

The Court may order a party, even if successful, to pay costs which the Court considers that party to have unreasonably or vexatiously caused the opposite party to incur.

Article 140

Costs of interveners

1. The Member States and institutions which have intervened in the proceedings shall bear their own costs.

2. The States, other than the Member States, which are parties to the EEA Agreement, and also the EFTA Surveillance Authority, shall similarly bear their own costs if they have intervened in the proceedings.

3. The Court may order an intervener other than those referred to in the preceding paragraphs to bear his own costs.

Article 141

Costs in the event of discontinuance or withdrawal

1. A party who discontinues or withdraws from proceedings shall be ordered to pay the costs if they have been applied for in the other party's observations on the discontinuance.

2. However, at the request of the party who discontinues or withdraws from proceedings, the costs shall be borne by the other party if this appears justified by the conduct of that party.

3. Where the parties have come to an agreement on costs, the decision as to costs shall be in accordance with that agreement.

4. If costs are not claimed, the parties shall bear their own costs.

Article 142

Costs where a case does not proceed to judgment

Where a case does not proceed to judgment the costs shall be in the discretion of the Court.

Article 143

Costs of proceedings

Proceedings before the Court shall be free of charge, except that:

(a) where a party has caused the Court to incur avoidable costs the Court may, after hearing the Advocate General, order that party to refund them;

(b) where copying or translation work is carried out at the request of a party, the cost shall, in so far as the Registrar considers it excessive, be paid for by that party on the Registry's scale of charges referred to in Article 22.

Article 144

Recoverable costs

Without prejudice to the preceding Article, the following shall be regarded as recoverable costs:

(a) sums payable to witnesses and experts under Article 73 of these Rules;

(b) expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers.

Article 145

Dispute concerning the costs to be recovered

1. If there is a dispute concerning the costs to be recovered, the Chamber of three Judges to which the Judge-Rapporteur who dealt with the case is assigned shall, on application by the party concerned and after hearing the opposite party and the Advocate General, make an order. In that event, the formation of the Court shall be composed of the President of that Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(3) on the date on which the dispute is brought before that Chamber by the Judge-Rapporteur.

2. If the Judge-Rapporteur is not a member of a Chamber of three Judges, the decision shall be taken, under the same conditions, by the Chamber of five Judges to which he is assigned. In addition to the Judge-Rapporteur, the formation of the Court shall be composed of four Judges designated from the list referred to in Article 28(2) on the date on which the dispute is brought before that Chamber by the Judge-Rapporteur.

3. The parties may, for the purposes of enforcement, apply for an authenticated copy of the order.

Article 146

Procedure for payment

1. Sums due from the cashier of the Court and from its debtors shall be paid in euro.

2. Where costs to be recovered have been incurred in a currency other than the euro or where the steps in respect of which payment is due were taken in a country of which the euro is not the currency, the conversion shall be effected at the European Central Bank's official rates of exchange on the day of payment.

Chapter 7

AMICABLE SETTLEMENT, DISCONTINUANCE, CASES THAT DO NOT PROCEED TO JUDGMENT AND PRELIMINARY ISSUES

Article 147

Amicable settlement

1. If, before the Court has given its decision, the parties reach a settlement of their dispute and inform the Court of the abandonment of their claims, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 141, having regard to any proposals made by the parties on the matter.

2. This provision shall not apply to proceedings under Articles 263 TFEU and 265 TFEU.

Article 148

Discontinuance

If the applicant informs the Court in writing or at the hearing that he wishes to discontinue the proceedings, the President shall order the case to be removed from the register and shall give a decision as to costs in accordance with Article 141.

Article 149

Cases that do not proceed to judgment

If the Court declares that the action has become devoid of purpose and that there is no longer any need to adjudicate on it, the Court may at any time of its own motion, on a proposal from the Judge-Rapporteur and after hearing the parties and the Advocate General, decide to rule by reasoned order. It shall give a decision as to costs.

Article 150

Absolute bar to proceeding with a case

On a proposal from the Judge-Rapporteur, the Court may at any time of its own motion, after hearing the parties and the Advocate General, decide to rule by reasoned order on whether there exists any absolute bar to proceeding with a case.

Article 151

Preliminary objections and issues

1. A party applying to the Court for a decision on a preliminary objection or issue not going to the substance of the case shall submit the application by a separate document.

2. The application must state the pleas of law and arguments relied on and the form of order sought by the applicant; any supporting items and documents must be annexed to it.

3. As soon as the application has been submitted, the President shall prescribe a time-limit within which the opposite party may submit in writing his pleas in law and the form of order which he seeks.

4. Unless the Court decides otherwise, the remainder of the proceedings on the application shall be oral.

5. The Court shall, after hearing the Advocate General, decide on the application as soon as possible or, where special circumstances so justify, reserve its decision until it rules on the substance of the case.

6. If the Court refuses the application or reserves its decision, the President shall prescribe new time-limits for the further steps in the proceedings.

Chapter 8

JUDGMENTS BY DEFAULT

Article 152

Judgments by default

1. If a defendant on whom an application initiating proceedings has been duly served fails to respond to the application in the proper form and within the time-limit prescribed, the applicant may apply to the Court for judgment by default.

2. The application for judgment by default shall be served on the defendant. The Court may decide to open the oral part of the procedure on the application.

3. Before giving judgment by default the Court shall, after hearing the Advocate General, consider whether the application initiating proceedings is admissible, whether the appropriate formalities have been complied with, and whether the applicant's claims appear well founded. The Court may adopt measures of organisation of procedure or order measures of inquiry.

4. A judgment by default shall be enforceable. The Court may, however, grant a stay of execution until the Court has given its decision on any application under Article 156 to set aside the judgment, or it may make execution subject to the provision of security of an amount and nature to be fixed in the light of the circumstances; this security shall be released if no such application is made or if the application fails.

Chapter 9

REQUESTS AND APPLICATIONS RELATING TO JUDGMENTS AND ORDERS

Article 153

Competent formation of the Court

1. With the exception of applications referred to in Article 159, the requests and applications referred to in this Chapter shall be assigned to the Judge-Rapporteur who was responsible for the case to which the request or application relates, and shall be assigned to the formation of the Court which gave a decision in that case.

2. If the Judge-Rapporteur is prevented from acting, the President of the Court shall assign the request or application referred to in this Chapter to a Judge who was a member of the formation of the Court which gave a decision in the case to which that request or application relates.

3. If the quorum referred to in Article 17 of the Statute can no longer be attained, the Court shall, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, assign the request or application to a new formation of the Court.

Article 154

Rectification

1. Without prejudice to the provisions relating to the interpretation of judgments and orders, clerical mistakes, errors in calculation and obvious inaccuracies may be rectified by the Court, of its own motion or at the request of a party made within two weeks after delivery of the judgment or service of the order.

2. Where the request for rectification concerns the operative part or one of the grounds constituting the necessary support for the operative part, the parties, whom the Registrar shall duly inform, may submit written observations within a time-limit prescribed by the President.

3. The Court shall take its decision after hearing the Advocate General.

4. The original of the rectification order shall be annexed to the original of the rectified decision. A note of this order shall be made in the margin of the original of the rectified decision.

Article 155

Failure to adjudicate

1. If the Court has failed to adjudicate on a specific head of claim or on costs, any party wishing to rely on that may, within a month after service of the decision, apply to the Court to supplement its decision.

2. The application shall be served on the opposite party and the President shall prescribe a time-limit within which that party may submit written observations.

3. After these observations have been submitted, the Court shall, after hearing the Advocate General, decide both on the admissibility and on the substance of the application.

Article 156

Application to set aside

1. Application may be made pursuant to Article 41 of the Statute to set aside a judgment delivered by default.

2. The application to set aside the judgment must be made within one month from the date of service of the judgment and must be submitted in the form prescribed by Articles 120 to 122 of these Rules.

3. After the application has been served, the President shall prescribe a time-limit within which the other party may submit his written observations.

4. The proceedings shall be conducted in accordance with Articles 59 to 92 of these Rules.

5. The Court shall decide by way of a judgment which may not be set aside.

6. The original of this judgment shall be annexed to the original of the judgment by default. A note of the judgment on the application to set aside shall be made in the margin of the original of the judgment by default.

Article 157

Third-party proceedings

1. Articles 120 to 122 of these Rules shall apply to an application initiating third-party proceedings made pursuant to Article 42 of the Statute. In addition such an application shall:

(a) specify the judgment or order contested;

(b) state how the contested decision is prejudicial to the rights of the third party;

(c) indicate the reasons for which the third party was unable to take part in the original case.

2. The application must be made against all the parties to the original case.

3. The application must be submitted within two months of publication of the decision in the *Official Journal of the European Union*.

4. The Court may, on application by the third party, order a stay of execution of the contested decision. The provisions of Chapter 10 of this Title shall apply.

5. The contested decision shall be varied on the points on which the submissions of the third party are upheld.

6. The original of the judgment in the third-party proceedings shall be annexed to the original of the contested decision. A note of the judgment in the third-party proceedings shall be made in the margin of the original of the contested decision.

Article 158

Interpretation

1. In accordance with Article 43 of the Statute, if the meaning or scope of a judgment or order is in doubt, the Court shall construe it on application by any party or any institution of the European Union establishing an interest therein.

2. An application for interpretation must be made within two years after the date of delivery of the judgment or service of the order.

3. An application for interpretation shall be made in accordance with Articles 120 to 122 of these Rules. In addition it shall specify:

(a) the decision in question;

(b) the passages of which interpretation is sought.

4. The application must be made against all the parties to the case in which the decision of which interpretation is sought was given.

5. The Court shall give its decision after having given the parties an opportunity to submit their observations and after hearing the Advocate General.

6. The original of the interpreting decision shall be annexed to the original of the decision interpreted. A note of the interpreting decision shall be made in the margin of the original of the decision interpreted.

Article 159

Revision

1. In accordance with Article 44 of the Statute, an application for revision of a decision of the Court may be made only on discovery of a fact which is of such a nature as to be a decisive factor and which, when the judgment was delivered or the order served, was unknown to the Court and to the party claiming the revision.

2. Without prejudice to the time-limit of 10 years prescribed in the third paragraph of Article 44 of the Statute, an application for revision shall be made within three months of the date on which the facts on which the application is founded came to the applicant's knowledge.

3. Articles 120 to 122 of these Rules shall apply to an application for revision. In addition such an application shall:

(a) specify the judgment or order contested;

(b) indicate the points on which the decision is contested;

(c) set out the facts on which the application is founded;

(d) indicate the nature of the evidence to show that there are facts justifying revision, and that the time-limits laid down in paragraph 2 have been observed.

4. The application for revision must be made against all parties to the case in which the contested decision was given.

5. Without prejudice to its decision on the substance, the Court shall, after hearing the Advocate General, give in the form of an order its decision on the admissibility of the application, having regard to the written observations of the parties.

6. If the Court declares the application admissible, it shall proceed to consider the substance of the application and shall give its decision in the form of a judgment in accordance with these Rules.

7. The original of the revising judgment shall be annexed to the original of the decision revised. A note of the revising judgment shall be made in the margin of the original of the decision revised.

Chapter 10

SUSPENSION OF OPERATION OR ENFORCEMENT AND OTHER INTERIM MEASURES

Article 160

Application for suspension or for interim measures

1. An application to suspend the operation of any measure adopted by an institution, made pursuant to Article 278 TFEU or Article 157 TEAEC, shall be admissible only if the applicant has challenged that measure in an action before the Court.

2. An application for the adoption of one of the other interim measures referred to in Article 279 TFEU shall be admissible only if it is made by a party to a case before the Court and relates to that case.

3. An application of a kind referred to in the preceding paragraphs shall state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measure applied for.

4. The application shall be made by a separate document and in accordance with the provisions of Articles 120 to 122 of these Rules.

5. The application shall be served on the opposite party, and the President shall prescribe a short time-limit within which that party may submit written or oral observations.

6. The President may order a preparatory inquiry.

7. The President may grant the application even before the observations of the opposite party have been submitted. This decision may be varied or cancelled even without any application being made by any party.

Article 161

Decision on the application

1. The President shall either decide on the application himself or refer it immediately to the Court.

2. If the President is prevented from acting, Articles 10 and 13 of these Rules shall apply.

3. Where the application is referred to it, the Court shall give a decision immediately, after hearing the Advocate General.

Article 162

Order for suspension of operation or for interim measures

1. The decision on the application shall take the form of a reasoned order, from which no appeal shall lie. The order shall be served on the parties forthwith.

2. The execution of the order may be made conditional on the lodging by the applicant of security, of an amount and nature to be fixed in the light of the circumstances.

3. Unless the order fixes the date on which the interim measure is to lapse, the measure shall lapse when the judgment which closes the proceedings is delivered.

4. The order shall have only an interim effect, and shall be without prejudice to the decision of the Court on the substance of the case.

Article 163

Change in circumstances

On application by a party, the order may at any time be varied or cancelled on account of a change in circumstances.

Article 164

New application

Rejection of an application for an interim measure shall not bar the party who made it from making a further application on the basis of new facts.

Article 165

Applications pursuant to Articles 280 TFEU and 299 TFEU and Article 164 TEAEC

1. The provisions of this Chapter shall apply to applications to suspend the enforcement of a decision of the Court or of any measure adopted by the Council, the European Commission or the European Central Bank, submitted pursuant to Articles 280 TFEU and 299 TFEU or Article 164 TEAEC.

2. The order granting the application shall fix, where appropriate, a date on which the interim measure is to lapse.

Article 166

Application pursuant to Article 81 TEAEC

1. An application of a kind referred to in the third and fourth paragraphs of Article 81 TEAEC shall contain:

(a) the names and addresses of the persons or undertakings to be inspected;

(b) an indication of what is to be inspected and of the purpose of the inspection.

2. The President shall give his decision in the form of an order. Article 162 of these Rules shall apply.

3. If the President is prevented from acting, Articles 10 and 13 of these Rules shall apply.

TITLE V

APPEALS AGAINST DECISIONS OF THE GENERAL COURT

Chapter 1

FORM AND CONTENT OF THE APPEAL, AND FORM OF ORDER SOUGHT

Article 167

Lodging of the appeal

1. An appeal shall be brought by lodging an application at the Registry of the Court of Justice or of the General Court.

2. The Registry of the General Court shall forthwith transmit to the Registry of the Court of Justice the file in the case at first instance and, where necessary, the appeal.

Article 168

Content of the appeal

1. An appeal shall contain:

(a) the name and address of the appellant;

(b) a reference to the decision of the General Court appealed against;

(c) the names of the other parties to the relevant case before the General Court;

(d) the pleas in law and legal arguments relied on, and a summary of those pleas in law;

(e) the form of order sought by the appellant.

2. Articles 119, 121 and 122(1) of these Rules shall apply to appeals.

3. The appeal shall state the date on which the decision appealed against was served on the appellant.

4. If an appeal does not comply with paragraphs 1 to 3 of this Article, the Registrar shall prescribe a reasonable time-limit within which the appellant is to put the appeal in order. If the appellant fails to put the appeal in order within the time-limit prescribed, the Court of Justice shall, after hearing the Judge-Rapporteur and the Advocate General, decide whether the non-compliance with that formal requirement renders the appeal formally inadmissible.

Article 169

Form of order sought, pleas in law and arguments of the appeal

1. An appeal shall seek to have set aside, in whole or in part, the decision of the General Court as set out in the operative part of that decision.

2. The pleas in law and legal arguments relied on shall identify precisely those points in the grounds of the decision of the General Court which are contested.

Article 170

Form of order sought in the event that the appeal is allowed

1. An appeal shall seek, in the event that it is declared well founded, the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order. The subject-matter of the proceedings before the General Court may not be changed in the appeal.

2. Where the appellant requests that the case be referred back to the General Court if the decision appealed against is set aside, he shall set out the reasons why the state of the proceedings does not permit a decision by the Court of Justice.

Chapter 2

RESPONSES, REPLIES AND REJOINDERS

Article 171

Service of the appeal

1. The appeal shall be served on the other parties to the relevant case before the General Court.

2. In a case where Article 168(4) of these Rules applies, service shall be effected as soon as the appeal has been put in order or the Court of Justice has declared it admissible notwithstanding the failure to observe the formal requirements laid down by that Article.

Article 172

Parties authorised to lodge a response

Any party to the relevant case before the General Court having an interest in the appeal being allowed or dismissed may submit a response within two months after service on him of the appeal. The time-limit for submitting a response shall not be extended.

Article 173

Content of the response

1. A response shall contain:

(a) the name and address of the party submitting it;

(b) the date on which the appeal was served on him;

(c) the pleas in law and legal arguments relied on;

(d) the form of order sought.

2. Articles 119 and 121 of these Rules shall apply to responses.

Article 174

Form of order sought in the response

A response shall seek to have the appeal allowed or dismissed, in whole or in part.

Article 175

Reply and rejoinder

1. The appeal and the response may be supplemented by a reply and a rejoinder only where the President, on a duly reasoned application submitted by the appellant within seven days of service of the response, considers it necessary, after hearing the Judge-Rapporteur and the Advocate General, in particular to enable the appellant to present his views on a plea of inadmissibility or on new matters relied on in the response.

2. The President shall fix the date by which the reply is to be produced and, upon service of that pleading, the date by which the rejoinder is to be produced. He may limit the number of pages and the subject-matter of those pleadings.

Chapter 3

FORM AND CONTENT OF THE CROSS-APPEAL, AND FORM OF ORDER SOUGHT

Article 176

Cross-appeal

1. The parties referred to in Article 172 of these Rules may submit a cross-appeal within the same time-limit as that prescribed for the submission of a response.

2. A cross-appeal must be introduced by a document separate from the response.

Article 177

Content of the cross-appeal

1. A cross-appeal shall contain:

(a) the name and address of the party bringing the cross-appeal;

(b) the date on which the appeal was served on him;

(c) the pleas in law and legal arguments relied on;

(d) the form of order sought.

2. Articles 119, 121 and 122(1) and (3) of these Rules shall apply to cross-appeals.

Article 178

Form of order sought, pleas in law and arguments of the cross-appeal

1. A cross-appeal shall seek to have set aside, in whole or in part, the decision of the General Court.

2. It may also seek to have set aside an express or implied decision relating to the admissibility of the action before the General Court.

3. The pleas in law and legal arguments relied on shall identify precisely those points in the grounds of the decision of the General Court which are contested. The pleas in law and arguments must be separate from those relied on in the response.

Chapter 4

PLEADINGS CONSEQUENT ON THE CROSS-APPEAL

Article 179

Response to the cross-appeal

Where a cross-appeal is brought, the applicant at first instance or any other party to the relevant case before the General Court having an interest in the cross-appeal being allowed or dismissed may submit a response, which must be limited to the pleas in law relied on in that cross-appeal, within two months after its being served on him. That time-limit shall not be extended.

Article 180

Reply and rejoinder on a cross-appeal

1. The cross-appeal and the response thereto may be supplemented by a reply and a rejoinder only where the President, on a duly reasoned application submitted by the party who brought the cross-appeal within seven days of service of the response to the cross-appeal, considers it necessary, after hearing the Judge-Rapporteur and the Advocate General, in particular to enable that party to present his views on a plea of inadmissibility or on new matters relied on in the response to the cross-appeal.

2. The President shall fix the date by which that reply is to be produced and, upon service of that pleading, the date by which the rejoinder is to be produced. He may limit the number of pages and the subject-matter of those pleadings.

Chapter 5

APPEALS DETERMINED BY ORDER

Article 181

Manifestly inadmissible or manifestly unfounded appeal or cross-appeal

Where the appeal or cross-appeal is, in whole or in part, manifestly inadmissible or manifestly unfounded, the Court may at any time, acting on a proposal from the Judge-Rapporteur and after hearing the Advocate General, decide by reasoned order to dismiss that appeal or cross-appeal in whole or in part.

Article 182

Manifestly well-founded appeal or cross-appeal

Where the Court has already ruled on one or more questions of law identical to those raised by the pleas in law of the appeal or cross-appeal and considers the appeal or cross-appeal to be manifestly well founded, it may, acting on a proposal from the Judge-Rapporteur and after hearing the parties and the Advocate General, decide by reasoned order in which reference is made to the relevant case-law to declare the appeal or cross-appeal manifestly well founded.

Chapter 6

EFFECT ON A CROSS-APPEAL OF THE REMOVAL OF THE APPEAL FROM THE REGISTER

Article 183

Effect on a cross-appeal of the discontinuance or manifest inadmissibility of the appeal

A cross-appeal shall be deemed to be devoid of purpose:

(a) if the appellant discontinues his appeal;

(b) if the appeal is declared manifestly inadmissible for non-compliance with the time-limit for lodging an appeal;

(c) if the appeal is declared manifestly inadmissible on the sole ground that it is not directed against a final decision of the General Court or against a decision disposing of the substantive issues in part only or disposing of a procedural issue concerning a plea of lack of competence or inadmissibility within the meaning of the first paragraph of Article 56 of the Statute.

Chapter 7

COSTS AND LEGAL AID IN APPEALS

Article 184

Costs in appeals

1. Subject to the following provisions, Articles 137 to 146 of these Rules shall apply, *mutatis mutandis*, to the procedure before the Court of Justice on an appeal against a decision of the General Court.

2. Where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court shall make a decision as to the costs.

3. When an appeal brought by a Member State or an institution of the European Union which did not intervene in the proceedings before the General Court is well founded, the Court of Justice may order that the parties share the costs or that the successful appellant pay the costs which the appeal has caused an unsuccessful party to incur.

4. Where the appeal has not been brought by an intervener at first instance, he may not be ordered to pay costs in the appeal proceedings unless he participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court may decide that he shall bear his own costs.

Article 185

Legal aid

1. A party who is wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid.

2. The application shall be accompanied by all information and supporting documents making it possible to assess the applicant's financial situation, such as a certificate issued by a competent national authority attesting to his financial situation.

Article 186

Prior application for legal aid

1. If the application is made prior to the appeal which the applicant for legal aid intends to commence, it shall briefly state the subject of the appeal.

2. The application for legal aid need not be made through a lawyer.

3. The introduction of an application for legal aid shall, with regard to the person who made that application, suspend the time-limit prescribed for the bringing of the appeal until the date of service of the order making a decision on that application.

4. The President shall assign the application for legal aid, as soon as it is lodged, to a Judge-Rapporteur who shall put forward, promptly, a proposal as to the action to be taken on it.

Article 187

Decision on the application for legal aid

1. The decision to grant legal aid, in whole or in part, or to refuse it shall be taken, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, by the Chamber of three Judges to which the Judge-Rapporteur is assigned. In that event, the formation of the Court shall be composed of the President of that Chamber, the Judge-Rapporteur and the first Judge or, as the case may be, the first two Judges designated from the list referred to in Article 28(3) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur. It shall consider, if appropriate, whether the appeal is manifestly unfounded.

2. If the Judge-Rapporteur is not a member of a Chamber of three Judges, the decision shall be taken, under the same conditions, by the Chamber of five Judges to which he is assigned. In addition to the Judge-Rapporteur, the formation of the Court shall be composed of four Judges designated from the list referred to in Article 28(2) on the date on which the application for legal aid is brought before that Chamber by the Judge-Rapporteur.

3. The formation of the Court shall give its decision by way of order. Where the application for legal aid is refused in whole or in part, the order shall state the reasons for that refusal.

Article 188

Sums to be advanced as legal aid

1. Where legal aid is granted, the cashier of the Court shall be responsible, where applicable within the limits set by the formation of the Court, for costs involved in the assistance and representation of the applicant before the Court. At the request of the applicant or his representative, an advance on those costs may be paid.

2. In its decision as to costs the Court may order the payment to the cashier of the Court of sums advanced as legal aid.

3. The Registrar shall take steps to obtain the recovery of these sums from the party ordered to pay them.

Article 189

Withdrawal of legal aid

The formation of the Court which gave a decision on the application for legal aid may at any time, either of its own motion or on request, withdraw that legal aid if the circumstances which led to its being granted alter during the proceedings.

Chapter 8

OTHER PROVISIONS APPLICABLE TO APPEALS

Article 190

Other provisions applicable to appeals

1. Articles 127, 129 to 136, 147 to 150, 153 to 155 and 157 to 166 of these Rules shall apply to the procedure before the Court of Justice on an appeal against decisions of the General Court.

2. By way of derogation from Article 130(1), an application to intervene shall, however, be made within one month of the publication of the notice referred to in Article 21(4).

3. Article 95 shall apply, *mutatis mutandis*, to the procedure before the Court of Justice on an appeal against decisions of the General Court.

TITLE VI

REVIEW OF DECISIONS OF THE GENERAL COURT

Article 191

Reviewing Chamber

A Chamber of five Judges shall be designated for a period of one year for the purpose of deciding, in accordance with Articles 193 and 194 of these Rules, whether a decision of the General Court is to be reviewed in accordance with Article 62 of the Statute.

Article 192

Information and communication of decisions which may be reviewed

1. As soon as the date for the delivery or signature of a decision to be given under Article 256(2) or (3) TFEU is fixed, the Registry of the General Court shall inform the Registry of the Court of Justice.

2. The decision shall be communicated to the Registry of the Court of Justice immediately upon its delivery or signature, as shall the file in the case, which shall be made available forthwith to the First Advocate General.

Article 193

Review of decisions given on appeal

1. The proposal of the First Advocate General to review a decision of the General Court given under Article 256(2) TFEU shall be forwarded to the President of the Court of Justice and to the President of the reviewing Chamber. Notice of that transmission shall be given to the Registrar at the same time.

2. As soon as he is informed of the existence of a proposal, the Registrar shall communicate the file in the case before the General Court to the members of the reviewing Chamber.

3. As soon as the proposal to review has been received, the President of the Court shall designate the Judge-Rapporteur from among the Judges of the reviewing Chamber on a proposal from the President of that Chamber. The composition of the formation of the Court shall be determined in accordance with Article 28(2) of these Rules on the day on which the case is assigned to the Judge-Rapporteur.

4. That Chamber, acting on a proposal from the Judge-Rapporteur, shall decide whether the decision of the General Court is to be reviewed. The decision to review the decision of the General Court shall indicate only the questions which are to be reviewed.

5. The General Court, the parties to the proceedings before it and the other interested persons referred to in the second paragraph of Article 62a of the Statute shall forthwith be informed by the Registrar of the decision of the Court of Justice to review the decision of the General Court.

6. Notice of the date of the decision to review the decision of the General Court and of the questions which are to be reviewed shall be published in the *Official Journal of the European Union*.

Article 194

Review of preliminary rulings

1. The proposal of the First Advocate General to review a decision of the General Court given under Article 256(3) TFEU shall be forwarded to the President of the Court of Justice and to the President of the reviewing Chamber. Notice of that transmission shall be given to the Registrar at the same time.

2. As soon as he is informed of the existence of a proposal, the Registrar shall communicate the file in the case before the General Court to the members of the reviewing Chamber.

3. The Registrar shall also inform the General Court, the referring court or tribunal, the parties to the main proceedings and the other interested persons referred to in the second paragraph of Article 62a of the Statute of the existence of a proposal to review.

4. As soon as the proposal to review has been received, the President of the Court shall designate the Judge-Rapporteur from among the Judges of the reviewing Chamber on a proposal from the President of that Chamber. The composition of the formation of the Court shall be determined in accordance with Article 28(2) of these Rules on the day on which the case is assigned to the Judge-Rapporteur.

5. That Chamber, acting on a proposal from the Judge-Rapporteur, shall decide whether the decision of the General Court is to be reviewed. The decision to review the decision of the General Court shall indicate only the questions which are to be reviewed.

6. The General Court, the referring court or tribunal, the parties to the main proceedings and the other interested persons referred to in the second paragraph of Article 62a of the Statute shall forthwith be informed by the Registrar of the decision of the Court of Justice as to whether or not the decision of the General Court is to be reviewed.

7. Notice of the date of the decision to review the decision of the General Court and of the questions which are to be reviewed shall be published in the *Official Journal of the European Union*.

Article 195

Judgment on the substance of the case after a decision to review

1. The decision to review a decision of the General Court shall be served on the parties and other interested persons referred to in the second paragraph of Article 62a of the Statute. The decision served on the Member States, and the States, other than the Member States, which are parties to the EEA Agreement, as well as the EFTA Surveillance Authority, shall be accompanied by a translation of the decision of the Court of Justice in accordance with the provisions of Article 98 of these Rules. The decision of the Court of Justice shall also be communicated to the General Court and, if applicable, to the referring court or tribunal.

2. Within one month of the date of service referred to in paragraph 1, the parties and other interested persons on whom the decision of the Court of Justice has been served may lodge statements or written observations on the questions which are subject to review.

3. As soon as a decision to review a decision of the General Court has been taken, the First Advocate General shall assign the review to an Advocate General.

4. The reviewing Chamber shall rule on the substance of the case, after hearing the Advocate General.

5. It may, however, request the Court of Justice to assign the case to a formation of the Court composed of a greater number of Judges.

6. Where the decision of the General Court which is subject to review was given under Article 256(2) TFEU, the Court of Justice shall make a decision as to costs.

TITLE VII

OPINIONS

Article 196

Written part of the procedure

1. In accordance with Article 218(11) TFEU, a request for an Opinion may be made by a Member State, by the European Parliament, by the Council or by the European Commission.

2. A request for an Opinion may relate both to whether the envisaged agreement is compatible with the provisions of the Treaties and to whether the European Union or any institution of the European Union has the power to enter into that agreement.

3. It shall be served on the Member States and on the institutions referred to in paragraph 1, and the President shall prescribe a time-limit within which they may submit written observations.

Article 197

Designation of the Judge-Rapporteur and of the Advocate General

As soon as the request for an Opinion has been submitted, the President shall designate a Judge-Rapporteur and the First Advocate General shall assign the case to an Advocate General.

Article 198

Hearing

The Court may decide that the procedure before it shall also include a hearing.

Article 199

Time-limit for delivering the Opinion

The Court shall deliver its Opinion as soon as possible, after hearing the Advocate General.

Article 200

Delivery of the Opinion

The Opinion, signed by the President, the Judges who took part in the deliberations and the Registrar, shall be delivered in open court. It shall be served on all the Member States and on the institutions referred to in Article 196(1).

TITLE VIII

PARTICULAR FORMS OF PROCEDURE

Article 201

Appeals against decisions of the arbitration committee

1. An application initiating an appeal under the second paragraph of Article 18 TEAEC shall state:

(a) the name and permanent address of the applicant;

(b) the description of the signatory;

(c) a reference to the arbitration committee's decision against which the appeal is made;

(d) the names of the respondents;

(e) a summary of the facts;

(f) the grounds on which the appeal is based and arguments relied on, and a brief statement of those grounds;

(g) the form of order sought by the applicant.

2. Articles 119 and 121 of these Rules shall apply to the application.

3. A certified copy of the contested decision shall be annexed to the application.

4. As soon as the application has been lodged, the Registrar of the Court shall request the arbitration committee registry to transmit to the Court the file in the case.

5. Articles 123 and 124 of these Rules shall apply to this procedure. The Court may decide that the procedure before it shall also include a hearing.

6. The Court shall give its decision in the form of a judgment. Where the Court sets aside the decision of the arbitration committee it may refer the case back to the committee.

Article 202

Procedure under Article 103 TEAEC

1. Four certified copies shall be lodged of an application under the third paragraph of Article 103 TEAEC. The application shall be accompanied by the draft of the agreement or contract concerned, by the observations of the European Commission addressed to the State concerned and by all other supporting documents.

2. The application and annexes thereto shall be served on the European Commission, which shall have a time-limit of 10 days from such service to submit its written observations. This time-limit may be extended by the President after the State concerned has been heard.

3. Following the lodging of such observations, which shall be served on the State concerned, the Court shall give its decision promptly, after hearing the Advocate General and, if they so request, the State concerned and the European Commission.

Article 203

Procedures under Articles 104 TEAEC and 105 TEAEC

Applications under the third paragraph of Article 104 TEAEC and the second paragraph of Article 105 TEAEC shall be governed by the provisions of Titles II and IV of these Rules. Such applications shall also be served on the State to which the respondent person or undertaking belongs.

Article 204

Procedure provided for by Article 111(3) of the EEA Agreement

1. In the case governed by Article 111(3) of the EEA Agreement, the matter shall be brought before the Court by a request submitted by the Contracting Parties which are parties to the dispute. The request shall be served on the other Contracting Parties, on the European Commission, on the EFTA Surveillance Authority and, where appropriate, on the other interested persons on whom a request for a preliminary ruling raising the same question of interpretation of European Union legislation would be served.

2. The President shall prescribe a time-limit within which the Contracting Parties and the other interested persons on whom the request has been served may submit written observations.

3. The request shall be made in one of the languages referred to in Article 36 of these Rules. Article 38 shall apply. The provisions of Article 98 shall apply *mutatis mutandis*.

4. As soon as the request referred to in paragraph 1 of this Article has been submitted, the President shall designate a Judge-Rapporteur. The First Advocate General shall, immediately afterwards, assign the request to an Advocate General.

5. The Court shall, after hearing the Advocate General, give a reasoned decision on the request.

6. The decision of the Court, signed by the President, the Judges who took part in the deliberations and the Registrar, shall be served on the Contracting Parties and on the other interested persons referred to in paragraphs 1 and 2.

Article 205

Settlement of the disputes referred to in Article 35 TEU in the version in force before the entry into force of the Treaty of Lisbon

1. In the case of disputes between Member States as referred to in Article 35(7) TEU in the version in force before the entry into force of the Treaty of Lisbon, as maintained in force by Protocol No 36 annexed to the Treaties, the matter shall be brought before the Court by an application by a party to the dispute. The application shall be served on the other Member States and on the European Commission.

2. In the case of disputes between Member States and the European Commission as referred to in Article 35(7) TEU in the version in force before the entry into force of the Treaty of Lisbon, as maintained in force by Protocol No 36 annexed to the Treaties, the matter shall be brought before the Court by an application by a party to the dispute. The application shall be served on the other Member States, the Council and the European Commission if it was submitted by a Member State. The application shall be served on the Member States and on the Council if it was submitted by the European Commission.

3. The President shall prescribe a time-limit within which the institutions and the Member States on which the application has been served may submit written observations.

4. As soon as the application referred to in paragraphs 1 and 2 has been submitted, the President shall designate a Judge-Rapporteur. The First Advocate General shall, immediately afterwards, assign the application to an Advocate General.

5. The Court may decide that the procedure before it shall also include a hearing.

6. The Court shall, after the Advocate General has delivered his Opinion, give its ruling on the dispute by way of judgment.

7. The same procedure as that laid down in the preceding paragraphs shall apply where an agreement concluded between the Member States confers jurisdiction on the Court to rule on a dispute between Member States or between Member States and an institution.

Article 206

Requests under Article 269 TFEU

1. Four certified copies shall be submitted of a request under Article 269 TFEU. The request shall be accompanied by any relevant document and, in particular, any observations and recommendations made pursuant to Article 7 TEU.

2. The request and annexes thereto shall be served on the European Council or on the Council, as appropriate, each of which shall have a time-limit of 10 days from such service to submit its written observations. This time-limit shall not be extended.

3. The request and annexes thereto shall also be communicated to the Member States other than the State in question, to the European Parliament and to the European Commission.

4. Following the lodging of the observations referred to in paragraph 2, which shall be served on the Member State concerned and on the States and institutions referred to in paragraph 3, the Court shall give its decision within a time-limit of one month from the lodging of the request and after hearing the Advocate General. At the request of the Member State concerned, the European Council or the Council, or of its own motion, the Court may decide that the procedure before it shall also include a hearing, which all the States and institutions referred to in this Article shall be given notice to attend.

FINAL PROVISIONS

Article 207

Supplementary rules

Subject to the provisions of Article 253 TFEU and after consultation with the Governments concerned, the Court shall adopt supplementary rules concerning its practice in relation to:

(a) letters rogatory;

(b) applications for legal aid;

(c) reports by the Court of perjury by witnesses or experts, delivered pursuant to Article 30 of the Statute.

Article 208

Implementing rules

The Court may, by a separate act, adopt practice rules for the implementation of these Rules.

Article 209

Repeal

These Rules replace the Rules of Procedure of the Court of Justice of the European Communities adopted on 19 June 1991, as last amended on 24 May 2011 (*Official Journal of the European Union*, L 162 of 22 June 2011, p. 17).

Article 210

Publication and entry into force of these Rules

These Rules, which are authentic in the languages referred to in Article 36 of these Rules, shall be published in the *Official Journal of the European Union* and shall enter into force on the first day of the second month following their publication.

Done at Luxembourg, 25 September 2012.

I

(Resolutions, recommendations and opinions)

RECOMMENDATIONS

COURT OF JUSTICE OF THE EUROPEAN UNION

These recommendations follow on from the adoption on 25 September 2012 in Luxembourg of the new Rules of Procedure of the Court of Justice (OJ L 265, 29.9.2012, p. 1). They replace the information note on references from national courts for a preliminary ruling (OJ C 160, 28.5.2011, p. 1) and reflect innovations introduced by those Rules which may affect both the principle of a reference for a preliminary ruling to the Court of Justice and the procedure for making such a reference.

RECOMMENDATIONS

to national courts and tribunals in relation to the initiation of preliminary ruling proceedings

(2012/C 338/01)

I — GENERAL PROVISIONS

The Court's jurisdiction in preliminary rulings

1. The reference for a preliminary ruling is a fundamental mechanism of European Union law aimed at enabling the courts and tribunals of the Member States to ensure uniform interpretation and application of that law within the European Union.

2. Under Article 19(3)(b) of the Treaty on European Union ('TEU') and Article 267 of the Treaty on the Functioning of the European Union ('TFEU'), the Court of Justice of the European Union has jurisdiction to give preliminary rulings on the interpretation of Union law and on the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.

3. Article 256(3) TFEU provides that the General Court is to have jurisdiction to hear and determine questions referred for a preliminary ruling under Article 267 TFEU, in specific areas laid down by the Statute. However, since no provisions have been introduced into the Statute in that regard, the Court of Justice alone currently has jurisdiction to give preliminary rulings.

4. While Article 267 TFEU confers on the Court of Justice a general jurisdiction in that regard, a number of primary law provisions exist which lay down exceptions to or temporary restrictions on that jurisdiction. This is true, in particular, of Articles 275 TFEU and 276 TFEU and Article 10 of Protocol (No 36) on Transitional Provisions of the Treaty of Lisbon (OJEU 2010 C 83, p. 1) ([1]).

([1]) Article 10(1) to (3) of Protocol No 36 provides that the powers of the Court of Justice in relation to acts of the Union adopted in the field of police cooperation and judicial cooperation in criminal matters before the entry into force of the Treaty of Lisbon, and which have not since been amended, are to remain the same for a maximum period of five years from the date of entry into force of the Treaty of Lisbon (1 December 2009). During that period, such acts may, therefore, form the subject-matter of a reference for a preliminary ruling only where the order for reference is made by a court or tribunal of a Member State which has accepted the jurisdiction of the Court of Justice, it being a matter for each of those States to determine whether the right to refer a question to the Court is to be available to all of its national courts and tribunals or is to be reserved to the courts or tribunals of last instance.

5. Since the preliminary ruling procedure is based on cooperation between the Court of Justice and the courts and tribunals of the Member States, it may be helpful, in order to ensure that that procedure is fully effective, to provide those courts and tribunals with the following recommendations.

6. While in no way binding, these recommendations are intended to supplement Title III of the Rules of Procedure of the Court of Justice (Articles 93 to 118) and to provide guidance to the courts and tribunals of the Member States as to whether it is appropriate to make a reference for a preliminary ruling, as well as practical information concerning the form and effect of such a reference.

The role of the Court of Justice in the preliminary ruling procedure

7. As stated above, under the preliminary ruling procedure the Court's role is to give an interpretation of European Union law or to rule on its validity, not to apply that law to the factual situation underlying the main proceedings. That is the task of the national court or tribunal and it is not, therefore, for the Court either to decide issues of fact raised in the main proceedings or to resolve any differences of opinion on the interpretation or application of rules of national law.

8. When ruling on the interpretation or validity of European Union law, the Court makes every effort to give a reply which will be of assistance in resolving the dispute in the main proceedings, but it is for the referring court or tribunal to draw specific conclusions from that reply, if necessary by disapplying the rule of national law in question.

The decision to make a reference for a preliminary ruling

The originator of the request for a preliminary ruling

9. Under Article 267 TFEU, any court or tribunal of a Member State, in so far as it is called upon to give a ruling in proceedings intended to arrive at a decision of a judicial nature, may as a rule submit a request for a preliminary ruling to the Court of Justice. Status as a court or tribunal is interpreted by the Court of Justice as a self-standing concept of European Union law, the Court taking account of a number of factors such as whether the body making the reference is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent.

10. Whether or not the parties to the main proceedings have expressed the wish that it do so, it is for the national court or tribunal alone to decide whether to refer a question to the Court of Justice for a preliminary ruling.

References on interpretation

11. Article 267 TFEU provides that any court or tribunal may submit a request for a preliminary ruling to the Court of Justice on the interpretation of a rule of European Union law if it considers it necessary to do so in order to resolve the dispute brought before it.

12. However, courts or tribunals against whose decisions there is no judicial remedy under national law must bring such a request before the Court, unless the Court has already ruled on the point (and there is no new context that raises any serious doubt as to whether that case-law may be applied in that instance), or unless the correct interpretation of the rule of law in question is obvious.

13. Thus, a national court or tribunal may, in particular when it considers that sufficient guidance is given by the case-law of the Court of Justice, itself decide on the correct interpretation of European Union law and its application to the factual situation before it. However, a reference for a preliminary ruling may prove particularly useful when there is a new question of interpretation of general interest for the uniform application of European Union law, or where the existing case-law does not appear to be applicable to a new set of facts.

14. In order to enable the Court of Justice properly to identify the subject-matter of the main proceedings and the questions that arise, it is helpful if, in respect of each question referred, the national court or tribunal explains why the interpretation sought is necessary to enable it to give judgment.

References on determination of validity

15. Although the courts and tribunals of the Member States may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.

16. All national courts or tribunals **must** therefore submit a request for a preliminary ruling to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that the act may be invalid.

17. However, if a national court or tribunal has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the act to be invalid.

The appropriate stage at which to make a reference for a preliminary ruling

18. A national court or tribunal may submit a request for a preliminary ruling to the Court as soon as it finds that a ruling on the interpretation or validity of European Union law is necessary to enable it to give judgment. It is that court or tribunal which is in fact in the best position to decide at what stage of the proceedings such a request should be made.

19. It is, however, desirable that a decision to make a reference for a preliminary ruling should be taken when the national proceedings have reached a stage at which the referring court or tribunal is able to define the legal and factual context of the case, so that the Court of Justice has available to it all the information necessary to check, where appropriate, that European Union law applies to the main proceedings. In the interests of the proper administration of justice, it may also be desirable for the reference to be made only after both sides have been heard.

The form and content of the request for a preliminary ruling

20. The decision by which a court or tribunal of a Member State refers one or more questions to the Court of Justice for a preliminary ruling may be in any form allowed by national law as regards procedural steps. However, it must be borne in mind that it is that document which will serve as the basis of the proceedings before the Court and that it must therefore contain such information as will enable the Court to give a reply which is of assistance to the referring court or tribunal. Moreover, it is only the request for a preliminary ruling which is notified to the parties to the main proceedings and to the other interested persons referred to in Article 23 of the Statute, including the Member States, in order to obtain any written observations.

21. Owing to the need to translate it into all the official languages of the European Union, the request for a preliminary ruling should therefore be drafted simply, clearly and precisely, avoiding superfluous detail.

22. About 10 pages is often sufficient to set out in a proper manner the context of a request for a preliminary ruling. That request must be succinct but sufficiently complete and must contain all the relevant information to give the Court and the interested persons entitled to submit observations a clear understanding of the factual and legal context of the main proceedings. In accordance with Article 94 of the Rules of Procedure, the request for a preliminary ruling must contain, in addition to the text of the questions referred to the Court for a preliminary ruling:

— a summary of the subject-matter of the dispute and the relevant findings of fact as determined by the referring court or tribunal, or, at least, an account of the facts on which the questions referred are based;

— the tenor of any national provisions applicable in the case and, where appropriate, the relevant national case-law ([1]);

([1]) The referring court or tribunal is requested to provide precise references for those texts and their publication, such as a page of an official journal or a specific law report, or a reference to an internet site.

— a statement of the reasons which prompted the referring court or tribunal to inquire about the interpretation or validity of certain provisions of European Union law, and the relationship between those provisions and the national legislation applicable to the main proceedings.

23. The European Union law provisions relevant to the case should be identified as accurately as possible in the request for a preliminary ruling, which should include, if need be, a brief summary of the relevant arguments of the parties to the main proceedings.

24. If it considers itself able to do so, the referring court or tribunal may, finally, briefly state its view on the answer to be given to the questions referred for a preliminary ruling. That information may be useful to the Court, particularly where it is called upon to give a preliminary ruling in an expedited or urgent procedure.

25. In order to make the request for a preliminary ruling easier to read, it is essential that the Court receive it in typewritten form. To enable the Court to refer to the request it is also very helpful if the pages and paragraphs of the order for reference – which must be dated and signed – are numbered.

26. The questions themselves should appear in a separate and clearly identified section of the order for reference, preferably at the beginning or the end. It must be possible to understand them on their own terms, without referring to the statement of the grounds for the request, which will however provide the necessary background for a proper understanding of the implications of the case.

27. Under the preliminary ruling procedure, the Court will, as a rule, use the information contained in the order for reference, including nominative or personal data. It is therefore for the referring court or tribunal itself, if it considers it necessary, to delete certain details in its request for a preliminary ruling or to render anonymous one or more persons or entities concerned by the dispute in the main proceedings.

28. After the request for a preliminary ruling has been lodged, the Court may also render such persons or entities anonymous of its own motion, or at the request of the referring court or tribunal or of a party to the main proceedings. In order to maintain its effectiveness, such a request for anonymity must, however, be made at the earliest possible stage of the proceedings, and in any event prior to publication in the *Official Journal of the European Union* of the notice relating to the case concerned, and to service of the request for a preliminary ruling on the interested persons referred to in Article 23 of the Statute.

The effects of the reference for a preliminary ruling on the national proceedings

29. Although the national court or tribunal may still order protective measures, particularly in connection with a reference on determination of validity (see point 17 above), the lodging of a request for a preliminary ruling nevertheless calls for the national proceedings to be stayed until the Court of Justice has given its ruling.

30. In the interests of the proper conduct of the preliminary ruling proceedings before the Court and in order to maintain their effectiveness, it is incumbent on the referring court or tribunal to inform the Court of Justice of any procedural step that may affect the referral and, in particular, if any new parties are admitted to the national proceedings.

Costs and legal aid

31. Preliminary ruling proceedings before the Court of Justice are free of charge and the Court does not rule on the costs of the parties to the proceedings pending before the referring court or tribunal; it is for the referring court or tribunal to rule on those costs.

32. If a party to the main proceedings has insufficient means and where it is possible under national rules, the referring court or tribunal may grant that party legal aid to cover the costs, including those of lawyers' fees, which it incurs before the Court. The Court itself may also grant legal aid where the party in question is not already in receipt of aid under national rules or to the extent to which that aid does not cover, or covers only partly, costs incurred before the Court.

Communication between the Court of Justice and the national courts and tribunals

33. The request for a preliminary ruling and the relevant documents (including, where applicable, the case file or a copy of it) are to be sent by the national court or tribunal making the reference directly to the Court of Justice. They must be sent by registered post to the Registry of the Court of Justice (Rue du Fort Niedergrünewald, L-2925 Luxembourg).

34. Until the decision containing the Court's ruling on the referring court's or tribunal's request for a preliminary ruling is served on that court or tribunal, the Court Registry will stay in contact with the referring court or tribunal, and will send it copies of the procedural documents.

35. The Court of Justice will send its ruling to the referring court or tribunal. It would welcome information from that court or tribunal on the action taken upon its ruling in the main proceedings, and communication of the referring court's or tribunal's final decision.

II — **SPECIAL PROVISIONS IN RELATION TO URGENT REFERENCES FOR A PRELIMINARY RULING**

36. As provided in Article 23a of the Statute and Articles 105 to 114 of the Rules of Procedure, a reference for a preliminary ruling may, in certain circumstances, be determined pursuant to an expedited procedure or an urgent procedure.

Conditions for the application of the expedited and urgent procedures

37. The Court of Justice decides whether these procedures are to be applied. Such a decision is generally taken only on a reasoned request from the referring court or tribunal. Exceptionally, the Court may, however, decide of its own motion to determine a reference for a preliminary ruling under an expedited procedure or an urgent procedure where that appears to be required by the nature or the particular circumstances of the case.

38. Article 105 of the Rules of Procedure provides that a reference for a preliminary ruling may be determined pursuant to an **expedited procedure** derogating from the provisions of those Rules, where the nature of the case requires that it be dealt with within a short time. Since that procedure imposes significant constraints on all those involved in it, and, in particular, on all the Member States called upon to lodge their observations, whether written or oral, within much shorter time-limits than would ordinarily apply, its application should be sought only in particular circumstances that warrant the Court giving its ruling quickly on the questions referred. The large number of persons or legal situations potentially affected by the decision that the referring court or tribunal has to deliver after bringing a matter before the Court for a preliminary ruling does not, in itself, constitute an exceptional circumstance that would justify the use of the expedited procedure ([1]).

39. The same applies *a fortiori* to the **urgent preliminary ruling procedure**, provided for in Article 107 of the Rules of Procedure. That procedure, which applies only in the areas covered by Title V of Part Three of the TFEU, relating to the area of freedom, security and justice, imposes even greater constraints on those concerned, since it limits in particular the number of parties authorised to lodge written observations and, in cases of extreme urgency, allows the written part of the procedure before the Court to be omitted altogether. The application of the urgent procedure should therefore be requested only where it is absolutely necessary for the Court to give its ruling very quickly on the questions submitted by the referring court or tribunal.

40. Although it is not possible to provide an exhaustive list of such circumstances, particularly because of the varied and evolving nature of the rules of European Union law governing the area of freedom, security and justice, a national court or tribunal might, for example, consider submitting a request for the urgent preliminary ruling procedure to be applied in the case, referred to in the fourth paragraph of Article 267 TFEU, of a person in custody or deprived of his liberty, where the answer to the question raised is decisive as to the assessment of that person's legal situation, or in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under European Union law depends on the answer to the question referred for a preliminary ruling.

([1]) For an insight into circumstances that have resulted in the approval or refusal of requests for the application of the accelerated procedure, made on the basis of Article 104a of the Rules of Procedure of the Court of Justice of 19 June 1991, as amended, see the orders made by the President of the Court of Justice, available at www.curia.europa.eu (the orders can be found under 'Case-law', by selecting each of the following in turn in the search form: Documents – Documents not published in the ECR – Orders – Expedited procedure).

The request for application of the expedited procedure or the urgent procedure

41. To enable the Court to decide quickly whether the expedited procedure or the urgent preliminary ruling procedure should be applied, the request must set out precisely the matters of fact and law which establish the urgency and, in particular, the risks involved in following the ordinary procedure.

42. In so far as it is able to do so, the referring court should briefly state its view on the answer to be given to the questions referred. Such a statement makes it easier for the parties to the main proceedings and the other interested persons participating in the procedure to define their positions and facilitates the Court's decision, thereby contributing to the rapidity of the procedure.

43. The request for the application of the expedited procedure or the urgent procedure must be submitted in an unambiguous form that enables the Court Registry to establish immediately that the file has to be dealt with in a particular way. Accordingly, the referring court or tribunal is asked to specify which of the two procedures is required in that particular case, and to mention in its request the relevant article of the Rules of Procedure (Article 105 for the expedited procedure or Article 107 for the urgent procedure). That mention must be included in a clearly identifiable place in its order for reference (for example, at the head of the page or in a separate judicial document). Where appropriate, a covering letter from the referring court or tribunal can usefully refer to that request.

44. As regards the order for reference itself, it is particularly important that it should be succinct where the matter is urgent, as this will help to ensure the rapidity of the procedure.

Communication between the Court of Justice, the referring court or tribunal and the parties to the main proceedings

45. In order to expedite and facilitate communication with the referring court or tribunal and the parties before it, a court or tribunal submitting a request for the expedited procedure or the urgent procedure to be applied is asked to state the e-mail address and any fax number which may be used by the Court of Justice, together with the e-mail addresses and any fax numbers of the representatives of the parties to the proceedings.

46. A copy of the signed order for reference together with a request for the expedited procedure or the urgent procedure to be applied can initially be sent to the Court by e-mail (ECJ-Registry@curia.europa.eu) or by fax (+352 43 37 66). Processing of the reference and of the request can then begin upon receipt of the e-mailed or faxed copy. The originals of those documents must, however, be sent to the Court Registry as soon as possible.

excluded from review by the Court when hearing an application for a preliminary ruling.[1]

3. The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.
Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

4. The fact that Articles 169 and 170 of the EEC Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not deprive individuals of the right to plead the same obligations, should the occasion arise, before a national court.

5. According to the spirit, the general scheme and the wording of the EEC Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

6. It follows from the wording and the general scheme of Article 12 of the Treaty that, in order to ascertain whether customs duties and charges having equivalent effect have been increased contrary to the prohibition contained in the said Article, regard must be had to the customs duties and charges actually applied by Member States at the date of the entry into force of the Treaty.[2]

7. Where, after the entry into force of the Treaty, the same product is charged with a higher rate of duty, irrespective of whether this increase arises from an actual increase of the rate of customs duty or from a rearrangement of the tariff resulting in the classification of the product under a more highly taxed heading, such increase is illegal under Article 12 of the EEC Treaty.

In Case 26/62

Reference to the Court under subparagraph (a) of the first paragraph and under the third paragraph of Article 177 of the Treaty establishing the European Economic Community by the Tariefcommissie, a Netherlands administrative tribunal having final jurisdiction in revenue cases, for a preliminary ruling in the action pending before that court between

N.V. ALGEMENE TRANSPORT- EN EXPEDITIE ONDERNEMING VAN GEND & LOOS, having its registered office at Utrecht, represented by H.G. Stibbe and L.F.D. ter Kuile, both Advocates of Amsterdam, with an address for

1 — Cf. Paragraph No 4 of Summary of Judgment in Case 13/61, Rec. 1962., p. 94.
2 — Cf. Paragraph No 1 of Summary of Judgment in Case 10/61, Rec. 1962., p. 5.

service in Luxembourg at the Consulate-General of the Kingdom of the Netherlands

and

NEDERLANDSE ADMINISTRATIE DER BELASTINGEN (NETHERLANDS INLAND REVENUE ADMINISTRATION), represented by the Inspector of Customs and Excise at Zaandam, with an address for service in Luxembourg at the Netherlands Embassy,

on the following questions:

1. Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, in other words, whether nationals of such a State can, on the basis of the Article in question, lay claim to individual rights which the courts must protect;

2. In the event of an affirmative reply, whether the application of an import duty of 8% to the import into the Netherlands by the applicant in the main action of ureaformaldehyde originating in the Federal Republic of Germany represented an unlawful increase within the meaning of Article 12 of the EEC Treaty or whether it was in this case a reasonable alteration of the duty applicable before 1 March 1960, an alteration which, although amounting to an increase from the arithmetical point of view, is nevertheless not to be regarded as prohibited under the terms of Article 12;

THE COURT

composed of: A. M. Donner, President, L. Delvaux and R. Rossi (Presidents of Chambers), O. Riese, Ch. L. Hammes (Rapporteur), A. Trabucchi and R. Lecourt, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and the procedure may be summarized as follows:

1. On 9 September 1960 the company N. V. Algemene Transport- en Expeditie Onderneming van Gend en Loos (hereinafter called 'Van Gend & Loos'), according to a customs declaration of 8 September on form D.5061, imported into the Netherlands from the Federal Republic of Germany a quantity of ureaformaldehyde, described in the import document as 'Harnstoffharz (U.F. resin) 70, aqueous emulsion of ureaformaldehyde'.

2. On the date of importation, the product in question was classified in heading 39.01-a-1 of the tariff of import duties listed in the 'Tariefbesluit' which entered into force on 1 March 1960. The nomenclature of the 'Tariefbesluit' is taken from the protocol concluded between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands at Brussels on 25 July 1958, ratified in the Netherlands by the Law of 16 December 1959.

3. The wording of heading 39.01-a-1 was as follows:

'Products of condensation, poly-condensation and poly-addition, whether modified or not, polymerized, or linear (phenoplasts, aminoplasts, alkyds, allylic polyesters and other non-saturated polyesters, silicones etc. . . .):

(a) Liquid or paste products, including emulsions, dispersions and solutions:

	Duties applicable gen. %	spec. %
1. Aminoplasts in aqueous emulsions, dispersions or solutions	10%	8%'

4. On this basis, the Dutch revenue authorities applied an *ad valorem* import duty of 8% to the importation in question.

5. On 20 September 1960 Van Gend & Loos lodged an objection with the Inspector of Customs and Excise at Zaandam against the application of this duty in the present case. The company put forward in particular the following arguments:

On 1 January 1958, the date on which the EEC Treaty entered into force, aminoplasts in emulsion were classified under heading 279-a-2 of the tariff in the 'Tariefbesluit' of 1947, and charged with an *ad valorem* import duty of 3%. In the 'Tariefbesluit' which entered into force on 1 March 1960, heading 279-a-2 was replaced by heading 39.01-a.

Instead of applying, in respect of intra-Community trade, an import duty of 3% uniformly to all products under the old heading 279-a-2, a sub-division was created: 39.01-a-1, which contained only aminoplasts in aqueous emulsions, dispersions or solutions, and in respect of which import duty was fixed at 8%. For the other products in heading 39.01-a, which also had been included in the old heading 279-a-2, the import duty of 3% applied on 1 January 1958 was maintained.

By thus increasing the import duty on the product in question after the entry

into force of the EEC Treaty, the Dutch Government infringed Article 12 of that Treaty, which provides that Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.

6. The objection of Van Gend & Loos was dismissed on 6 March 1961 by the Inspector of Customs and Excise at Zaandam on the ground of inadmissibility, because it was not directed against the actual application of the tariff but against the rate.

7. Van Gend & Loos appealed against this decision to the Tariefcommissie, Amsterdam, on 4 April 1961.

8. The case was heard by the Tariefcommissie on 21 May 1962. In support of its application for the annulment of the contested decision Van Gend & Loos put forward the arguments already submitted in its objection of 20 September 1960. The Nederlandse administratie der belastingen replied in particular that when the EEC Treaty entered into force the product in question was not charged under the heading 279-a-2 with a duty of only 3% but, because of its composition and intended application, was classified under heading 332 bis ('synthetic and other adhesives, not stated or included elsewhere') and charged with a duty of 10% so that there had not in fact been any increase.

9. The Tariefcommissie, without giving a formal decision on the question whether the product in question fell within heading 332 bis or heading 279-a-2 of the 1947 'Tariefbesluit', took the view that the arguments of the parties raised a question concerning the interpretation of the EEC Treaty. It therefore suspended the proceedings and, in conformity with the third paragraph of Article 177 of the Treaty, referred to the Court of Justice on 16 August 1962, for a preliminary ruling the two questions set out above.

10. The decision of the Tariefcommissie was notified on 23 August 1962 by the Registrar of the Court to the parties to the action, to the Member States and to the Commission of the EEC.

11. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted to the Court by the parties to the main action, by the Government of the Kingdom of Belgium, the Government of the Federal Republic of Germany, the Commission of the EEC and the Government of the Kingdom of the Netherlands.

12. At the public hearing the Court on 29 November 1962, the oral submissions of the plaintiff in the main action and of the Commission of the EEC were heard. At the same hearing questions were put to them by the Court. Written replies to these were supplied within the prescribed time.

13. The Advocate-General gave his reasoned oral opinion at the hearing on 12 December 1962, in which he proposed that the Court should in its judgment only answer the first question referred to it and hold that Article 12 of the EEC Treaty imposes a duty only on Member States.

II—Arguments and observations

The arguments contained in the observations submitted in accordance with the second paragraph of Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community by the parties to the main action, the Member States and the Commission may be summarized as follows:

A—*The first question*

Admissibility

The *Netherlands Government,* the

Belgian Government and the *Nederlandse administratie der belastingen* (which in its statement of case declared that it was in complete agreement with the observations submitted by the Netherlands Government) confirm that the main complaint of Van Gend & Loos against the Governments of the Benelux countries is that by the Brussels Protocol of 25 July 1958 they infringed Article 12 of the EEC Treaty by increasing after its entry into force a customs duty applied in their trade with other Member States of the Communities.

The *Netherlands Government* disputes whether an alleged infringement of the Treaty by a Member State can be submitted to the judgment of the Court by a procedure other than that laid down by Article 169 or 170, that is to say on the initiative of another Member State or of the Commission. It maintains in particular that the matter cannot be brought before the Court by means of the procedure of reference for a preliminary ruling under Article 177.

The Court, according to the Netherlands Government, cannot, in the context of the present proceedings, decide a problem of this nature, since it does not relate to the interpretation but to the application of the Treaty in a specific case.

The *Belgian Government* maintains that the first question is a reference to the Court of a problem of constitutional law, which falls exclusively within the jurisdiction of the Netherlands court.

That court is confronted with two international treaties both of which are part of the national law. It must decide under national law—assuming that they are in fact contradictory—which treaty prevails over the other or more exactly whether a prior national law of ratification prevails over a subsequent one.

This is a typical question of national constitutional law which has nothing to do with the interpretation of an Article of the EEC Treaty and is within the exclusive jurisdiction of the Netherlands court, because it can only be answered according to the constitutional principles and jurisprudence of the national law of the Netherlands.

The Belgian Government also points out that a decision on the first question referred to the Court is not only unnecessary to enable the Tariefcommissie to give its judgment but cannot even have any influence on the solution to the actual problem which it is asked to resolve.

In fact, whatever answer the Court may give, the Tariefcommissie has to solve the same problem: Has it the right to ignore the law of 16 December 1959 ratifying the Brussels Protocol, because it conflicts with an earlier law of 5 December 1957 ratifying the Treaty establishing the EEC?

The question raised is not therefore an appropriate question for a preliminary ruling, since its answer cannot enable the court which has to adjudicate upon the merits of the main action to make a final decision in the proceedings pending before it.

The *Commission of the EEC*, on the other hand, observes that the effect of the provisions of the Treaty on the national law of Member States cannot be determined by the actual national law of each of them but by the Treaty itself. The problem is therefore without doubt one of interpretation of the Treaty.

Further the Commission calls attention to the fact that a finding of inadmissibility would have the paradoxical and shocking result that the rights of individuals would be protected in all cases of infringement of Community law except in the case of an infringement by a Member State.

On the substance

Van Gend & Loos answers in the affirmative the question whether the Article has internal effect.

It maintains in particular that:

—Article 12 is applicable without any preliminary incorporation in the national legislation of Member States, since it only imposes a negative obligation;

—it has direct effect without any further measures of implementation under Community legislation, as all the customs duties applied by Member States in their trade with each other were bound on 1 January 1957 (Article 14 of the Treaty);

—although the Article does not directly refer to the nationals of Member States but to the national authorities, infringement of it adversely affects the fundamental principles of the Community, and individuals as well as the Community must be protected against such infringements;

—it is particularly well adapted for direct application by the national court which must set aside the application of customs duties introduced or increased in breach of its provisions.

The *Commission* emphasizes the importance of the Court's answer to the first question. It will have an effect not only on the interpretation of the provision at issue in a specific case and on the effect which will be attributed to it in the legal systems of Member States but also on certain other provisions of the Treaty which are as clear and complete as Article 12.

According to the Commission an analysis of the legal structure of the Treaty and of the legal system which it establishes shows on the one hand that the Member States did not only intend to undertake mutual commitments but to establish a system of Community law, and on the other hand that they did not wish to withdraw the application of this law from the ordinary jurisdiction of the national courts of law.

However, Community law must be effectively and uniformly applied throughout the whole of the Community.

The result is first that the effect of Community law on the internal law of Member States cannot be determined by this internal law but only by Community law, further that the national courts are bound to apply directly the rules of Community law and finally that the national court is bound to ensure that the rules of Community law prevail over conflicting national laws even if they are passed later.

The Commission observes in this context that the fact that a Community rule is, as regards its form, directed to the states does not of itself take away from individuals who have an interest in it the right to require it to be applied in the national courts.

As regards more particularly the question referred to the Court, the Commission is of the opinion that Article 12 contains a rule of law capable of being effectively applied by the national court.

It is a provision which is perfectly clear in the sense that it creates for Member States a specific unambiguous obligation relating to the extension of their internal law in a matter which directly affects their nationals and it is not affected or qualified by any other provision of the Treaty.

It is also a complete and self-sufficient provision in that it does not require on a Community level any new measure to give concrete form to the obligation which it defines.

The *Netherlands Government* draws a distinction between the question of the internal effect and that of the direct effect (or direct applicability), the first, according to it, being a pre-condition of the second.

It considers that the question whether a particular provision of the Treaty has an internal effect can only be answered in the affirmative, if all the essential elements, namely the intention of the contracting parties and the material

terms of the provision under consideration, allows such a conclusion.

With regard to the intention of the parties to the Treaty the Netherlands Government maintains that an examination of the actual wording is sufficient to establish that Article 12 only places an obligation on Member States, who are free to decide how they intend to fulfil this obligation. A comparison with other provisions of the Treaty confirms this finding.

As Article 12 does not have internal effect it cannot, *a fortiori,* have direct effect.

Even if the fact that Article 12 places an obligation on Member States were to be considered as an internal effect, it cannot have direct effect in the sense that it permits the nationals of Member States to assert subjective rights which the courts must protect.

Alternatively the Netherlands Government argues that, so far as the necessary conditions for its direct application are concerned, the EEC Treaty does not differ from a standard international treaty. The conclusive factors in this respect are the intention of the parties and the provisions of the Treaty.

However the question whether under Netherlands constitutional law Article 12 is directly applicable is one concerning the interpretation of Netherlands law and does not come within the jurisdiction of the Court of Justice.

Finally the Netherlands Government indicates what the effect would be, in its view, of an affirmative answer to the first question put by the Tariefcommissie:

—it would upset the system which the authors of the Treaty intended to establish;

—it would create, with regard to the many provisions in Community regulations which expressly impose obligations on Member States, an uncertainty in the law of a kind which could call in question the readiness of these States to cooperate in the future;

—it would put in issue the responsibility of States by means of a procedure which was not designed for this purpose.

The *Belgian Government* maintains that Article 12 is not one of the provisions —which are the exception in the Treaty —having direct internal effect.

Article 12 does not constitute a rule of law of general application providing that any introduction of a new customs duty or any increase in an existing duty is automatically without effect or is absolutely void. It merely obliges Member States to refrain from taking such measures.

It does not create therefore a directly applicable right which nationals could invoke and enforce. It requires from Governments action at a later date to attain the objective fixed by the Treaty. A national court cannot be asked to enforce compliance with this obligation.

The *German Government* is also of the opinion that Article 12 of the EEC Treaty does not constitute a legal provision which is directly applicable in all Member States. It imposes on them an international obligation (in the field of customs policy) which must be implemented by national authorities endowed with legislative powers.

Customs duties applicable to a citizen of a Member State of the Community, at least during the transitional period, thus do not derive from the EEC Treaty or the legal measures taken by the institutions, but from legal measures enacted by Member States. Article 12 only lays down the provisions with which they must comply in their customs legislation.

Moreover the obligation laid down only applies to the other contracting Member States.

In German law a legal provision which laid down a customs duty contrary to the provisions of Article 12 would be perfectly valid.

Within the framework of the EEC Treaty the legal protection of nationals of Member States is secured, by provisions derogating from their national constitutional system, only in respect of those measures taken by the institutions of the Community which are of direct and individual concern to such nationals.

B—*The second question*

Admissibility

The *Netherlands* and *Belgian Governments* are of the opinion that the second as well as the first question is inadmissible.
According to them the answer to the question whether in fact the Brussels Protocol of 1958 represents a failure by those states who are signatories to fulfil the obligations laid down in Article 12 of the EEC Treaty cannot be given in the context of a preliminary ruling, because the issue is the application of the Treaty and not its interpretation. Moreover such an answer presupposes a careful study and a specific evaluation of the facts and circumstances peculiar to a given situation, and this is also inadmissible under Article 177.
The *Netherlands Government* emphasizes, furthermore, that if a failure by a state to fulfil its Community obligations could be brought before the Court by a procedure other than those under Articles 169 and 170 the legal protection of that state would be considerably diminished.
The *German Government,* without making a formal objection of inadmissibility, maintains that Article 12 only imposes an international obligation on states and that the question whether national rules enacted for its implementation do not comply with this obligation cannot depend upon a decision of the Court under Article 177 since it does not involve the interpretation of the Treaty.
Van Gend & Loos also considers that direct form of the second question would necessitate an examination of the facts for which the Court has no jurisdiction when it makes a ruling under Article 177. The real question for interpretation according to it could be worded as follows:
Is it possible for a derogation from the rules applied before 1 March 1960 (or more accurately, before 1 January 1958) not to be in the nature of an increase prohibited by Article 12 of the Treaty, even though this derogation arithmetically represents an increase?

On the substance

Van Gend & Loos repeats in detail the history of the classification of aminoplasts in the successive tariffs to show that the company was charged with a duty of 8% instead of 3% intentionally and not because of the inevitable effect of adapting the old tariff to the new. The Netherlands Government was therefore in breach of Article 12 of the EEC Treaty when it increased a customs duty applied in its trade with other Member States.
The *Netherlands* and *Belgian Governments* reply that, before the modification of the Benelux Tariff of 1958, ureaformaldehyde was not subject to an import duty of 3% laid down for heading 279-a-2 of the 'Tariefbesluit' of 1947, but to an import duty of 10% laid down for heading 332 bis (adhesives).
In fact experience showed that the goods in question were usually used as glue and that as a general rule they could be used as such. Therefore the ministries concerned decided that the product in question was always to be taxed as glue and was to be included under heading 332 bis.
Although, when the intended appli-

cation of the product in dispute was not sufficiently specified, the Tariefcommissie in certain cases classified it under heading 279-a-2, the authorities of the Benelux States charged it with an import duty of 10% from the date of the entry into force of the Brussels nomenclature, which put an end to any possible argument.

There can be no question, therefore, in this case, of an increase of a customs duty or of a derogation from the provisions of Article 12 of the Treaty.

Van Gend & Loos replies that only aqueous solutions of aminoplasts to which fillers or binders had been added and which only required the addition of a hardener to make an effective adhesive, that is to say, solutions which could be considered as raw materials, could be classified under heading 332 bis.

The *Commission of the EEC* is of the opinion first that the prohibition in Article 12 relates to all goods which are capable of being the subject matter of trade between Member States (to the extent to which such trade relates to products complying with the conditions of Article 9(2)).

Article 12 not only aims at the general maintenance of customs duties applied by the various Member States in their relations with each other but also relates to each individual product. It allows no exception even partial or provisional.

The Commission then points out that, in the context of Article 12, regard must be had to the duty actually applied when the Treaty entered into force. This duty results from the whole of the provisions and customary practice of administrative law.

However, an isolated classification under another tariff heading is in itself insufficient proof that the duty of 10% chargeable under heading 332 bis is not in fact applied to aminoplasts.

In this case it is necessary to recognize a concept of *prima facie* legality: when there is an official interpretation by the competent administration and instructions in conformity with this interpretation have been given to executive officers to fix the detailed rules for levying a duty, that is the 'duty applied' within the meaning of Article 12 of the Treaty.

The Commission, therefore, considers the duty of 10% as the duty applied on the entry into force of the Treaty. There has not therefore been in this case any increase contrary to Article 12.

Grounds of judgment

I — Procedure

No objection has been raised concerning the procedural validity of the reference to the Court under Article 177 of the EEC Treaty by the Tariefcommissie, a court or tribunal within the meaning of that Article. Further, no grounds exist for the Court to raise the matter of its own motion.

II — The first question

A — *Jurisdiction of the Court*

The Government of the Netherlands and the Belgian Government challenge the jurisdiction of the Court on the ground that the reference relates not to the interpretation but to the application of the Treaty in the context of

the constitutional law of the Netherlands, and that in particular the Court has no jurisdiction to decide, should the occasion arise, whether the provisions of the EEC Treaty prevail over Netherlands legislation or over other agreements entered into by the Netherlands and incorporated into Dutch national law. The solution of such a problem, it is claimed, falls within the exclusive jurisdiction of the national courts, subject to an application in accordance with the provisions laid down by Articles 169 and 170 of the Treaty.

However in this case the Court is not asked to adjudicate upon the application of the Treaty according to the principles of the national law of the Netherlands, which remains the concern of the national courts, but is asked, in conformity with subparagraph (a) of the first paragraph of Article 177 of the Treaty, only to interpret the scope of Article 12 of the said Treaty within the context of Community law and with reference to its effect on individuals. This argument has therefore no legal foundation.

The Belgian Government further argues that the Court has no jurisdiction on the ground that no answer which the Court could give to the first question of the Tariefcommissie would have any bearing on the result of the proceedings brought in that court.

However, in order to confer jurisdiction on the Court in the present case it is necessary only that the question raised should clearly be concerned with the interpretation of the Treaty. The considerations which may have led a national court or tribunal to its choice of questions as well as the relevance which it attributes to such questions in the context of a case before it are excluded from review by the Court of Justice.

It appears from the wording of the questions referred that they relate to the interpretation of the Treaty. The Court therefore has the jurisdiction to answer them.

This argument, too, is therefore unfounded.

B—*On the substance of the Case*

The first question of the Tariefcommissie is whether Article 12 of the Treaty has direct application in national law in the sense that nationals of Member States may on the basis of this Article lay claim to rights which the national court must protect.

To ascertain whether the provisions of an international treaty extend so far in their effects it is necessary to consider the spirit, the general scheme and the wording of those provisions.

The objective of the EEC Treaty, which is to establish a Common Market, the functioning of which is of direct concern to interested parties in the Community, implies that this Treaty is more than an agreement which merely creates mutual obligations between the contracting states. This view is confirmed by the preamble to the Treaty which refers not only to governments but to peoples. It is also confirmed more specifically by the establishment of institutions endowed with sovereign rights, the exercise of which affects Member States and also their citizens. Furthermore, it must be noted that the nationals of the states brought together in the Community are called upon to cooperate in the functioning of this Community through the intermediary of the European Parliament and the Economic and Social Committee.

In addition the task assigned to the Court of Justice under Article 177, the object of which is to secure uniform interpretation of the Treaty by national courts and tribunals, confirms that the states have acknowledged that Community law has an authority which can be invoked by their nationals before those courts and tribunals.

The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

With regard to the general scheme of the Treaty as it relates to customs duties and charges having equivalent effect it must be emphasized that Article 9, which bases the Community upon a customs union, includes as an essential provision the prohibition of these customs duties and charges. This provision is found at the beginning of the part of the Treaty which defines the 'Foundations of the Community'. It is applied and explained by Article 12.

The wording of Article 12 contains a clear and unconditional prohibition which is not a positive but a negative obligation. This obligation, moreover, is not qualified by any reservation on the part of states which would make its implementation conditional upon a positive legislative measure enacted under national law. The very nature of this prohibition makes it ideally adapted to produce direct effects in the legal relationship between Member States and their subjects.

The implementation of Article 12 does not require any legislative intervention on the part of the states. The fact that under this Article it is the Member States who are made the subject of the negative obligation does not imply that their nationals cannot benefit from this obligation.

In addition the argument based on Articles 169 and 170 of the Treaty put forward by the three Governments which have submitted observations to the Court in their statements of case is misconceived. The fact that these Articles of the Treaty enable the Commission and the Member States to bring before the Court a State which has not fulfilled its obligations does not mean that individuals cannot plead these obligations, should the occasion arise, before a national court, any more than the fact that the Treaty places at the disposal of the Commission ways of ensuring that obligations imposed upon those subject to the Treaty are observed, precludes the possibility, in actions between individuals before a national court, of pleading infringements of these obligations.

A restriction of the guarantees against an infringement of Article 12 by Member States to the procedures under Article 169 and 170 would remove all direct legal protection of the individual rights of their nationals. There is the risk that recourse to the procedure under these Articles would be ineffective if it were to occur after the implementation of a national decision taken contrary to the provisions of the Treaty.

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 to the diligence of the Commission and of the Member States.

It follows from the foregoing considerations that, according to the spirit, the general scheme and the wording of the Treaty, Article 12 must be interpreted as producing direct effects and creating individual rights which national courts must protect.

III — The second question

A—*The jurisdiction of the Court*

According to the observations of the Belgian and Netherlands Governments, the wording of this question appears to require, before it can be answered, an examination by the Court of the tariff classification of ureaformaldehyde imported into the Netherlands, a classification on which Van Gend & Loos and the Inspector of Customs and Excise at Zaandam hold different opinions with regard to the 'Tariefbesluit' of 1947. The question clearly does not call for an interpretation of the Treaty but concerns the application of Netherlands customs legislation to the classification of aminoplasts, which is outside the jurisdiction conferred upon the Court of Justice of the European Communities by subparagraph (a) of the first paragraph of Article 177.

The Court has therefore no jurisdiction to consider the reference made by the Tariefcommissie.

However, the real meaning of the question put by the Tariefcommissie is whether, in law, an effective increase in customs duties charged on a given product as a result not of an increase in the rate but of a new classification of the product arising from a change of its tariff description contravenes the prohibition in Article 12 of the Treaty.

Viewed in this way the question put is concerned with an interpretation of this provision of the Treaty and more particularly of the meaning which should be given to the concept of duties applied before the Treaty entered into force.

Therefore the Court has jurisdiction to give a ruling on this question.

B—*On the substance*

It follows from the wording and the general scheme of Article 12 of the Treaty that, in order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in the said Article, regard must be had to the customs duties and charges actually applied at the date of the entry into force of the Treaty.

Further, with regard to the prohibition in Article 12 of the Treaty, such an illegal increase may arise from a re-arrangement of the tariff resulting in the

classification of the product under a more highly taxed heading and from an actual increase in the rate of customs duty.

It is of little importance how the increase in customs duties occurred when, after the Treaty entered into force, the same product in the same Member State was subjected to a higher rate of duty.

The application of Article 12, in accordance with the interpretation given above, comes within the jurisdiction of the national court which must enquire whether the dutiable product, in this case ureaformaldehyde originating in the Federal Republic of Germany, is charged under the customs measures brought into force in the Netherlands with an import duty higher than that with which it was charged on 1 January 1958.

The Court has no jurisdiction to check the validity of the conflicting views on this subject which have been submitted to it during the proceedings but must leave them to be determined by the national courts.

IV — Costs

The costs incurred by the Commission of the EEC and the Member States which have submitted their observations to the Court are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Tariefcommissie, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 9, 12, 14, 169, 170 and 177 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it for a preliminary ruling by the Tariefcommissie by decision of 16 August 1962, hereby rules:

1. **Article 12 of the Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.**

2. **In order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in Article 12 of the Treaty, regard must be had to the duties and charges actually applied by the Member State in question at the date of the entry into force of the Treaty.**
Such an increase can arise both from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an increase in the rate of customs duty applied.

3. **The decision as to costs in these proceedings is a matter for the Tariefcommissie.**

Donner Delvaux Rossi

Riese Hammes Trabucchi Lecourt

Delivered in open court in Luxembourg on 5 February 1963.

A. Van Houtte — Registrar

A. M. Donner — President

OPINION OF MR ADVOCATE-GENERAL KARL ROEMER DELIVERED ON 12 DECEMBER 1962[1]

Mr President,

Members of the Court,

The present proceedings originate in an action before the Tariefcommissie, a Dutch administrative court. This action is for the annulment of a decision of the Nederlandse administratie der belastingen (the Netherlands Inland Revenue Administration) of 6 March 1961 concerning the application of a particular customs duty to the import of urea-formaldehyde from the Federal Republic of Germany. The decision is based on

1 — Translated from the German.

seeing that the Member States respect those obligations which have been imposed upon them by the Treaty and which bind them as States without creating individual rights, but this obligation on the part of the Commission does not give individuals the right to allege, in Community law or under Article 177, either failure by the State concerned to fulfil any of its obligations or breach of duty on the part of the Commission.

5. Article 102 of the EEC Treaty contains no provisions which are capable of creating individual rights which national courts must protect.

6. Article 93 of the EEC Treaty contains no provisions which are capable of creating individual rights which national courts must protect.

7. A Member State's obligation under the EEC Treaty, which is neither subject to any conditions nor, as regards its execution or effect, to the adoption of any measure either by the States or by the Commission, is legally complete and consequently capable of producing direct effects on the relations between Member States and individuals. Such an obligation becomes an integral part of the legal system of the Member States, and thus forms part of their own law, and directly concerns their nationals in whose favour it has created individual rights which national courts must protect.

8. Article 53 of the EEC Treaty constitutes a Community rule capable of creating individual rights which national courts must protect.

9. Article 53 of the EEC Treaty is satisfied so long as no new measure subjects the establishment of nationals of other Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertakings.

10. Article 37 (2) of the EEC Treaty constitutes in all its provisions a rule of Community law capable of creating individual rights which national courts must protect.

11. The provisions of Article 37 (2) of the EEC Treaty have as their object the prohibition of any new measure contrary to the principles of Article 37 (1), that is any measure having as its object or effect a new discrimination between nationals of Member States regarding the conditions in which goods are procured and marketed, by means of monopolies or bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade.
It is a matter for the court dealing with the main action to assess in each case whether the economic activity under review relates to such a product which, by virtue of its nature and the technical or international conditions to which it is subject, is capable of playing such a part in imports or exports between nationals of the Member States.

In Case 6/64

Reference to the Court under Article 177 of the EEC Treaty by the Giudice Conciliatore, Milan, for a preliminary ruling in the action pending before that court between

FLAMINIO COSTA

and

ENEL (Ente Nazionale Energia Elettrica (National Electricity Board), formerly the Edison Volta undertaking)

on the interpretation of Articles 102, 93, 53 and 37 of the said Treaty

THE COURT

composed of: A. M. Donner, President, Ch. L. Hammes and A. Trabucchi, Presidents of Chambers, L. Delvaux, R. Rossi, R. Lecourt (Rapporteur) and W. Strauß, Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

By Law No 1643 of 6 December 1962 and subsequent decrees the Italian Republic nationalized the production and distribution of electric energy and created an organization, the Ente Nazionale Energia Elettrica (or ENEL) (National Electricity Board) to which the assets of the electricity undertakings were transferred.

In proceedings about the payment of an invoice for electricity between Flaminio Costa and ENEL, before the Giudice Conciliatore, Milan, Mr Costa, as a shareholder of Edison Volta, a company affected by the nationalization, and as an electricity consumer, requested the court to apply Article 177 of the EEC Treaty so as to obtain an interpretation of Articles 102, 93, 53 and 37 of the said Treaty, which Articles, he alleged, had been infringed by the Law of 6 December 1962. The Giudice Conciliatore, by order of 16 January 1964 acceding to this request, decided as follows:

'Having regard to Article 177 of the Treaty of 25 March 1957 establishing the EEC, incorporated into Italian law by Law No 1203 of 14 October 1957, and having regard to the allegation that Law No 1643 of 6 December 1962 and the presidential decrees issued in execution of that Law (No 1670 of 15 December 1962, No 36 of 4 February 1963, No 138 of 25 February 1963 and No 219 of 14 March 1963) infringe Articles 102, 93, 53 and 37 of the aforementioned Treaty, the Court hereby stays the proceedings and orders that a certified copy of the file be transmitted to the Court of Justice of the European Economic Community in Luxembourg.'

This application for a preliminary ruling was transmitted by the Registrar of the Giudice Conciliatore to the Court and was received in the Court Registry on

20 February 1964.
Mr Costa set out his observations in his written statement of case lodged on 15 May 1964. He asked the Court 'for an interpretation of the Treaty, in particular of Articles 102, 93, 53 and 37'.
In its statement of case lodged on 23 May 1964, the Italian Government submitted that the application for a preliminary ruling was 'absolutely inadmissible' and that there were no grounds for raising the questions referred. ENEL, in its statement of case lodged on the same day, also submitted that there were no grounds for raising these questions.
In its statement of case dated 23 May 1964, the EEC Commission made its observations both on the relevance of the questions put and on the interpretation of the abovementioned Articles.
The Court also received an 'application to intervene', filed in the Registry on 20 May 1964, which was declared inadmissible by order of 3 June 1964.

II — Observations submitted under Article 20 of the Statute of the Court

On the admissibility of the reference for a preliminary ruling

The *Italian Government* complains that the Giudice Conciliatore did not restrict itself to asking the Court to interpret the Treaty but also asked it to declare whether the Italian law in dispute was in conformity with the Treaty, and that because of this the preliminary ruling is inadmissible.
A national court, it is claimed, cannot have recourse to this procedure when, for the purposes of deciding a dispute it has only to apply a domestic law and not a provision of the Treaty. Article 177 cannot be used as a means of allowing a national court, on the initiative of a national of a Member State, to subject a law of that State to the procedure for a preliminary ruling for infringement of the obligations of the Treaty. The only procedure possible is that under Articles 169 and 170 and consequently the present proceedings before the Court of Justice are 'absolutely inadmissible'.
Mr Costa claims on the other hand that by the Treaty the jurisdiction of the Court depends on the mere existence of a request within the meaning of Article 177 and it appears from the question submitted that it involves a case of interpretation of the Treaty; it is not for the Court of Justice to judge the facts or the considerations which may have led the national court to make its choice of questions.
Finally the *Commission* raises the point that the Court's examination cannot concern itself with the reasons which led the national court to adopt its questions or with their importance for the solution of the dispute. In this case their wording seems to bear a resemblance to an action for failure to fulfil a Community obligation as envisaged under Articles 169 and 170 and as such is inadmissible. It is however for the Court to decide from the questions referred those relating solely to the subject of interpretation as permitted by Article 177.
Finally the Commission points out that in a judgment dated 7 March 1964 the Italian constitutional court failed to apply this Article in a similar case and thus took a decision involving certain repercussions on the future of Community law as a whole.

On the interpretation of Article 102

As to the interpretation of Article 102, *Mr Costa* suggests that prior consultation with the Commission should be regarded as an obligation for the Member State in question and not as a mere right. Any other interpretation of Article 102 would deprive it of its purpose. Failure to consult the Commission, when faced with the existence of a potential danger of distortion, consti-

tutes an irregularity. A Member State cannot itself appreciate the likelihood of distortion without unilaterally assuming a power which has not been conferred on it.

The *Commission* denies the existence of a distortion. It seems to state however that, if there is any doubt as to its existence, then there would be grounds for consulting the Commission and that, at the time when the disputed law concerning nationalization was adopted, the Italian Republic did not respect the rule of procedure applicable in this case.

The *Italian Government* points out that the Commission, when informed by a written question submitted by a German deputy, accepted nationalization in this case and referred to Article 222. There is no distortion within the meaning of Article 102 as long as it is a question of setting up a public service intended to achieve the objectives of public utility indicated in Article 43 of the Italian constitution and as long as the conditions of competition are not adversely affected.

ENEL puts forward similar arguments and points out that the establishment of a public service applies equally to all those coming under the scheme.

On the interpretation of Article 93

With regard to the interpretation of Article 93, *Mr Costa* considers that the nationalization of an economic activity automatically results in the creation of a system in which hidden aid is granted to the nationalized sector. The Commission must accordingly intervene in accordance with the procedure prescribed by Article 93.

The *Commission* considers that Member States which do not respect the provisions of Article 93 (3) are committing a procedural infringement which itself suffices to entitle the Commission to take action under Article 169. The Commission nevertheless retains the power to bring the matter before the Court of Justice in cases where the material incompatibility of the aid in dispute is accompanied by infringement of the procedural rule under consideration.

The Commission has studied the draft law in dispute but without coming to the conclusion that it is incompatible with the Common Market. In the Commission's opinion the only question relates to the matter of procedure and concerns the failure to notify. The Commission reserves the right to take action if the aid in question proves to be incompatible with the Treaty.

The *Italian Government* and *ENEL* point out that the facts show that there is no incompatibility between the Law on nationalization and Article 93.

The establishment of ENEL has nothing to do with Community law.

On the interpretation of Article 53

With regard to the interpretation of Article 53 which prohibits States from introducing any new restrictions on the right of establishment in their territories, *Mr Costa* claims to see in the nationalization of a sector of the economy a measure incompatible with the above Article.

Article 222 cannot justify the legality of every conceivable system of property ownership and the abolition of private property is contrary to the above Article.

No rule exempts a nationalized sector from the application of Article 53.

Nationalization constitutes a denial of a Community system and is the method best calculated to prevent the freedom of establishment enshrined by the said Article with regard to nationals both of other Member States and of the nationalizing state.

Finally, Article 55 cannot be considered as derogating from Article 53, as the former is exclusively concerned with exempting from the ambit of the latter the official powers of the State and not the power to pursue an economic activity.

The *Italian Government* objects to this interpretation on the ground that Article 53 does not apply where the Member State concerned leaves to free private enterprise (without any distinction as to nationality) that part of the economy which is not reserved to the public authorities.

In support of the same interpretation *ENEL* suggests that Article 53 should be regarded as intended to place foreigners on the same footing as nationals as regards the exercise of a productive activity.

This principle is not infringed if a law instituting a public service reserves to the State the relevant sector of the economy, by the same token excluding nationals and foreigners alike from this sector.

The *Commission* considers that, when regarded in the light of Article 222, nationailization is not inconsistent with the Treaty. Articles 5 and 90 are aimed at alleviating the consequences resulting from the operation of nationalizing sectors of the economy. Article 53 however applies to possible restrictions on the right of establishment of nationals of other States which might result from a case of nationalization, such restrictions not being justified by technical requirements in the sector in question.

On the interpretation of Article 37

In respect of the requirements of Article 37 to the effect that Member States shall progressively adjust any State monopolies of a commercial character so as to avoid all discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed, *Mr Costa* asks the Court to interpret this provision very widely in such a way that it refers to every measure by which a State confers either on itself or on a body subject to it a monopoly which is by its very nature commercial.

The said Article applies, he claims, not only to actual cases of discrimination but also to potential discrimination and it would have no effect if its only purpose were to eliminate existing cases of discrimination whilst allowing the establishment of new ones. The consequences of nationalization are identical to those of a legal monopoly, in other words the sole power of management, the binding and ineluctable character of its decisions, the power in reaching those decisions to adopt criteria outside the field of economics and the exclusion of competition. Therefore, the result of such a monopoly is to render the importation of similar goods produced by foreign undertakings difficult if not impossible.

By creating a commercial monopoly, nationalization has the same restrictive effect on imports as protective duties or quantitative restrictions.

Rebutting this interpretation the *Italian Government* submits that Article 37 can have nothing to do with the operation of a public service nor with an article whose production depends on limited natural sources (themselves subject to a public concession) which can only be used by a necessarily limited number of producers. The rules of the Treaty safeguarding a free market cannot be concerned with the system of public services.

Moreover, as Article 222 in no way prejudices the rules in Member States governing the system of property ownership, it is possible for the constitutional authorities in each to prescribe the goods and services capable of being considered as public property and which, on the basis of objective decisions, remain outside any rule on competition. Consequently, the exclusion of exports and imports in such a sector must be considered not in terms of a commercial activity but rather of the exercise of a public service.

In support of this interpretation and by reference to the position of Article 37 in the Treaty, *ENEL* considers the 'commercial monopolies' specified in the said Article to be public or private

organizations aiming, as institutions, to make a concentration of exports and imports calculated to disturb the free movement of goods. That could never be the objective of a public service; moreover international trade in a particular article depends on international agreements and complex administrative procedures and is by its very nature outside the requirements of Article 37 and any provision relating to competition.

The *Commission* finally considers that Article 37 should be applied whenever a State establishes an exclusive right to import or export. To fall within the prohibitions in Article 37 the impugned measure must be intended to operate in the field of the circulation of goods or services. Although nationalization may be considered as permissible under Article 222, the creation of a new monopoly cannot.

However, a factual estimate of the trade in existence between Member States in respect of the commodity in question must be taken into consideration.

There is no need to inquire whether the creation of a monopoly of a commercial character is inconsistent with Article 37 (2), where the importation and exportation of the said commodity are not subject to the discretionary power of the administering body.

Grounds of judgment

By Order dated 16 January 1964, duly sent to the Court, the Giudice Conciliatore of Milan, 'having regard to Article 177 of the Treaty of 25 March 1957 establishing the EEC, incorporated into Italian law by Law No 1203 of 14 October 1957, and having regard to the allegation that Law No 1643 of 6 December 1962 and the presidential decrees issued in execution of that Law . . . infringe Articles 102, 93, 53 and 37 of the aforementioned Treaty', stayed the proceedings and ordered that the file be transmitted to the Court of Justice.

On the application of Article 177

On the submission regarding the working of the question

The complaint is made that the intention behind the question posed was to obtain, by means of Article 177, a ruling on the compatibility of a national law with the Treaty.

By the terms of this Article, however, national courts against whose decisions, as in the present case, there is no judicial remedy, must refer the matter to the Court of Justice so that a preliminary ruling may be given upon the 'interpretation of the Treaty' whenever a question of interpretation is raised before them. This provision gives the Court no jurisdiction either to apply the Treaty to a specific case or to decide upon the validity of a provision of

domestic law in relation to the Treaty, as it would be possible for it to do under Article 169.

Nevertheless, the Court has power to extract from a question imperfectly formulated by the national court those questions which alone pertain to the interpretation of the Treaty. Consequently a decision should be given by the Court not upon the validity of an Italian law in relation to the Treaty, but only upon the interpretation of the abovementioned Articles in the context of the points of law stated by the Giudice Conciliatore.

On the submission that an interpretation is not necessary

The complaint is made that the Milan court has requested an interpretation of the Treaty which was not necessary for the solution of the dispute before it.

Since, however, Article 177 is based upon a clear separation of functions between national courts and the Court of Justice, it cannot empower the latter either to investigate the facts of the case or to criticize the grounds and purpose of the request for interpretation.

On the submission that the court was obliged to apply the national law

The Italian Government submits that the request of the Giudice Conciliatore is 'absolutely inadmissible', inasmuch as a national court which is obliged to apply a national law cannot avail itself of Article 177.

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the Member States and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

The integration into the laws of each Member State of provisions which derive from the Community, and more generally the terms and the spirit of the Treaty, make it impossible for the States, as a corollary, to accord

precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty set out in Article 5 (2) and giving rise to the discrimination prohibited by Article 7.

The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in question by subsequent legislative acts of the signatories. Wherever the Treaty grants the States the right to act unilaterally, it does this by clear and precise provisions (for example Articles 15, 93 (3), 223, 224 and 225). Applications, by Member States for authority to derogate from the Treaty are subject to a special authorization procedure (for example Articles 8 (4), 17 (4), 25, 26, 73, the third subparagraph of Article 93 (2), and 226) which would lose their purpose if the Member States could renounce their obligations by means of an ordinary law.

The precedence of Community law is confirmed by Article 189, whereby a regulation 'shall be binding' and 'directly applicable in all Member States'. This provision, which is subject to no reservation, would be quite meaningless if a State could unilaterally nullify its effects by means of a legislative measure which could prevail over Community law.

It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question.

The transfer by the States from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail. Consequently Article 177 is to be applied regardless of any domestic law, whenever questions relating to the interpretation of the Treaty arise.

The questions put by the Giudice Conciliatore regarding Articles 102, 93, 53, and 37 are directed first to enquiring whether these provisions produce direct effects and create individual rights which national courts must protect, and, if so, what their meaning is.

On the interpretation of Article 102

Article 102 provides that, where 'there is reason to fear' that a provision laid down by law may cause 'distortion', the Member State desiring to proceed therewith shall 'consult the Commission'; the Commission has power to recommend to the Member States the adoption of suitable measures to avoid the distortion feared.

This Article, placed in the chapter devoted to the 'Approximation of Laws', is designed to prevent the differences between the legislation of the different nations with regard to the objectives of the Treaty from becoming more pronounced. By virtue of this provision, Member States have limited their freedom of initiative by agreeing to submit to an appropriate procedure of consultation. By binding themselves unambiguously to prior consultation with the Commission in all those cases where their projected legislation might create a risk, however slight, of a possible distortion, the States have undertaken an obligation to the Community which binds them as States, but which does not create individual rights which national courts must protect. For its part, the Commission is bound to ensure respect for the provisions of this Article, but this obligation does not give individuals the right to allege, within the framework of Community law and by means of Article 177 either failure by the State concerned to fulfil any of its obligations or breach of duty on the part of the Commission.

On the interpretation of Article 93

Under Article 93 (1) and (2), the Commission, in cooperation with Member States, is to 'keep under constant review all systems of aid existing in those States' with a view to the adoption of appropriate measures required by the functioning of the Common Market.

By virtue of Article 93 (3), the Commission is to be informed, in sufficient time, of any plans to grant or alter aid, the Member State concerned not being entitled to put its proposed measures into effect until the Community procedure, and, if necessary, any proceedings before the Court of Justice, have been completed.

These provisions, contained in the section of the Treaty headed 'Aids granted by States', are designed, on the one hand, to eliminate progressively existing aids and, on the other hand, to prevent the individual States in the conduct of their internal affairs from introducing new aids 'in any form whatsoever'

which are likely directly or indirectly to favour certain undertakings or products in an appreciable way, and which threaten, even potentially, to distort competition. By virtue of Article 92, the Member States have acknowledged that such aids are incompatible with the Common Market and have thus implicitly undertaken not to create any more, save as otherwise provided in the Treaty; in Article 93, on the other hand, they have merely agreed to submit themselves to appropriate procedures for the abolition of existing aids and the introduction of new ones.

By so expressly undertaking to inform the Commission 'in sufficient time' of any plans for aid, and by accepting the procedures laid down in Article 93, the States have entered into an obligation with the Community, which binds them as States but creates no individual rights except in the case of the final provision of Article 93 (3), which is not in question in the present case.

For its part, the Commission is bound to ensure respect for the provisions of this Article, and is required, in cooperation with Member States, to keep under constant review existing systems of aids. This obligation does not, however, give individuals the right to plead, within the framework of Community law and by means of Article 177, either failure by the State concerned to fulfil any of its obligations or breach of duty on the part of the Commission.

On the interpretation of Article 53

By Article 53 the Member States undertake not to introduce any new restrictions on the right of establishment in their territories of nationals of other Member States, save as otherwise provided in the Treaty. The obligation thus entered into by the States simply amounts legally to a duty not to act, which is neither subject to any conditions, nor, as regards its execution or effect, to the adoption of any measure either by the States or by the Commission. It is therefore legally complete in itself and is consequently capable of producing direct effects on the relations between Member States and individuals. Such an express prohibition which came into force with the Treaty throughout the Community, and thus became an integral part of the legal system of the Member States, forms part of the law of those States and directly concerns their nationals, in whose favour it has created individual rights which national courts must protect.

The interpretation of Article 53 which is sought requires that it be considered in the context of the Chapter relating to the right of establishment in which it occurs. After enacting in Article 52 that 'restrictions on the freedom of establishment of nationals of a Member State in the territory of another

Member State shall be abolished by progressive stages', this chapter goes on in Article 53 to provide that 'Member States shall not introduce any new restrictions on the right of establishment in their territories of nationals of other Member States'. The question is, therefore, on what conditions the nationals of other Member States have a right of establishment. This is dealt with by the second paragraph of Article 52, where it is stated that freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings 'under the conditions laid down for its own nationals by the law of the country where such establishment is effected'.

Article 53 is therefore satisfied so long as no new measure subjects the establishment of nationals of other Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertaking.

On the interpretation of Article 37

Article 37 (1) provides that Member States shall progressively adjust any 'State monopolies of a commercial character' so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States. By Article 37 (2), the Member States are under an obligation to refrain from introducing any new measure which is contrary to the principles laid down in Article 37 (1).

Thus, Member States have undertaken a dual obligation: in the first place, an active one to adjust State monopolies, in the second place, a passive one to avoid any new measures. The interpretation requested is of the second obligation together with any aspects of the first necessary for this interpretation.

Article 37 (2) contains an absolute prohibition: not an obligation to do something but an obligation to refrain from doing something. This obligation is not accompanied by any reservation which might make its implementation subject to any positive act of national law. This prohibition is essentially one which is capable of producing direct effects on the legal relations between Member States and their nationals.

Such a clearly expressed prohibition which came into force with the Treaty throughout the Community, and so became an integral part of the legal system of the Member States, forms part of the law of those States and directly concerns their nationals, in whose favour it creates individual rights which

national courts must protect. By reason of the complexity of the wording and the fact that Articles 37 (1) and 37 (2) overlap, the interpretation requested makes it necessary to examine them as a part of the Chapter in which they occur. This Chapter deals with the 'elimination of quantitative restrictions between Member States'. The object of the reference in Article 37 (2) to 'the principles laid down in paragraph (1)' is thus to prevent the establishment of any new 'discrimination regarding the conditions under which goods are procured and marketed . . . between nationals of Member States'. Having specified the objective in this way, Article 37 (1) sets out the ways in which this objective might be thwarted in order to prohibit them.

Thus, by the reference in Article 37 (2), any new monopolies or bodies specified in Article 37 (1) are prohibited in so far as they tend to introduce new cases of discrimination regarding the conditions under which goods are procured and marketed. It is therefore a matter for the court dealing with the main action first to examine whether this objective is being hampered, that is whether any new discrimination between nationals of Member States regarding the conditions under which goods are procured and marketed results from the disputed measure itself or will be the consequence thereof.

There remain to be considered the means envisaged by Article 37 (1). It does not prohibit the creation of any State monopolies, but merely those 'of a commercial character', and then only in so far as they tend to introduce the cases of discrimination referred to. To fall under this prohibition the State monopolies and bodies in question must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade.

It is a matter for the court dealing with the main action to assess in each case whether the economic activity under review relates to such a product which, by virtue of its nature and the technical or international conditions to which it is subject, is capable of playing an effective part in imports or exports between nationals of the Member States.

Costs

The costs incurred by the Commission of the European Economic Community and the Italian Government, which have submitted observations to the Court, are not recoverable and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the Giudice Conciliatore, Milan, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the parties to the main action, the Commission of the European Economic Community and the Italian Government;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 37, 53, 93, 102 and 177 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

Ruling upon the plea of inadmissibility based on Article 177 hereby declares:

As a subsequent unilateral measure cannot take precedence over Community law, the questions put by the Giudice Conciliatore, Milan, are admissible in so far as they relate in this case to the interpretation of provisions of the EEC Treaty;

and also rules:

1. **Article 102 contains no provisions which are capable of creating individual rights which national courts must protect;**

2. **Those individual portions of Article 93 to which the question relates equally contain no such provisions;**

3. **Article 53 constitutes a Community rule capable of creating individual rights which national courts must protect. It prohibits any new measure which subjects the establishment of nationals of other Member States to more severe rules than those prescribed for nationals of the country of establishment, whatever the legal system governing the undertakings.**

4. **Article 37 (2) is in all its provisions a rule of Community law**

capable of creating individual rights which national courts must protect. In so far as the question put to the Court is concerned, it prohibits the introduction of any new measure contrary to the principles of Article 37 (1), that is, any measure having as its object or effect a new discrimination between nationals of Member States regading the conditions in which goods are procured and marketed, by means of monopolies or bodies which must, first, have as their object transactions regarding a commercial product capable of being the subject of competition and trade between Member States, and secondly must play an effective part in such trade;

and further declares:

The decision on the costs of the present action is a matter for the Guidice Conciliatore, Milan.

Donner Hammes Trabucchi

Delvaux Rossi Lecourt Strauβ

Delivered in open court in Luxembourg on 15 July 1964.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL LAGRANGE DELIVERED ON 25 JUNE 1964[1]

Mr President,
Members of the Court,

The preliminary question upon which you have to give a ruling under Article 177 of the EEC Treaty does not, for once, come from a Netherlands court, but from an Italian one, and it is no longer a question of social security or of Regulation No 3, but rather of a certain number of provisions of the Treaty itself, in respect of which your interpretation is requested in circumstances that are such as to bring in issue the constitutional relations between the European Economic Community and its Member States. This highlights the importance of the judgment you are called upon to pronounce in this case. The facts are known to you: Mr Costa, a lawyer practising in Milan, claims that he is not under an obligation to pay an invoice amounting to 1925 lire demanded of him in respect of the supply of electricity by the 'Ente Nazionale per l'Energia Elettrica (ENEL)'. He objected to this

1—Translated from the French.

individuals were prevented from relying on it before the national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts.

It is necessary to examine in every case whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.

3. Article 3 (1) of Council Directive No 64/221 of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health confers on individuals rights which are enforceable by them in the national courts of a Member State and which the latter must protect.

4. The concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from a fundamental principle of Community law, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.

5. Article 48 of the EEC Treaty and Article 3 (1) of Directive No 64/221 must be interpreted as meaning that a Member State, imposing restrictions justified on grounds of public policy, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the Member State considers socially harmful but which are not unlawful in that State, despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with the same bodies or organizations.

In Case 41/74

Reference to the Court under Article 177 of the EEC Treaty by the Chancery Division of the High Court of Justice, England, for a preliminary ruling in the action pending before that court between

YVONNE VAN DUYN

and

HOME OFFICE

on the interpretation of Article 48 of the EEC Treaty and Article 3 of Council Directive 64/221/EEC of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health. (OJ of 4. 4. 1964, p. 850).

THE COURT

composed of: R. Lecourt, President C. Ó Dálaigh and Mackenzie Stuart, Presidents of Chambers A. M. Donner, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher and M. Sørensen (Rapporteur), Judges.

Advocate-General: H. Mayras,
Registrar: A. Van Houtte,

gives the following

JUDGMENT

Facts

The order for reference and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. The Church of Scientology is a body established in the United States of America, which functions in the United Kingdom through a college at East Grinstead, Sussex. The British Government regards the activities of the Church of Scientology as contrary to public policy. On 25 July 1968, the Minister of Health stated in the House of Commons that the Government was satisfied that Scientology was socially harmful. The statement included the following remarks: 'Scientology is a pseudo-philosophical cult ... The Government are satisfied having reviewed all the available evidence that Scientology is socially harmful. It alienates members of families from each other and attributes squalid and disgraceful motives to all who oppose it; its authoritarian principles and practice are a potential menace to the personality and well-being of those so deluded as to become its followers; above all its methods can be a serious danger to the health of those who submit to them. There is evidence that children are now being indoctrinated. There is no power under existing law to prohibit the practice of Scientology; but the Government have concluded that it is so objectionable that it would be right to take all steps within their power to curb its growth... Foreign nationals come here to study

Scientology and to work at the so-called College in East Grinstead. The Government can prevent this under existing law ... and have decided to do so. The following steps are being taken with immediate effect ...

.....

(e) Work permits and employment vouchers will not be issued to foreign nationals ... for work at a Scientology establishment.'

No legal restrictions are placed upon the practice of Scientology in the United Kingdom nor upon British nationals (with certain immaterial exceptions) wishing to become members of or take employment with the Church of Scientology.

2. Miss van Duyn is a Dutch national. By a letter dated 4 May 1973 she was offered employment as a secretary with the Church of Scientology at its college at East Grinstead. With the intention of taking up that offer she arrived at Gatwick Airport on 9 May 1973 where she was interviewed by an immigration officer and refused leave to enter the United Kingdom. It emerged in the course of the interview that she had worked in a Scientology establishment in Amsterdam for six months, that she had taken a course in the subject of Scientology, that she was a practising Scientologist and that she was intending to work at a Scientology establishment in the United Kingdom.

The ground of refusal of leave to enter which is stated in the document entitled 'Refusal of Leave to Enter' handed by the immigration officer to Miss van Duyn reads: 'You have asked for leave to enter the United Kingdom in order to take employment with The Church of Scientology, but the Secretary of State considers it undesirable to give anyone leave to enter the United Kingdom on the business of or in the employment of that organization'.

The power to refuse entry into the United Kingdom is vested in immigration officers by virtue of section 4 (1) of the Immigration Act 1971. Leave to enter was refused by the immigration officer acting in accordance with the policy of the Government and with Rule 65 of the relevant Immigration Rules for Control of Entry which Rules have legislative force. Rule 65 reads:

'Any passenger except the wife or child under 18 of a person settled in the United Kingdom may be refused leave to enter on the ground that the exclusion is conducive to the public good where —

(a) the Secretary of State has personally so directed, or

(b) from information available to the Immigration Officer it seems right to refuse leave to enter on that ground — if, for example, in the light of the passenger's character, conduct or associations it is undesirable to give him leave to enter.'

3. Relying on the Community rules on freedom of movement of workers and especially on Article 48 of the EEC Treaty, Regulation 1612/68 and Article 3 of Directive 64/221, [1] Miss van Duyn claims that the refusal of leave to enter was unlawful and seeks a declaration from the High Court that she is entitled to stay in the United Kingdom for the purpose of employment and to be given leave to enter the United Kingdom.

Before deciding further, the High Court has stayed the proceedings and requested the Court of Justice, pursuant to Article 177 of the EEC Treaty, to give a preliminary ruling on the following questions:

1. Whether Article 48 of the Treaty establishing the European Economic Community is directly applicable so as to confer on individuals rights enforceable by them in the Court of a Member State.

1 — Article 3 (1) of the Directive reads: 'Measures taken on grounds of public policy or of public security shall be based exclusively on the personal conduct of the individual concerned.'

2. Whether Directive 64/221 adopted on 25 February 1964 in accordance with the Treaty establishing the European Economic Community is directly applicable so as to confer on individuals rights enforceable by them in the Courts of a Member State.

3. Whether upon the proper interpretation of Article 48 of the Treaty establishing the European Economic Community and Article 3 of Directive 64/221/EEC a Member State in the performance of its duty to base a measure taken on grounds of public policy exclusively on the personal conduct of the individual concerned is entitled to take into account as matters of personal conduct

   (a) the fact that the individual is or has been associated with some body or organization the activities of which the Member State considers contrary to the public good but which are not unlawful in that State

   (b) the fact that the individual intends to take employment in the Member State with such a body or organization it being the case that no restrictions are placed upon nationals of the Member State who wish to take similar employment with such a body or organization.

4. The order of the High Court of 1 March 1974 was registered at the Court on 13 June 1974.

Written observations have been submitted on behalf of Miss van Duyn by Alan Newman, on behalf of the United Kingdom by W. H. Godwin and on behalf of the Commission by its Legal Adviser, A. McClellan.

Having heard the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

On the First Question

Miss van Duyn and the *Commission* submit that Article 48 of the EEC Treaty is directly applicable. They rely in particular on the judgments of the Court of 4 April 1974 in *Commission* v *French Republic* (Case No 167/73, [1974] ECR 359) and of 21 June 1974 in *Reyners* v *Belgian State* (Case No 2/74, not yet published).

In the light of the judgment in Case No 167/73 the *United Kingdom* makes no submission on this question.

On the Second Question

Miss van Duyn submits that Article 3 of Directive 64/221 is directly applicable. She observes that the Court has already held that, in principle, directives are susceptible of direct application. She refers to the judgments of the Court of 6 October 1970 in *Grad v Finanzamt Traunstein* (Case No 9/70, Recueil 1970, p. 825) and of 17 December 1970 in *Spa SACE* v *Italian Ministry of Finance* (Case No 33/70, Recueil 1970, p. 1213).

She submits that the criterion as to whether a directive is directly applicable is identical with the criterion adopted in the case of articles in the Treaty itself, and she observes that the Court has not felt itself constrained to hold that a given article in the Treaty is not directly applicable merely because in its formal wording it imposes an obligation on a Member State. She refers to the judgments of the Court of 19 December 1968 in *Salgoil* v *Italian Ministry* (Case No 13/68, Recueil 1968, p. 661) and of 16 June 1966 in *Lütticke GmbH* v *Hauptzollamt Sarrelouis* (Case No 57/65, Recueil 1966, p. 293).

Miss van Duyn further submits that a directive which directly affects an individual is capable of creating direct rights for that individual where its

provisions are clear and unconditional and where, as to the result to be achieved, it leaves no substantial measure of discretion to the Member State. Provided that these criteria are fulfilled it does not matter

(a) whether the provision in the directive consists of a positive obligation to act or of a negative prohibition, or

(b) that the Member State has a choice of form and methods to be adopted in order to achieve the stated result.

As to (a), it is implicit in the Court's judgments in the cases of *Lütticke* and *Salgoil* (already cited) that an article of the Treaty which imposes a positive obligation on a Member State to act is capable of direct applicability and the same reasoning is valid in relation to directives.

As to (b), she notes that Article 189 of the Treaty expressly draws a distinction in relation to directives between binding effect of the result to be achieved and the discretionary nature of the methods to be adopted.

She contends that the provisions of Article 3 fulfil the criteria for direct applicability. She refers to the preamble to the Directive which envisages a direct applicability when it states: 'whereas, in each Member State, nationals of other Member States should have adequate legal remedies available to them in respect of the administration in such matters . . .' (i.e. when a Member State invokes grounds of public policy, public security or public health in matters connected with the movement or residence of foreign nationals).

The only 'adequate legal remedy' available to an individual is the right to invoke the provisions of the Directive before the national courts. A decision to this effect would undoubtedly strengthen the legal protection of individual citizens in the national courts.

The Commission submits that a provision in a directive is directly applicable when it is clear and unambiguous. It refers to the judgments in the *Grad* and *SACE* cases (already cited).

The Commission observes that a Community Regulation has the same weight with immediate effect as national legislation whereas the effect of a directive is similar to that of those provisions of the Treaty which create obligations for the Member States. If provisions of a directive are legally clear and unambiguous, leaving only a discretion to the national authorities for their implementation, they must have an effect similar to those Treaty provisions which the Court has recognized as directly applicable.

It therefore submits that

(a) the executive of a Member State is bound to respect Community law

(b) if a provision in a directive is not covered by an identical provision in national law, but left, as to the result to be achieved, to the discretion of the national authority, the discretionary power of that authority is reduced by the Community provision

(c) in these circumstances and given that to comply with a directive it is not always indispensable to amend national legislation it is clear that the private individual must have the right to prevent the national authority concerned from exceeding its powers under Community law to the detriment of that individual.

According to the Commission, Article 3 is one of the provisions of Directive 64/221 having all the characteristics necessary to have direct effect in the Member State to which it is addressed. And it further recalls that the difficulty of applying the rules in a particular case does not derogate from their general application.

In this context the Commission examines the Judgment of 7 October 1968 of the Belgian Conseil d'État in the

Corveleyn case (CE 1968, No 13.146 arrêt 7. 10. 1968, p. 710).

As the British authorities have not adopted the wording of Article 3 of the Directive to achieve the required result, the Commission submits, by virtue of Article 189 of the Treaty and in the light of the case-law of the Court, that Article 3 is a directly applicable obligation which limits the wide discretion given to immigration officers under Rule 65 in the 'Statement of Immigration Rules'. The Commission proposes the following answer to the question: Where a provision is legally clear and unambiguous as is Article 3 of Directive 64/221, such a provision is directly applicable so as to confer on individuals rights enforceable by them in the Courts of a Member State.

The United Kingdom recalls that Article 189 of the EEC Treaty draws a clear distinction between regulations and directives, and that different effects are ascribed to each type of provision. It therefore submits that prima facie the Council in not issuing a regulation must have intended that the Directive should have an effect other than that of a regulation and accordingly should not be binding in its entirety and not be directly applicable in all Member States.

The United Kingdom submits that neither the *Grad* nor the *SACE* decision is authority for the proposition that it is immaterial whether or not a provision is contained in a regulation, directive or decision. In both cases the purpose of the directive in question was merely to fix a date for the implementation of clear and binding obligations contained in the Treaty and instruments made under it. Those cases show that in special circumstances a limited provision in a directive could be directly applicable. The provisions of the Directive in the present case are wholly different. Directive 64/221 is far broader in scope. It gives comprehensive guidance to Member States as to all measures taken by them affecting freedom of movement for workers and it was expressly contemplated in Article 10 that Member States would put into force the measures necessary to comply with the provisions of the Directive. Indeed the very terms of Article 3 (1) itself contemplate the taking of measures.

The United Kingdom examines the only four cases in which national courts to its knowledge have considered the question of the direct applicability of the Directive. It submits that little assistance can be obtained from these cases. *Inter alia* it points out that the true effect of the *Corveleyn* case (already cited) has been the subject of considerable debate among Belgian jurists and the better view appears to be that the Conseil d'État did not decide that the Directive was directly applicable but applied the Belgian concept of public order which itself required international obligations of Belgium to be taken into account.

On the Third Question

Miss van Duyn points out that the first part of the question assumes a situation where an organization engages in activities which are lawful in the State. The question does not necessarily assume that the individual concerned intends to continue this association. It is sufficient that he has in the past been associated. In this respect Miss van Duyn recalls that even if the individual had been associated with an illegal organization and, by virtue of his activities therein, had been convicted of a crime, that circumstance would not, by virtue of the provisions of Article 3, paragraph 2, of Directive 64/221, in itself be sufficient grounds for the Member State to take measures based on public policy to exclude the individual.

Merely belonging to a lawful organization, without necessarily taking part in its activities, cannot, in her submission, amount to 'conduct'. Conduct implies 'activity.' Moreover, the activities of the organization in question are not, merely because the individual is or has been a passive member, 'personal' to the individual concerned. To hold

otherwise would mean that a Member State could exclude an individual merely because, in the distant past, he had for a brief period perfectly lawfully belonged to a somewhat extreme political or religious organization in his own Member State.

In regard to the second part of the question, Miss van Duyn recalls that freedom of movement of persons is one of the fundamental principles established by the Treaty and that discrimination on grounds of nationality is prohibited in Article 7. Exemptions to these fundamental principles must be interpreted restrictively.

She points out that the question assumes discrimination on grounds of nationality and that it assumes a situation where an individual whose past activity has been blameless seeks entry into a Member State in order to work for an organization in whose employment the nationals of the Member State are prefectly free to engage. She submits that if an organization is deemed contrary to the public good the Member State is faced with a simple choice: either to ban everyone, including its own nationals, from engaging in employment with that organization, or to tolerate nationals of other Member States as it tolerates its own nationals engaging in such employment.

The Commission asserts that the concepts 'public policy' and 'personal conduct' contained in Article 48, paragraph 3 of the Treaty and Article 3 of Directive 64/221 are concepts of Community law. The must first be interpreted in the context of Community law and national criteria are only relevant to its application.

In practice, if each Member State could set limits to the interpretation of public policy the obligations deriving from the principle of freedom of movement of workers would take a variety of forms in different Member States. It is only possible for this freedom to be maintained throughout the Community on the basis of uniform application in all the Member States. It would be inconsistent with the Treaty if one Member State accepted workers from another Member State while its own workers did not receive uniform treatment as regards the application of the rules in respect of public order in that other State.

The Commission submits that the discrimination by a Member State on grounds of public policy against nationals of another Member State for being employed by an organization the activities of which it considers contrary to the public good when it does not make it unlawful for its own nationals to be employed by such organization is contrary to Article 48, paragraph 2 of the Treaty. Article 3 (1) of the Directive is precise in stating that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned. Personal conduct which is acceptable when exercised by a national of one Member State cannot be unacceptable, under Community law, when exercised by a national of another Member State.

It is for consideration that Article 3 precludes a Member State, as a general contingency against some potential harm to society, from invoking public policy as a ground for refusing entry when the personal conduct of the individual is or was not contrary to public policy in the Member States concerned. It is not denied that membership of a militant organization proscribed in the host Member State would be an element to be taken into account in assessing personal conduct for the purpose of justifying a refusal of entry on grounds of public policy or public security.

As to the first part of the question *the United Kingdom* deals with three problems.

The first problem is whether an individual's past or present association with an organization can be regarded as an aspect of his personal conduct. The United Kingdom asserts that it is of importance that a Member State in

relation to public policy should be entitled to consider a person's associations with a body or organization. The Member State should be entitled to exclude that person in appropriate cases, i.e. if the organization is considered sufficiently undesirable from the viewpoint of public policy and the association by that person with that organization is sufficiently close.

Secondly the United Kingdom submits that a measure which is taken on grounds of public policy and which provides for the exclusion from a Member State of an individual on the grounds of that individual's association with an organization is compatible with the requirement of Article 3 (1). It accepts that the intention underlying that Article must have been to exclude collective expulsions and to require the consideration by the national authorities of the personal circumstances of each individual in each case. Nevertheless it is not inconsistent with that intention for a Member State to take into account an individual's association with an organization and, in appropriate cases, to exclude the individual by reason of that association. Whether, in any given case, such exclusion is justified will depend on the view the Member State takes of the organization.

As a practical matter the processes of admitting persons to enter a Member State must be administered by a large number of officials. Such officials cannot be expected to know all that the Government may know about a particular organization and it is inevitable that such officials must act in accordance with directions given by the Government and laying down broad principles on which the officials are to act. It is inevitable also that such directions may relate to particular organizations which a Government may consider contrary to the public good.

Thirdly the United Kingdom submits that the fact that the activities of the organization are not unlawful in a Member State though considered by the Member State to be contrary to the public good does not disentitle the Member State from taking into account the individual's association with the organization. It must be a matter for each State to decide whether it should make activities of an organization, or the organization itself, illegal. Only the State is competent to make such evaluation and it will do so in the light of the particular circumstances of that State. Thus, as is common knowledge, the United Kingdom practises a considerable degree of tolerance in relation to organizations within the United Kingdom. In the case of Scientology the reasons why the United Kingdom regards the activities of the Scientologists as contrary to public policy were explained in the statement made in Parliament on 25 July 1968. The Scientologists still have their World Headquarters in the United Kingdom so that Scientology is of particular concern to the United Kingdom.

The United Kingdom notes that two problems arise in connection with the matter referred to in subparagraph (b) of the question.

The first problem is whether the fact that an individual intends to take employment with such an organization is an aspect of that individual's personal conduct. It is submitted that such an intention is a very material aspect of the individual's personal conduct.

The second problem is whether the fact that no restrictions are placed upon nationals of the Member State who wish to take similar employment with such an organization disentitles the Member State from taking this intention into account.

The United Kingdom points out that it is inevitable that in respect of the entry into a state of persons, there must be some discrimination in favour of the nationals of that state. For a national, however undesirable and potentially harmful his entry may be, cannot be refused admission into his own state. A state has a duty under international law

to receive back its own nationals. The United Kingdom refers *inter alia* to Article 5 (b) (ii) of the Universal Declaration of Human Rights which states: 'Everyone has the right to leave any country, including his own, and to return to his country'. It observes that, for example, a Member State would be justified in refusing to admit a drug addict who is a national of another State even though it would be obliged to admit a drug addict who was one of its own nationals.

Miss van Duyn, represented by Alan Newman, the United Kingdom, represented by Peter Gibson, and the Commission, represented by Anthony McClellan, submitted oral observations at the hearing on 23 October 1974.

The Advocate-General delivered his opinion at the hearing on 13 November 1974.

Law

1 By order of the Vice-Chancellor of 1 March 1974, lodged at the Court on 13 June, the Chancery Division of the High Court of Justice of England, referred to the Court, under Article 177 of the EEC Treaty, three questions relating to the interpretation of certain provisions of Community law concerning freedom of movement for workers.

2 These questions arise out of an action brought against the Home Office by a woman of Dutch nationality who was refused leave to enter the United Kingdom to take up employment as a secretary with the 'Church of Scientology'.

3 Leave to enter was refused in accordance with the policy of the Government of the United Kingdom in relation to the said organization, the activities of which it considers to be socially harmful.

First question

4 By the first question, the Court is asked to say whether Article 48 of the EEC Treaty is directly applicable so as to confer on individuals rights enforceable by them in the courts of a Member State.

5 It is provided, in Article 48 (1) and (2), that freedom of movement for workers shall be secured by the end of the transitional period and that such freedom shall entail 'tha abolition of any discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of work and employment.'

6 These provisions impose on Member States a precise obligation which does not require the adoption of any further measure on the part either of the Community institutions or of the Member States and which leaves them, in relation to its implementation, no discretionary power.

7 Paragraph 3, which defines the rights implied by the principle of freedom of movement for workers, subjects them to limitations justified on grounds of public policy, public security or public health. The application of these limitations is, however, subject to judicial control, so that a Member State's right to invoke the limitations does not prevent the provisions of Article 48, which enshrine the principle of freedom of movement for workers, from conferring on individuals rights which are enforceable by them and which the national courts must protect.

8 The reply to the first question must therefore be in the affirmative.

Second question

9 The second question asks the Court to say whether Council Directive No 64/221 of 25 February 1964 on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health is directly applicable so as to confer on individuals rights enforceable by them in the courts of a Member State.

10 It emerges from the order making the reference that the only provision of the Directive which is relevant is that contained in Article 3 (1) which provides that 'measures taken on grounds of public policy or public security shall be based exclusively on the personal conduct of the individual concerned.'

11 The United Kingdom observes that, since Article 189 of the Treaty distinguishes between the effects ascribed to regulations, directives and decisions, it must therefore be presumed that the Council, in issuing a directive rather than making a regulation, must have intended that the directive should have an effect other than that of a regulation and accordingly that the former should not be directly applicable.

12 If, however, by virtue of the provisions of Article 189 regulations are directly applicable and, consequently, may by their very nature have direct effects, it does not follow from this that other categories of acts mentioned in that Article can never have similar effects. It would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of Community law. Article 177, which empowers national courts to refer to the Court questions concerning the validity and interpretation of all acts of the Community institutions, without distinction, implies furthermore that these acts may be invoked by individuals in the national courts. It is necessary to examine, in every case, whether the nature, general scheme and wording of the provision in question are capable of having direct effects on the relations between Member States and individuals.

13 By providing that measures taken on grounds of public policy shall be based exclusively on the personal conduct of the individual concerned, Article 3 (1) of Directive No 64/221 is intended to limit the discretionary power which national laws generally confer on the authorities responsible for the entry and expulsion of foreign nationals. First, the provision lays down an obligation which is not subject to any exception or condition and which, by its very nature, does not require the intervention of any act on the part either of the institutions of the Community or of Member States. Secondly, because Member States are thereby obliged, in implementing a clause which derogates from one of the fundamental principles of the Treaty in favour of individuals, not to take account of factors extraneous to personal conduct, legal certainty for the persons concerned requires that they should be able to rely on this obligation even though it has been laid down in a legislative act which has no automatic direct effect in its entirety.

14 If the meaning and exact scope of the provision raise questions of interpretation, these questions can be resolved by the courts, taking into account also the procedure under Article 177 of the Treaty.

15 Accordingly, in reply to the second question, Article 3 (1) of Council Directive No 64/221 of 25 February 1964 confers on individuals rights which are enforceable by them in the courts of a Member State and which the national courts must protect.

Third question

16 By the third question the Court is asked to rule whether Article 48 of the Treaty and Article 3 of Directive No 64/221 must be interpreted as meaning that

'a Member State, in the performance of its duty to base a measure taken on grounds of public policy exclusively on the personal conduct of the individual concerned is entitled to take into account as matters of personal conduct:

(a) the fact that the individual is or has been associated with some body or organization the activities of which the Member State considers contrary to the public good but which are not unlawful in that State;

(b) the fact that the individual intends to take employment in the Member State with such a body or organization it being the case that no restrictions are placed upon nationals of the Member State who wish to take similar employment with such a body or organization.'

17 It is necessary, first, to consider whether association with a body or an organization can in itself constitute personal conduct within the meaning of Article 3 of Directive No 64/221. Although a person's past association cannot in general, justify a decision refusing him the right to move freely within the Community, it is nevertheless the case that present association, which reflects participation in the activities of the body or of the organization as well as identification with its aims and its designs, may be considered a voluntary act of the person concerned and, consequently, as part of his personal conduct within the meaning of the provision cited.

18 This third question further raises the problem of what importance must be attributed to the fact that the activities of the organization in question, which are considered by the Member State as contrary to the public good are not however prohibited by national law. It should be emphasized that the concept of public policy in the context of the Community and where, in particular, it is used as a justification for derogating from the fundamental principle of freedom of movement for workers, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without being subject to control by the institutions of the Community. Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the Treaty.

19 It follows from the above that where the competent authorities of a Member State have clearly defined their standpoint as regards the activities of a particular organization and where, considering it to be socially harmful, they have taken administrative measures to counteract these activities, the Member State cannot be required, before it can rely on the concept of public policy, to make such activities unlawful, if recourse to such a measure is not thought appropriate in the circumstances.

20 The question raises finally the problem of whether a Member State is entitled, on grounds of public policy, to prevent a national of another Member State from taking gainful employment within its territory with a body or organization, it being the case that no similar restriction is placed upon its own nationals.

21 In this connexion, the Treaty, while enshrining the principle of freedom of movement for workers without any discrimination on grounds of nationality, admits, in Article 48 (3), limitations justified on grounds of public policy, public security or public health to the rights deriving from this principle. Under the terms of the provision cited above, the right to accept offers of employment actually made, the right to move freely within the territory of Member States for this purpose, and the right to stay in a Member State for the purpose of employment are, among others all subject to such limita-

tions. Consequently, the effect of such limitations, when they apply, is that leave to enter the territory of a Member State and the right to reside there may be refused to a national of another Member State.

22 Furthermore, it is a principle of international law, which the EEC Treaty cannot be assumed to disregard in the relations between Member States, that a State is precluded from refusing its own nationals the right of entry or residence.

23 It follows that a Member State, for reasons of public policy, can, where it deems, necessary, refuse a national of another Member State the benefit of the principle of freedom of movement for workers in a case where such a national proposes to take up a particular offer of employment even though the Member State does not place a similar restriction upon its own nationals.

24 Accordingly, the reply to the third question must be that Article 48 of the EEC Treaty and Article 3 (1) of Directive No 64/221 are to be interpreted as meaning that a Member State, in imposing restrictions justified on grounds of public policy, is entitled to take into account, as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the Member State considers socially harmful but which are not unlawful in that State, despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with these same bodies or organizations.

Costs

25 The costs incurred by the United Kingdom and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable, and as these proceedings are, insofar as the parties to the main action are concerned, a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the High Court of Justice, by order of that court, dated 1 March 1974, hereby rules:

1. **Article 48 of the EEC Treaty has a direct effect in the legal orders of the Member States and confers on individuals rights which the national courts must protect.**

2. **Article 3 (1) of Council Directive No 64/221 of 25 February 1964 on the coordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health confers on individuals rights which are enforceable by them in the national courts of a Member State and which the national courts must protect.**

3. **Article 48 of the EEC Treaty and Article 3 (1) of Directive No 64/221 must be interpreted as meaning that a Member State, in imposing restrictions justified on grounds of public policy, is entitled to take into account as a matter of personal conduct of the individual concerned, the fact that the individual is associated with some body or organization the activities of which the Member State considers socially harmful but which are not unlawful in that State, despite the fact that no restriction is placed upon nationals of the said Member State who wish to take similar employment with the same body or organization.**

Lecourt Ó Dálaigh Mackenzie Stuart Donner Monaco

Mertens de Wilmars Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 4 December 1974.

A. Van Houtte
Registrar

R. Lecourt
President

at issue are not strictly identical. However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.

5. The third paragraph of Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

In Case 283/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the First Civil Division of the Corte Suprema di Cassazione [Supreme Court of Cassation] for a preliminary ruling in the proceedings pending before that court

SRL CILFIT — in liquidation — and 54 Others, Rome,

v

MINISTRY OF HEALTH, in the person of the Minister, Rome,

and

LANIFICIO DI GAVARDO SPA, Milan,

v

MINISTRY OF HEALTH, in the person of the Minister, Rome,

on the interpretation of the third paragraph of Article 177 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: F. Capotorti
Registrar: P. Heim

gives the following

JUDGMENT

Facts and issues

I — Facts and procedure

By a summons served on the Italian Minister for Health on 18 September 1974, the plaintiffs in the main proceedings, which are textile firms, contended that since the adoption of Law No 30 of 30 January 1968 they had paid, by way of fixed health inspection levy, LIT 700 per quintal of imported wool, until the entry into force of Law No 1239 of 30 December 1970, which amended the levy, although they should have been required to pay only a sum of LIT 70 per quintal "according to the correct interpretation of the Law of 30 January 1968 and, in any event, according to the authentic interpretation of that law given by Law No 1239 of 1970".

After the Tribunal di Roma [District Court, Rome] had dismissed their applications by judgment of 27 October 1976, the plaintiffs in the main proceedings lodged an appeal based on the argument rejected by the Tribunale. They also contended that Law No 1968 was inapplicable as a result of the adoption of Regulation (EEC) No 827/68 of the Council of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty (Official Journal, English Special Edition 1968 (I) p. 209).

By judgment of 12 December 1978, the Corte d'Appello [Court of Appeal], Rome, rejected all the submissions relied upon by the plaintiffs and accepted the Ministry of Health's argument concerning the compatibility of Law No 30 of 1968 with the aforesaid regulation.

On 4 October 1979, the plaintiff in the main proceedings appealed against that judgment. In support of its submission that the appeal should be dismissed, the Ministry of Health, sharing the view held by the Court of Appeal, argued that since wool is not included in Annex II to the EEC Treaty, it is not subject to the common organization of the markets and cannot therefore come within the scope of the regulation in question.

The Ministry of Health urged the Court of Cassation to "decide the case along the lines suggested on the ground that the factual circumstances are so obvious as to rule out the possibility of their being capable of any other interpretation and that obviates the need to refer the matter for a preliminary ruling to the Court of Justice of the European Communities".

The Court of Cassation took the view that counsel for the Ministry of Health had raised a question concerning the interpretation of Article 177 of the Treaty in so far as he contended that that provision must be understood as meaning that the Court of Cassation, against whose decisions there is no judicial remedy under national law, is not obliged to refer a matter to the Court of Justice "when the solution of a question on the interpretation of acts performed by the Community institutions is so obvious as to preclude the very possibility of their being open to another interpretation".

Therefore the Court of Cassation, by order of 27 March 1981, stayed the proceedings and submitted to the Court of Justice a reference for a preliminary ruling on the following question:

"Does the third paragraph of Article 177 of the EEC Treaty, which provides that where any question of the same kind as those listed in the first paragraph of that article is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law that court or tribunal must bring the matter before the Court of Justice, lay down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or does it, and if so within what limits, make that obligation conditional on the prior finding of a reasonable interpretative doubt?"

The order making the reference was registered at the Court on 30 October 1981.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiffs in the main proceedings, represented by G. Scarpa, G. Stella Richter, G. M. Ubertazzi and F. Capelli; by the Government of the Kingdom of Denmark, represented by its Legal Adviser, Laurids Mikaelsen, acting as Agent; by the Government of the Italian Republic, represented by S. Laporta, Avvocato dello Stato, and by A. Squillante, acting as Agent; and by the Commission of the European Communities, represented by G. Olmi, Deputy Director General, and Miss Mary Minch, a member of the Commission's Legal Department, acting as Agents.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice

A — Observations of the plaintiffs in the main proceedings

The *plaintiffs in the main proceedings* define the problem raised in the question submitted by the national court and express the view that it is concerned solely with the following three points:

"Does the obligation to make a reference for a preliminary ruling depend on a decision of the court hearing the case which establishes that the question raised before it is concerned with the interpretation rather than the application of Community law?

Must the Court of Cassation seek a ruling on interpretation from the Court of Justice even though the matter is not in any doubt?

Irrespective of the clarity of the text, must the question of interpretation appear *prima facie* to be substantially justified, fair and plausible?"

(a) Questions concerning interpretation and questions concerning application

The plaintiffs observe that the EEC Treaty is concerned only with questions of interpretation; therefore, the courts referred to in the third paragraph of Article 177 are required to make a reference for a preliminary ruling only in respect of such questions. Thus it is for those courts to determine beforehand whether the question raised before them is concerned with interpretation or rather with application.

However, in disputes brought before them national courts must apply Community law and it is for that purpose that they may refer questions concerning its interpretation to the Court of Justice.

Thus any doubts concerning the application of Community law relate above all to its interpretation with the result that the court would have to look beyond the external appearance of the question raised by the parties regarding the application of Community law "and discover the underlying question of interpretation".

(b) Must the Court of Cassation seek a ruling on interpretation from the Court even though the matter is not in any doubt?

The plaintiffs consider, in the first place, that under national law the maxim *in claris non fit interpretatio* "does not authorize the court to confine itself to the apparent meaning of a provision, on the basis of its literal purport", but implies that "if a provision is clear and unequivocal and there is no possible scope for divergence between the letter and the spirit, then (and only then) is an interpretation other than that suggested by the wording of the provision prohibited".

Next, the plaintiffs maintain that the rules of interpretation of classical international law which enable the principle of the *acte clair* to be applied should not be followed in Community law on the ground that Community law is a legal system in evolution and should be interpreted in a sense "which transcends the wording of the various specific provisions" and is therefore teleological, thus ensuring that the system is effectively applied.

Furthermore, the expressions used in legislation are not sufficiently clear to eliminate the risk of differing interpretations, especially since in the case of Community law the national court has to

overcome numerous difficulties resulting from the technical nature thereof, from the fact that the national court does not always have access to all the sources which make up the Community legal system and from the uncertainties "due to the sometimes complex interaction of national law and Community law".

In view of those difficulties, the courts referred to in the third paragraph of Article 177 are under an obligation to make a reference "whenever the interpretation of a Community provision is necessary, even though the meaning is apparently clear".

(c) Must the question of interpretation appear *prima facie* to be substantially justified, fair and plausible?

The last paragraph of Article 177 requires courts of last instance to bring a matter before the Court of Justice "if and only if 'a question' is raised before them".

The word "question" should be understood in the broad sense, that is to say not necessarily as referring to a disagreement between the parties but as meaning that an interpretative doubt in a case constitutes a necessary and sufficient condition for creating an obligation to make a reference to the Court of Justice.

However, the purpose of the question submitted by the Court of Cassation is not so much to ascertain the meaning of the term in question as to determine whether it is "reasonable" to use it. One answer may be obtained from the wording of the third paragraph of Article 177 "which makes no distinction between questions which are reasonable and those which are not".

A comparative study of the second and third paragraphs of Article 177 lends weight to that initial answer since both those provisions lead to the adoption of an interpretation designed to widen the obligation to make a reference, in other words to deprive the national court or tribunal referred to in the third paragraph of any discretion.

That argument is also supported by the objective of Article 177, which is to ensure the uniform application of Community law in the Member States, especially since that objective is constantly growing in importance and since the task of the Court of Cassation is, *inter alia*, to ensure "that the law is uniformly applied".

Moreover, the decisions of the Court of Justice are also consistent with a broad interpretation of Article 177; in particular in its judgment of 27 March 1963 in Joined Cases 28 to 30/62 *Da Costa en Schaake* [1963] ECR 31, the Court held that "the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law . . . to refer to the Court every question of interpretation raised before them".

That view is endorsed by leading academic lawyers and finally, as regards judicial policy, there would be a "serious risk" in allowing national supreme courts to determine whether questions raised before them are reasonable, inasmuch as they might inhibit or distort the process of integration between Community law and national law. To allow national supreme courts such a discretion would

also involve "the risk of creating an atmosphere of tension between national courts and Community institutions" and might promote discord.

B — Observations of the Italian Government

After outlining the facts of the case, the *Italian Government* observes that it stated before the Court of Cassation that there was in the present case "a factual circumstance so clear and so important as to preclude the very possibility of there being any interpretative doubt, thus making it unnecessary to refer the matter for a preliminary ruling to the Court of Justice of the European Communities".

The Italian Government considers that, in spite of the differences in the wording of the second and third paragraphs of Article 177, the third paragraph is no different "in scope and that consequently the purpose of that provision is not to deprive the national court of last instance of the power to determine whether a preliminary ruling is necessary".

The authors of the Treaty considered it appropriate to provide for a filter for questions of interpretation which might be submitted to the Court, as is shown by the retention of the ordinary procedure for making a reference to the Court even in proceedings before the national court of last instance.

Furthermore, when the Court of Justice stated in the *Da Costa en Schaake* judgment cited above that the obligation imposed by the third paragraph of Article 177 upon national courts or tribunals of last instance may be deprived of its purpose and emptied of its substance by the authority of an interpretation given by the Court in an earlier preliminary ruling in a similar case, it recognized that a national court of last instance is empowered to define the scope of the proceedings and thus to disclaim jurisdiction over a question or problem of interpretation concerning Community law by relying on the answer given by the Court to the same question.

Since Community law forms part of the legal system of each of the Member States "it would be absurd to take the view that a national court is prohibited from interpreting a provision which it is nevertheless obliged to apply". That consideration disposes of the argument that the national court of last instance must confine itself to taking note of the existence of arguments put forward by the parties which are based on Community law and referring them to the Court of Justice for scrutiny. That court must therefore formulate a question which is capable of being referred to the Court of Justice and, to that end, it must determine whether an interpretative doubt actually exists; that is supported by the opinion of Mr Advocate General Lagrange in the *Da Costa en Schaake* case (cited above), in which he pointed out that "before the procedure of referring a question for a preliminary ruling on interpretation can be set in motion, there must clearly be a question".

Thus, according to the Italian Government, a provision may be described as "clear" not only when it has already been interpreted by the Court of Justice in connection with a related question but also "when it cannot reasonably have more than one meaning having regard to its letter and context".

In the Italian Government's opinion, it seems highly improbable that the national court of last instance has, in Community matters, been divested of

some of its conventional instruments of interpretation and must therefore restrict itself exclusively to the letter of a provision in order to determine whether or not the meaning is obscure, whilst refraining *a priori* from considering any lingering doubts merely by comparing the results of a literal interpretation with those which a logical and systematic interpretation would yield.

Therefore it must be acknowledged that the provisions of Article 177 imply the need for an effective filter for the reference of questions of interpretation to the Court. It necessarily follows that the national court of last instance must give proper consideration to the question whether or not a genuine doubt exists.

It remains to define the limits of the court's discretion in this matter. The question is more complex in theory than it is in practice, at least at the present stage of development of Community law and given the degree of "Community awareness" attained in each of the Member States. Furthermore, the objective embodied in Article 177 of achieving a uniform interpretation of Community law and "the notion that any resistance will ultimately be overcome by the force of law" raise the question of the extent to which in practice a national court of last instance may deny in good faith the existence of a genuine preliminary question.

The Italian Government therefore proposes that the answer to the question submitted should be "that the EEC Treaty requires national courts of last instance to seek a preliminary ruling from the Court of Justice in cases in which, after due consideration, they recognize that the question of interpretation raised before them is not manifestly unfounded".

C — Observations of the Danish Government

After describing the objective of Article 177 and the way in which it operates the *Danish Government* expresses the view that the third paragraph of that article "cannot be understood as meaning that a national court against whose decisions there is no judicial remedy must refer to the Court of Justice any question concerning the interpretation or validity of a provision of Community law merely because the parties wish it to do so".

Such an approach would transform that article into a remedy available to private individuals, which is by no means the purpose of that provision.

It is clear from the Court's judgment of 22 November 1978 in Case 93/78 *Mattheus* ([1978] ECR 2203) that "national courts are under an obligation to determine whether it is necessary to make a reference to the Court of Justice of the European Communities". Accordingly, it is for the national court to decide whether a doubt really exists which justifies referring a question to the Court of Justice for a preliminary ruling; that view is supported by the Court's judgment of 16 December 1981 in Case 244/80 *Foglia* v *Novello* ([1981] ECR 3045).

Next, the Danish Government, like the Italian Government, maintains that the decisions of the Court, in particular the *Da Costa en Schaake* judgment cited above, reaffirm that the obligation to make a reference to the Court of Justice for a preliminary ruling, as provided for

by the third paragraph of Article 177, is not an absolute one.

The Danish Government observes that even where there are no previous decisions by the Court, the national court may none the less decide a point directly, without requesting a preliminary ruling, if the provision of Community law at issue does not give rise to any difficulties of interpretation.

With regard to the theory of the *acte clair,* the Danish Government recalls that the Commission, in reply to Written Question No 608/78 (Official Journal 1979, C 28 pp. 8 and 9) stated that the courts "may decline to make a reference and decide the matter themselves in cases where such questions are perfectly straightforward and the answer is obvious to any lawyer with a modicum of experience".

The Danish Government informs the Court that the above criterion is also applied by the Danish courts, including courts of last instance.

It observes that, in its opinion, "a theoretical interpretative doubt does not in itself justify systematic recourse to the procedure for obtaining a preliminary ruling. For that, there must be a genuine interpretative doubt".

If, however, the *acte clair* test is to be adopted it must be applied with caution and the national supreme court must take a number of factors into account, especially as the provisions of Community law are drafted in several languages and the aim of Article 177 is to ensure the uniform application of Community law. In conclusion, therefore, that national court may not, on its own authority, set aside a Community measure which it regards as unlawful; similarly, it may not discard an interpretation previously adopted by the Court of Justice.

The Danish Government therefore proposes that the Court should give the following answer to the question referred to it:

"National courts against whose decisions there is no judicial remedy are under an obligation to refer to the Court of Justice of the European Communities for a preliminary ruling questions on the validity or interpretation of Community law if they consider that a decision on the question is necessary to enable them to give judgment in a particular case. It is neither necessary nor sufficient, for the purposes of that obligation, for a party to make a request to that effect. However, a court against whose decisions there is no judicial remedy and whose authority is such that its decisions are capable of constituting precedents must, for reasons based on the need to apply Community law in a uniform manner, avoid resolving such questions itself wherever possible".

D — Observations of the Commission

As a preliminary remark, the *Commission* expresses the view that the question submitted to the Court of Justice by the Italian Supreme Court of Cassation "is fundamental".

In the first place, the Commission relies on the theory of the *acte clair* which states that "there must be a genuine difficulty, raised by the parties or perceived by the Court itself, such as to insinuate a doubt into an alert mind"; it

also refers to a similar concept which exists in Italy and in the Federal Republic of Germany regarding the obligation on the part of courts to refer to the constitutional court questions relating to the constitutionality of national legislation. The position in Italy and in the Federal Republic of Germany is that "a court is not obliged to refer a matter to the constitutional court if it considers that the grounds relied upon before it for declaring a measure unconstitutional are manifestly devoid of all substance".

Next, after examining the principal arguments for and against the view that a court of last instance has a margin of discretion in relation to Community law, the Commission considers that such a view is acceptable under Community law.

In this connection it recalls that in its reply to Written Question No 608/78 by Mr Krieg (Official Journal 1979 C 28) it has already stated that in its opinion:

"National courts are not required, under Article 177 of the EEC Treaty, to stay proceedings and systematically refer to the Court of Justice all questions concerning the interpretation of Community law which are submitted to them. They can decline to make a reference and decide the matter themselves in cases where such questions are perfectly straightforward and the answer is obvious to any lawyer with a modicum of experience."

After analysing the third paragraph of Article 177, the Commission expresses the conviction that its earlier standpoint is correct. It takes the view that before there can be an obligation to make a reference for a preliminary ruling a question must arise before the national court of last instance and that question must relate to the interpretation of a text. According to the Commission, the word "question" is synonymous with "problem" and the verb "to interpret" means to comprehend and explain the wording of a text or a speech, the meaning of which is obscure or which creates uncertainty".

If therefore a provision is quite unequivocal "no question can arise and there is no need to seek an interpretation".

Admittedly, it is true that interpretation is a continuing process, even in relation to provisions which are unequivocal and therefore immediately comprehensible, but "it is clear however that only genuine problems, intellectual difficulties which need to be overcome can form the subject-matter of the questions of interpretation referred to in the third paragraph of Article 177".

The discretion which the Commission thus attributes to the court hearing the case falls into the same category as the discretionary powers which have already been entrusted to it. National courts must therefore decide cases brought before them and apply Community law, whilst recognizing the jurisdiction of the Court of Justice to interpret Community law. The Court of Justice's recognition of the national court's margin of discretion "would bear witness to its confidence in national courts"; moreover, only in a spirit of mutual confidence can the procedures provided for by Article 177 be applied successfully.

Of course, mistakes may be made by national courts in interpreting a provision of Community law but, in the Court's opinion, the drawbacks which may result from such errors are limited and offset by the advantages, especially

for the proper administration of justice, of not compelling the courts of last instance of the Member States to refer to the Court of Justice all questions concerning provisions of Community law".

However, the Commission wishes to "emphasize categorically that, in view of the peculiarities of Community law, the national court's discretion in relation to Community law must be exercised only with the greatest caution".

The Commission recalls in this regard that Community legislation is drafted in seven languages and frequently reflects political compromises with the result that "the exercise of a discretion by a national court in relation to Community legislation calls for much greater caution than recourse to the theory of the *acte clair* in a national context". Thus, before it exercises its discretion, a national court must first and foremost acquaint itself with the decisions of the Court of Justice and, if the slightest doubt exists, the supreme court must refer the matter to the Court of Justice for a preliminary ruling.

In the Commission's opinion, the result would be that "cases in which it is legitimate to refrain from referring a matter to the Court of Justice would in practice be very few".

The Commission therefore proposes that, the question referred to the Court of Justice for a preliminary ruling should be answered as follows:

"Under the third paragraph of Article 177 of the EEC Treaty courts against whose decisions there is no judicial remedy under national law must refer to the Court of Justice any question raised before them regarding the meaning of a provision of Community law, unless they have established that that provision does not give rise to any reasonable interpretative doubt."

III — Oral procedure

At the sitting on 8 June 1982, the plaintiffs in the main action, represented by G. M. Ubertazzi and F. Capelli, the Italian Government, represented by S. Laporta, Avvocato dello Stato, and the Commission of the European Communities, represented by G. Olmi, Deputy Director General of its Legal Department, and by Miss Mary Minch, a member of its Legal Department, acting as Agents, presented oral argument and replied to the questions put to them by the Court.

The Advocate General delivered his opinion at the sitting on 13 July 1982.

Decision

1 By order of 27 March 1981, which was received at the Court on 31 October 1981, the Corte Suprema di Cassazione [Supreme Court of Cassation] referred to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of the third paragraph of Article 177 of the EEC Treaty.

2 That question was raised in connection with a dispute between wool importers and the Italian Ministry of Health concerning the payment of a fixed health inspection levy in respect of wool imported from outside the Community. The firms concerned relied on Regulation (EEC) No 827/68 of 28 June 1968 on the common organization of the market in certain products listed in Annex II to the Treaty (Official Journal, English Special Edition 1968 (I) p. 209). Article 2 (2) of that regulation prohibits Member States from levying any charge having an effect equivalent to a customs duty on imported "animal products", not specified or included elsewhere, classified under heading 05.15 of the Common Customs Tariff. Against that argument the Ministry for Health contended that wool is not included in Annex II to the Treaty and is therefore not subject to a common organization of agricultural markets.

3 The Ministry of Health infers from those circumstances that the answer to the question concerning the interpretation of the measure adopted by the Community institutions is so obvious as to rule out the possibility of there being any interpretative doubt and thus obviates the need to refer the matter to the Court of Justice for a preliminary ruling. However, the companies concerned maintain that since a question concerning the interpretation of a regulation has been raised before the Corte Suprema di Cassazione, against whose decisions there is no judicial remedy under national law, that court cannot, according to the terms of the third paragraph of Article 177, escape the obligation to bring the matter before the Court of Justice.

4 Faced with those conflicting arguments, the Corte Suprema di Cassazione referred to the Court the following question for a preliminary ruling:

"Does the third paragraph of Article 177 of the EEC Treaty, which provides that where any question of the same kind as those listed in the first paragraph of that article is raised in a case pending before a national court or tribunal against whose decisions there is no judicial remedy under national law that court or tribunal must bring the matter before the Court of Justice, lay down an obligation so to submit the case which precludes the national court from determining whether the question raised is justified or does it, and if so within what limits, make that obligation conditional on the prior finding of a reasonable interpretative doubt?"

5 In order to answer that question it is necessary to take account of the system established by Article 177, which confers jurisdiction on the Court of Justice to give preliminary rulings on, *inter alia,* the interpretation of the Treaty and the measures adopted by the institutions of the Community.

6 The second paragraph of that article provides that any court or tribunal of a Member State *may,* if it considers that a decision on a question of interpretation is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. The third paragraph of that article provides that, where a question of interpretation is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal *shall,* bring the matter before the Court of Justice.

7 That obligation to refer a matter to the Court of Justice is based on cooperation, established with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice. More particularly, the third paragraph of Article 177 seeks to prevent the occurrence within the Community of divergences in judicial decisions on questions of Community law. The scope of that obligation must therefore be assessed, in view of those objectives, by reference to the powers of the national courts, on the one hand, and those of the Court of Justice, on the other, where such a question of interpretation is raised within the meaning of Article 177.

8 In this connection, it is necessary to define the meaning for the purposes of Community law of the expression "where any such question is raised" in order to determine the circumstances in which a national court or tribunal against whose decisions there is no judicial remedy under national law is obliged to bring a matter before the Court of Justice.

9 In this regard, it must in the first place be pointed out that Article 177 does not constitute a means of redress available to the parties to a case pending before a national court or tribunal. Therefore the mere fact that a party contends that the dispute gives rise to a question concerning the interpretation of Community law does not mean that the court or tribunal concerned is compelled to consider that a question has been raised within the meaning of Article 177. On the other hand, a national court or tribunal may, in an appropriate case, refer a matter to the Court of Justice of its own motion.

10 Secondly, it follows from the relationship between the second and third paragraphs of Article 177 that the courts or tribunals referred to in the third paragraph have the same discretion as any other national court or tribunal to ascertain whether a decision on a question of Community law is necessary to enable them to give judgment. Accordingly, those courts or tribunals are not obliged to refer to the Court of Justice a question concerning the interpretation of Community law raised before them if that question is not relevant, that is to say, if the answer to that question, regardless of what it may be, can in no way affect the outcome of the case.

11 If, however, those courts or tribunals consider that recourse to Community law is necessary to enable them to decide a case, Article 177 imposes an obligation on them to refer to the Court of Justice any question of interpretation which may arise.

12 The question submitted by the Corte di Cassazione seeks to ascertain whether, in certain circumstances, the obligation laid down by the third paragraph of Article 177 might none the less be subject to certain restrictions.

13 It must be remembered in this connection that in its judgment of 27 March 1963 in Joined Cases 28 to 30/62 *(Da Costa* v *Nederlandse Belastingadministratie* [1963] ECR 31) the Court ruled that: "Although the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law . . . to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case."

14 The same effect, as regards the limits set to the obligation laid down by the third paragraph of Article 177, may be produced where previous decisions of the Court have already dealt with the point of law in question, irrespective of the nature of the proceedings which led to those decisions, even though the questions at issue are not strictly identical.

15 However, it must not be forgotten that in all such circumstances national courts and tribunals, including those referred to in the third paragraph of Article 177, remain entirely at liberty to bring a matter before the Court of Justice if they consider it appropriate to do so.

16 Finally, the correct application of Community law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it.

17 However, the existence of such a possibility must be assessed on the basis of the characteristic features of Community law and the particular difficulties to which its interpretation gives rise.

18 To begin with, it must be borne in mind that Community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions.

19 It must also be borne in mind, even where the different language versions are entirely in accord with one another, that Community law uses terminology which is peculiar to it. Furthermore, it must be emphasized that legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States.

20 Finally, every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied.

21 In the light of all those considerations, the answer to the question submitted by the Corte Suprema di Cassazione must be that the third paragraph of

Article 177 of the EEC Treaty is to be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

Costs

22 The costs incurred by the Italian Government, the Danish Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Corte Suprema di Cassazione, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question submitted to it by the Corte Suprema di Cassazione by order of 27 March 1981, hereby rules:

The third paragraph of Article 177 of the EEC Treaty must be interpreted as meaning that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community

provision in question has already been interpreted by the Court of Justice or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt. The existence of such a possibility must be assessed in the light of the specific characteristics of Community law, the particular difficulties to which its interpretation gives rise and the risk of divergences in judicial decisions within the Community.

	Mertens de Wilmars	Bosco	Touffait
Due	Pescatore	Mackenzie Stuart	O'Keeffe
Koopmans	Everling	Chloros	Grévisse

Delivered in open court in Luxembourg on 6 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 13 JULY 1982 [1]

Mr President,
Members of the Court,

The request for a preliminary ruling now before the Court concerns one of the provisions of the EEC Treaty relating to the powers of the Court, namely the third paragraph of Article 177. The Italian Corte Suprema di Cassazione [Supreme Court of Cassation] wishes to ascertain whether that provision lays down an obligation to submit a case to the Court of Justice which precludes the national court from determining whether the question raised is justified or whether, and if so within what limits, it makes that obligation conditional on the prior finding of a reasonable interpretative doubt.

I shall briefly summarize the facts of the case. In September 1974 a large number

1 — Translated from the Italian.

Judgment of the Court of Justice, Foto-Frost, Case 314/85 (22 October 1987)

Caption: According to the Foto-Frost judgment, national courts may consider the validity of a Community act. However, national courts themselves have no jurisdiction to declare that a Community act is invalid (in this case, a Commission decision). Only the Court of Justice, responsible for ensuring that Community law is applied uniformly in all the Member States, has the jurisdiction both to declare void or invalid an act of a Community institution.
Source: Reports of Cases before the Court. 1987. [s.l.].
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Publication date: 24/10/2012

Case 314/85
Foto-Frost v Hauptzollamt Lübeck-Ost

(request for a preliminary ruling from the Finanzgericht Hamburg)

(Lack of jurisdiction of national courts to declare acts of Community institutions invalid — Validity of a decision on the post-clearance recovery of import duties)

[…]

Summary of the judgment

1. Preliminary questions — Appraisal of validity — Declaration of invalidity — Lack of jurisdiction of national courts (EEC Treaty, Arts 173, 177 and 184)

2. Own resources of the European Communities — Post-clearance recovery of import or export duties — Importer fulfilling the requirements set out in Article 5 (2) of Regulation No 1697/79 — Post-clearance recovery — Precluded (Council Regulation No 1697/79, Art. 5 (2))

1. National courts against whose decisions there is a judicial remedy under national law may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. In contrast, national courts, whether or not a judicial remedy exists against their decisions under national law, themselves have no jurisdiction to declare that acts of Community institutions are invalid.

That conclusion is dictated, in the first place, by the requirement for Community law to be applied uniformly. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.

Secondly, it is dictated by the necessary coherence of the system of judicial protection established by the Treaty. In Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of an act is challenged before a national court the power to declare the act invalid must also be reserved for the Court of Justice.

That division of jurisdiction may have to be qualified in certain circumstances where the validity of a Community act is contested before a national court in proceedings relating to an application for interim measures.

2. Article 5 (2) of Council Regulation No 1697/79 on the post-clearance recovery of import or export duties, which lays down three specific requirements which must be fulfilled before the competent authorities may waive the post-clearance recovery of duties, must be interpreted as meaning that if all those requirements are fulfilled the person liable is entitled to the waiver of the recovery of the duty in question.

REPORT FOR THE HEARING
delivered in Case 314/85 *

1 — Facts and procedure

A — Legislative context

The matter at issue in the main proceedings is the post-clearance recovery of import duties in respect of the purchase by a trader in the Federal Republic of Germany from traders in other Member States of goods manufactured in the German Democratic Republic.

The post-clearance recovery of import duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties is governed by Council Regulation No 1697/79 of 24 July 1979 (Official Journal 1979, L 197, p. 1).

Article 5 (2) of the regulation governs the situation where the duties have not been collected as a result of an error made by the competent authorities themselves. It provides as follows:

‘The competent authorities may refrain from taking action for the post-clearance recovery of import duties … which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned.

The cases in which the first subparagraph can be applied shall be determined in accordance with the implementing provisions laid down in accordance with the procedure provided for in Article 10’.

The Commission adopted the relevant implementing provisions in Regulation (EEC) No 1573/80 of 20 June 1980 (Official Journal 1980, L 161, p. 1) on the basis of Article 5 (2) of Regulation No 1697/79 and after consulting the Committee on Duty-free Arrangements pursuant to Article 10 of that regulation.

Regulation No 1573/80 provides that where the amount of the duties involved is equal to or greater than 2 000 ECU the competent authority of the Member State ‘shall request the Commission to take a decision on the case, submitting to it all the necessary background information’ (Article 4). After consulting a group of experts from the Member States meeting within the framework of the Committee on Duty-free Arrangements, the Commission ‘shall decide whether the circumstances under consideration are such that no action should be taken for recovery of the duties concerned’ (Article 6). Its decision is to be addressed to the Member State whose competent authority requested the Commission to take a decision on the matter.

B — Facts

Heinz Frost, the plaintiff in the main proceedings, is an importer, exporter and wholesaler of photographic goods in the Federal Republic of Germany, where he trades under the name of Foto-Frost.

Between 23 September 1980 and 9 July 1981 Foto-Frost purchased prismatic binoculars made in the German Democratic Republic from traders in Denmark and in the United Kingdom.

The goods were dispatched under the external Community transit procedure (Article 12 *et seq.* of Council Regulation (EEC) No 222/77 of 13 December 1976 on Community transit, Official Journal 1977, L 38, p. 1) from customs warehouses in Denmark and in the Netherlands. That procedure enables goods coming from a non-member country which are not in free circulation in a Member State to be transported within the Community without renewed customs formalities when the goods cross from one Member State to another.

When Foto-Frost declared the goods for free circulation in the Federal Republic of Germany the competent customs offices, as in the case of previous similar operations, allowed the goods to enter free of duty on the ground that they had been manufactured in the German Democratic Republic.

Following a check, Hauptzollamt Lübeck-Ost took the view that under the German customs legislation the operations in question should give rise to the post-clearance recovery of import duties.

However, the Hauptzollamt considered that Foto-Frost satisfied the requirements laid down in the first subparagraph of Article 5 (2) of Regulation No 1697/79 for the waiver of the post-clearance recovery of duties. Foto-Frost had duly completed its customs declaration and was entitled to believe in good faith that the decision of the customs offices was correct, since similar previous operations had also been exempt from duty.

Since the amount of the duty involved was greater than 2 000 ECU, under Article 4 of the aforementioned implementing regulation (Regulation No 1573/80) the Hauptzollamt itself was not empowered to take the decision not to effect post-clearance recovery of the uncollected duty.

Consequently, the Hauptzollamt referred the matter to the Federal Minister for Finance. By a letter dated 4 February 1983 the Minister requested the Commission to decide under Article 6 of Regulation No 1573/80 whether the post-clearance recovery of the import duties in question could be waived.

On 6 May 1983 the Commission delivered its decision to the Federal Republic of Germany to the effect that post-clearance recovery could not be waived.

In that decision the Commission states in the first place that, in accordance with usual practice, the customs authorities had initially merely accepted Foto-Frost's statements as being correct.

The decision goes on to state as follows:

'Whereas it was found when the declarations were checked subsequently that the binoculars declared for free circulation under the conditions described above did not meet the conditions for duty-free admission under the arrangements for inter-German trade;

Whereas the importer was in a position to consider the circumstances of the import operations in question in the light of the provisions governing inter-German trade, the application of which he was claiming; whereas he could thus detect any error in implementing these provisions; whereas, moreover, it has been established that he did not comply with all the provisions laid down by the rules in force as regards the customs declarations;

Whereas consequently the conditions laid down in Article 5 (2) of Regulation (EEC) No 1697/79 are not met;

Whereas there is therefore no justification for not effecting the post-clearance recovery of import duties in this case'.

On those grounds, the Commission decided that 'the import duties of DM 64 346.53, the subject-matter of the request by the Federal Republic of Germany dated 4 February 1983, shall be the subject of post-clearance recovery'.

Following that decision, Hauptzollamt Lübeck-Ost issued an amendment notice on 22 July 1983 in respect of the import operations in question. In that notice the Hauptzollamt notified Foto-Frost that the Commission had adopted a decision on 6 May 1983 to the effect that the competent authorities in the Federal Republic of Germany could not waive the post-clearance recovery of duty in its case. However, the Hauptzollamt did not specify the grounds for the Commission's decision. Accordingly it claimed payment from Foto-Frost of DM 64 346.53 by way of customs duties on the imports. It also claimed payment of DM 12 786.10 by way of import turnover tax in respect of the same operations.

Foto-Frost did not challenge the Commission's decision before the Court of Justice. It did, however, request the Finanzgericht Hamburg to suspend the operation of the amendment notice issued by the Hauptzollamt.

In an order of 22 September 1983 the Finanzgericht took the view that the effect of the Protocol on German internal trade was to exempt operations which fell within the ambit of German internal trade from import duties. Paragraph 1 of that Protocol provided as follows: 'Since trade between the German territories subject to the Basic Law for the Federal Republic of Germany and the German territories in which the Basic Law does not apply is a part of German internal trade, the application of this Treaty in Germany requires no change in the treatment currently accorded this trade'. In the light of the case-law of both the courts of the Federal Republic of Germany and the Court of Justice the Finanzgericht considered that the operations in question appeared to fall within the ambit of German internal trade. Consequently, it considered that it was appropriate to suspend the amendment notice until it had been established definitively, if necessary after referring a preliminary question to the Court of Justice, whether post-clearance recovery of the import duties was justified in this case.

In addition, Foto-Frost instituted proceedings before the Finanzgericht Hamburg for the definitive annulment of the amendment notice.

C — The preliminary questions

In the course of those proceedings, the Finanzgericht Hamburg decided, by order of 29 August 1985, to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

‘(1) Can the national court review the validity of a decision adopted by the Commission pursuant to Article 6 of Commission Regulation (EEC) No 1573/80 of 20 June 1980 (Official Journal L 161, p. 1) on whether the post-clearance recovery of import duties should be waived pursuant to Article 5 (2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 (Official Journal L 197, p. 1), which decision held that there was no justification for waiving the recovery of the import duties, and can it, if appropriate, hold in proceedings challenging such a decision that recovery of the duties should be waived?

(2) If the national court cannot review the validity of the Commission’s decision, is the Commission’s decision of 6 May 1983 (ECR 3/83) valid?

(3) If the national court can review the validity of the Commission’s decision, is Article 5 (2) of Regulation (EEC) No 1697/79 to be interpreted as conferring a power to adopt a discretionary decision, which may be reviewed by the Court only as regards abuses of that discretion (and if so, which abuses?) without any possibility of substituting its own discretion, or does it confer the power to adopt a measure of equitable relief, which is fully subject to review by the court?

(4) If the assessment to customs duties cannot be waived pursuant to Article 5 (2) of Regulation (EEC) No 1697/79, do goods originating in the German Democratic Republic which have been introduced into the Federal Republic of Germany via a Member State other than Germany by way of the external Community transit procedure fall within the ambit of German internal trade within the meaning of the Protocol on German internal trade and connected problems of 25 March 1957, with the consequence that when they are imported into the Federal Republic of Germany they are liable neither to customs duties nor to import turnover tax, or are such charges to be levied as in the case of imports from non-member countries, so that Community customs duties, in accordance with the relevant customs legislation, and import turnover tax, in accordance with Article 2 (2) of the Sixth Council Directive on the harmonization of turnover taxes in the European Communities, are to be levied?’

The Finanzgericht set out the following matters in its request for a preliminary ruling by way of explanation of the questions referred to the Court.

In the first place, in its opinion, the validity of the Commission’s decision is doubtful. Foto-Frost’s position appears to satisfy the requirements laid down in the first subparagraph of Article 5 (2) of Regulation No 1697/79 (an error by the competent authorities which could not reasonably have been detected by the person liable, good faith on the latter’s part and observance of all the provisions laid down as far as the customs declaration is concerned). Since the amendment notice at issue was based on the Commission’s decision of 6 May 1983 the Finanzgericht considers that it could not annul the notice unless the decision has been declared invalid first.

The Finanzgericht therefore asks, in the first place, whether it can itself review the validity of the Commission's decision. In its opinion it is for the Court of Justice alone to rule on the validity of the Commission's decision of 6 May 1983, but it nevertheless seeks the Court's ruling on that question.

Secondly, in the event that the Court states that it alone has the power to review the validity of the Commission's decision, the Finanzgericht requests the Court of Justice to review the validity of that decision.

Thirdly, in the event that the Court nevertheless considers that the Finanzgericht itself can decide on the validity of the Commission's decision, it asks whether the application of Article 5 (2) of Regulation No 1697/79 is based upon the exercise of a discretion which the national court may review only as regards an abuse thereof ('Ermessensfehler') or whether, as the Finanzgericht itself believes, it is based upon a measure of equitable relief all aspects of which are open to review.

Fourthly, in the event that it is clear from the answers given to the foregoing questions that it was not possible in this case to waive post-clearance recovery, the Finanzgericht asks whether Foto-Frost did in fact have to pay duty on the operations in question. According to the Finanzgericht this question is concerned to establish whether the operations in question fell within the scope of German internal trade for the purposes of the Protocol on German internal trade. Contrary to the view expressed in the order of 22 September 1983, it considers that those operations did not fall within the scope of that trade. It is now of the opinion that the protocol covers only those transactions which fell within the ambit of German internal trade within the meaning of the German legislation in force at the time when the protocol was adopted. At the time when the protocol came into force, operations of the type with which this case is concerned did not fall within the ambit of German internal trade.

The Finanzgericht's order was received at the Court Registry on 18 October 1985.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice, written observations were submitted on 6 January 1986 by Hauptzollamt Lübeck-Ost, the defendant in the main proceedings, represented by its Director, Mr Koal, on 14 January 1986 by the Commission of the European Communities, represented by Jörn Sack, acting as Agent, on 16 January 1986 by the Government of the Federal Republic of Germany, represented by Martin Seidel, acting as Agent, and on 20 January 1986 by Foto-Frost, the plaintiff in the main proceedings, represented by Messrs Modest, Gündisch and Landry, Rechtsanwälte, Hamburg.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. Nevertheless, the Court requested Foto-Frost, the government of the Federal Republic of Germany and the Commission to reply in writing to a number of questions and to produce certain documents. Those requests were acted upon within the period laid down.

2 — Written observations submitted to the Court

The first question (competence of courts against whose decisions a judicial remedy exists under national law to declare a Community act invalid themselves without referring the matter to the Court of Justice under Article 177 of the EEC Treaty)

Foto-Frost interprets Article 177 of the EEC Treaty as meaning that the power to judge the validity of acts of the Community institutions is confined to the Court of Justice. Such a conclusion is necessary in order to ensure uniform application of the relevant provisions of Community law.

The *government of the Federal Republic of Germany* states, without giving reasons for its view, that the Court of Justice alone has the power to annul an act of a Community institution.

The *Commission* considers that the second paragraph of Article 177 of the EEC Treaty cannot be interpreted

as conferring on a court or tribunal against whose decisions a judicial remedy exists the power to declare Community acts invalid or inapplicable.

In the first place, such an interpretation would detract from the binding effect which Article 189 of the EEC Treaty attributes to acts of the Community institutions. The binding effect of a decision addressed to a Member State extends, moreover, to all the authorities of that State, including its courts, in so far as the Court of Justice has not declared the decision unlawful.

According to the Commission, this case shows that if it were accepted that a national court or tribunal against whose decisions judicial remedies lie has the power to set aside the application of Community acts, the binding effect of those acts could easily be circumvented, specifically in situations of conflict. The Commission's decision does not always correspond to the point of view of the Member State to which it is addressed. If the national court or tribunal were to declare the Community decision invalid, the Member State could refrain from lodging an appeal against the judgment and the decision would therefore be deprived of its binding effect.

Secondly, the distribution of responsibilities between the Court of Justice and national courts in any event requires the power to rule on the validity of Community acts to be confined to the Court.

For reasons relating to the effective legal protection of individuals the Commission accepts a single exception, namely the possibility of granting a suspension in urgent cases, that is to say in connection with an application for interim measures, provided that in the main proceedings a reference is made to the Court of Justice. In that regard the Commission refers to the observations submitted by it in Cases 97/85 *Union Deutsche Lebensmittelwerke GmbH* v *Commission* [1987] ECR 2265 and 249/85 *Albako Margarinefabrik* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1987] ECR 2345.

The second question (validity of the Commission's decision of 6 May 1983)

Foto-Frost considers that the decision of 6 May 1983 is invalid. In order to support that view Foto-Frost attempts to show first that the Commission is under a duty to adopt a decision declaring that the situation examined by it is such as to permit the waiver of post-clearance recovery of the duty in question where the requirements laid down in the first subparagraph of Article 5 (2) of Regulation No 1697/79 are satisfied and, secondly, that those requirements were actually satisfied in this case.

Foto-Frost bases its view that the Commission was under a duty to adopt a decision permitting post-clearance recovery to be waived on two arguments.

First, it maintains that the preamble to Council Regulation No 1697/79 expresses a concern to limit post-clearance recovery in the light of the need for legal certainty. In Foto-Frost's view its interpretation of Article 5 (2) is consistent with the objective of legal certainty, since it results in uniform application of the provision in all Member States.

Secondly, Foto-Frost states that even if there is no provision expressly obliging the Commission to adopt a decision permitting post-clearance recovery to be waived where the requirements laid down in Article 5 (2) are satisfied, Article 2 of Commission Regulation No 1573/80 obliges the national authorities, when the question falls to be decided by them, not to take action for post-clearance recovery in such cases. Foto-Frost takes the view that it is possible to infer by analogy from that provision that when the question falls to be decided by the Commission it is bound to adopt a decision permitting post-clearance recovery to be waived in those circumstances.

Foto-Frost then endeavours to show that the requirements laid down in Article 5 (2) were in fact satisfied in this case, in particular that it acted in good faith. In that regard it places particular emphasis on the fact that the Finanzgericht Hamburg itself considered in its order of 22 September 1983 suspending the amendment notice that it was extremely doubtful whether import duty could be levied in respect of the goods in

question. Consequently, Foto-Frost, which had no expertise in the matter, could be excused for not having detected the alleged mistake. In addition, previous imports of a similar nature had always been exempted from duty. Finally, it maintains that it completed the customs declarations correctly.

According to Foto-Frost, it follows from the foregoing that the Commission was under a duty to adopt a decision permitting post-clearance recovery of the duty in question to be waived. Consequently, its decision of 6 May 1983 is invalid.

The *government of the Federal Republic of Germany* does not wish to submit any opinion on the second question. However, it points out that the German customs authorities at no time cast doubt on the validity of the decision and, on the contrary, ensured its execution.

The *Commission* contends, in the first place, that the duty in question was in fact payable. It goes on to maintain that the error which led the customs authorities not to claim the duty could have been detected by Foto-Frost.

In order to show that the duty in question was payable the Commission states that the system of trade between the Federal Republic of Germany and the German Democratic Republic, which is regulated by the Berlin Agreement of 20 September 1951 (the version in force at the relevant time was published in the annex to *Bundesanzeiger* No 41 of 28.2.1979), is based on two essential ideas. First, on account of the contrasting nature of the two economic systems, German internal trade is subject to significant restrictions with regard to quantities and price. Secondly, the system of trade is based on the idea that a single customs territory continues to exist despite the division of Germany, with the consequence that direct economic relations between the Federal Republic of Germany and the German Democratic Republic are exempt from import duty.

With regard more particularly to what are known as triangular operations, such as those at issue in the main proceedings, the Commission accepts that they fall within the ambit of German internal trade. They are therefore subject to certain provisions of that trade system and, in particular, to the restrictions applicable with regard to quantities and price. However, such transactions are not subject to all the rules which generally govern operations falling within the ambit of German internal trade. Thus, they are not exempt from customs duty since that exemption applies only to goods which have not left the single customs territory (Federal Republic of Germany and German Democratic Republic). Moreover, the Protocol on German internal trade does not provide that operations falling within the ambit of German internal trade are necessarily exempt from import duty.

In order to show that the error committed by the customs offices could have been detected, the Commission argues that the position in the Federal Republic of Germany has been settled as described above since a judgment of the Bundesfinanzhof (Federal Finance Court) of 3 July 1958 (*Zeitschrift für Zölle and Verbrauchssteuern*, 1958, p. 373). Since Foto-Frost specialized in trade with the German Democratic Republic it could have obtained that information without difficulty. Since it had not made the relevant inquiries it bore a substantial part of the responsibility for the error which occurred and could not therefore seek to benefit from the first subparagraph of Article 5 (2) of Regulation No 1697/79.

In its view the decision of 6 May 1983 was therefore valid.

The third question (scope of the power of review of the national court in the event that the Court of Justice considers that the national court has the power to declare such a decision invalid itself)

The *government of the Federal Republic of Germany* and the *Commission* consider that in view of the proposed reply to the first question there is no need to reply to the third question.

The fourth question (do the operations in question fall within the ambit of German internal trade for the purposes of the Protocol on German internal trade and hence are not liable to customs duty and turnover

tax?)

Foto-Frost states that customs duty was not payable in respect of the operations in question since they fell within the scope of German internal trade within the meaning of the relevant protocol.

In that regard it refers to Paragraph 16 of the Regulation of 1 March 1979 implementing the interzonal trade regulation (*Supplement to Bundesanzeiger* No 47 of 8.3.1979, p. 3) according to which German internal trade includes triangular transactions, defined as follows: 'Operations effected between a person located in the territory of the Federal Republic of Germany and a person located in a country other than the Federal Republic of Germany or the German Democratic Republic on the basis of which goods ... are to be transported from the currency area of the mark of the German Democratic Republic to the territory of the Federal Republic of Germany either directly or via some other country'.

Foto-Frost recognizes that the adoption of that rule is of a later date to the protocol. However, the legislation in force at the time of the protocol's adoption itself gave a very wide definition to operations falling within the ambit of German internal trade and did not exclude operations such as the ones at issue in this case. In its view that was the reason why the Bundesverwaltungsgericht (Federal Administrative Court) decided in its judgment of 26 June 1981 (*Zeitschrift fur Zölle and Verbrauchssteuern*, 1982, p. 55) that German internal trade within the meaning of the protocol also covered triangular transactions. Foto-Frost also refers to the judgment of the Court of Justice of 27 September 1979 in Case 23/79 (*Geflügelschlachterei Freystadt* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 2789, at p. 2802) according to which the sequence of commercial transactions and their forms do not need to be taken into account in determining whether or not a transaction forms part of German internal trade.

With regard to import turnover tax, Foto-Frost refers to the German Government's declaration concerning Article 3 of the Sixth Council Directive on the harmonization of the laws of the Member States relating to turnover taxes. By that declaration the German Government reserved the right to treat the territory of the German Democratic Republic as forming part of its national territory for the purposes of turnover tax. A circular issued by the Federal Minister for Finance concerning German law on turnover tax states that the importation into the Federal Republic of Germany, within the framework of German internal trade, of goods which are in free circulation in the currency area of the mark of the German Democratic Republic is not subject to import turnover tax.

In their observations concerning the fourth question the *Hauptzollamt*, the *government of the Federal Republic of Germany* and the *Commission* deal only with the question of customs duty since the question of turnover tax does not fall within the Community rules governing post-clearance recovery of import duties.

According to the *Hauptzollamt* it does not follow from the fact that an operation falls within the ambit of German internal trade that it is exempt from import duty. It is clear from the Berlin Agreement of 20 September 1951 that only goods which are imported directly and whose cost is settled by means of a clearing system between the central banks of the two countries in question are exempt from import duty. Since triangular transactions do not give rise to such clearing there is no reason for them to be exempt from customs duty. The Hauptzollamt therefore considers that it is not necessary for the purposes of these proceedings to determine whether or not triangular transactions fall within the ambit of German internal trade.

The *government of the Federal Republic of Germany* considers that the exemption from duty provided for by the protocol applies only to operations which were exempt under the German legislation in force at the time when the protocol was adopted. At the time when the protocol was adopted import duty had to be paid in respect of goods imported into the Federal Republic of Germany by virtue of a triangular operation. The exemption from duty provided for by the protocol does not therefore extend to such operations. The Government states in that regard that since the establishment of the Community it has always levied Community customs duty in respect of triangular operations and has remitted it to the Community.

The *Commission* considers that the fourth question is irrelevant. In its view there is no need to consider whether or not operations such as those at issue in this case fall within the scope of German internal trade. Even if they did fall within the scope of that trade that would not make them exempt from import duty. The protocol refers expressly to 'the treatment currently accorded' German internal trade, that is to say the system in force at the time when the protocol was adopted. At that time import duty was payable in respect of triangular operations. Consequently, the protocol does not provide a basis for exempting the operations at issue from import duty.

3 — Answers to questions put by the Court

(1) *Foto-Frost* was asked to answer the following two questions:

'(a) Why were the goods whose importation gave rise to the customs duty at issue not imported directly from the German Democratic Republic into the Federal Republic of Germany?

(b) What *was* the final destination of the goods?'

In reply to the *first question* Foto-Frost explained that there were agreements between Firma Carl Zeiss Jena (German Democratic Republic) and Firma Carl Zeiss Oberkochen (Federal Republic of Germany) under which the goods in question had to pass through a third country.

Foto-Frost replied to the *second question* that it had exported those binoculars at issue which it had purchased during 1980 to Italy. Of those which it had acquired during 1981 some were exported to Italy and South Africa and some were sold to two other undertakings established in the Federal Republic of Germany which, to the best of its knowledge, subsequently exported them.

(2) The *Commission* was asked by the Court to state in what manner Foto-Frost had failed to observe all the requirements laid down by the rules in force with regard to customs declarations.

The Commission replied that in its decision of 6 May 1983 it had regarded the question whether or not Foto-Frost had observed all the requirements laid down by the rules in force with regard to customs declarations as being of secondary importance. However, it accepted in its reply to this question that Foto-Frost had completed its customs declaration correctly. The complaint made by the Commission against Foto-Frost in its decision was that the latter had maintained *vis-à-vis* the customs authorities that the goods were exempt from customs duty because they originated in the German Democratic Republic whereas the question was doubtful. The Commission considered that a person liable to pay duty who submits a declaration to the customs authorities cannot act as if he qualifies for some entitlement when the matter is manifestly open to doubt.

(3) The *government of the Federal Republic of Germany* was asked by the Court to explain the system of German internal trade, the application of which is protected by the Protocol of 25 March 1957, in order to enable the Court to place the fourth question in the relevant context of primary and secondary legislation.

In its answer to the question the German Government states that the system of German internal trade within the meaning of the protocol is based on the Berlin Agreement of 20 September 1951, various regulations and laws adopted in 1949 and 1950 by the respective governments and military commanders, and implementing regulations subsequently adopted by the legislature of the Federal Republic of Germany.

Under the laws and regulations adopted by the military authorities transactions for the purchase of goods between the Federal Republic of Germany and the German Democratic Republic are, in principle, prohibited.

Nevertheless, the government of the Federal Republic of Germany has the right to provide for exceptions to

that prohibition.

Operations authorized pursuant to such derogations are effected by means of a clearing system. That means that they are not paid for in freely convertible currency but are entered in clearing accounts kept on behalf of the Federal Republic of Germany by the Deutsche Bundesbank and on behalf of the German Democratic Republic by the Staatsbank.

In order that trade relations between the Federal Republic of Germany and the German Democratic Republic are conducted exclusively by means of the clearing system, measures have been adopted to prevent goods originating in the German Democratic Republic from being imported into the Federal Republic of Germany via other countries. The German Democratic Republic is able, by means of such indirect imports, to obtain freely convertible currency and thereby circumvent the clearing system.

The measures in question are contained in the laws and regulations adopted by the military authorities. They established a system of advance authorization and monitoring which is applied very strictly by the government of the Federal Republic of Germany.

The German Government also states that at the time when the protocol was adopted customs duty was payable on triangular operations. The exemption provided for by the protocol does not therefore extend to such operations.

Finally, the German Government states that since triangular operations are subject to import customs duty they are also subject to turnover tax.

R. Joliet
Judge-Rapporteur

[…]

JUDGMENT OF THE COURT
22 October 1987 *

In Case 314/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Hamburg for a preliminary ruling in the proceedings pending before that court between

Foto-Frost, Ammersbek,

and

Hauptzollamt Lübeck-Ost,

on the interpretation of Article 177 of the EEC Treaty, Article 5 (2) of Council Regulation No 1697/79 (EEC) of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (Official Journal 1979, L 197, p. 1), on the interpretation of the Protocol of 25 March 1957 on German internal trade and connected problems, and on the validity of a Commission decision addressed on 6 May 1983 to the Federal Republic of Germany finding that the post-clearance recovery of import duties must be effected in a particular case,

THE COURT,

composed of: Lord Mackenzie Stuart, President, G. Bosco, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias (Presidents of Chambers), T. Koopmans, U. Everling, K. Bahlmann, Y. Galmot, R. Joliet,

T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: G. F. Mancini
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of

— Foto-Frost, the plaintiff in the main proceedings, by H. Heemann, Rechtsanwalt, Hamburg, assisted by H. Frost, expert,

— the Government of the Federal Republic of Germany, by M. Seidel, acting as Agent,

— the Commission of the European Communities, by J. Sack, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing as supplemented further to the hearing on 16 December 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 19 May 1987,

gives the following

Judgment

1 By an order of 29 August 1985, which was received at the Court on 18 October 1985, the Finanzgericht (Finance Court) Hamburg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions concerning the interpretation of Article 177 of the EEC Treaty, Article 5 (2) of Council Regulation No 1697/79 on 24 July 1979 on the post-clearance recovery of import duties or export duties (Official Journal 1979, L 197, p. 1) and the Protocol of 25 March 1957 on German internal trade and connected problems, and the validity of a Commission decision addressed on 6 May 1983 to the Federal Republic of Germany finding that the post-clearance recovery of import duties must be effected in a particular case.

2 Those questions were raised in proceedings brought by Firma Foto-Frost, Ammersbek (Federal Republic of Germany), an importer, exporter and wholesaler of photographic goods, for the annulment of a notice issued by the Hauptzollamt (Principal Customs Office) Lübeck-Ost for the post-clearance recovery of import duties following a Commission decision addressed to the Federal Republic of Germany on 6 May 1983 in which it was held that it was not permissible to waive the recovery of import duties in the case in question.

3 The operation to which the recovery of duties related were Foto-Frost's importation into the Federal Republic of Germany and release for free circulation there of prismatic binoculars originating in the German Democratic Republic. Foto-Frost purchased the binoculars from traders in Denmark and the United Kingdom, which dispatched them to it under the Community external transit procedure from customs warehouses in Denmark and the Netherlands.

4 The competent customs offices initially allowed the goods to enter free of duty on the ground that they originated in the German Democratic Republic. Following a check, Hauptzollamt Lübeck-Ost, the principal customs office, considered that customs duty was due under the German customs legislation. However, it took the view that it was not appropriate to effect the post-clearance recovery of the duty on the ground that Foto-Frost fulfilled the requirements set out in Article 5 (2) of Council Regulation No 1697/79, which provides that 'The competent authorities may refrain from taking action for the post-clearance recovery of import duties or export duties which were not collected as a result of an error made by the competent authorities themselves which could not reasonably have been detected by the person liable, the latter having for his part acted in good faith and observed all the provisions laid down by the rules in force as far as his customs declaration is concerned'. According to the order requesting a preliminary ruling the Hauptzollamt

took the view that Foto-Frost had completed the customs declaration correctly and could not have been expected to detect the error in so far as other customs offices had considered that previous similar operations did not give rise to the payment of duty.

5 Since the amount of the duty involved was greater than 2 000 ECU, under Commission Regulation No 1573/80 of 20 June 1980 laying down provisions for the implementation of Article 5 (2) of the aforementioned Council Regulation No 1697/79 (Official Journal 1980, L 161, p. 1) the Hauptzollamt itself was not empowered to take the decision not to effect post-clearance recovery. Consequently, at the Hauptzollamt's request, the Federal Minister for Finance requested the Commission to decide under Article 6 of the aforesaid Regulation No 1573/80 whether the post-clearance recovery of the duty in question could be waived.

6 On 6 May 1983 the Commission addressed to the Federal Republic of Germany a decision to the effect that it could not. The grounds given for the decision were that 'the customs offices concerned did not themselves make an error in the application of the provisions governing inter-German trade but merely accepted as correct, without immediate question, the information given on the declarations presented by the importer; ... this practice in no way prevents those authorities from subsequently making a correction in respect of charges, this possibility being expressly provided for in Article 10 of Council Directive 79/695/EEC of 24 July 1979 on the harmonization of procedures for the release of goods for free circulation' (Official Journal 1979, L 205, p. 19). It further considered that 'the importer was in a position to consider the circumstances of the import operations in question in the light of the provisions governing inter-German trade, the application of which he was claiming; ... he could thus detect any error in implementing these provisions; ... it has been established that he did not comply with all the provisions laid down by the rules in force as regards the customs declarations'.

7 Following that decision the Hauptzollamt issued the notice for the post-clearance recovery of duty which Foto-Frost is contesting in the main proceedings.

8 Foto-Frost applied to the Finanzgericht Hamburg for an order suspending the operation of that notice. The Finanzgericht allowed the application on the ground that the operations in question appeared to fall within the ambit of German internal trade and were therefore exempt from customs duty under the Protocol on German internal trade.

9 Foto-Frost then applied to the Finanzgericht Hamburg for the annulment of the notice for the post-clearance recovery of duty. The Finanzgericht took the view that the validity of the Commission's decision of 6 May 1983 was doubtful on the ground that all the requirements set out in Article 5 (2) of Council Regulation No 1697/79 for refraining from taking action for the post-clearance recovery of duty were fulfilled. Since the contested notice was based on the Commission's decision, the Finanzgericht considered that it could not annul it unless the Community decision was itself invalid. The Finanzgericht therefore referred the following four questions to the Court for a preliminary ruling:

'(1) Can the national court review the validity of a decision adopted by the Commission pursuant to Article 6 of Commission Regulation (EEC) No 1573/80 of 20 June 1980 (Official Journal L 161, p. 1) on whether the post-clearance recovery of import duties should be waived pursuant to Article 5 (2) of Council Regulation (EEC) No 1697/79 of 24 July 1979 (Official Journal L 197, p. 1), which decision held that there was no justification for waiving the recovery of the import duties, and can it, if appropriate, hold in proceedings challenging such a decision that recovery of the duties should be waived?

(2) If the national court cannot review the validity of the Commission's decision, is the Commission's decision of 6 May 1983 (ECR 3/83) valid?

(3) If the national court can review the validity of the Commission's decision, is Article 5 (2) of Regulation No 1697/79 to be interpreted as conferring a power to adopt a discretionary decision, which may be

reviewed by the court only as regards abuses of that discretion (and if so, which abuses?) without any possibility of substituting its own discretion, or does it confer the power to adopt a measure of equitable relief, which is fully subject to review by the court?

(4) If the assessment to customs duties cannot be waived pursuant to Article 5 (2) of Regulation No 1697/79, do goods originating in the German Democratic Republic which have been introduced into the Federal Republic of Germany via a Member State other than Germany by way of the external Community transit procedure fall within the ambit of German internal trade within the meaning of the Protocol on German internal trade and connected problems of 25 March 1957, with the consequence that when they are imported into the Federal Republic of Germany they are liable neither to customs duties nor to import turnover tax, or are such charges to be levied as in the case of imports from non-member countries, so that Community customs duties, in accordance with the relevant customs legislation, and import turnover tax, in accordance with Article 2 (2) of the Sixth Council Directive on the harmonization of turnover taxes in the European Communities, are to be levied?'

10 Reference is made to the Report for the Hearing for a fuller description of the facts and of the applicable provisions of Community law and for an account of the observations submitted by Foto-Frost, Hauptzollamt Lübeck-Ost, the Government of the Federal Republic of Germany and the Commission.

The first question

11 In its first question the Finanzgericht asks whether it itself is competent to declare invalid a Commission decision such as the decision of 6 May 1983. It casts doubt on the validity of that decision on the ground that all the requirements laid down by Article 5 (2) of Regulation No 1697/79 for taking no action for the post-clearance recovery of duty seem to be fulfilled in this case. However, it considers that in view of the division of jurisdiction between the Court of Justice and the national courts set out in Article 177 of the EEC Treaty only the Court of Justice is competent to declare invalid acts of the Community institutions.

12 Article 177 confers on the Court jurisdiction to give preliminary rulings on the interpretation of the Treaty and of acts of the Community institutions and on the validity of such acts. The second paragraph of that Article provides that national courts may refer such questions to the Court and the third paragraph of that article puts them under an obligation to do so where there is no judicial remedy under national law against their decisions.

13 In enabling national courts, against those decisions where there is a judicial remedy under national law, to refer to the Court for a preliminary ruling questions on interpretation or validity, Article 177 did not settle the question whether those courts themselves may declare that acts of Community institutions are invalid.

14 Those courts may consider the validity of a Community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the Community measure.

15 On the other hand, those courts do not have the power to declare acts of the Community institutions invalid. As the Court emphasized in the judgment of 13 May 1981 in Case 66/80 *International Chemical Corporation v Amministrazione delle Finanze* [1981] ECR 1191, the main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly imperative when the validity of a Community act is in question. Divergences between courts in the Member States as to the validity of Community acts would be liable to place in jeopardy the very unity of the Community legal order and detract from the fundamental requirement of legal certainty.

16 The same conclusion is dictated by consideration of the necessary coherence of the system of judicial protection established by the Treaty. In that regard it must be observed that requests for preliminary rulings, like actions for annulment, constitute means for reviewing the legality of acts of the Community institutions. As the Court pointed out in its judgment of 23 April 1986 in Case 294/83 *Parti écologiste 'les Verts' v European Parliament* [1986] ECR 1339), 'in Articles 173 and 184, on the one hand, and in Article 177, on the other, the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.

17 Since Article 173 gives the Court exclusive jurisdiction to declare void an act of a Community institution, the coherence of the system requires that where the validity of a Community act is challenged before a national court the power to declare the act invalid must also be reserved to the Court of Justice.

18 It must also be emphasized that the Court of Justice is in the best position to decide on the validity of Community acts. Under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, Community institutions whose acts are challenged are entitled to participate in the proceedings in order to defend the validity of the acts in question. Furthermore, under the second paragraph of Article 21 of that Protocol the Court may require the Member States and institutions which are not participating in the proceedings to supply all information which it considers necessary for the purposes of the case before it.

19 It should be added that the rule that national courts may not themselves declare Community acts invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures; however, that case is not referred to in the national court's question.

20 The answer to the first question must therefore be that the national courts have no jurisdiction themselves to declare that acts of Community institutions are invalid.

The second question

21 The second and third questions assume that the operations in question are in fact liable to customs duties. In its second question the Finanzgericht is seeking to ascertain, in the event that the Court alone has jurisdiction to review the validity of the Commission decision, whether that decision is valid.

22 It must be observed that Article 5 (2) of Regulation No 1697/79 lays down three specific requirements which must be fulfilled before the competent authorities may waive the post-clearance recovery of duties. That provision must be interpreted as meaning that if all those requirements are fulfilled the person liable is entitled to the waiver of the recovery of the duty in question.

23 It now falls to be considered whether the three requirements set out in Article 5 (2) of Regulation No 1697/79 are fulfilled in this case. The Court has the power to verify the existence of the facts on which a Community act is based and the legal inferences which the Community institution has drawn therefrom where, in the context of a request for a preliminary ruling, they are alleged to be incorrect.

24 The first requirement contained in Article 5 (2) is that the failure to collect the duty must have been the result of an error made by the competent authorities themselves. In that regard, the Commission's argument to the effect that the customs authorities did not make an error themselves but merely made the initial assumption that the particulars given in Foto-Frost's declaration were correct, as they were entitled to do under Article 10 of Council Directive 79/695/EEC, must be rejected. According to the latter provision, where duty has been calculated on the basis of non-verified particulars given in the customs declaration, the declaration may be subjected to subsequent verification and the amount of duty calculated rectified. In this case, as the Commission itself acknowledged in its observations and in answering a question put to it by the Court, Foto-Frost's declaration contained all the factual particulars needed in order to apply the relevant rules, and those particulars were correct. In those circumstances, the post-clearance check carried out by the German customs authorities failed to disclose any new fact. Therefore, it was in fact as a result of an error made by the customs authorities themselves in initially applying the relevant rules that duty was not charged

when the goods were imported.

25 The second requirement is that the person liable must have acted in good faith or, in other words, that he could not have detected the error made by the competent authorities. In that connection, it is observed that the specialist judges of the Finanzgericht Hamburg expressed the view in their order of 22 September 1983 suspending the operation of the amendment notice that it was very doubtful whether duty was payable on operations of the type at issue. The Finanzgericht considered that such operations appeared to fall within the ambit of German internal trade and were therefore exempt from customs duty under the Protocol on such trade. However, it observed that the situation was uncertain as regards the case-law of both the Court of Justice and the national courts. In those circumstances, it cannot reasonably be considered that Foto-Frost, a commercial undertaking, could have detected the error made by the customs authorities. Moreover, it had even less reason to suspect that an error had been made, since previous similar operations had been granted exemption from duty.

26 The third requirement is that the person liable must have observed all the provisions laid down by the rules in force as far as his customs declaration is concerned. As to that point, it must be observed that, in answering a question put to it by the Court, the Commission itself admitted, contrary to what is stated in its decision of 6 May 1983, that Foto-Frost had completed its customs declaration correctly. Moreover, there is nothing in the documents before the Court to suggest that that was not the case.

27 It follows from the foregoing that all the requirements laid down in Article 5 (2) of Regulation No 1697/79 were fulfilled in this case and therefore Foto-Frost was entitled to the waiver of the post-clearance recovery of the duty in question.

28 Accordingly, the decision addressed to the Federal Republic of Germany on 6 May 1983 in which the Commission stated that post-clearance recovery of import duties must be carried out in a particular case is invalid.

The third question

29 The Finanzgericht asks whether, in the event that it itself is competent to declare the Commission's decision invalid, the application of Article 5 (2) of Regulation No 1697/79 depends on a discretionary decision which the national court may review only as regards abuses of that discretion ('Ermessensfehler') or on a measure of equitable relief, which is fully subject to review by that court?

30 In view of the answers given to the first and second questions, the third question does not call for a reply.

The fourth question

31 The fourth question is put to the Court in the event that it does not emerge from the answers to the first questions that Foto-Frost is entitled to the waiver of post-clearance recovery. The Finanzgericht asks whether in that case the operations in question fall within the ambit of German internal trade within the meaning of the Protocol on German internal trade, which would mean, in its view, that they are exempt from customs duty.

32 In view of the answer given to the second question, the fourth question does not call for a reply.

Costs

33 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

on those grounds,

THE COURT,

in answer to questions submitted to it by the Finanzgericht, Hamburg, by order of 29 August 1985, hereby rules:

(1) The national courts have no jurisdiction themselves to declare that measures taken by Community institutions are invalid.

(2) The decision addressed to the Federal Republic of Germany on 6 May 1983 in which the Commission stated that post-clearance recovery of import duties must be carried out in a particular case is invalid.

Mackenzie Stuart
Bosco
Moitinho de Almeida
Rodríguez Iglesias
Koopmans
Everling
Bahlmann
Galmot
Joliet
O'Higgins
Schockweiler

Delivered in open court in Luxembourg on 22 October 1987.

P. Heim
Registrar

For the President A. J. Mackenzie Stuart
G. Bosco
acting as President

* Language of the Case: German

Avis juridique important

61986J0222

Judgment of the Court of 15 October 1987. - Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others. - Reference for a preliminary ruling: Tribunal de grande instance de Lille - France. - Free movement of workers - Equivalence of diplomas - Sports trainer. - Case 222/86.

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Swedish special edition Page 00223
Finnish special edition Page 00225

Summary
Parties
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Keywords

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1 . FREE MOVEMENT OF PERSONS - WORKERS - RECOGNITION OF DIPLOMAS - ABSENCE OF HARMONIZING DIRECTIVES - DUTY OF THE MEMBER STATES TO ENSURE THE FREE MOVEMENT OF WORKERS UNDER THEIR LEGISLATION ON THE EQUIVALENCE OF DIPLOMAS - CRITERIA FOR ASSESSING EQUIVALENCE

(EEC TREATY, ARTS 5 AND 48)

2 . FREE MOVEMENT OF PERSONS - WORKERS - FREE ACCESS TO EMPLOYMENT - FUNDAMENTAL RIGHT LAID DOWN IN THE TREATY - DECISION OF A NATIONAL AUTHORITY REFUSING THE BENEFIT OF THAT RIGHT - SUBJECT TO JUDICIAL PROCEEDINGS - REQUIREMENT STEMMING FROM A GENERAL PRINCIPLE OF COMMUNITY LAW

(EEC TREATY, ART . 48)

3 . FREE MOVEMENT OF PERSONS - WORKERS - RECOGNITION OF DIPLOMAS - ABSENCE OF HARMONIZING DIRECTIVES - DECISION OF A NATIONAL AUTHORITY REFUSING TO GRANT RECOGNITION - DUTY TO STATE REASONS - SUBJECT TO JUDICIAL PROCEEDINGS

(EEC TREATY, ART . 48)

Summary

1 . THE LAWFUL REQUIREMENT WHEREBY, IN THE VARIOUS MEMBER STATES, ADMISSION TO CERTAIN OCCUPATIONS IS SUBJECTED TO THE POSSESSION OF DIPLOMAS CONSTITUTES A RESTRICTION ON THE EFFECTIVE EXERCISE OF THE FREEDOM OF ESTABLISHMENT GUARANTEED BY THE TREATY THE ABOLITION OF WHICH IS TO BE MADE EASIER BY DIRECTIVES FOR THE MUTUAL RECOGNITION OF DIPLOMAS, CERTIFICATES AND OTHER EVIDENCE OF FORMAL QUALIFICATIONS . IN VIEW OF THE REQUIREMENTS OF ARTICLE 5 OF THE TREATY, THE FACT THAT SUCH DIRECTIVES HAVE NOT YET BEEN ADOPTED DOES NOT ENTITLE A MEMBER STATE TO DENY THE PRACTICAL BENEFIT OF THAT FREEDOM TO A PERSON SUBJECT TO COMMUNITY LAW WHEN THAT FREEDOM CAN BE ENSURED IN THAT MEMBER STATE, IN PARTICULAR BECAUSE IT IS POSSIBLE UNDER ITS LAWS AND REGULATIONS FOR EQUIVALENT

FOREIGN DIPLOMAS TO BE RECOGNIZED .

SINCE IT HAS TO RECONCILE THE REQUIREMENT AS TO THE QUALIFICATIONS NECESSARY IN ORDER TO EXERCISE A PARTICULAR OCCUPATION WITH THE REQUIREMENTS OF THE FREE MOVEMENT OF WORKERS, THE PROCEDURE FOR THE RECOGNITION OF EQUIVALENCE MUST ENABLE THE NATIONAL AUTHORITIES TO ASSURE THEMSELVES, ON AN OBJECTIVE BASIS, THAT THE FOREIGN DIPLOMA CERTIFIES THAT ITS HOLDER HAS KNOWLEDGE AND QUALIFICATIONS WHICH ARE, IF NOT IDENTICAL, AT LEAST EQUIVALENT TO THOSE CERTIFIED BY THE NATIONAL DIPLOMA . THAT ASSESSMENT OF THE EQUIVALENCE OF THE FOREIGN DIPLOMA MUST BE EFFECTED EXCLUSIVELY IN THE LIGHT OF THE LEVEL OF KNOWLEDGE AND QUALIFICATIONS WHICH ITS HOLDER CAN BE ASSUMED TO POSSESS IN THE LIGHT OF THAT DIPLOMA, HAVING REGARD TO THE NATURE AND DURATION OF THE STUDIES AND PRACTICAL TRAINING WHICH THE DIPLOMA CERTIFIES THAT HE HAS CARRIED OUT .

2 . SINCE FREE ACCESS TO EMPLOYMENT IS A FUNDAMENTAL RIGHT WHICH THE TREATY CONFERS INDIVIDUALLY ON EACH MIGRANT WORKER IN THE COMMUNITY, THE EXISTENCE OF A REMEDY OF A JUDICIAL NATURE AGAINST ANY DECISION OF A NATIONAL AUTHORITY REFUSING THE BENEFIT OF THAT RIGHT IS ESSENTIAL IN ORDER TO SECURE FOR THE INDIVIDUAL EFFECTIVE PROTECTION FOR HIS RIGHT . THAT REQUIREMENT REFLECTS A GENERAL PRINCIPLE OF COMMUNITY LAW WHICH STEMS FROM THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES AND HAS BEEN ENSHRINED IN ARTICLES 6 AND 13 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS .

3 . WHERE IN A MEMBER STATE ACCESS TO AN OCCUPATION AS AN EMPLOYED PERSON IS DEPENDENT UPON THE POSSESSION OF A NATIONAL DIPLOMA OR A FOREIGN DIPLOMA RECOGNIZED AS EQUIVALENT THERETO, THE PRINCIPLE OF THE FREE MOVEMENT OF WORKERS LAID DOWN IN ARTICLE 48 OF THE TREATY REQUIRES THAT IT MUST BE POSSIBLE FOR A DECISION REFUSING TO RECOGNIZE THE EQUIVALENCE OF A DIPLOMA GRANTED TO A WORKER WHO IS A NATIONAL OF ANOTHER MEMBER STATE BY THAT MEMBER STATE TO BE MADE THE SUBJECT OF JUDICIAL PROCEEDINGS IN WHICH ITS LEGALITY UNDER COMMUNITY LAW CAN BE REVIEWED, AND FOR THE PERSON CONCERNED TO ASCERTAIN THE REASONS FOR THE DECISION .

Parties

IN CASE 222/86

REFERENCE TO THE COURT UNDER ARTICLE 177 OF THE EEC TREATY BY THE TRIBUNAL DE GRANDE INSTANCE (REGIONAL COURT), LILLE, (EIGHTH CRIMINAL CHAMBER) FOR A PRELIMINARY RULING IN THE PROCEEDINGS PENDING BEFORE THAT COURT BETWEEN

UNION NATIONALE DES ENTRAINEURS ET CADRES TECHNIQUES PROFESSIONNELS DU FOOTFALL (UNECTEF), A TRADE UNION HAVING ITS REGISTERED OFFICE IN PARIS, ON THE ONE HAND,

AND

GEORGES HEYLENS, A FOOTBALL TRAINER, RESIDING AT LA MADELEINE (FRANCE),

JACQUES DEWAILLY, PRESIDENT AND MANAGING DIRECTOR OF THE LILLE OLYMPIC SPORTING CLUB, A SOCIETE ANONYME D' ECONOMIE MIXTE, RESIDING AT VILLENEUVE-D' ASCQ (FRANCE),

JACQUES AMYOT, ALSO A DIRECTOR OF THE LILLE OLYMPIC SPORTING CLUB, RESIDING AT TEMPLEMARS (FRANCE), AND

ROGER DESCHOD, ALSO A DIRECTOR OF THE LILLE OLYMPIC SPORTING CLUB, RESIDING AT FACHES-THUMESNIL (FRANCE), ON THE OTHER HAND,

ON THE INTERPRETATION OF ARTICLE 48 OF THE EEC TREATY,

THE COURT

COMPOSED OF : LORD MACKENZIE STUART, PRESIDENT, G . BOSCO, O . DUE, J . C . MOITINHO DE ALMEIDA AND G . C . RODRIGUEZ IGLESIAS (PRESIDENTS OF CHAMBERS), T . KOOPMANS, U . EVERLING, K . BAHLMANN, Y . GALMOT, C . KAKOURIS, R . JOLIET, T . F . O' HIGGINS AND F . SCHOCKWEILER, JUDGES,

ADVOCATE GENERAL : G . F . MANCINI

REGISTRAR : J . A . POMPE, DEPUTY REGISTRAR

AFTER CONSIDERING THE OBSERVATIONS SUBMITTED ON BEHALF OF

UNION NATIONALE DES ENTRAINEURS ET CADRES TECHNIQUES PROFESSIONNELS DU FOOTBALL (UNECTEF), THE PRIVATE PROSECUTOR IN THE MAIN PROCEEDINGS, BY J . J . BERTRAND IN THE WRITTEN AND IN THE ORAL PROCEEDINGS;

GEORGES HEYLENS, JACQUES DEWAILLY, JACQUES AMYOT AND ROGER DESCHODT, THE DEFENDANTS IN THE MAIN PROCEEDINGS, BY G . DOUSSOT IN THE WRITTEN AND IN THE ORAL PROCEEDINGS;

THE GOVERNMENT OF THE FRENCH REPUBLIC, BY G . GUILLAUME IN THE WRITTEN PROCEEDINGS;

THE GOVERNMENT OF THE KINGDOM OF DENMARK, BY L . MIKAELSEN IN THE WRITTEN PROCEEDINGS AND JOERGEN MOLDE, LEGAL ADVISER IN THE MINISTRY FOR FOREIGN AFFAIRS, IN THE ORAL PROCEEDINGS;

THE COMMISSION OF THE EUROPEAN COMMUNITIES, BY J . GRIESMAR IN THE WRITTEN PROCEEDINGS AND IN THE ORAL PROCEEDINGS;

HAVING REGARD TO THE REPORT FOR THE HEARING AS SUPPLEMENTED FURTHER TO THE HEARING ON 31 MARCH 1987,

AFTER HEARING THE OPINION OF THE ADVOCATE GENERAL DELIVERED AT THE SITTING ON 18 JUNE 1987,

GIVES THE FOLLOWING

JUDGMENT

Grounds

1 BY JUDGMENT OF 4 JULY 1986, LODGED AT THE COURT REGISTRY ON 18 AUGUST 1986, THE TRIBUNAL DE GRANDE INSTANCE (REGIONAL COURT), LILLE, REFERRED TO THE COURT FOR A PRELIMINARY RULING PURSUANT TO ARTICLE 177 OF THE EEC TREATY A QUESTION ON THE INTERPRETATION OF ARTICLE 48 OF THE EEC TREATY .

2 THAT QUESTION WAS RAISED IN THE CRIMINAL PROCEEDINGS FOLLOWING THE PRIVATE PROSECUTION BROUGHT BY UNION NATIONALE DES ENTRAINEURS ET CADRES TECHNIQUES PROFESSIONELS DU FOOTBALL AGAINST GEORGES HEYLENS, A FOOTBALL TRAINER, AND JACQUES DEWAILLY, JACQUES AMYOT AND ROGER DESCHODT, DIRECTORS OF THE LILLE OLYMPIC SPORTING CLUB, A SOCIETE ANONYME D' ECONOMIE MIXTE, AS PRINCIPAL AND ACCESSORIES, RESPECTIVELY, FOR HAVING INFRINGED THE PROVISIONS OF FRENCH LAW NO 84-610 OF 16 JULY 1984 ON THE ORGANIZATION AND PROMOTION OF PHYSICAL AND SPORTING ACTIVITIES (JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE OF 17.7.1984) AND ARTICLE 259 OF THE CRIMINAL CODE WITH REGARD TO THE WRONGFUL ASSUMPTION OF A TITLE .

3 IT APPEARS FROM THE DOCUMENTS BEFORE THE COURT THAT IN ORDER TO PRACTISE THE OCCUPATION OF FOOTBALL TRAINER IN FRANCE A PERSON MUST BE THE HOLDER OF A FRENCH FOOTBALL-TRAINER' S DIPLOMA OR A FOREIGN DIPLOMA WHICH HAS BEEN RECOGNIZED AS EQUIVALENT BY DECISION OF THE COMPETENT MEMBER OF THE GOVERNMENT AFTER CONSULTING A SPECIAL COMMITTEE .

4 THE DEFENDANT IN THE MAIN PROCEEDINGS, GEORGES HEYLENS, IS A BELGIAN NATIONAL AND THE HOLDER OF A BELGIAN FOOTBALL-TRAINER' S DIPLOMA AND WAS ENGAGED BY THE LILLE OLYMPIC SPORTING CLUB AS TRAINER OF THE CLUB' S PROFESSIONAL FOOTBALL TEAM . AN APPLICATION FOR RECOGNITION OF THE EQUIVALENCE OF THE BELGIAN DIPLOMA WAS REJECTED BY DECISION OF THE COMPETENT MEMBER OF THE GOVERNMENT, WHICH REFERRED, BY WAY OF STATEMENT OF REASONS, TO AN ADVERSE OPINION OF THE SPECIAL COMMITTEE, WHICH ITSELF CONTAINED NO STATEMENT OF REASONS . SINCE MR HEYLENS CONTINUED TO PRACTISE AS A FOOTBALL TRAINER, THE FRENCH FOOTBALL-TRAINERS' TRADE UNION SUMMONED HIM AND THE DIRECTORS OF THE FOOTBALL CLUB WHICH HAD ENGAGED HIM BEFORE THE LILLE CRIMINAL COURT .

5 SINCE IT HAD DOUBTS ABOUT THE COMPATIBILITY OF THE FRENCH LEGISLATION WITH THE RULES ON THE FREE MOVEMENT OF WORKERS, THE TRIBUNAL DE GRANDE INSTANCE DE LILLE (

EIGHTH CRIMINAL CHAMBER) SUSPENDED THE PROCEEDINGS UNTIL THE COURT HAD DELIVERED A PRELIMINARY RULING ON THE FOLLOWING QUESTION :

"DOES THE REQUIREMENT THAT A PERSON WISHING TO PURSUE A GAINFUL OCCUPATION AS TRAINER OF A SPORTS TEAM (ARTICLE 43 OF THE LAW OF 16 JULY 1984) MUST HOLD A FRENCH DIPLOMA OR A FOREIGN DIPLOMA RECOGNIZED AS EQUIVALENT THERETO BY A COMMITTEE WHOSE RULINGS DO NOT STATE THE REASONS ON WHICH THEY ARE BASED AND AGAINST WHOSE DECISIONS NO SPECIFIC LEGAL REMEDY IS AVAILABLE CONSTITUTE A RESTRICTION ON FREEDOM OF MOVEMENT FOR WORKERS AS DEFINED BY ARTICLES 48 TO 51 OF THE EEC TREATY, IN THE ABSENCE OF ANY DIRECTIVE APPLICABLE TO THAT OCCUPATION?"

6 REFERENCE IS MADE TO THE REPORT FOR THE HEARING FOR A FULLER ACCOUNT OF THE FACTS OF THE CASE, THE COURSE OF THE PROCEDURE AND THE OBSERVATIONS SUBMITTED PURSUANT TO ARTICLE 20 OF THE PROTOCOL ON THE STATUTE OF THE COURT OF JUSTICE OF THE EEC, WHICH ARE MENTIONED OR DISCUSSED HEREINAFTER ONLY IN SO FAR AS IS NECESSARY FOR THE REASONING OF THE COURT .

7 THE QUESTION PUT BY THE NATIONAL COURT ESSENTIALLY SEEKS TO ESTABLISH WHETHER, WHERE IN A MEMBER STATE ACCESS TO AN OCCUPATION AS AN EMPLOYED PERSON IS DEPENDENT UPON THE POSSESSION OF A NATIONAL DIPLOMA OR A FOREIGN DIPLOMA RECOGNIZED AS EQUIVALENT THERETO, THE PRINCIPLE OF THE FREE MOVEMENT OF WORKERS LAID DOWN IN ARTICLE 48 OF THE TREATY REQUIRES THAT IT MUST BE POSSIBLE FOR A DECISION REFUSING TO RECOGNIZE THE EQUIVALENCE OF A DIPLOMA GRANTED TO A WORKER WHO IS A NATIONAL OF ANOTHER MEMBER STATE BY THAT MEMBER STATE TO BE MADE THE SUBJECT OF JUDICIAL PROCEEDINGS, AND THAT THE DECISION MUST STATE THE REASONS ON WHICH IT IS BASED .

8 IN ORDER TO ANSWER THAT QUESTION IT MUST BE BORNE IN MIND THAT ARTICLE 48 OF THE TREATY IMPLEMENTS, WITH REGARD TO WORKERS, A FUNDAMENTAL PRINCIPLE CONTAINED IN ARTICLE 3*(C) OF THE TREATY, WHICH STATES THAT, FOR THE PURPOSES SET OUT IN ARTICLE 2, THE ACTIVITIES OF THE COMMUNITY ARE TO INCLUDE THE ABOLITION, AS BETWEEN MEMBER STATES, OF OBSTACLES TO FREEDOM OF MOVEMENT FOR PERSONS AND SERVICES (SEE THE JUDGMENT OF 7 JULY 1976 IN CASE 118/75 WATSON AND BELMANN ((1976)) ECR 1185).

9 IN APPLICATION OF THE GENERAL PRINCIPLE SET OUT IN ARTICLE 7 OF THE TREATY UNDER WHICH DISCRIMINATION ON GROUNDS OF NATIONALITY IS PROHIBITED, ARTICLE 48 AIMS TO ELIMINATE IN THE LEGISLATION OF THE MEMBER STATES PROVISIONS AS REGARDS EMPLOYMENT, REMUNERATION AND OTHER CONDITIONS OF WORK AND EMPLOYMENT UNDER WHICH A WORKER WHO IS A NATIONAL OF ANOTHER MEMBER STATE IS SUBJECT TO MORE SEVERE TREATMENT OR IS PLACED IN AN UNFAVOURABLE SITUATION IN LAW OR IN FACT AS COMPARED WITH THE SITUATION OF A NATIONAL IN THE SAME CIRCUMSTANCES (SEE THE JUDGMENT OF 28 MARCH 1979 IN CASE 175/78 SAUNDERS ((1979)) ECR 1129).

10 IN THE ABSENCE OF HARMONIZATION OF THE CONDITIONS OF ACCESS TO A PARTICULAR OCCUPATION, THE MEMBER STATES ARE ENTITLED TO LAY DOWN THE KNOWLEDGE AND QUALIFICATIONS NEEDED IN ORDER TO PURSUE IT AND TO REQUIRE THE PRODUCTION OF A DIPLOMA CERTIFYING THAT THE HOLDER HAS THE RELEVANT KNOWLEDGE AND QUALIFICATIONS .

11 HOWEVER, AS THE COURT HELD IN ITS JUDGMENT OF 28 JUNE 1977 IN CASE 11/77 PATRICK V MINISTRE DES AFFAIRES CULTURELLES ((1977)) ECR 1199, THE LAWFUL REQUIREMENT, IN THE VARIOUS MEMBER STATES, RELATING TO THE POSSESSION OF DIPLOMAS FOR ADMISSION TO CERTAIN OCCUPATIONS CONSTITUTES A RESTRICTION ON THE EFFECTIVE EXERCISE OF THE FREEDOM OF ESTABLISHMENT GUARANTEED BY THE TREATY THE ABOLITION OF WHICH IS TO BE MADE EASIER BY DIRECTIVES FOR THE MUTUAL RECOGNITION OF DIPLOMAS, CERTIFICATES AND OTHER EVIDENCE OF FORMAL QUALIFICATIONS . AS THE COURT ALSO HELD IN THAT JUDGMENT, THE FACT THAT SUCH DIRECTIVES HAVE NOT YET BEEN ISSUED DOES NOT ENTITLE A MEMBER STATE TO DENY THE PRACTICAL BENEFIT OF THAT FREEDOM TO A PERSON SUBJECT TO COMMUNITY LAW WHEN THAT FREEDOM CAN BE ENSURED IN THAT MEMBER STATE, IN PARTICULAR BECAUSE IT IS POSSIBLE UNDER ITS LAWS AND REGULATIONS FOR EQUIVALENT FOREIGN DIPLOMAS TO BE RECOGNIZED .

12 SINCE FREEDOM OF MOVEMENT FOR WORKERS IS ONE OF THE FUNDAMENTAL OJECTIVES OF THE TREATY, THE REQUIREMENT TO SECURE FREE MOVEMENT UNDER EXISTING NATIONAL LAWS AND REGULATIONS STEMS, AS THE COURT HELD IN ITS JUDGMENT OF 28 APRIL 1977 IN

CASE 71/76 THIEFFRY ((1977)) ECR 765, FROM ARTICLE 5 OF THE TREATY, UNDER WHICH THE MEMBER STATES ARE BOUND TO TAKE ALL APPROPRIATE MEASURES, WHETHER GENERAL OR PARTICULAR, TO ENSURE FULFILMENT OF THE OBLIGATIONS ARISING OUT OF THE TREATY AND TO ABSTAIN FROM ANY MEASURE WHICH COULD JEOPARDIZE THE ATTAINMENT OF THE OBJECTIVES OF THE TREATY .

13 SINCE IT HAS TO RECONCILE THE REQUIREMENT AS TO THE QUALIFICATIONS NECESSARY IN ORDER TO PURSUE A PARTICULAR OCCUPATION WITH THE REQUIREMENTS OF THE FREE MOVEMENT OF WORKERS, THE PROCEDURE FOR THE RECOGNITION OF EQUIVALENCE MUST ENABLE THE NATIONAL AUTHORITIES TO ASSURE THEMSELVES, ON AN OBJECTIVE BASIS, THAT THE FOREIGN DIPLOMA CERTIFIES THAT ITS HOLDER HAS KNOWLEDGE AND QUALIFICATIONS WHICH ARE, IF NOT IDENTICAL, AT LEAST EQUIVALENT TO THOSE CERTIFIED BY THE NATIONAL DIPLOMA . THAT ASSESSMENT OF THE EQUIVALENCE OF THE FOREIGN DIPLOMA MUST BE EFFECTED EXCLUSIVELY IN THE LIGHT OF THE LEVEL OF KNOWLEDGE AND QUALIFICATIONS WHICH ITS HOLDER CAN BE ASSUMED TO POSSESS IN THE LIGHT OF THAT DIPLOMA, HAVING REGARD TO THE NATURE AND DURATION OF THE STUDIES AND PRACTICAL TRAINING WHICH THE DIPLOMA CERTIFIES THAT HE HAS CARRIED OUT .

14 SINCE FREE ACCESS TO EMPLOYMENT IS A FUNDAMENTAL RIGHT WHICH THE TREATY CONFERS INDIVIDUALLY ON EACH WORKER IN THE COMMUNITY, THE EXISTENCE OF A REMEDY OF A JUDICIAL NATURE AGAINST ANY DECISION OF A NATIONAL AUTHORITY REFUSING THE BENEFIT OF THAT RIGHT IS ESSENTIAL IN ORDER TO SECURE FOR THE INDIVIDUAL EFFECTIVE PROTECTION FOR HIS RIGHT . AS THE COURT HELD IN ITS JUDGMENT OF 15 MAY 1986 IN CASE 222/84 JOHNSTON V CHIEF CONSTABLE OF THE ROYAL ULSTER CONSTABULARY ((1986)) ECR 1651, AT P . 1663, THAT REQUIREMENT REFLECTS A GENERAL PRINCIPLE OF COMMUNITY LAW WHICH UNDERLIES THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES AND HAS BEEN ENSHRINED IN ARTICLES 6 AND 13 OF THE EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS .

15 EFFECTIVE JUDICIAL REVIEW, WHICH MUST BE ABLE TO COVER THE LEGALITY OF THE REASONS FOR THE CONTESTED DECISION, PRESUPPOSES IN GENERAL THAT THE COURT TO WHICH THE MATTER IS REFERRED MAY REQUIRE THE COMPETENT AUTHORITY TO NOTIFY ITS REASONS . BUT WHERE, AS IN THIS CASE, IT IS MORE PARTICULARLY A QUESTION OF SECURING THE EFFECTIVE PROTECTION OF A FUNDAMENTAL RIGHT CONFERRED BY THE TREATY ON COMMUNITY WORKERS, THE LATTER MUST ALSO BE ABLE TO DEFEND THAT RIGHT UNDER THE BEST POSSIBLE CONDITIONS AND HAVE THE POSSIBILITY OF DECIDING, WITH A FULL KNOWLEDGE OF THE RELEVANT FACTS, WHETHER THERE IS ANY POINT IN THEIR APPLYING TO THE COURTS . CONSEQUENTLY, IN SUCH CIRCUMSTANCES THE COMPETENT NATIONAL AUTHORITY IS UNDER A DUTY TO INFORM THEM OF THE REASONS ON WHICH ITS REFUSAL IS BASED, EITHER IN THE DECISION ITSELF OR IN A SUBSEQUENT COMMUNICATION MADE AT THEIR REQUEST .

16 IN VIEW OF THEIR AIMS THOSE REQUIREMENTS OF COMMUNITY LAW, THAT IS TO SAY, THE EXISTENCE OF A JUDICIAL REMEDY AND THE DUTY TO STATE REASONS, ARE HOWEVER LIMITED ONLY TO FINAL DECISIONS REFUSING TO RECOGNIZE EQUIVALENCE AND DO NOT EXTEND TO OPINIONS AND OTHER MEASURES OCCURRING IN THE PREPARATION AND INVESTIGATION STAGE .

17 CONSEQUENTLY, THE ANSWER TO THE QUESTION PUT BY THE TRIBUNAL DE GRANDE INSTANCE, LILLE, MUST BE THAT WHERE IN A MEMBER STATE ACCESS TO AN OCCUPATION AS AN EMPLOYED PERSON IS DEPENDENT UPON THE POSSESSION OF A NATIONAL DIPLOMA OR A FOREIGN DIPLOMA RECOGNIZED AS EQUIVALENT THERETO, THE PRINCIPLE OF THE FREE MOVEMENT OF WORKERS LAID DOWN IN ARTICLE 48 OF THE TREATY REQUIRES THAT IT MUST BE POSSIBLE FOR A DECISION REFUSING TO RECOGNIZE THE EQUIVALENCE OF A DIPLOMA GRANTED TO A WORKER WHO IS A NATIONAL OF ANOTHER MEMBER STATE BY THAT MEMBER STATE TO BE MADE THE SUBJECT OF JUDICIAL PROCEEDINGS IN WHICH ITS LEGALITY UNDER COMMUNITY LAW CAN BE REVIEWED, AND FOR THE PERSON CONCERNED TO ASCERTAIN THE REASONS FOR THE DECISION .

Decision on costs

COSTS

18 THE COSTS INCURRED BY THE GOVERNMENT OF THE FRENCH REPUBLIC, THE GOVERNMENT OF THE KINGDOM OF DENMARK AND THE COMMISSION OF THE EUROPEAN COMMUNITIES, WHICH HAVE SUBMITTED OBSERVATIONS TO THE COURT, ARE NOT RECOVERABLE . AS THESE PROCEEDINGS ARE, IN SO FAR AS THE PARTIES TO THE MAIN PROCEEDINGS ARE CONCERNED, IN THE NATURE OF A STEP IN THE ACTION PENDING BEFORE THE NATIONAL COURT, THE DECISION ON COSTS IS A MATTER FOR THAT COURT .

Operative part

ON THOSE GROUNDS,

THE COURT,

IN ANSWER TO THE QUESTION REFERRED TO IT BY THE TRIBUNAL DE GRANDE INSTANCE, LILLE, BY JUDGMENT OF 4 JULY 1986, HEREBY RULES :

WHERE IN A MEMBER STATE ACCESS TO AN OCCUPATION AS AN EMPLOYED PERSON IS DEPENDENT UPON THE POSSESSION OF A NATIONAL DIPLOMA OR A FOREIGN DIPLOMA RECOGNIZED AS EQUIVALENT THERETO, THE PRINCIPLE OF THE FREE MOVEMENT OF WORKERS LAID DOWN IN ARTICLE 48 OF THE TREATY REQUIRES THAT IT MUST BE POSSIBLE FOR A DECISION REFUSING TO RECOGNIZE THE EQUIVALENCE OF A DIPLOMA GRANTED TO A WORKER WHO IS A NATIONAL OF ANOTHER MEMBER STATE BY THE MEMBER STATE TO BE MADE THE SUBJECT OF JUDICIAL PROCEEDINGS IN WHICH ITS LEGALITY UNDER COMMUNITY LAW CAN BE REVIEWED, AND FOR THE PERSON CONCERNED TO ASCERTAIN THE REASONS FOR THE DECISION .

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Avis juridique important

61993J0415

Judgment of the Court of 15 December 1995. - Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman. - Reference for a preliminary ruling: Cour d'appel de Liège - Belgium. - Freedom of movement for workers - Competition rules applicable to undertakings - Professional footballers - Sporting rules on the transfer of players requiring the new club to pay a fee to the old club - Limitation of the number of players having the nationality of other Member States who may be fielded in a match. - Case C-415/93.

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Summary
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Keywords

1. Procedure ° Request for measures of inquiry ° Request made after the close of the oral procedure ° Conditions for admissibility

(Rules of Procedure of the Court of Justice, Arts 59(2) and 60)

2. Preliminary rulings ° Jurisdiction of the Court ° Limits ° Manifestly irrelevant questions and hypothetical questions referred in circumstances in which a useful answer is precluded ° Jurisdiction to reply to questions raised in the context of declaratory proceedings permitted under national law

(EEC Treaty, Art. 177)

3. Community law ° Scope ° Sport as an economic activity ° Included

(EEC Treaty, Art. 2)

4. Freedom of movement for persons ° Workers ° Treaty provisions ° Conditions of application ° Existence of an employment relationship ° Employer not an undertaking ° Not relevant

(EEC Treaty, Art. 48)

5. Freedom of movement for persons ° Workers ° Treaty provisions ° Scope ° Rules governing business relationships between employers but affecting the terms of employment of workers ° Included

(EEC Treaty, Art. 48)

6. Freedom of movement for persons ° Workers ° Freedom of establishment ° Freedom to provide services ° Treaty provisions ° Scope ° Sporting activity ° Limits

(EEC Treaty, Arts 48, 52 and 59)

7. Freedom of movement for persons ° Workers ° Treaty provisions ° Scope ° Limitation in order to respect the diversity of national cultures as required by Article 128 of the EC Treaty ° Not possible

(EEC Treaty, Art. 48; EC Treaty, Art 128(1))

8. Community law ° Principles ° Fundamental rights ° Freedom of association ° Implications ° Right of sporting associations to lay down rules likely to restrict freedom of movement for

professional sportsmen ° Excluded

(Single European Act, preamble; Treaty on European Union, Art. F(2))

9. Community law ° Principles ° Principle of subsidiarity ° Scope ° Restriction on the exercise of rights conferred on individuals by the Treaty ° Excluded

10. Freedom of movement for persons ° Workers ° Treaty provisions ° Scope ° Rules aimed at regulating gainful employment in a collective manner but not emanating from a public authority ° Included

(EEC Treaty, Art. 48)

11. Freedom of movement for persons ° Workers ° Restrictions justified on grounds of public policy, public security or public health ° Grounds which may be relied on by any private individual or public body

(EEC Treaty, Art. 48)

12. Freedom of movement for persons ° Workers ° Treaty provisions ° Scope ° Rules laid down by sporting associations which determine the terms on which professional sportsmen can engage in gainful employment ° Included

(EEC Treaty, Art. 48)

13. Freedom of movement for persons ° Workers ° Treaty provisions ° Scope ° Professional sportsman who is a national of a Member State and has entered into a contract of employment with a club in another Member State with a view to exercising gainful employment in that State ° Included

(EEC Treaty, Art. 48)

14. Freedom of movement for persons ° Workers ° Rules laid down by sporting associations making the recruitment of a professional sportsman by a new employer in another Member State subject to the payment of a fee by the new employer to the old employer ° Not permissible ° Justification ° None

(EEC Treaty, Art. 48)

15. Freedom of movement for persons ° Workers ° Equal treatment ° Rules laid down by sporting associations limiting the participation of players who are nationals of other Member States in certain competitions ° Not permissible ° Justification ° None

(EEC Treaty, Art. 48)

16. Commission ° Powers ° Power to give guarantees concerning the compatibility of specific practices with the Treaty ° None unless specifically conferred ° Power to authorize practices contrary to the Treaty ° None

17. Preliminary rulings ° Interpretation ° Temporal effects of judgments ruling on interpretation ° Retroactive effect ° Limits ° Legal certainty ° Power of assessment of the Court

(EEC Treaty, Art. 177)

Summary

1. A request for the Court to order a measure of inquiry under Article 60 of the Rules of Procedure, made by a party after the close of the oral procedure, can be admitted only if it relates to facts which may have a decisive influence and which the party concerned could not put forward before the close of the oral procedure.

2. In the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling

Nevertheless, in order to determine whether it has jurisdiction, the Court should examine the conditions in which the case was referred to it by the national court. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to

have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions.

That is why the Court has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

Questions submitted by a national court called upon to decide on declaratory actions seeking to prevent the infringement of a right which is seriously threatened are to be regarded as meeting an objective need for the purpose of settling the dispute brought before that court, even though they are necessarily based on hypotheses which are, by their nature, uncertain, if it holds them to be admissible under its interpretation of its national law.

3. Having regard to the objectives of the Community, sport is subject to Community law in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty, as in the case of the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service.

4. It is not necessary, for the purposes of the application of the Community provisions on freedom of movement for workers, for the employer to be an undertaking; all that is required is the existence of, or the intention to create, an employment relationship.

5. Rules governing business relationships between employers in a sector of activity fall within the scope of the Community provisions relating to freedom of movement for workers if their application affects the terms of employment of workers.

That is true of rules relating to the transfer of players between football clubs which, although they govern the business relationships between clubs rather than the employment relationships between clubs and players, affect, because the employing clubs must pay fees on recruiting a player from another club, players'opportunities for finding employment and the terms under which such employment is offered.

6. The Community provisions concerning freedom of movement for persons and freedom to provide services do not preclude rules or practices in sport which are justified on non-economic grounds which relate to the particular nature and context of certain competitions. Such a restriction on the scope of the provisions in question must remain limited to its proper objective and cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.

7. Freedom of movement for workers, guaranteed by Article 48 of the Treaty, is a fundamental freedom in the Community system and its scope cannot be limited by the Community's obligation to respect the national and regional cultural diversity of the Member States when it uses the powers of limited extent conferred upon it by Article 128(1) of the EC Treaty in the field of culture.

8. The principle of freedom of association, enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.

However, rules likely to restrict freedom of movement for professional sportsmen, laid down by sporting associations, cannot be seen as necessary to ensure enjoyment of that freedom by those associations, by the clubs or by their players, nor can they be seen as an inevitable result thereof.

9. The principle of subsidiarity, even when interpreted broadly to the effect that intervention by Community authorities in the area of organization of sporting activities must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty.

10. Article 48 of the Treaty not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner.

The abolition as between Member States of obstacles to freedom of movement for persons would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law. Furthermore, if the scope of Article 48 were confined to acts of a public authority there would be

a risk of creating inequality in its application, inasmuch as working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons.

11. There is nothing to preclude individuals from relying, to justify restrictions on freedom of movement for workers which they may be alleged to have set up, on the grounds of public policy, public security or public health permitted by Article 48 of the Treaty. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the restrictive rules in support of which they are adduced.

12. Article 48 of the Treaty applies to rules laid down by sporting associations which determine the terms on which professional sportsmen can engage in gainful employment.

13. The situation of a professional footballer who is a national of a Member State and, by entering into a contract of employment with a club in another Member State with a view to exercising gainful employment in that State, has accepted an offer of employment actually made within the meaning of Article 48(3)(a) of the Treaty, cannot be classified as purely internal and therefore not covered by Community law.

14. Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.

Such rules, even though they do not differ from those governing transfers within the same Member State, are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs.

Nor are they an adequate means of achieving such legitimate aims as maintaining a financial and competitive balance between clubs and supporting the search for talent and the training of young players, since

° those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs,

° the fees provided for in those rules are by nature contingent and uncertain and are in any event unrelated to the actual cost of training borne by clubs and

° the same aims can be achieved at least as efficiently by other means which do not impede freedom of movement for workers.

15. Article 48 of the Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States.

Such rules are contrary to the principle of the prohibition of discrimination based on nationality as regards employment, remuneration and conditions of work and employment and it is of no relevance that they concern not the employment of such players, on which there is no restriction, but the extent to which their clubs may field them in official matches, since, in so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned.

Nor can those rules, which do not concern specific matches between teams representing their countries but apply to all official matches between clubs, be justified for reasons which are not of an economic nature and are of sporting interest only, such as: preserving the traditional link between each club and its country, since a football club's links with the Member State in which it is established cannot be regarded as inherent in its sporting activity; creating a sufficient pool of national players to provide the national teams with top players to field in all team positions, since, whilst national teams must be made up of players having the nationality of the relevant country, those players need not necessarily be registered to play for clubs in that country; or maintaining a competitive balance between clubs, since there are no rules limiting the possibility for richer clubs to recruit the best national players, thus undermining that balance to just the same extent.

16. Except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty and in no circumstances does it have the power to authorize practices which are contrary to the Treaty.

17. The interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 177 of the Treaty, gives to a rule of Community law clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied.

It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict the opportunity for any person concerned to rely upon the provision as thus interpreted with a view to calling in question legal relationships established in good faith. Such a restriction may be allowed only by the Court, in the actual judgment ruling upon the interpretation sought.

Since the specific features of the rules laid down by the sporting associations for transfers of players between clubs of different Member States, together with the fact that the same or similar rules applied to transfers both between clubs belonging to the same national association and between clubs belonging to different national associations within the same Member State, may have caused uncertainty as to whether those rules were compatible with Community law, overriding considerations of legal certainty militate against calling in question legal situations whose effects have already been exhausted.

It must therefore be held that the direct effect of Article 48 of the Treaty cannot be relied upon in support of claims relating to a fee in respect of transfer, training or development which has already been paid on, or is still payable under an obligation which arose before, the date of this judgment, except by those who have brought court proceedings or raised an equivalent claim under the applicable national law before that date.

Parties

In Case C-415/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour d'Appel, Liège, Belgium, for a preliminary ruling in the proceedings pending before that court between

Union Royale Belge des Sociétés de Football Association ASBL

and

Jean-Marc Bosman,

between

Royal Club Liégois SA

and

Jean-Marc Bosman,

SA d'Économie Mixte Sportive de l'Union Sportive du Littoral de Dunkerque,

Union Royale Belge des Sociétés de Football Association ASBL,

Union des Associations Européennes de Football (UEFA),

and between

Union des Associations Européennes de Football (UEFA)

and

Jean-Marc Bosman,

on the interpretation of Articles 48, 85 and 86 of the EEC Treaty,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C.N. Kakouris, D.A.O. Edward and G. Hirsch (Presidents of Chambers), G.F. Mancini (Rapporteur), J.C. Moitinho de Almeida, P.J.G. Kapteyn, C. Gulmann, J.L. Murray, P. Jann and H. Ragnemalm, Judges,

Advocate General: C.O. Lenz,

Registrars: R. Grass, Registrar, and D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

° Union Royale Belge des Sociétés de Football Association ASBL, by G. Vandersanden and J.-P. Hordies, of the Brussels Bar, and by R. Rasir and F. Moïses, of the Liège Bar,

° Union des Associations Européennes de Football (UEFA), by I.S. Forrester QC,

° Mr Bosman, by L. Misson, J.-L. Dupont, M.-A. Lucas and M. Franchimont, of the Liège Bar,

° the French Government, by H. Duchène, Foreign Affairs Secretary in the Legal Directorate of the Ministry of Foreign Affairs, and C. de Salins, Assistant Director in the same directorate,

° the Italian Government, by Professor L. Ferrari Bravo, Head of the Legal Service in the Ministry of Foreign Affairs, assisted by D. Del Gaizo, Avvocato dello Stato,

° the Commission of the European Communities, by F.E. González Díaz, of its Legal Service, G. de Bergues, a national official placed at the disposal of its Legal Service, and Th. Margellos, of the Athens Bar,

having regard to the Report for the Hearing,

after hearing the oral observations of Union Royale Belge des Sociétés de Football Association ASBL, represented by F. Moïses, J.-P. Hordies and G. Vandersanden; of Union des Associations Européennes de Football ° UEFA, represented by I.S. Forrester and E. Jakhian, of the Brussels Bar; of Mr Bosman, represented by L. Misson and J.-L. Dupont; of the Danish Government, represented by P. Biering, Kontorchef in the Ministry of Foreign Affairs, acting as Agent; of the German Government, represented by E. Roeder, Ministerialrat in the Federal Ministry of the Economy; of the French Government, represented by C. de Salins and P. Martinet, Foreign Affairs Secretary in the Legal Directorate of the Ministry of Foreign Affairs, acting as Agents; of the Italian Government, represented by D. Del Gaizo; and of the Commission, represented by F.E. González Díaz, G. de Bergues and M. Wolfcarius, of its Legal Service, at the hearing on 20 June 1995,

after hearing the Opinion of the Advocate General at the sitting on 20 September 1995,

gives the following

Judgment

Grounds

1 By judgment of 1 October 1993, received at the Court on 6 October 1993, the Cour d'Appel (Appeal Court), Liège, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a set of questions on the interpretation of Articles 48, 85 and 86 of that Treaty.

2 Those questions were raised in various proceedings between (i) Union Royale Belge des Sociétés de Football Association ASBL ("URBSFA") and Mr Bosman, (ii) Royal Club Liégois SA ("RC Liège") and Mr Bosman, SA d'Économie Mixte Sportive de l'Union Sportive du Littoral de Dunkerque ("US Dunkerque"), URBSFA and Union des Associations Européennes de Football (UEFA) ("UEFA") and, (iii) UEFA and Mr Bosman.

The rules governing the organization of football

3 Association football, commonly known as "football", professional or amateur, is practised as an organized sport in clubs which belong to national associations or federations in each of the Member States. Only in the United Kingdom are there more than one (in fact, four) national associations, for England, Wales, Scotland and Northern Ireland respectively. URBSFA is the Belgian national association. Also dependent on the national associations are other secondary or subsidiary associations responsible for organizing football in certain sectors or regions. The associations hold national championships, organized in divisions depending on the sporting status of the participating clubs.

4 The national associations are members of the Fédération Internationale de Football Association ("FIFA"), an association governed by Swiss law, which organizes football at world level. FIFA is divided into confederations for each continent, whose regulations require its approval. The confederation for Europe is UEFA, also an association governed by Swiss law. Its members are the national associations of some 50 countries, including in particular those of the Member States which, under the UEFA Statutes, have undertaken to comply with those Statutes and with the regulations and decisions of UEFA.

5 Each football match organized under the auspices of a national association must be played between two clubs which are members of that association or of secondary or subsidiary associations affiliated to it. The team fielded by each club consists of players who are registered by the national association to play for that club. Every professional player must be registered as such with his national association and is entered as the present or former employee of a specific club.

Transfer rules

6 The 1983 URBSFA federal rules, applicable at the time of the events giving rise to the different actions in the main proceedings, distinguish between three types of relationship: affiliation of a player to the federation, affiliation to a club, and registration of entitlement to play for a club, which is necessary for a player to be able to participate in official competitions. A transfer is defined as the transaction by which a player affiliated to an association obtains a change of club affiliation. If the transfer is temporary, the player continues to be affiliated to his club but is registered as entitled to play for another club.

7 Under the same rules, all professional players'contracts, which have a term of between one and five years, run to 30 June. Before the expiry of the contract, and by 26 April at the latest, the club must offer the player a new contract, failing which he is considered to be an amateur for transfer purposes and thereby falls under a different section of the rules. The player is free to accept or refuse that offer.

8 If he refuses, he is placed on a list of players available, between 1 and 31 May, for "compulsory" transfer, without the agreement of the club of affiliation but subject to payment to that club by the new club of a compensation fee for "training", calculated by multiplying the player's gross annual income by a factor varying from 14 to 2 depending on the player's age.

9 1 June marks the opening of the period for "free" transfers, with the agreement of both clubs and the player, in particular as to the amount of the transfer fee which the new club must pay to the old club, subject to penalties which may include striking off the new club for debt.

10 If no transfer takes place, the player's club of affiliation must offer him a new contract for one season on the same terms as that offered prior to 26 April. If the player refuses, the club has a period until 1 August in which it may suspend him, failing which he is reclassified as an amateur. A player who persistently refuses to sign the contracts offered by his club may obtain a transfer as an amateur, without his club's agreement, after not playing for two seasons.

11 The UEFA and FIFA regulations are not directly applicable to players but are included in the rules of the national associations, which alone have the power to enforce them and to regulate relations between clubs and players.

12 UEFA, URBSFA and RC Liège stated before the national court that the provisions applicable at the material time to transfers between clubs in different Member States or clubs belonging to different national associations within the same Member State were contained in a document entitled Principles of Cooperation between Member Associations of UEFA and their Clubs , approved by the UEFA Executive Committee on 24 May 1990 and in force from 1 July 1990.

13 That document provides that at the expiry of the contract the player is free to enter into a new contract with the club of his choice. That club must immediately notify the old club which in turn is to notify the national association, which must issue an international clearance certificate. However, the former club is entitled to receive from the new club compensation for training and development, to be fixed, failing agreement, by a board of experts set up within UEFA using a scale of multiplying factors, from 12 to 1 depending on the player's age, to be applied to the player's gross income, up to a maximum of SFR 5 000 000.

14 The document stipulates that the business relationships between the two clubs in respect of the compensation fee for training and development are to exert no influence on the activity of the player, who is to be free to play for his new club. However, if the new club does not immediately pay the fee to the old club, the UEFA Control and Disciplinary Committee is to deal with the matter and notify its decision to the national association concerned, which may also impose penalties on the debtor club.

15 The national court considers that in the case with which the main proceedings are concerned URBSFA and RC Liège applied not the UEFA but the FIFA regulations.

16 At the material time, the FIFA regulations provided in particular that a professional player could not leave the national association to which he was affiliated so long as he was bound by his contract and by the rules of his club and his national association, no matter how harsh their terms

might be. An international transfer could not take place unless the former national association issued a transfer certificate acknowledging that all financial commitments, including any transfer fee, had been settled.

17 After the events which gave rise to the main proceedings, UEFA opened negotiations with the Commission of the European Communities. In April 1991, it undertook in particular to incorporate in every professional player's contract a clause permitting him, at the expiry of the contract, to enter into a new contract with the club of his choice and to play for that club immediately. Provisions to that effect were incorporated in the Principles of Cooperation between Member Associations of UEFA and their Clubs adopted in December 1991 and in force from 1 July 1992.

18 In April 1991, FIFA adopted new Regulations governing the Status and Transfer of Football Players. That document, as amended in December 1991 and December 1993, provides that a player may enter into a contract with a new club where the contract between him and his club has expired, has been rescinded or is to expire within six months.

19 Special rules are laid down for "non-amateur" players, defined as players who have received, in respect of participation in or an activity connected with football, remuneration in excess of the actual expenses incurred in the course of such participation, unless they have reacquired amateur status.

20 Where a non-amateur player, or a player who assumes non-amateur status within three years of his transfer, is transferred, his former club is entitled to a compensation fee for development or training, the amount of which is to be agreed upon between the two clubs. In the event of disagreement, the dispute is to be submitted to FIFA or the relevant confederation.

21 Those rules have been supplemented by UEFA regulations "governing the fixing of a transfer fee", adopted in June 1993 and in force since 1 August 1993, which replace the 1991 "Principles of Cooperation between Member Associations of UEFA and their Clubs". The new rules retain the principle that the business relationship between the two clubs are to exert no influence on the sporting activity of the player, who is to be free to play for the club with which he has signed the new contract. In the event of disagreement between the clubs concerned, it is for the appropriate UEFA board of experts to determine the amount of the compensation fee for training or development. For non-amateur players, the calculation of the fee is based on the player's gross income in the last 12 months or on the fixed annual income guaranteed in the new contract, increased by 20% for players who have played at least twice in the senior national representative team for their country and multiplied by a factor of between 12 and 0 depending on age.

22 It appears from documents produced to the Court by UEFA that rules in force in other Member States also contain provisions requiring the new club, when a player is transferred between two clubs within the same national association, to pay the former club, on terms laid down in the rules in question, a compensation fee for transfer, training or development.

23 In Spain and France, payment of compensation may only be required if the player transferred is under 25 years of age or if his former club is the one with which he signed his first professional contract, as the case may be. In Greece, although no compensation is explicitly payable by the new club, the contract between the club and the player may make the player's departure dependent on the payment of an amount which, according to UEFA, is in fact most commonly paid by the new club.

24 The rules applicable in that regard may derive from the national legislation, from the regulations of the national football associations or from the terms of collective agreements.

Nationality clauses

25 From the 1960s onwards, many national football associations introduced rules ("nationality clauses") restricting the extent to which foreign players could be recruited or fielded in a match. For the purposes of those clauses, nationality is defined in relation to whether the player can be qualified to play in a country's national or representative team.

26 In 1978, UEFA gave an undertaking to Mr Davignon, a Member of the Commission of the European Communities, that it would remove the limitations on the number of contracts entered into by each club with players from other Member States and would set the number of such players who may participate in any one match at two, that limit not being applicable to players established for over five years in the Member State in question.

27 In 1991, following further discussions with Mr Bangemann, a Vice-President of the Commission, UEFA adopted the "3 + 2" rule permitting each national association to limit to three the number of foreign players whom a club may field in any first division match in their national

championships, plus two players who have played in the country of the relevant national association for an uninterrupted period of five years, including three years as a junior. The same limitation also applies to UEFA matches in competitions for club teams.

Facts of the cases before the national court

28 Mr Bosman, a professional footballer of Belgian nationality, was employed from 1988 by RC Liège, a Belgian first division club, under a contract expiring on 30 June 1990, which assured him an average monthly salary of BFR 120 000, including bonuses.

29 On 21 April 1990, RC Liège offered Mr Bosman a new contract for one season, reducing his pay to BFR 30 000, the minimum permitted by the URBSFA federal rules. Mr Bosman refused to sign and was put on the transfer list. The compensation fee for training was set, in accordance with the said rules, at BFR 11 743 000.

30 Since no club showed an interest in a compulsory transfer, Mr Bosman made contact with US Dunkerque, a club in the French second division, which led to his being engaged for a monthly salary in the region of BFR 100 000 plus a signing-on bonus of some BFR 900 000.

31 On 27 July 1990, a contract was also concluded between RC Liège and US Dunkerque for the temporary transfer of Mr Bosman for one year, against payment by US Dunkerque to RC Liège of a compensation fee of BFR 1 200 000 payable on receipt by the Fédération Française de Football ("FFF") of the transfer certificate issued by URBSFA. The contract also gave US Dunkerque an irrevocable option for full transfer of the player for BFR 4 800 000.

32 Both contracts, between US Dunkerque and RC Liège and between US Dunkerque and Mr Bosman, were however subject to the suspensive condition that the transfer certificate must be sent by URBSFA to FFF in time for the first match of the season, which was to be held on 2 August 1990.

33 RC Liège, which had doubts as to US Dunkerque's solvency, did not ask URBSFA to send the said certificate to FFF. As a result, neither contract took effect. On 31 July 1990, RC Liège also suspended Mr Bosman, thereby preventing him from playing for the entire season.

34 On 8 August 1990, Mr Bosman brought an action against RC Liège before the Tribunal de Première Instance (Court of First Instance), Liège. Concurrently with that action, he applied for an interlocutory decision ordering RC Liège and URBSFA to pay him an advance of BFR 100 000 per month until he found a new employer, restraining the defendants from impeding his engagement, in particular by requiring payment of a sum of money, and referring a question to the Court of Justice for a preliminary ruling.

35 By order of 9 November 1990, the judge hearing the interlocutory application ordered RC Liège and URBSFA to pay Mr Bosman an advance of BFR 30 000 per month and to refrain from impeding Mr Bosman's engagement. He also referred to the Court for a preliminary ruling a question (in Case C-340/90) on the interpretation of Article 48 in relation to the rules governing transfers of professional players ("transfer rules").

36 In the meantime, Mr Bosman had been signed up by the French second-division club Saint-Quentin in October 1990, on condition that his interlocutory application succeeded. His contract was terminated, however, at the end of the first season. In February 1992, Mr Bosman signed a new contract with the French club Saint-Denis de la Réunion, which was also terminated. After looking for further offers in Belgium and France, Mr Bosman was finally signed up by Olympic de Charleroi, a Belgian third-division club.

37 According to the national court, there is strong circumstantial evidence to support the view that, notwithstanding the "free" status conferred on him by the interlocutory order, Mr Bosman has been boycotted by all the European clubs which might have engaged him.

38 On 28 May 1991, the Cour d'Appel, Liège, revoked the interlocutory decision of the Tribunal de Première Instance in so far as it referred a question to the Court of Justice for a preliminary ruling. But it upheld the order against RC Liège to pay monthly advances to Mr Bosman and enjoined RC Liège and URBSFA to make Mr Bosman available to any club which wished to use his services, without it being possible to require payment of any compensation fee. By order of 19 June 1991, Case C-340/90 was removed from the register of the Court of Justice.

39 On 3 June 1991, URBSFA, which, contrary to the situation in the interlocutory proceedings, had not been cited as a party in the main action before the Tribunal de Première Instance, intervened voluntarily in that action. On 20 August 1991, Mr Bosman issued a writ with a view to joining UEFA to the proceedings which he had brought against RC Liège and URBSFA and bringing proceedings directly against it on the basis of its responsibility in drafting the rules as a result of

which he had suffered damage. On 5 December 1991, US Dunkerque was joined as a third party by RC Liège, in order to be indemnified against any order which might be made against it. On 15 October and 27 December 1991 respectively, Union Nationale des Footballeurs Professionnels ("UNFP"), a French professional footballers'union, and Vereniging van Contractspelers ("VVCS"), an association governed by Netherlands law, intervened voluntarily in the proceedings.

40 In new pleadings lodged on 9 April 1992, Mr Bosman amended his initial claim against RC Liège, brought a new preventive action against URBSFA and elaborated his claim against UEFA. In those proceedings, he sought a declaration that the transfer rules and nationality clauses were not applicable to him and an order, on the basis of their wrongful conduct at the time of the failure of his transfer to US Dunkerque, against RC Liège, URBSFA and UEFA to pay him BFR 11 368 350 in respect of the damage suffered by him from 1 August 1990 until the end of his career and BFR 11 743 000 in respect of loss of earnings since the beginning of his career as a result of the application of the transfer rules. He also applied for a question to be referred to the Court of Justice for a preliminary ruling.

41 By judgment of 11 June 1992, the Tribunal de Première Instance held that it had jurisdiction to entertain the main actions. It also held admissible Mr Bosman's claims against RC Liège, URBSFA and UEFA seeking, in particular, a declaration that the transfer rules and nationality clauses were not applicable to him and orders penalizing the conduct of those three organizations. But it dismissed RC Liège's application to join US Dunkerque as a third party and indemnifier, since no evidence of fault in the latter's performance of its obligations had been adduced. Finally, finding that the examination of Mr Bosman's claims against UEFA and URBSFA involved considering the compatibility of the transfer rules with the Treaty, it made a reference to the Court of Justice for a preliminary ruling on the interpretation of Articles 48, 85 and 86 of the Treaty (Case C-269/92).

42 URBSFA, RC Liège and UEFA appealed against that decision. Since those appeals had suspensive effect, the procedure before the Court of Justice was suspended. By order of 8 December 1993, Case C-269/92 was finally removed from the register following the new judgment of the Cour d'Appel, Liège, out of which the present proceedings arise.

43 No appeal was brought against UNFP or VVCS, who did not seek to intervene again on appeal.

GROUNDS CONTINUED UNDER DOC.NUM: 693J0415.1

44 In its judgment ordering the reference, the Cour d'Appel upheld the judgment under appeal in so far as it held that the Tribunal de Première Instance had jurisdiction, that the actions were admissible and that an assessment of Mr Bosman's claims against UEFA and the URBSFA involved a review of the lawfulness of the transfer rules. It also considered that a review of the lawfulness of the nationality clauses was necessary, since Mr Bosman's claim in their regard was based on Article 18 of the Belgian Judicial Code, which permits actions "with a view to preventing the infringement of a seriously threatened right", and Mr Bosman had adduced factual evidence suggesting that the damage which he fears ° that the application of those clauses may impede his career ° will in fact occur.

45 The national court considered in particular that Article 48 of the Treaty could, like Article 30, prohibit not only discrimination but also non-discriminatory barriers to freedom of movement for workers if they could not be justified by imperative requirements.

46 With regard to Article 85 of the Treaty, it considered that the FIFA, UEFA and URBSFA regulations might constitute decisions of associations of undertakings by which the clubs restrict competition between themselves for players. Transfer fees were dissuasive and tended to depress the level of professional sportsmen's pay. In addition, the nationality clauses prohibited foreign players'services from being obtained over a certain quota. Finally, trade between Member States was affected, in particular by the restriction of players'mobility.

47 Furthermore, the Cour d'Appel thought that URBSFA, or the football clubs collectively, might be in a dominant position, within the meaning of Article 86 of the Treaty and that the restrictions on competition mentioned in connection with Article 85 might constitute abuses prohibited by Article 86.

48 The Cour d'Appel dismissed UEFA's request that it ask the Court of Justice whether the reply to the question submitted on transfers would be different if the system permitted a player to play freely for his new club even where that club had not paid the transfer fee to the old club. It noted in particular that, because of the threat of severe penalties for clubs not paying the transfer fee, a player's ability to play for his new club remained dependent on the business relationships between the clubs.

49 In view of the foregoing, the Cour d'Appel decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

"Are Articles 48, 85 and 86 of the Treaty of Rome of 25 March 1957 to be interpreted as:

(i) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club;

(ii) prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the European Community to the competitions which they organize?"

50 On 3 June 1994, URBSFA applied to the Belgian Cour de Cassation (Court of Cassation) for review of the Cour d'Appel's judgment, requesting that the judgment be extended to apply jointly to RC Liège, UEFA and US Dunkerque. By letter of 6 October 1994, the Procureur Général (Principal Crown Counsel) to the Cour de Cassation informed the Court of Justice that the appeal did not have suspensive effect in this case.

51 By judgment of 30 March 1995, the Cour de Cassation dismissed the appeal and held that as a result the request for a declaration that the judgment be extended was otiose. The Cour de Cassation has forwarded a copy of that judgment to the Court of Justice.

The request for measures of inquiry

52 By letter lodged at the Court Registry on 16 November 1995, UEFA requested the Court to order a measure of inquiry under Article 60 of the Rules of Procedure, with a view to obtaining fuller information on the role played by transfer fees in the financing of small or medium-sized football clubs, the machinery governing the distribution of income within the existing football structures and the presence or absence of alternative machinery if the system of transfer fees were to disappear.

53 After hearing again the views of the Advocate General, the Court considers that that application must be dismissed. It was made at a time when, in accordance with Article 59(2) of the Rules of Procedure, the oral procedure was closed. The Court has held (see Case 77/70 Prelle v Commission [1971] ECR 561, paragraph 7) that such an application can be admitted only if it relates to facts which may have a decisive influence and which the party concerned could not put forward before the close of the oral procedure.

54 In this case, it is sufficient to hold that UEFA could have submitted its request before the close of the oral procedure. Moreover, the question whether the aim of maintaining a balance in financial and competitive terms, and in particular that of ensuring the financing of smaller clubs, can be achieved by other means such as a redistribution of a portion of football takings was raised, in particular by Mr Bosman in his written observations.

Jurisdiction of the Court to give a preliminary ruling on the questions submitted

55 The Court's jurisdiction to give a ruling on all or part of the questions submitted by the national court has been challenged, on various grounds, by URBSFA, by UEFA, by some of the governments which have submitted observations and, during the written procedure, by the Commission.

56 First, UEFA and URBSFA have claimed that the main actions are procedural devices designed to obtain a preliminary ruling from the Court on questions which meet no objective need for the purpose of settling the cases. The UEFA regulations were not applied when Mr Bosman's transfer to US Dunkerque fell through; if they had been applied, that transfer would not have been dependent on the payment of a transfer fee and could thus have taken place. The interpretation of Community law requested by the national court thus bears no relation to the actual facts of the cases in the main proceedings or their purpose and, in accordance with consistent case-law, the Court has no jurisdiction to rule on the questions submitted.

57 Secondly, URBSFA, UEFA, the Danish, French and Italian Governments and, in its written observations, the Commission have claimed that the questions relating to nationality clauses has no connection with the disputes, which concern only the application of the transfer rules. The impediments to his career which Mr Bosman claims arise out of those clauses are purely hypothetical and do not justify a preliminary ruling by the Court on the interpretation of the Treaty in that regard.

58 Thirdly, URBSFA and UEFA pointed out at the hearing that, according to the judgment of the Cour de Cassation of 30 March 1995, the Cour d'Appel did not accept as admissible Mr Bosman's

claims for a declaration that the nationality clauses in the URBSFA regulations were not applicable to him. Consequently, the issues in the main proceedings do not relate to the application of nationality clauses and the Court should not rule on the questions submitted on that point. The French Government concurred in that conclusion, subject however to verification of the scope of the judgment of the Cour de Cassation.

59 As to those submissions, it is to be remembered that, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 177 of the Treaty, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-125/94 Aprile v Amministrazione delle Finanze dello Stato [1995] ECR I-0000, paragraphs 16 and 17).

60 Nevertheless, the Court has taken the view that, in order to determine whether it has jurisdiction, it should examine the conditions in which the case was referred to it by the national court. The spirit of cooperation which must prevail in the preliminary-ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (see, inter alia, Case C-83/91 Meilicke v ADV/ORGA [1992] ECR I-4871, paragraph 25).

61 That is why the Court has held that it has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual facts of the main action or its purpose (see, inter alia, Case C-143/94 Furlanis v ANAS [1995] ECR I-0000, paragraph 12) or where the problem is hypothetical and the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Meilicke, cited above, paragraph 32).

62 In the present case, the issues in the main proceedings, taken as a whole, are not hypothetical and the national court has provided this Court with a clear statement of the surrounding facts, the rules in question and the grounds on which it believes that a decision on the questions submitted is necessary to enable it to give judgment.

63 Furthermore, even if, as URBSFA and UEFA contend, the UEFA regulations were not applied when Mr Bosman's transfer to US Dunkerque fell through, they are still in issue in the preventive actions brought by Mr Bosman against URBSFA and UEFA (see paragraph 40 above) and the Court's interpretation as to the compatibility with Community law of the transfer system set up by the UEFA regulations may be useful to the national court.

64 With regard more particularly to the questions concerning nationality clauses, it appears that the relevant heads of claim have been held admissible in the main proceedings on the basis of a national procedural provision permitting an action to be brought, albeit for declaratory purposes only, to prevent the infringement of a right which is seriously threatened. As is clear from its judgment, the national court considered that application of the nationality clauses could indeed impede Mr Bosman's career by reducing his chances of being employed or fielded in a match by a club from another Member State. It concluded that Mr Bosman's claims for a declaration that those nationality clauses were not applicable to him met the conditions laid down by the said provision.

65 It is not for this Court, in the context of these proceedings, to call that assessment in question. Although the main actions seek a declaratory remedy and, having the aim of preventing infringement of a right under threat, must necessarily be based on hypotheses which are, by their nature, uncertain, such actions are none the less permitted under national law, as interpreted by the referring court. Consequently, the questions submitted by that court meet an objective need for the purpose of settling disputes properly brought before it.

66 Finally, the judgment of the Cour de Cassation of 30 March 1995 does not suggest that the nationality clauses are extraneous to the issues in the main proceedings. That court held only that URBSFA's appeal against the judgment of the Cour d'Appel rested on a misinterpretation of that judgment. In its appeal, URBSFA had claimed that that court had held inadmissible a claim by Mr Bosman for a declaration that the nationality clauses contained in its regulations were not applicable to him. However, it would appear from the judgment of the Cour de Cassation that,

according to the Cour d'Appel, Mr Bosman's claim sought to prevent impediments to his career likely to arise from the application not of the nationality clauses in the URBSFA regulations, which concerned players with a nationality other than Belgian, but of the similar clauses in the regulations of UEFA and the other national associations which are members of it, which could concern him as a player with Belgian nationality. Consequently, it does not appear from the judgment of the Cour de Cassation that those latter nationality clauses are extraneous to the main proceedings.

67 It follows from the foregoing that the Court has jurisdiction to rule on the questions submitted by the Cour d'Appel, Liège.

Interpretation of Article 48 of the Treaty with regard to the transfer rules

68 By its first question, the national court seeks in substance to ascertain whether Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former a transfer, training or development fee.

Application of Article 48 to rules laid down by sporting associations

69 It is first necessary to consider certain arguments which have been put forward on the question of the application of Article 48 to rules laid down by sporting associations.

70 URBSFA argued that only the major European clubs may be regarded as undertakings, whereas clubs such as RC Liège carry on an economic activity only to a negligible extent. Furthermore, the question submitted by the national court on the transfer rules does not concern the employment relationships between players and clubs but the business relationships between clubs and the consequences of freedom to affiliate to a sporting federation. Article 48 of the Treaty is accordingly not applicable to a case such as that in issue in the main proceedings.

71 UEFA argued, inter alia, that the Community authorities have always respected the autonomy of sport, that it is extremely difficult to distinguish between the economic and the sporting aspects of football and that a decision of the Court concerning the situation of professional players might call in question the organization of football as a whole. For that reason, even if Article 48 of the Treaty were to apply to professional players, a degree of flexibility would be essential because of the particular nature of the sport.

72 The German Government stressed, first, that in most cases a sport such as football is not an economic activity. It further submitted that sport in general has points of similarity with culture and pointed out that, under Article 128(1) of the EC Treaty, the Community must respect the national and regional diversity of the cultures of the Member States. Finally, referring to the freedom of association and autonomy enjoyed by sporting federations under national law, it concluded that, by virtue of the principle of subsidiarity, taken as a general principle, intervention by public, and particularly Community, authorities in this area must be confined to what is strictly necessary.

73 In response to those arguments, it is to be remembered that, having regard to the objectives of the Community, sport is subject to Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty (see Case 36/74 Walrave v Union Cycliste Internationale [1974] ECR 1405, paragraph 4). This applies to the activities of professional or semi-professional footballers, where they are in gainful employment or provide a remunerated service (see Case 13/76 Donà v Mantero [1976] ECR 1333, paragraph 12).

74 It is not necessary, for the purposes of the application of the Community provisions on freedom of movement for workers, for the employer to be an undertaking; all that is required is the existence of, or the intention to create, an employment relationship.

75 Application of Article 48 of the Treaty is not precluded by the fact that the transfer rules govern the business relationships between clubs rather than the employment relationships between clubs and players. The fact that the employing clubs must pay fees on recruiting a player from another club affects the players'opportunities for finding employment and the terms under which such employment is offered.

76 As regards the difficulty of severing the economic aspects from the sporting aspects of football, the Court has held (in Donà, cited above, paragraphs 14 and 15) that the provisions of Community law concerning freedom of movement of persons and of provision of services do not preclude rules or practices justified on non-economic grounds which relate to the particular nature and context of certain matches. It stressed, however, that such a restriction on the scope

of the provisions in question must remain limited to its proper objective. It cannot, therefore, be relied upon to exclude the whole of a sporting activity from the scope of the Treaty.

77 With regard to the possible consequences of this judgment on the organization of football as a whole, it has consistently been held that, although the practical consequences of any judicial decision must be weighed carefully, this cannot go so far as to diminish the objective character of the law and compromise its application on the ground of the possible repercussions of a judicial decision. At the very most, such repercussions might be taken into consideration when determining whether exceptionally to limit the temporal effect of a judgment (see, inter alia, Case C-163/90 Administration des Douanes v Legros and Others [1992] ECR I-4625, paragraph 30).

78 The argument based on points of alleged similarity between sport and culture cannot be accepted, since the question submitted by the national court does not relate to the conditions under which Community powers of limited extent, such as those based on Article 128(1), may be exercised but on the scope of the freedom of movement of workers guaranteed by Article 48, which is a fundamental freedom in the Community system (see, inter alia, Case C-19/92 Kraus v Land Baden-Wuerttemberg [1993] ECR I-1663, paragraph 16).

79 As regards the arguments based on the principle of freedom of association, it must be recognized that this principle, enshrined in Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and resulting from the constitutional traditions common to the Member States, is one of the fundamental rights which, as the Court has consistently held and as is reaffirmed in the preamble to the Single European Act and in Article F(2) of the Treaty on European Union, are protected in the Community legal order.

80 However, the rules laid down by sporting associations to which the national court refers cannot be seen as necessary to ensure enjoyment of that freedom by those associations, by the clubs or by their players, nor can they be seen as an inevitable result thereof.

81 Finally, the principle of subsidiarity, as interpreted by the German Government to the effect that intervention by public authorities, and particularly Community authorities, in the area in question must be confined to what is strictly necessary, cannot lead to a situation in which the freedom of private associations to adopt sporting rules restricts the exercise of rights conferred on individuals by the Treaty.

82 Once the objections concerning the application of Article 48 of the Treaty to sporting activities such as those of professional footballers are out of the way, it is to be remembered that, as the Court held in paragraph 17 of its judgment in Walrave, cited above, Article 48 not only applies to the action of public authorities but extends also to rules of any other nature aimed at regulating gainful employment in a collective manner.

83 The Court has held that the abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services would be compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law (see Walrave, cited above, paragraph 18).

84 It has further observed that working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons. Accordingly, if the scope of Article 48 of the Treaty were confined to acts of a public authority there would be a risk of creating inequality in its application (see Walrave, cited above, paragraph 19). That risk is all the more obvious in a case such as that in the main proceedings in this case in that, as has been stressed in paragraph 24 above, the transfer rules have been laid down by different bodies or in different ways in each Member State.

85 UEFA objects that such an interpretation makes Article 48 of the Treaty more restrictive in relation to individuals than in relation to Member States, which are alone in being able to rely on limitations justified on grounds of public policy, public security or public health.

86 That argument is based on an false premiss. There is nothing to preclude individuals from relying on justifications on grounds of public policy, public security or public health. Neither the scope nor the content of those grounds of justification is in any way affected by the public or private nature of the rules in question.

87 Article 48 of the Treaty therefore applies to rules laid down by sporting associations such as URBSFA, FIFA or UEFA, which determine the terms on which professional sportsmen can engage in gainful employment.

Whether the situation envisaged by the national court is of a purely internal nature

88 UEFA considers that the disputes pending before the national court concern a purely internal Belgian situation which falls outside the ambit of Article 48 of the Treaty. They concern a Belgian player whose transfer fell through because of the conduct of a Belgian club and a Belgian association.

89 It is true that, according to consistent case-law (see, inter alia, Case 175/78 Regina v Saunders [1979] ECR 1129, paragraph 11; Case 180/83 Moser v Land Baden-Wuerttemberg [1984] ECR 2539, paragraph 15; Case C-332/90 Steen v Deutsche Bundespost [1992] ECR I-341, paragraph 9; and Case C-19/92 Kraus, cited above, paragraph 15), the provisions of the Treaty concerning the free movement of workers, and particularly Article 48, cannot be applied to situations which are wholly internal to a Member State, in other words where there is no factor connecting them to any of the situations envisaged by Community law.

90 However, it is clear from the findings of fact made by the national court that Mr Bosman had entered into a contract of employment with a club in another Member State with a view to exercising gainful employment in that State. By so doing, as he has rightly pointed out, he accepted an offer of employment actually made, within the meaning of Article 48(3)(a).

91 Since the situation in issue in the main proceedings cannot be classified as purely internal, the argument put forward by UEFA must be dismissed.

Existence of an obstacle to freedom of movement for workers

92 It is thus necessary to consider whether the transfer rules form an obstacle to freedom of movement for workers prohibited by Article 48 of the Treaty.

93 As the Court has repeatedly held, freedom of movement for workers is one of the fundamental principles of the Community and the Treaty provisions guaranteeing that freedom have had direct effect since the end of the transitional period.

94 The Court has also held that the provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see Case 143/87 Stanton v INASTI [1988] ECR 3877, paragraph 13, and Case C-370/90 The Queen v Immigration Appeal Tribunal and Surinder Singh [1992] ECR I-4265, paragraph 16).

95 In that context, nationals of Member States have in particular the right, which they derive directly from the Treaty, to leave their country of origin to enter the territory of another Member State and reside there in order there to pursue an economic activity (see, inter alia, Case C-363/89 Roux v Belgium [1991] ECR I-273, paragraph 9, and Singh, cited above, paragraph 17).

96 Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (see also Case C-10/90 Masgio v Bundesknappschaft [1991] ECR I-1119, paragraphs 18 and 19).

97 The Court has also stated, in Case 81/87 The Queen v H.M. Treasury and Commissioners of Inland Revenue ex parte Daily Mail and General Trust plc [1988] ECR 5483, paragraph 16, that even though the Treaty provisions relating to freedom of establishment are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58. The rights guaranteed by Article 52 et seq. of the Treaty would be rendered meaningless if the Member State of origin could prohibit undertakings from leaving in order to establish themselves in another Member State. The same considerations apply, in relation to Article 48 of the Treaty, with regard to rules which impede the freedom of movement of nationals of one Member State wishing to engage in gainful employment in another Member State.

98 It is true that the transfer rules in issue in the main proceedings apply also to transfers of players between clubs belonging to different national associations within the same Member State and that similar rules govern transfers between clubs belonging to the same national association.

99 However, as has been pointed out by Mr Bosman, by the Danish Government and by the Advocate General in points 209 and 210 of his Opinion, those rules are likely to restrict the freedom of movement of players who wish to pursue their activity in another Member State by

preventing or deterring them from leaving the clubs to which they belong even after the expiry of their contracts of employment with those clubs.

100 Since they provide that a professional footballer may not pursue his activity with a new club established in another Member State unless it has paid his former club a transfer fee agreed upon between the two clubs or determined in accordance with the regulations of the sporting associations, the said rules constitute an obstacle to freedom of movement for workers.

101 As the national court has rightly pointed out, that finding is not affected by the fact that the transfer rules adopted by UEFA in 1990 stipulate that the business relationship between the two clubs is to exert no influence on the activity of the player, who is to be free to play for his new club. The new club must still pay the fee in issue, under pain of penalties which may include its being struck off for debt, which prevents it just as effectively from signing up a player from a club in another Member State without paying that fee.

102 Nor is that conclusion negated by the case-law of the Court cited by URBSFA and UEFA, to the effect that Article 30 of the Treaty does not apply to measures which restrict or prohibit certain selling arrangements so long as they apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (see Joined Cases C-267/91 and C-268/91 Keck and Mithouard [1993] ECR I-6097, paragraph 16).

103 It is sufficient to note that, although the rules in issue in the main proceedings apply also to transfers between clubs belonging to different national associations within the same Member State and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players'access to the employment market in other Member States and are thus capable of impeding freedom of movement for workers. They cannot, thus, be deemed comparable to the rules on selling arrangements for goods which in Keck and Mithouard were held to fall outside the ambit of Article 30 of the Treaty (see also, with regard to freedom to provide services, Case C-384/93 Alpine Investments v Minister van Financiën [1995] ECR I-1141, paragraphs 36 to 38).

104 Consequently, the transfer rules constitute an obstacle to freedom of movement for workers prohibited in principle by Article 48 of the Treaty. It could only be otherwise if those rules pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those rules would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, inter alia, the judgment in Kraus, cited above, paragraph 32, and Case C-55/94 Gebhard [1995] ECR I-0000, paragraph 37).

Existence of justifications

105 First, URBSFA, UEFA and the French and Italian Governments have submitted that the transfer rules are justified by the need to maintain a financial and competitive balance between clubs and to support the search for talent and the training of young players.

106 In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.

107 As regards the first of those aims, Mr Bosman has rightly pointed out that the application of the transfer rules is not an adequate means of maintaining financial and competitive balance in the world of football. Those rules neither preclude the richest clubs from securing the services of the best players nor prevent the availability of financial resources from being a decisive factor in competitive sport, thus considerably altering the balance between clubs.

108 As regards the second aim, it must be accepted that the prospect of receiving transfer, development or training fees is indeed likely to encourage football clubs to seek new talent and train young players.

109 However, because it is impossible to predict the sporting future of young players with any certainty and because only a limited number of such players go on to play professionally, those fees are by nature contingent and uncertain and are in any event unrelated to the actual cost borne by clubs of training both future professional players and those who will never play professionally. The prospect of receiving such fees cannot, therefore, be either a decisive factor in encouraging recruitment and training of young players or an adequate means of financing such activities, particularly in the case of smaller clubs.

110 Furthermore, as the Advocate General has pointed out in point 226 et seq. of his Opinion, the same aims can be achieved at least as efficiently by other means which do not impede freedom of movement for workers.

111 It has also been argued that the transfer rules are necessary to safeguard the worldwide organization of football.

112 However, the present proceedings concern application of those rules within the Community and not the relations between the national associations of the Member States and those of non-member countries. In any event, application of different rules to transfers between clubs belonging to national associations within the Community and to transfers between such clubs and those affiliated to the national associations of non-member countries is unlikely to pose any particular difficulties. As is clear from paragraphs 22 and 23 above, the rules which have so far governed transfers within the national associations of certain Member States are different from those which apply at the international level.

113 Finally, the argument that the rules in question are necessary to compensate clubs for the expenses which they have had to incur in paying fees on recruiting their players cannot be accepted, since it seeks to justify the maintenance of obstacles to freedom of movement for workers simply on the ground that such obstacles were able to exist in the past.

114 The answer to the first question must therefore be that Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.

Interpretation of Article 48 of the Treaty with regard to the nationality clauses

115 By its second question, the national court seeks in substance to ascertain whether Article 48 of the Treaty precludes the application of rules laid down by sporting associations, under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States.

Existence of an obstacle to freedom of movement for workers

116 As the Court has held in paragraph 87 above, Article 48 of the Treaty applies to rules laid down by sporting associations which determine the conditions under which professional sports players may engage in gainful employment. It must therefore be considered whether the nationality clauses constitute an obstacle to freedom of movement for workers, prohibited by Article 48.

117 Article 48(2) expressly provides that freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and conditions of work and employment.

118 That provision has been implemented, in particular, by Article 4 of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition, 1968(II), p. 475), under which provisions laid down by law, regulation or administrative action of the Member States which restrict by number or percentage the employment of foreign nationals in any undertaking, branch of activity or region, or at a national level, are not to apply to nationals of the other Member States.

119 The same principle applies to clauses contained in the regulations of sporting associations which restrict the right of nationals of other Member States to take part, as professional players, in football matches (see the judgment in Donà, cited above, paragraph 19).

120 The fact that those clauses concern not the employment of such players, on which there is no restriction, but the extent to which their clubs may field them in official matches is irrelevant. In so far as participation in such matches is the essential purpose of a professional player's activity, a rule which restricts that participation obviously also restricts the chances of employment of the player concerned.

Existence of justifications

121 The existence of an obstacle having thus been established, it must be considered whether that obstacle may be justified in the light of Article 48 of the Treaty.

122 URBSFA, UEFA and the German, French and Italian Governments argued that the nationality clauses are justified on non-economic grounds, concerning only the sport as such.

123 First, they argued, those clauses serve to maintain the traditional link between each club and

its country, a factor of great importance in enabling the public to identify with its favourite team and ensuring that clubs taking part in international competitions effectively represent their countries.

124 Secondly, those clauses are necessary to create a sufficient pool of national players to provide the national teams with top players to field in all team positions.

125 Thirdly, they help to maintain a competitive balance between clubs by preventing the richest clubs from appropriating the services of the best players.

126 Finally, UEFA points out that the "3 + 2" rule was drawn up in collaboration with the Commission and must be revised regularly to remain in line with the development of Community policy.

127 It must be recalled that in paragraphs 14 and 15 of its judgment in Donà, cited above, the Court held that the Treaty provisions concerning freedom of movement for persons do not prevent the adoption of rules or practices excluding foreign players from certain matches for reasons which are not of an economic nature, which relate to the particular nature and context of such matches and are thus of sporting interest only, such as, for example, matches between national teams from different countries. It stressed, however, that that restriction on the scope of the provisions in question must remain limited to its proper objective.

128 Here, the nationality clauses do not concern specific matches between teams representing their countries but apply to all official matches between clubs and thus to the essence of the activity of professional players.

129 In those circumstances, the nationality clauses cannot be deemed to be in accordance with Article 48 of the Treaty, otherwise that article would be deprived of its practical effect and the fundamental right of free access to employment which the Treaty confers individually on each worker in the Community rendered nugatory (on this last point, see Case 222/86 Unectef v Heylens and Others [1987] ECR 4097, paragraph 14).

130 None of the arguments put forward by the sporting associations and by the governments which have submitted observations detracts from that conclusion.

131 First, a football club's links with the Member State in which it is established cannot be regarded as any more inherent in its sporting activity than its links with its locality, town, region or, in the case of the United Kingdom, the territory covered by each of the four associations. Even though national championships are played between clubs from different regions, towns or localities, there is no rule restricting the right of clubs to field players from other regions, towns or localities in such matches.

132 In international competitions, moreover, participation is limited to clubs which have achieved certain results in competition in their respective countries, without any particular significance being attached to the nationalities of their players.

133 Secondly, whilst national teams must be made up of players having the nationality of the relevant country, those players need not necessarily be registered to play for clubs in that country. Indeed, under the rules of the sporting associations, foreign players must be allowed by their clubs to play for their country's national team in certain matches.

134 Furthermore, although freedom of movement for workers, by opening up the employment market in one Member State to nationals of the other Member States, has the effect of reducing workers'chances of finding employment within the Member State of which they are nationals, it also, by the same token, offers them new prospects of employment in other Member States. Such considerations obviously apply also to professional footballers.

135 Thirdly, although it has been argued that the nationality clauses prevent the richest clubs from engaging the best foreign players, those clauses are not sufficient to achieve the aim of maintaining a competitive balance, since there are no rules limiting the possibility for such clubs to recruit the best national players, thus undermining that balance to just the same extent.

136 Finally, as regards the argument based on the Commission's participation in the drafting of the "3 + 2" rule, it must be pointed out that, except where such powers are expressly conferred upon it, the Commission may not give guarantees concerning the compatibility of specific practices with the Treaty (see also Joined Cases 142/80 and 143/80 Amministrazione delle Finanze dello Stato v Essevi and Salengo [1981] ECR 1413, paragraph 16). In no circumstances does it have the power to authorize practices which are contrary to the Treaty.

137 It follows from the foregoing that Article 48 of the Treaty precludes the application of rules

laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States.

Interpretation of Articles 85 and 86 of the Treaty

138 Since both types of rule to which the national court's question refer are contrary to Article 48, it is not necessary to rule on the interpretation of Articles 85 and 86 of the Treaty.

The temporal effects of this judgment

139 In their written and oral observations, UEFA and URBSFA have drawn the Court's attention to the serious consequences which might ensue from its judgment for the organization of football as a whole if it were to consider the transfer rules and nationality clauses to be incompatible with the Treaty.

140 Mr Bosman, whilst observing that such a solution is not indispensable, has suggested that the Court could limit the temporal effects of its judgment in so far as it concerns the transfer rules.

141 It has consistently been held that the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 177 of the Treaty, gives to a rule of Community law clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. It follows that the rule as thus interpreted can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions for bringing before the courts having jurisdiction an action relating to the application of that rule are satisfied (see, inter alia, Case 24/86 Blaizot v University of Liège and Others [1988] ECR 379, paragraph 27).

142 It is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict the opportunity for any person concerned to rely upon the provision as thus interpreted with a view to calling in question legal relationships established in good faith. Such a restriction may be allowed only by the Court, in the actual judgment ruling upon the interpretation sought (see, inter alia, the judgments in Blaizot, cited above, paragraph 28, and Legros, cited above, paragraph 30).

143 In the present case, the specific features of the rules laid down by the sporting associations for transfers of players between clubs of different Member States, together with the fact that the same or similar rules applied to transfers both between clubs belonging to the same national association and between clubs belonging to different national associations within the same Member State, may have caused uncertainty as to whether those rules were compatible with Community law.

144 In such circumstances, overriding considerations of legal certainty militate against calling in question legal situations whose effects have already been exhausted. An exception must, however, be made in favour of persons who may have taken timely steps to safeguard their rights. Finally, limitation of the effects of the said interpretation can be allowed only in respect of compensation fees for transfer, training or development which have already been paid on, or are still payable under an obligation which arose before, the date of this judgment.

145 It must therefore be held that the direct effect of Article 48 of the Treaty cannot be relied upon in support of claims relating to a fee in respect of transfer, training or development which has already been paid on, or is still payable under an obligation which arose before, the date of this judgment, except by those who have brought court proceedings or raised an equivalent claim under the applicable national law before that date.

146 With regard to nationality clauses, however, there are no grounds for a temporal limitation of the effects of this judgment. In the light of the Walrave and Donà judgments, it was not reasonable for those concerned to consider that the discrimination resulting from those clauses was compatible with Article 48 of the Treaty.

Decision on costs

Costs

147 The costs incurred by the Danish, French, German and Italian Governments and the Commission of the European Communities, which have submitted observations to the Court, are

not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the Cour d'Appel, Liège, by judgment of 1 October 1993, hereby rules:

1. Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations, under which a professional footballer who is a national of one Member State may not, on the expiry of his contract with a club, be employed by a club of another Member State unless the latter club has paid to the former club a transfer, training or development fee.

2. Article 48 of the EEC Treaty precludes the application of rules laid down by sporting associations under which, in matches in competitions which they organize, football clubs may field only a limited number of professional players who are nationals of other Member States.

3. The direct effect of Article 48 of the EEC Treaty cannot be relied upon in support of claims relating to a fee in respect of transfer, training or development which has already been paid on, or is still payable under an obligation which arose before, the date of this judgment, except by those who have brought court proceedings or raised an equivalent claim under the applicable national law before that date.

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Avis juridique important

61987J0247

Judgment of the Court (Second Chamber) of 14 February 1989. - Star Fruit Company SA v Commission of the European Communities. - Action for failure to act brought by an undertaking - Failure by the Commission to commence proceedings under Article 169 of the EEC Treaty. - Case 247/87.

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Keywords

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Action for failure to act - Natural or legal persons - Failures to act against which an action lies - Failure to commence proceedings for a breach of Treaty obligations - Inadmissibility

(EEC Treaty, Art . 169, second paragraph, and Art . 175, third paragraph)

Summary

An action for failure to act brought by a natural or legal person for a declaration that in not commencing against a Member State proceedings to establish its breach of obligations the Commission has, in breach of the Treaty, failed to take a decision .

First, it is clear from the scheme of Article 169 of the Treaty that the Commission is not obliged to commence proceedings under that provision but has a discretionary power in this regard which excludes the right of private individuals to require that institution to adopt a specific position .

Secondly, a natural or legal person who asks the Commission to commence proceedings pursuant to Article 169 is in fact seeking the adoption of acts which are not of direct and individual concern to him within the meaning of the second paragraph of Article 173 and which it could not therefore challenge by means of an action for annulment in any event .

Parties

In Case 247/87

Star Fruit Company SA, whose registered office is in Brussels, represented by J . Cloetens, of the Brussels Bar with an address for service in Luxembourg at the Chambers of P . Schleimer, 26 rue Philippe-II,

applicant,

v

Commission of the European Communities, represented by its Legal Adviser, M . J . Jonczy, acting

as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a Member of its Legal Department, Wagner Centre, C 254, Luxembourg,

defendant,

supported by the

French Republic, represented by E . Belliard and Géraud de Bergues, acting as Agents, with an address for service in Luxembourg at the French Embassy,

intervener,

APPLICATION under Articles 173 and 175 of the EEC Treaty for a declaration that the Commission has failed to commence proceedings under Article 169 of the Treaty to establish the French Republic' s failure to fulfil its obligations,

THE COURT (Second Chamber)

composed of : T . F . O' Higgins, President of the Chamber, G . F . Mancini and F . A . Schockweiler, Judges,

Advocate General : C . O . Lenz

Registrar : D . Louterman, Administrator

having regard to the Report for the Hearing and further to the hearing on 30 November 1988,

having heard the Opinion of the Advocate General delivered at the sitting on 14 December 1988,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 14 August 1987, the Belgian company Star Fruit Company, which specializes in the importation and exportation of fresh bananas, brought an action under the second paragraph of Article 173 and the third paragraph of Article 175 of the EEC Treaty essentially for a declaration that the Commission of the European Communities had failed to commence proceedings against the French Republic under Article 169 of the Treaty .

2 The applicant considers that the system for supplying the banana market in France is incompatible with Article 30 et seq . of the EEC Treaty and with Article 2 of the Lomé Convention of 28 February 1975 (Official Journal 1976, L 25, p . 1). It therefore requested the Commission, by letter of 17 April 1987, to commence proceedings under Article 169 of the EEC Treaty against the French Republic in order to determine that the system in question is incompatible with the aforementioned provisions, to call upon that Member State to abolish import quotas on bananas originating in non-member States which are in free circulation in the other Member States of the Community and to pay it compensation for the damage which it has allegedly suffered as a result of the impossibility of fulfilling the orders of its French customers and the loss of goods resulting from the import bans applied by the Member State in question .

3 By a letter dated 4 May 1987 the Commission acknowledged receipt of the applicant' s letter and informed it that it would adopt the measures needed in the matter .

4 It was after receiving that communication that the applicant brought this action .

5 By a separate document received at the Court on 9 November 1987 the Commission raised an objection of inadmissibility pursuant to Article 91 of the Rules of Procedure and requested the Court to rule on its objection without considering the substance of the case .

6 In support of its objection the Commission, supported on all points by the French Republic which was granted leave to intervene in support of its conclusions, contends in substance that the application is inadmissible under the second paragraph of Article 173 because the applicant has failed to specify the act of the Commission which it seeks to have declared void . The application is also inadmissible, in the Commission' s view, under the third paragraph of Article 175, the wording of which excludes the possibility of an action for failure to act being brought by a private individual for non-application of the procedure provided for in Article 169 against a Member State .

7 The applicant leaves it to the Court to decide whether its application is admissible under the second paragraph of Article 173 . It maintains that its application is admissible under the third

paragraph of Article 175 of the Treaty .

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court .

9 It appears that the applicant has not even identified the act adopted by the Commission against which the action is directed . Consequently, the application is inadmissible in so far as it is based on the second paragraph of Article 173 of the EEC Treaty .

10 In so far as it is based on the third paragraph of Article 175 of the Treaty, the purpose of the application is to obtain a declaration that in not commencing against the French Republic proceedings to establish its breach of obligations the Commission infringed the Treaty by failing to take a decision .

11 However, it is clear from the scheme of Article 169 of the Treaty that the Commission is not bound to commence the proceedings provided for in that provision but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position .

12 It is only if it considers that the Member State in question has failed to fulfil one of its obligations that the Commission delivers a reasoned opinion . Furthermore, in the event that the State does not comply with the opinion within the period allowed, the institution has in any event the right, but not the duty, to apply to the Court of Justice for a declaration that the alleged breach of obligations has occurred .

13 It must also be observed that in requesting the Commission to commence proceedings pursuant to Article 169 the applicant is in fact seeking the adoption of acts which are not of direct and individual concern to it within the meaning of the second paragraph of Article 173 and which it could not therefore challenge by means of an action for annulment in any event .

14 Consequently, the applicant cannot be entitled to raise the objection that the Commission failed to commence proceedings against the French Republic pursuant to Article 169 of the Treaty .

15 It follows that the application is inadmissible in its entirety .

Decision on costs

Costs

16 Under Article 69(2) of the Rules of Procedure the unsuccessful party must be ordered to pay the costs if they have been asked in the successful party' s pleadings .

17 Since the applicant has failed in its submissions, it must be ordered to pay the costs .

18 Since only the Commission has pleaded to that effect, the order for costs must be limited to those incurred by the Commission .

Operative part

On those grounds,

THE COURT (Second Chamber)

hereby :

(1) Dismisses the action as inadmissible;

(2) Orders the applicant to pay the costs incurred by the Commission;

(3) Orders the French Republic to bear its own costs .

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Avis juridique important

62000J0099

Judgment of the Court of 4 June 2002. - Criminal proceedings against Kenny Roland Lyckeskog. - Reference for a preliminary ruling: Hovrätten för Västra Sverige - Sweden. - Questions for a preliminary ruling - Obligation to refer - Court or tribunal against whose decisions there is no judicial remedy under national law - Interpretation of Regulation (EEC) No 918/83 - Community system of reliefs from customs duty. - Case C-99/00.

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Keywords

1. Preliminary rulings - Reference to the Court - Obligation to refer - None - Conditions - Decisions of a national court or tribunal appealable to a supreme court subject to a condition of admissibility

(Art. 234 EC, third para.)

2. Common Customs Tariff - Duty-free allowances for goods contained in travellers' personal luggage - Non-commercial nature of goods imported - Assessment criteria

(Council Regulation No 918/83, Art. 45(2)(b), as amended by Regulation No 355/94)

3. Common Customs Tariff - Duty-free allowances for goods contained in travellers' personal luggage - Non-commercial nature of goods imported - National administrative instructions imposing binding quantitative limits on relief from customs duties - Not permissible

(Council Regulation No 918/83, Art. 45, as amended by Regulation No 355/94)

Summary

$$1. Where its decisions may be appealed to a supreme court, a national court or tribunal is not under the obligation referred to in the third paragraph of Article 234 EC to refer a question to the Court of Justice for a preliminary ruling even if examination of the merits by the supreme court is subject to a prior declaration of admissibility.

(see paras 16, 19, operative part 1)

2. The question whether an importation of goods is non-commercial, within the meaning of Article 45(2)(b) of Regulation No 918/83 setting up a Community system of reliefs from customs duty, as amended by Regulation No 355/94, must be examined case by case on the basis of an overall assessment of the circumstances, taking into account the nature of the importation and the quantity of goods involved, the frequency with which the same goods are imported by the traveller concerned, but also, where appropriate, taking into account that traveller's lifestyle and habits or his family environment.

(see para. 27, operative part 2)

3. Article 45 of Regulation No 918/83 setting up a Community system of reliefs from customs duty, as amended by Regulation No 355/94, precludes national administrative instructions or

practices which impose binding quantitative limits on relief from customs duties or which would have the effect of creating an irrebuttable presumption that the importation concerned is commercial by reason of the quantity of goods imported.

(see para. 33, operative part 3)

Parties

In Case C-99/00,

REFERENCE to the Court under Article 234 EC by the Hovrätt för Västra Sverige (Sweden) for a preliminary ruling in the criminal proceedings pending before that court against

Kenny Roland Lyckeskog,

on the interpretation of the third paragraph of Article 234 EC and of Article 45(1) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ 1983 L 105, p. 1), as amended by Council Regulation (EC) No 355/94 of 14 February 1994 (OJ 1994 L 46, p. 5),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P. Jann, F. Macken, N. Colneric, and S. von Bahr (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola, J.-P. Puissochet (Rapporteur), M. Wathelet, V. Skouris, J.N. Cunha Rodrigues and A. Rosas, Judges,

Advocate General: A. Tizzano,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Swedish Government, by L. Nordling, acting as Agent,

- the Danish Government, by J. Molde, acting as Agent,

- the Finnish Government, by E. Bygglin, acting as Agent,

- the United Kingdom Government, by J.E. Collins, acting as Agent, and M. Hoskins, Barrister,

- the Commission of the European Communities, by L. Ström, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 21 February 2002,

gives the following

Judgment

Grounds

1 By decision of 10 March 2000, received at the Court on 16 March 2000, the Hovrätt för Västra Sverige (Court of Appeal for Western Sweden) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of the third paragraph of Article 234 EC and of Article 45(1) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ 1983 L 105, p. 1), as amended by Council Regulation (EC) No 355/94 of 14 February 1994 (OJ 1994 L 46, p. 5) (Regulation No 918/83).

2 Those questions have arisen in proceedings brought against Mr Lyckeskog on the ground that he had attempted to smuggle into Sweden 500 kg of rice from Norway without declaring that importation.

Community law

3 With regard to the obligations devolving on the court or tribunal making a reference, the third paragraph of Article 234 EC provides:

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

4 The provisions of Community law applicable to the dispute in the main proceedings are Articles 45 and 47 of Regulation No 918/83, which provide:

Article 45

1. Subject to Articles 46 to 49, goods contained in the personal luggage of travellers coming from a third country shall be admitted free of import duties, provided such imports are of a non-commercial nature.

2. For the purposes of paragraph 1:

...

(b) "imports of a non-commercial nature" means imports which:

- are of an occasional nature, and

- consist exclusively of goods for the personal use of the travellers or their families, or of goods intended as presents; the nature and quantity of such goods should not be such as might indicate that they are being imported for commercial reasons.

...

Article 47

The relief referred to in Article 45 shall be granted up to a total value of ECU 175 per traveller to goods other than those listed in Article 46.

However, Member States may reduce this amount to ECU 90 for travellers under 15 years of age.

National legislation

5 The Swedish hovrätter deliver judgments which may be the subject of appeal to the Högsta domstol (Supreme Court) (Sweden). Such an appeal will always be examined if it is brought by the Public Prosecutor in cases involving the exercise of public authority. In other cases, an appeal will be examined as to its substance only if the Högsta domstol has declared it admissible.

6 Paragraph 10 of Chapter 54 of the Rättegångsbalk (Code of Procedure) provides that the Högsta domstol may declare an appeal admissible only if:

1. it is important for guidance in the application of the law that the appeal be examined by the Högsta domstol, or

2. there are special grounds for examination of the appeal, such as the existence of grounds of review on a point of law, formal defect, or where the outcome of the case before the hovrätt is manifestly attributable to negligence or serious error.

The dispute in the main proceedings and the questions submitted for preliminary ruling

7 Mr Lyckeskog was found guilty of attempted smuggling by the Strömstads tingsrätt (District Court, Strömstad) on the ground that he had attempted, in 1998, to import 500 kg of rice from Norway into Sweden. The tingsrätt, basing itself on the fact that Mr Lyckeskog had exceeded the quantity of 20 kg authorised by decision of the customs administration for the duty-free importation of rice, held that the importation by Mr Lyckeskog was of a commercial nature within the meaning of Regulation No 918/83.

8 Mr Lyckeskog appealed against that decision to the Hovrätt för Västra Sverige, which, although taking the view that it could rule on the merits of the case given that there was no difficulty in interpreting the applicable provisions of Community law, expressed uncertainty as to whether it was to be regarded as a court ruling at last instance and for that reason obliged under the third paragraph of Article 234 EC to refer a question for a preliminary ruling to the Court to enable it to interpret the relevant provisions of Regulation No 918/83, as the conditions laid down in the judgment in Case 283/81 CILFIT [1982] ECR 3415 did not appear to be satisfied.

9 It was in those circumstances that the Hovrätt för Västra Sverige referred the following questions to the Court for a preliminary ruling:

1. Is a national court or tribunal which in practice is the last instance in a case, because a declaration of admissibility is needed in order for the case to be reviewed by the country's supreme court, a court or tribunal within the meaning of the third paragraph of Article 234 EC?

2. May a court or tribunal within the meaning of the third paragraph of Article 234 EC decline to request a preliminary ruling where it considers it clear how the questions of Community law in point must be decided, even if those questions are not covered by the doctrine of acte clair or acte éclairé?

In the event that the Court of Justice answers the first question in the negative, or the first

question in the affirmative and the second question in the negative - but not otherwise - the Hovrätt also wishes to have an answer to the following questions:

3. Under Article 45(1) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty, goods contained in the personal luggage of travellers coming from a third country are, subject to Articles 46 to 49 of that regulation, to be admitted free of import duties, provided that such imports are of a non-commercial nature. Does this mean that the nature and quantity of the goods should, on an objective view, not be such as to raise doubts about the nature of the import? Or may regard be had to the individual's lifestyle and habits?

4. What is the legal significance of a national authority's provisions which indicate the duty-free quantity of a certain product - to which Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty is applicable - normally to be admitted?

The first question

10 The essence of the first question referred by the Hovrätt för Västra Sverige is whether a national court or tribunal whose decisions will be examined by the national supreme court, before which they are challenged, only if that supreme court declares the appeal to be admissible is to be regarded as a court or tribunal against whose decisions there is no judicial remedy under national law within the meaning of the third paragraph of Article 234 EC.

11 The Danish Government submits that any court or tribunal whose decisions may be the subject of appeal only after a declaration of admissibility has been issued must be considered to be a court or tribunal of the type referred to in the third paragraph of Article 234 EC. It bases its reasoning on, first, the judgment in Case 6/64 Costa [1964] ECR 585, in which the Court pointed out that, under the actual wording of that provision, national courts against whose decisions, as in the main proceedings in that case, there was no judicial remedy, had to refer the matter to the Court so that a preliminary ruling could be given on the interpretation of Community law, and, second, the judgment in Case 107/76 Hoffmann-La Roche [1977] ECR 957, in which the Court ruled that the underlying purpose of Article 234 EC is to ensure that Community law is interpreted and applied in a uniform manner in all the Member States, the particular objective of the third paragraph being to prevent a body of national case-law not in accordance with the rules of Community law from coming into existence in any Member State. The requirement of a declaration of admissibility would thus constitute an obstacle to the uniform interpretation of Community law if the supreme court alone were covered by the obligation arising under the third paragraph of Article 234 EC.

12 The judgment in Costa, cited above, is also cited by the Swedish and Finnish Governments in their observations submitted to the Court, but in support of an analysis contrary to that of the Danish Government. Thus, they contend that the mere fact that the decisions of the hovrätter may be subject to appeal suffices to justify the conclusion that those courts are not covered by the third paragraph of Article 234 EC. The mechanism of a declaration of admissibility, they argue, does no more than limit the prospects of an applicant having his appeal examined. It does not, as the United Kingdom Government points out, remove the possibility of lodging an appeal against judgments of the hovrätter. The United Kingdom further submits that, at the stage of considering the admissibility of an appeal, a supreme court can make a reference for a preliminary ruling on a question as to the interpretation of a rule of Community law. The referring court, questioned on this point by the Court, accepts that this is so as regards the Högsta domstol. The Swedish Government points out, moreover, that, in the exceptional cases in which there is no ordinary avenue of appeal against judgments of the hovrätter and those courts therefore, from the formal point of view, rule at final instance, they come within the scope of the third paragraph of Article 234 EC.

13 The Commission takes the same position, basing its reasoning on the fact that, where a court ruling on admissibility at last instance considers that an issue of Community law has not been correctly dealt with, that court is required to refer a question to the Court for a preliminary ruling pursuant to the third paragraph of Article 234 EC, or rely on one of the limits on the obligation to refer defined in the judgment in CILFIT, cited above, or remit the case to a lower court. Thus, the possibility of referring a question for a preliminary ruling will always be preserved and the risk of interference with the uniform interpretation of Community law consequently avoided.

14 The obligation on national courts against whose decisions there is no judicial remedy to refer a question to the Court for a preliminary ruling has its basis in the cooperation established, in order

to ensure the proper application and uniform interpretation of Community law in all the Member States, between national courts, as courts responsible for applying Community law, and the Court. That obligation is in particular designed to prevent a body of national case-law that is not in accordance with the rules of Community law from coming into existence in any Member State (see, inter alia, Hoffmann-La Roche, cited above, paragraph 5, and Case C-337/95 Parfums Christian Dior [1997] ECR I-6013, paragraph 25).

15 That objective is secured when, subject to the limits accepted by the Court of Justice (CILFIT), supreme courts are bound by this obligation to refer (Parfums Christian Dior, cited above) as is any other national court or tribunal against whose decisions there is no judicial remedy under national law (Joined Cases 28/62, 29/62 and 30/62 Da Costa en Schaake [1963] ECR 31).

16 Decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law within the meaning of Article 234 EC. The fact that examination of the merits of such appeals is subject to a prior declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy.

17 That is so under the Swedish system. The parties always have the right to appeal to the Högsta domstol against the judgment of a hovrätt, which cannot therefore be classified as a court delivering a decision against which there is no judicial remedy. Under Paragraph 10 of Chapter 54 of the Rättegångsbalk, the Högsta domstol may issue a declaration of admissibility if it is important for guidance as to the application of the law that the appeal be examined by that court. Thus, uncertainty as to the interpretation of the law applicable, including Community law, may give rise to review, at last instance, by the supreme court.

18 If a question arises as to the interpretation or validity of a rule of Community law, the supreme court will be under an obligation, pursuant to the third paragraph of Article 234 EC, to refer a question to the Court of Justice for a preliminary ruling either at the stage of the examination of admissibility or at a later stage.

19 The answer to the first question must therefore be that, where the decisions of a national court or tribunal can be appealed to the supreme court under conditions such as those that apply to decisions of the referring court in the present case, that court or tribunal is not under the obligation referred to in the third paragraph of Article 234 EC.

The second question

20 The essence of the second question referred by the Hovrätt för Västra Sverige is whether, in the event that a hovrätt is to be regarded as a court or tribunal within the meaning of the third paragraph of Article 234 EC, it is obliged to refer the matter to the Court even though interpretation of the rule of Community law applicable to the dispute in the main proceedings does not present any difficulty but the conditions required by the judgment in CILFIT for application of the acte clair doctrine are not met.

21 In view of the answer to the first question and to the fact that, under Swedish legislation, the Högsta domstol may, on appeal to it against a decision by a hovrätt, refer a question to the Court for a preliminary ruling, it is unnecessary to reply to the second question.

The third question

22 The Hovrätt för Västra Sverige is asking the Court, essentially, to specify the criteria for determining whether the importation of goods contained in the personal luggage of a person travelling from a non-member country is entirely non-commercial within the meaning of Article 45(1) of Regulation No 918/83, and in particular whether that assessment must take into account the lifestyle and habits of the individual concerned.

23 According to the Finnish Government, when, by reason of their nature or the fact that they are of significant quantity, goods seized from the personal luggage of a traveller appear to have been imported for commercial purposes, the lifestyle and habits of the person concerned must be examined. If, at the conclusion of such an examination, it does not appear that the goods are intended solely for personal or family use, the customs authorities are entitled to take the view that the importation is commercial in nature and for that reason to refuse duty-free status. The Commission agrees with that approach, which requires a case-by-case consideration of whether it is appropriate to grant duty-free status.

24 The Swedish Government also maintains that, in order to determine whether the importation of goods seized from a traveller's personal luggage is commercial in nature, account must be taken of the nature and quantity of the goods, but adds that the economic and personal

circumstances of the traveller, whose wife, in the main proceedings in the present case, comes from Asia, must also be taken into account. The Swedish Government bases itself on the position taken by the Court in Case C-208/88 Commission v Denmark [1990] ECR I-4445, according to which Article 45 of Regulation No 918/83 does not allow Member States to presume, without allowing proof to the contrary, that an importation must be commercial in nature where the imported goods found in the personal luggage of a traveller exceed a certain quantity.

25 According to the relevant provisions of Regulation No 918/83, imports of a non-commercial nature are imports which consist exclusively of goods for the personal use of travellers or their families, or of goods intended as presents, where the nature or quantity of the goods is not such as to indicate that they are being imported for commercial reasons.

26 Personal use, by definition, varies from one person to another, and from one culture to another, and the designation, for reference purposes, of a typical use would for that reason be unsatisfactory. It is therefore essential, for the proper application of Regulation No 918/83, that a case-by-case assessment be made as to whether importation is commercial in character, account being taken, where appropriate, of the lifestyle and habits of each traveller. While the nature and quantity of the goods under consideration are among the indicators to be taken into account, customs authorities cannot confine themselves to those indicators in assessing whether or not the importation is commercial.

27 The answer to the third question must therefore be that the question whether an importation of goods is non-commercial, within the meaning of Article 45(2)(b) of Regulation No 918/83, must be examined case by case on the basis of an overall assessment of the circumstances, taking into account the nature of the importation and the quantity of goods involved, the frequency with which those goods are imported by the traveller concerned, but also, where appropriate, taking account of that traveller's lifestyle and habits or of his family environment.

The fourth question

28 By its fourth question, the Hovrätt för Västra Sverige is asking, essentially, whether Regulation No 918/83 is compatible with national administrative provisions fixing the quantity of goods to which that regulation applies and which may be imported free from customs duty.

29 The Finnish Government points out the purpose of Regulation No 918/83, which is to establish, throughout Community territory, a uniform system of relief from customs duties.

30 Like the Swedish Government and the Commission, the Finnish Government contends that that regulation does not entitle Member States to impose more stringent quantitative restrictions for certain products unless such restrictions are justified on moral or public-policy grounds. Nor does it enable Member States to decide whether importation is or is not commercial solely by reference to the quantity of goods imported. National provisions of that kind are incompatible with Regulation No 918/83.

31 On the other hand, the parties which have submitted observations contend that Community law does not preclude non-binding instructions drawn up by the customs authorities indicating, for a particular product, the maximum quantity below which a traveller is not required to provide other evidence that the importation is non-commercial.

32 Such an analysis of Regulation No 918/83 is in accordance with the reply given to the third question. If Member States were entitled to impose quantitative restrictions on grounds other than morality or public policy, the uniform nature of the system of relief from customs duties throughout Community territory would be jeopardised. However, instructions drawn up by the customs authorities, as long as they are not an indirect way of introducing an irrebuttable presumption that imports are commercial, but are simply a non-binding criterion designed to facilitate customs procedures, are not incompatible with the system established by Regulation No 918/83.

33 The answer to the fourth question must therefore be that Article 45 of Regulation No 918/83 precludes national administrative instructions or practices which impose binding quantitative limits on relief from customs duties or which would have the effect of creating an irrebuttable presumption that the importation concerned is commercial by reason of the quantity of goods imported.

Decision on costs

Costs

34 The costs incurred by the Swedish, Danish, Finnish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hovrätt för Västra Sverige by decision of 10 March 2000, hereby rules:

1. Where the decisions of a national court or tribunal can be appealed to the supreme court under conditions such as those that apply to decisions of the referring court in the present case, that court or tribunal is not under the obligation referred to in the third paragraph of Article 234 EC.

2. The question whether an importation of goods is non-commercial, within the meaning of Article 45(2)(b) of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty, as amended by Council Regulation (EC) No 355/94 of 14 February 1994, must be examined case by case on the basis of an overall assessment of the circumstances, taking into account the nature of the importation and the quantity of goods involved, the frequency with which those goods are imported by the traveller concerned, but also, where appropriate, taking account of that traveller's lifestyle and habits or of his family environment.

3. Article 45 of Regulation No 918/83, as amended by Regulation No 355/94, precludes national administrative instructions or practices which impose binding quantitative limits on relief from customs duties or which would have the effect of creating an irrebuttable presumption that the importation concerned is commercial by reason of the quantity of goods imported.

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Joined Cases C-397/01 to C-403/01

Bernhard Pfeiffer and Others

v

Deutsches Rotes Kreuz, Kreisverband Waldshut eV

(Reference for a preliminary ruling from the Arbeitsgericht Lörrach)

(Social policy – Protection of the health and safety of workers – Directive 93/104/EC – Scope – Emergency workers in attendance in ambulances in the framework of an emergency service run by the German Red Cross – Definition of 'road transport' – Maximum weekly working time – Principle – Direct effect – Derogation – Conditions)

Summary of the Judgment

1. *Social policy – Protection of the health and safety of workers – Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work – Directive 93/104 concerning certain aspects of the organisation of working time – Scope – Activity of emergency workers – Included – Activity not forming part of civil protection services or road transport excluded from such scope*

   (Council Directives 89/391, Art. 2, and 93/104, Art. 1(3))

2. *Social policy – Protection of the health and safety of workers – Directive 93/104 concerning certain aspects of the organisation of working time – Maximum weekly working time – Derogation – Worker's consent – Employment contract referring to a collective agreement permitting the extension of that time – Insufficient*

   (Council Directive 93/104, Art. 18(1)(b)(i))

3. *Social policy – Protection of the health and safety of workers – Directive 93/104 concerning certain aspects of the organisation of working time – Activity of emergency workers – National legislation permitting the extension of the maximum weekly working time by means of a collective or works agreement – Not permissible*

   (Council Directive 93/104, Art. 6(2))

4. *Social policy – Protection of the health and safety of workers – Directive 93/104 concerning certain aspects of the organisation of working time – Article 6(2) – Direct effect – Powers and duties of the national court – Non-application of national provisions permitting the extension of the maximum weekly working time set by that article*

   (Council Directive 93/104, Art. 6(2))

1. Article 2 of Directive 89/391 on the introduction of measures to encourage improvements in the safety and health of workers at work and Article 1(3) of Directive 93/104 concerning certain aspects of the organisation of working time must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service, falls within the scope of those directives.

   In that regard, that activity does not come within the exclusion in the first subparagraph of Article 2(2) of Directive 89/391 relating to certain specific activities within the public service. That exclusion was adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in

cases the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers.

Likewise, the activity of emergency workers, even if it includes, at least in part, using a vehicle and accompanying a patient on his journey to hospital, cannot be regarded as 'road transport' and therefore must be excluded from the scope of Article 1(3) of Directive 93/104.

(see paras 55, 63, 72, 74, operative part 1)

2. The first indent of Article 18(1)(b)(i) of Directive 93/104 concerning certain aspects of the organisation of working time, which confers the right not to apply Article 6 of that directive containing the rule as to the maximum weekly working time, is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of that directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension, since it is by no means certain that, when he entered into such a contract, the worker concerned knew of the restriction of the rights conferred on him by Directive 93/104.

(see paras 85-86, operative part 2)

3. Article 6(2) of Directive 93/104 concerning certain aspects of the organisation of working time must be interpreted as precluding legislation in a Member State the effect of which, as regards periods of duty time completed by emergency workers in the framework of an emergency medical service, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded.

First, it follows both from the wording of Article 6(2) of Directive 93/104 and from the purpose and scheme of that directive, that the 48-hour upper limit on weekly working time constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health, so that national legislation which authorises weekly working time in excess of 48 hours, including periods of duty time, is not compatible with the requirements of Article 6(2) of the directive. Second, periods of duty time completed by emergency workers must be taken into account in their totality in the calculation of maximum daily and weekly working time, regardless of the fact that they necessarily include periods of inactivity of varying length between calls.

(see paras 94-95, 100-101, 120, operative part 3)

4. Article 6(2) of Directive 93/104 concerning certain aspects of the organisation of working time fulfils all the conditions necessary for it to have direct effect, since it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it, which provides for a 48-hour maximum as regards average weekly working time. The fact that the directive leaves the Member States a degree of latitude to adopt rules in order to implement Article 6, and that it permits them to derogate from it, do not alter the precise and unconditional nature of Article 6(2).

Accordingly, when hearing a case between individuals, a national court, which is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by it, must do whatever lies within its jurisdiction to ensure that the maximum

period of weekly working time, which is set at 48 hours by the said Article 6(2), is not exceeded.

(see paras 104-106, 119-120, operative part 3)

JUDGMENT OF THE COURT (Grand Chamber)
5 October 2004(1)

(Social policy – Protection of the health and safety of workers – Directive 93/104/EC – Scope – Emergency workers in attendance in ambulances in the framework of an emergency service run by the German Red Cross – Definition of 'road transport' – Maximum weekly working time – Principle – Direct effect – Derogation – Conditions)

In Joined Cases C-397/01 to C-403/01,REFERENCES for a preliminary ruling under Article 234 EC,from the Arbeitsgericht Lörrach (Germany), made by orders of 26 September 2001, received at the Court on 12 October 2001, in the proceedings

Bernhard Pfeiffer (C-397/01),**Wilhelm Roith** (C-398/01),**Albert Süß** (C-399/01),**Michael Winter** (C-400/01),**Klaus Nestvogel** (C-401/01),**Roswitha Zeller** (C-402/01),**Matthias Döbele** (C-403/01)

v

Deutsches Rotes Kreuz, Kreisverband Waldshut eV,

THE COURT (Grand Chamber),,

composed of: V. Skouris, President, P. Jann, C.W.A. Timmermans, C. Gulmann, J.-P. Puissochet and J.N. Cunha Rodrigues, Presidents of Chambers, R. Schintgen (Rapporteur), F. Macken, N. Colneric, S. von Bahr and K. Lenaerts, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure,after considering the observations submitted on behalf of:

–
Mr Pfeiffer, Mr Roith, Mr Süß, Mr Winter, Mr Nestvogel, Ms Zeller and Mr Döbele, by B. Spengler, Rechtsanwalt,

–
the Commission of the European Communities, by J. Sack and H. Kreppel, acting as Agents,

after considering the observations submitted on behalf of:

–
Mr Pfeiffer, Mr Roith, Mr Nestvogel, Ms Zeller and Mr Döbele, by B. Spengler,

–
Mr Süß and Mr Winter, by K. Lörcher, Gewerkschaftssekretär,

–
the German Government, by W.-D. Plessing, acting as Agent,

–
the French Government, by R. Abraham, G. de Bergues and C. Bergeot-Nunes, acting as Agents,

–
the Italian Government, by I.M. Braguglia, acting as Agent, and A. Cingolo, avvocato del Stato,

–
the United Kingdom Government, by C. Jackson, acting as Agent, and A. Dashwood, Barrister,

–
the Commission, by J. Sack and H. Kreppel,

after hearing the Opinion of the Advocate General at the sitting on 6 May 2003,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2004,

gives the following

Judgment

1
These references for a preliminary ruling concern the interpretation of Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ 1989 L 183, p. 1) and of Articles 1(3), 6 and 18(1)(b)(i) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18).

2
The references were made to the Court in various sets of proceedings between (i) Mr Pfeiffer, Mr Roith, Mr Süß, Mr Winter, Mr Nestvogel, Ms Zeller and Mr Döbele, who work or used to work as emergency workers, and (ii) Deutsches Rotes Kreuz, Kreisverband Waldshut eV (German Red Cross, Waldshut section ('Deutsches Rotes Kreuz')), a body which employs or employed the claimants in the main actions. The proceedings concern German legislation providing for weekly working time in excess of 48 hours.

Legal framework

Community legislation

3
Directives 89/391 and 93/104 were adopted on the basis of Article 118a of the EC Treaty (Articles 117 to 120 of the EC Treaty have been replaced by Articles 136 EC to 143 EC).

4
Directive 89/391 is the framework directive which lays down general principles concerning the health and safety of workers. Those principles were subsequently developed by a series of specific directives, including Directive 93/104.

5
Article 2 of Directive 89/391 defines the scope of the directive as follows:

‘1. This Directive shall apply to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.).

2. This Directive shall not be applicable where characteristics peculiar to certain specific public service activities, such as the armed forces or the police, or to certain specific activities in the civil protection services inevitably conflict with it.

In that event, the safety and health of workers must be ensured as far as possible in the light of the objectives of this Directive.’

6
Article 1 of Directive 93/104, entitled ‘Purpose and scope’, provides as follows:

‘1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of daily rest, weekly rest and annual leave, to breaks and maximum weekly working time; and

(b) certain aspects of night work, shift work and patterns of work.

3. This Directive shall apply to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391/EEC, without prejudice to Article 17 of this Directive, with the exception of air, rail, road, sea, inland waterway and lake transport, sea fishing, other work at sea and the activities of doctors in training;

4. The provisions of Directive 89/391/EEC are fully applicable to the matters referred to in paragraph 2, without prejudice to more stringent and/or specific provisions contained in this Directive.’

7
Under the heading ‘Definitions’, Article 2 of Directive 93/104 provides:

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

1. “working time” shall mean any period during which the worker is working, at the employer’s disposal and carrying out his activity or duties, in accordance with national laws and/or practice;

2. “rest period” shall mean any period which is not working time;

…’

8
Section II of the directive lays down the measures which the Member States must take to ensure that all workers are afforded, inter alia, daily minimum rest periods and weekly rest periods and it also regulates maximum weekly working time.

9
So far as maximum weekly working time is concerned, Article 6 of Directive 93/104 provides:

‘Member States shall take the measures necessary to ensure that, in keeping with the need to protect the safety and health of workers:

…

2. the average working time for each 7-day period, including overtime, does not exceed 48 hours.’

10
Article 15 of Directive 93/104 provides:

‘This Directive shall not affect Member States’ right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.’

11
Article 16 of the directive provides:

‘Member States may lay down:

…

2. for the application of Article 6 (maximum weekly working time), a reference period not exceeding four months.

…’

12
Directive 93/104 sets out a set of exceptions to a number of its basic rules, in view of the specific features of certain activities and subject to compliance with certain conditions. In that connection, Article 17 provides:

‘1. With due regard for the general principles of the protection of the safety and health of workers, Member States may derogate from Article 3, 4, 5, 6, 8 or 16 when, on account of the specific characteristics of the activity concerned, the duration of the working time is not measured and/or predetermined or can be determined by the workers themselves, and particularly in the case of:

(a)
managing executives or other persons with autonomous decision-taking powers;

(b)
family workers; or

(c)
workers officiating at religious ceremonies in churches and religious communities.

2. Derogations may be adopted by means of laws, regulations or administrative provisions or by means of collective agreements or agreements between the two sides of industry provided that the workers concerned are afforded equivalent periods of compensatory rest or that, in exceptional cases in which it is not possible, for objective reasons, to grant such equivalent periods of compensatory rest, the workers concerned are afforded appropriate protection:

2.1 from Articles 3, 4, 5, 8 and 16:

…

(c)
in the case of activities involving the need for continuity of service or production, particularly;

(i) services relating to the reception, treatment and/or care provided by hospitals or similar establishments, residential institutions and prisons;

…

(iii) press, radio, television, cinematographic production, postal and telecommunications services, ambulance, fire and civil protection services;

…

3. Derogations may be made from Articles 3, 4, 5, 8 and 16 by means of collective agreements or agreements concluded between the two sides of industry at national or regional level or, in conformity with the rules laid down by them, by means of collective agreements or agreements concluded between the two sides of industry at a lower level.

…

The derogations provided for in the first and second subparagraphs shall be allowed on condition that equivalent compensating rest periods are granted to the workers concerned or, in exceptional cases where it is not possible for objective reasons to grant such periods, the workers concerned are afforded appropriate protection.

…

4. The option to derogate from point 2 of Article 16, provided in paragraph 2, points 2.1 and 2.2 and in paragraph 3 of this Article, may not result in the establishment of a reference period exceeding six months.

However, Member States shall have the option, subject to compliance with the general principles relating to the protection of the safety and health of workers, of allowing, for objective or technical reasons or reasons concerning the organisation of work, collective agreements or agreements concluded between the two sides of industry to set reference periods in no event exceeding 12 months.

…'

13
Article 18 of Directive 93/104 is worded as follows:

'1. (a) Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 23 November 1996, or shall ensure by that date that the two sides of industry establish the necessary measures by agreement, with Member States being obliged to take any necessary steps to enable them to guarantee at all times that the provisions laid down by this Directive are fulfilled.

(b) (i) However, a Member State shall have the option not to apply Article 6, while respecting the general principles of the protection of the safety and health of workers, and provided it takes the necessary measures to ensure that:

– no employer requires a worker to work more than 48 hours over a 7-day period, calculated as an average for the reference period referred to in point 2 of Article 16, unless he has first obtained the worker's agreement to perform such work,

– no worker is subjected to any detriment by his employer because he is not willing to give his agreement to perform such work,

– the employer keeps up-to-date records of all workers who carry out such work,

– the records are placed at the disposal of the competent authorities, which may, for reasons connected with the safety and/or health of workers, prohibit or restrict the possibility of exceeding the maximum weekly working hours,

– the employer provides the competent authorities at their request with information on cases in which agreement has been given by workers to perform work exceeding 48 hours over a period of seven days, calculated as an average for the reference period referred to in point 2 of Article 16.

…'

National legislation

14
German labour law distinguishes between duty time ('Arbeitsbereitschaft'), on-call time ('Bereitschaftsdienst') and stand-by time ('Rufbereitschaft').

15
The three concepts are not defined by national legislation but their features derive from case-

law.

16
Duty time (‘Arbeitsbereitschaft’) covers the situation in which the worker must make himself available to his employer at the place of employment and is, moreover, obliged to remain continuously attentive in order to be able to act immediately should the need arise.

17
While a worker is on call (‘Bereitschaftsdienst’), he must be present at a place determined by his employer, either on or outside the latter’s premises, and must keep himself available to take up his duties if so requested by his employer but he is authorised to rest or occupy himself as he sees fit as long as his services are not required.

18
Stand-by time (‘Rufbereitschaft’) is characterised by the fact that the worker is not obliged to remain waiting in a place designated by the employer: it is sufficient for him to be reachable at any time so that he may be called upon at short notice to perform his professional tasks.

19
Under German labour law only duty time (‘Arbeitsbereitschaft’) is, as a general rule, deemed to constitute full working time. Conversely, both on-call time (‘Bereitschaftsdienst’) and stand-by time (‘Rufbereitschaft’) are categorised as rest time, save for the part of the time during which the worker has in fact performed his professional tasks.

20
The German legislation on working time and rest periods is contained in the Arbeitszeitgesetz (Law on Working Time) of 6 June 1994 (BGBl. 1994 I, p. 1170; ‘the ArbZG’), which was enacted to transpose Directive 93/104.

21
Paragraph 2(1) of the ArbZG defines working time as the period between the beginning and end of work, with the exception of breaks.

22
Paragraph 3 of the ArbZG provides:

‘Employees’ daily working time must not exceed eight hours. It may be extended to a maximum of 10 hours but only on condition that an average 8-hour working day is not exceeded over 6 calendar months or 24 weeks.’

23
Paragraph 7 of the ArbZG is worded as follows:

‘(1) Under a collective agreement, or a works agreement based on a collective agreement, provision may be made:

1. by way of derogation from Paragraph 3,

   (a)
   to extend working time beyond 10 hours per day, even without offset, where working time regularly includes significant periods of duty time (“Arbeitsbereitschaft”),

   (b)

to determine a different period of offset,

(c)

to extend working time to 10 hours per day, without offset, for a maximum period of 60 days per year,

…'

24
Paragraph 25 of the ArbZG provides:

'Where, at the date of entry into force of this law, an existing collective agreement or one continuing to produce effects after that date contains derogating rules under Paragraph 7(1) and (2) …, which exceed the maximum limits laid down in the provisions cited, those rules shall not be affected. Works agreements based on collective agreements are deemed equivalent to collective agreements such as those mentioned in the first sentence …'

25
The Tarifvertrag über die Arbeitsbedingungen für Angestellte, Arbeiter und Auszubildende des Deutschen Roten Kreuzes (Collective agreement on working conditions for German Red Cross employees, workers and apprentices; 'the DRK-TV') includes the following provision:

'Paragraph 14 Normal working time

(1)

Normal working time, exclusive of breaks, shall be on average 39 hours (from 1 April 1990 38 and a half hours) per week. As a general rule, the average weekly working time shall be calculated on the basis of a period of 26 weeks.

In the case of workers who work in rotas or on shifts a longer period may be set.

(2) Normal working time may be extended …

(a)

to 10 hours per day (49 hours per week on average) if it regularly includes duty time ("Arbeitsbereitschaft") of at least 2 hours per day on average:

(b)

to 11 hours per day (54 hours per week on average) if it regularly includes duty time ("Arbeitsbereitschaft") of at least 3 hours per day on average,

(c)

to 12 hours per day (60 hours per week on average) if the employee must merely be present at the work-place in order to carry out his duties should the need arise.

...

(5)

The employee shall be required, if so directed by his employer, to remain outside normal working hours in a particular place selected by the employer, from where he may be called to work if the need arises (on-call time, "Bereitschaftsdienst"). The employer may require such on-call service only when some work is expected but, on the basis of experience, work-free time will predominate.

...'

26
An observation in the following terms is made in respect of Paragraph 14(2) of the DRK-TV:

'Where Annex 2 concerning staff in the emergency and ambulance services applies, regard is to be had to the notice concerning Paragraph 14(2) of the [DRK-TV].'

27
Annex 2 includes special provisions under the collective agreement for staff in the emergency and ambulance services. The relevant notice provides that the maximum weekly working time of 54 hours provided for in Paragraph 14(2)(b) of the DRK-TV is to be progressively reduced. As a consequence, with effect from 1 January 1993, provision is made for the maximum period to fall from 54 to 49 hours.

The main proceedings and the questions referred for a preliminary ruling

28
Seven cases have given rise to these references for a preliminary ruling.

29
According to the documents available to the Court, the Deutsches Rotes Kreuz operates inter alia the land-based emergency service in a part of the Landkreis of Waldshut. The Deutsches Rotes Kreuz maintains the stations at Waldshut (Germany), Dettighoffen (Germany) and Bettmaringen (Germany), which are manned round the clock, and a station at Lauchringen (Germany), which is manned for 12 hours per day. Land-based emergency rescue is carried out by means of ambulances and emergency medical vehicles. An ambulance crew consists of two paramedics, whilst an emergency medical vehicle consists of an emergency worker and a doctor. When they are alerted of an emergency, these vehicles go to the relevant place in order to provide medical assistance to the patients. Subsequently, the patients are usually taken to hospital.

30
Mr Pfeiffer and Mr Nestvogel were formally employed by the Deutsches Rotes Kreuz as emergency workers, whilst the other claimants in the main proceedings were still employed by that body at the time when their actions before the national court were commenced.

31
The parties to the main proceedings are at odds in essence over whether, in calculating the period of maximum weekly working time, account should be taken of periods of duty time ('Arbeitsbereitschaft') which the workers concerned have been required to do in the course of their employment in the service of the Deutsches Rotes Kreuz.

32
The actions brought by Mr Pfeiffer and Mr Nestvogel before the Arbeitsgericht Lörrach claim payment for hours they worked in excess of 48 hours per week. They claim that they were wrongly required to work more than 48 hours per week on average from June 2000 to March 2001. As a consequence, they asked the national court to order the Deutsches Rotes Kreuz to pay them DEM 4 335.45 gross (for 156.85 hours at the overtime rate of DEM 29.91 gross) and DEM 1 841.88 gross (for 66.35 hours at the overtime rate of DEM 27.76), together with interest for late payment.

33
As regards the actions brought by the other claimants in the proceedings before the national court, they seek to determine the maximum period which they must work per week for the Deutsches Rotes Kreuz.

34
The parties to the main proceedings agreed in their various contracts of employment that the DRK-TV should apply.

35
The Arbeitsgericht Lörrach found that, on the basis of the rules of the collective agreement, weekly working time in the emergency service operated by the Deutsches Rotes Kreuz was, on average, 49 hours. Normal working time was extended pursuant to Paragraph 14(2)(b) of the DRK-TV, given the obligation of those concerned to be available for duty ('Arbeitsbereitschaft') for at least 3 hours per day on average.

36
The claimants in the main proceedings submit that the provision made by the Deutsches Rotes Kreuz to set weekly working time at 49 hours is unlawful. They rely in that connection on Directive 93/104 and on the judgment in Case C-303/98 *Simap* [2000] ECR I-7963. In their submission, Paragraph 14(2)(b) of the DRK-TV infringes Community law by providing for working time in excess of 48 hours per week. Furthermore, the rules of the collective agreement are not permissible under the derogation provided for in Paragraph 7(1)(i)(a) of the ArbZG. Indeed, the claimants in the main proceedings argue that the ArbZG does not correctly implement the provisions of Directive 93/104 in that respect. Accordingly, they submit that the derogation in the ArbZG must be interpreted in conformity with Community law and that if it is not, it does not apply at all.

37
Conversely, the Deutsches Rotes Kreuz contends that the actions should be dismissed. It maintains inter alia that its rules on the extension of working time comply with national legislation and the collective agreements.

38
With these cases before it, the Arbeitsgericht Lörrach is in doubt, first, as to whether the activity of the claimants in the main proceedings falls within the scope of Directive 93/104.

39
In the first place, Article 1(3) of Directive 93/104, which refers, as regards the directive's scope, to Article 2 of Directive 89/391, excludes from that scope a number of areas to the extent to which characteristics peculiar to certain specific activities inevitably conflict with it. However, in the referring court's view, that exclusion is intended to cover only those activities which aim to secure public safety and order, which are indispensable to the common good or which, owing to their nature, do not lend themselves to planning. It mentions, by way of example, major catastrophies. By contrast, emergency services should not be excluded from the scope of the two directives, even though emergency workers must be ready to respond round the clock, since the duties and working time of each of them remain amenable to planning.

40
Second, it is necessary to ascertain whether work in a land-based emergency service must be regarded as 'road transport' for the purposes of Article 1(3) of Directive 93/104. If that term were to be construed as including any activity in a vehicle travelling on the public highways, a

service operated by means of ambulances and emergency medical vehicles would also have to be subsumed thereunder, since a significant part of that activity entails going to places where emergencies have occurred and conveying patients to hospital. However, the emergency service normally operates within a limited geographical area, in general within a Landkreis (provincial district), so the distances are not great and the operations are of limited duration. The work of a land-based emergency service is thus to be distinguished from the typical line of work in the road transport sector. Doubts none the less subsist on this point on account of the judgment in Case C-76/97 *Tögel* [1998] ECR I-5357, paragraph 40).

41
The referring court then asks whether the non-application of the 48-hour limit for the average working week as provided for under Article 18(1)(b)(i) of Directive 93/104 requires the express and unambiguous consent of the employee concerned or whether the employee's general consent to the application of a collective agreement as a whole is sufficient, since the latter provides inter alia for the possibility of weekly working time being extended beyond the 48-hour limit.

42
Finally, the Arbeitsgericht Lörrach asks whether Article 6 of Directive 93/104 is unconditional and sufficiently precise to be capable of being relied on by an individual before a national court in the event of a Member State having failed to implement the directive correctly. Under German law, if the provision at Paragraph 14(2)(b) of the DRK-TV, which is applicable to the employment contracts concluded by the parties to the main proceedings, were covered by the provision made by the legislature in Paragraph 7(1)(i)(a) of the ArbZG, the latter would permit the employer to extend daily working time without compensation, with the result that the restriction of weekly working time to 48 hours on average which derives from Paragraph 3 of the ArbZG and from Article 6(2) of Directive 93/104 would be negated.

43
Taking the view that in those circumstances an interpretation of Community law was necessary to enable it to reach a decision in the cases before it, the Arbeitsgericht Lörrach decided to stay the proceedings and to refer to the Court for a preliminary ruling the following questions, which are cast in identical terms in Cases C-397/01 to C-403/01:

'1. (a) Is the reference in Article 1(3) of Directive 93/104 ... to Article 2(2) of Directive 89/391 ..., under which [those] directives are not applicable where characteristics peculiar to certain specific activities in the civil protection services inevitably conflict with their application, to be construed as meaning that the claimants' activity as emergency workers is caught by this exclusion?

2. In view of the judgment of the Court in ... *Simap* (paragraphs 73 and 74), is Article 18(1)(b)(i) of Directive 93/104 to be construed as meaning that consent given individually by a worker must expressly refer to the extension of working time to more than 48 hours per week, or may such consent also reside in the worker's agreeing with the employer, in the contract of employment, that working conditions are to be governed by a collective agreement which itself allows working time to be extended to more than 48 hours on average?

3. Is Article 6 of Directive 93/104 in itself unconditional and sufficiently precise to be capable of being relied on by individuals before national courts where the State has not properly transposed the directive into national law?'

44
By order of the President of the Court of 7 November 2001, Cases C-397/01 to C-403/01 were joined for the purposes of the written and oral procedure and the judgment.

45
By decision of 14 January 2003, the Court stayed proceedings in those cases until the hearing in Case C-151/02 *Jaeger* [2003] ECR I-8389, in which judgment was delivered on 9 September 2003. That hearing took place on 25 February 2003.

46
By order of the Court of 13 January 2004, the oral procedure in Cases C-397/01 to C-403/01 was re-opened.

The questions referred for a preliminary ruling

Question 1(a)

47
By Question 1(a), the national court is essentially asking whether Article 2 of Directive 89/391 and Article 1(3) of Directive 93/104 must be interpreted as meaning that the activity of emergency workers, performed within an emergency medical service such as the service at issue in the main proceedings, falls within the scope of the directives.

48
In order to reply to that question, it must be borne in mind at the outset that Article 1(3) of Directive 93/104 defines the scope of the directive by referring expressly to Article 2 of Directive 89/391. Therefore, before determining whether an activity such as that of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of a service run by the Deutsches Rotes Kreuz falls within the scope of Directive 93/104, it is first necessary to examine whether that activity is within the scope of Directive 89/391 (see the judgment in *Simap*, paragraphs 30 and 31).

49
By virtue of Article 2(1) of Directive 89/391, the latter applies to ‘all sectors of activity, both public and private’, which include service activities as a whole.

50
However, as is clear from the first subparagraph of Article 2(2), the directive is not applicable where characteristics peculiar to certain specific activities, particularly in the civil protection services, inevitably conflict with it.

51
It must none the less be held that the activity of emergency workers in attendance in an ambulance or emergency medical vehicle in the framework of an emergency service for the injured or sick, run by a body such as the Deutsches Rotes Kreuz, is not covered by the exclusion referred to in the preceding paragraph.

52
It is clear both from the purpose of Directive 89/391 (encouraging the improvement of the health and safety of workers at work) and from the wording of Article 2(1) thereof that the directive must be taken to be broad in scope. It follows that the exclusions from its scope provided for in

the first subparagraph of Article 2(2) must be interpreted restrictively (see the judgment in *Simap*, paragraphs 34 and 35, and the order of 3 July 2001 in Case C-241/99 *CIG* [2001] ECR I-5139, paragraph 29).

53
Furthermore, the first subparagraph of Article 2(2) of Directive 89/391 excludes from the directive's scope not the civil protection services as such but solely 'certain specific activities' of those services, whose characteristics are such as inevitably to conflict with the rules laid down by the directive.

54
This exclusion from the broadly-defined field of application of Directive 89/391 must therefore be interpreted in such a way that its scope is restricted to what is strictly necessary in order to safeguard the interests which it allows the Member States to protect.

55
In that regard, the exclusion in the first subparagraph of Article 2(2) of Directive 89/391 was adopted purely for the purpose of ensuring the proper operation of services essential for the protection of public health, safety and order in cases, such as a catastrophe, the gravity and scale of which are exceptional and a characteristic of which is the fact that, by their nature, they do not lend themselves to planning as regards the working time of teams of emergency workers.

56
However, the civil protection service in the strict sense thus defined, at which the provision is aimed, can be clearly distinguished from the activities of emergency workers tending the injured and sick which are at issue in the main proceedings.

57
Even if a service such as the one with which the national court is concerned must deal with events which, by definition, are unforeseeable, the activities which it entails in normal conditions and which correspond moreover to the duties specifically assigned to a service of that kind are none the less capable of being organised in advance, including, in so far as they are concerned, the working hours of its staff.

58
The service thus exhibits no characteristic which inevitably conflicts with the application of the Community rules on the protection of the health and safety of workers and therefore is not covered by the exclusion in the first subparagraph of Article 2(2) of Directive 89/391, the directive instead applying to such a service.

59
It is apparent from the wording of Article 1(3) of Directive 93/104 that it applies to all sectors of activity, both public and private, within the meaning of Article 2 of Directive 89/391, with the exception of certain specific activities which are exhaustively listed.

60
None of those activities is relevant in relation to a service such as the one at issue in the main proceedings. In particular, it is clear that the activity of workers who, in the framework of an emergency medical service, attend on patients in an ambulance or emergency medical vehicle is not comparable to the activity of trainee doctors, to which Directive 93/104 does not apply by virtue of Article 1(3) thereof.

61
Consequently, an activity such as that with which the national court is concerned also falls within the scope of Directive 93/104.

62
As the Commission rightly pointed out, further support is lent to that finding by the fact that Article 17(2), point 2.1(c)(iii), of Directive 93/104 expressly refers to, inter alia, ambulance services. Such a reference would be redundant if the activity referred to was already excluded from the scope of Directive 93/104 in its entirety by virtue of Article 1(3). Instead, that reference shows that the Community legislature laid down the principle that the directive is applicable to activities of such a kind, whilst providing for the option, in given circumstances, to derogate from certain specific provisions of the directive.

63
In those circumstances, the answer to be given to Question 1(a) is that Article 2 of Directive 89/391 and Article 1(3) of Directive 93/104 must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service such as that at issue before the national court, falls within the scope of the directives.

Question 1(b)

64
By Question 1(b), the national court is essentially asking whether, on a proper construction, the concept of 'road transport' in Article 1(3) of Directive 93/104 encompasses the activity of an emergency medical service, on account of the fact that the activity consists, at least in part, of using a vehicle and attending the patient during the journey to hospital.

65
In that regard, it must be observed that under Article 1(3) of Directive 93/104, the latter '[applies] to all sectors of activity … with the exception of air, rail, road, sea, inland waterway and lake transport …'.

66
In its judgment in Case C-133/00 *Bowden and Others* [2001] ECR I-7031, the Court ruled that on a proper construction of Article 1(3) all workers employed in the road transport sector, including office staff, are excluded from the scope of that directive.

67
Since they are exceptions to the Community system for the organisation of working time put in place by Directive 93/104, the exclusions from the scope of the directive provided for in Article 1(3) must be interpreted in such a way that their scope is limited to what is strictly necessary in order to safeguard the interests which the exclusions are intended to protect (see, by analogy, the judgment in *Jaeger*, paragraph 89).

68
The transport sector was excluded from the scope of Directive 93/104 on the grounds that a Community regulatory framework already existed in that sector, which laid down specific rules for, inter alia, the organisation of working time on account of the special nature of the activity in question. That legislation does not apply, however, to transport for emergencies or assistance.

69
Furthermore, the judgment in *Bowden* is based on the fact that the employer belonged to one of

the transport sectors specifically listed in Article 1(3) of Directive 93/104 (see paragraphs 39 to 41 of the judgment). However, it can hardly be argued that when the Deutsches Rotes Kreuz operates an emergency medical service such as that at issue in the main proceedings its activity pertains to the road transport sector.

70
The fact that that activity includes using an emergency vehicle and accompanying the patient on his journey to hospital is not decisive, since the main purpose of the activity concerned is to provide initial medical treatment to a person who is ill or injured and not to carry out an operation relating to the road transport sector.

71
Furthermore, it is necessary to bear in mind that ambulance services are specifically included in Article 17(2), point 2.1(c)(iii), of Directive 93/104. Their inclusion, which is intended to enable there to be a derogation from certain specific provisions of the directive, would be redundant if such services were already excluded from the field of application of the directive in its entirety pursuant to Article 1(3) thereof.

72
In those circumstances, the concept of 'road transport' in Article 1(3) of Directive 93/104 does not encompass an emergency medical service such as that at issue in the main proceedings.

73
That interpretation is not undermined by the judgment in *Tögel*, to which the national court refers, since the subject-matter of the judgment was not the interpretation of Directive 93/104 but rather that of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (JO 1992 L 209, p. 1), the contents and purpose of which are wholly irrelevant for the purpose of determining the scope of Directive 93/104.

74
In the light of all of the foregoing considerations, the answer to Question 1(b) must be that, on a proper construction, the concept of 'road transport' in Article 1(3) of Directive 93/104 does not encompass the activity of an emergency medical service, even though the latter includes using a vehicle and accompanying a patient on his journey to hospital.

The second question

75
By its second question, the national court is asking in substance whether the first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended or whether it is sufficient in that regard that the relevant person's employment contract refers to a collective agreement which permits such an extension.

76
In order to reply to the question formulated in this manner, it must be borne in mind, first, that it is apparent from Article 118a of the Treaty, the legal basis for Directive 93/104, from the first, fourth, seventh and eighth recitals in the preamble to the directive and from the actual wording of Article 1(1) of the directive that its objective is to guarantee the better protection of the safety and health of workers by affording them minimum rest periods – especially on a daily and

weekly basis –and adequate breaks and by providing for an upper limit on weekly working time.

77
Second, under the system established by Directive 93/104, only some of its provisions, which are exhaustively listed, may form the subject-matter of derogations by the Member States or the two sides of industry. Furthermore, the implementation of such derogations is subject to strict conditions intended to secure effective protection for the safety and health of workers.

78
Thus, Article 18(1)(b)(i) of Directive 93/104 provides that Member States have the right not to apply Article 6 provided that they observe the general principles of the protection of the safety and health of workers and that they satisfy a certain number of conditions set out cumulatively in Article 18(1)(b)(i).

79
In particular, the first indent of Article 18(1)(b)(i) requires that working time should not exceed 48 hours over a 7-day period, calculated as an average for the reference period referred to in point 2 of Article 16 of Directive 93/104, the worker none the less being able to agree to work more than 48 hours per week.

80
In that regard, the Court has already held, in paragraph 73 of the judgment in *Simap*, that, as is apparent from its actual wording, the first indent of Article 18(1)(b)(i) of Directive 93/104 requires the consent of the individual worker.

81
In paragraph 74 of *Simap*, the Court concluded that the consent given by trade-union representatives in the context of a collective or other agreement is not equivalent to that given by the worker himself, as provided for in the first indent of Article 18(1)(b)(i) of Directive 93/104.

82
That interpretation derives from the objective of Directive 93/104, which seeks to guarantee the effective protection of the safety and health of workers by ensuring that they actually have the benefit of, inter alia, an upper limit on weekly working time and minimum rest periods. Any derogation from those minimum requirements must therefore be accompanied by all the safeguards necessary to ensure that, if the worker concerned is encouraged to relinquish a social right which has been directly conferred on him by the directive, he must do so freely and with full knowledge of all the facts. Those requirements are all the more important given that the worker must be regarded as the weaker party to the employment contract and it is therefore necessary to prevent the employer being in a position to disregard the intentions of the other party to the contract or to impose on that party a restriction of his rights without him having expressly given his consent in that regard.

83
Those considerations are equally relevant so far as the situation described in the second question is concerned.

84
It follows that, for a derogation from the maximum period of weekly working time laid down in Article 6 of Directive 93/104 (48 hours) to be valid, the worker's consent must be given not only individually but also expressly and freely.

85
Those conditions are not met where the worker's employment contract merely refers to a collective agreement authorising an extension of maximum weekly working time. It is by no means certain that, when he entered into such a contract, the worker concerned knew of the restriction of the rights conferred on him by Directive 93/104.

86
The answer to the second question must therefore be that the first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension.

The third question

87
By its third question, the national court is essentially asking whether, if Directive 93/104 has been implemented incorrectly, Article 6(2) thereof may be taken to have direct effect.

88
As is clear both from its wording and from the context in which it occurs, there are two aspects to that question: the first concerns the interpretation of Article 6(2) of Directive 93/104 for the purpose of enabling the national court to decide whether the relevant rules of national law are compatible with the requirements of Community law, whilst the second concerns whether, if the Member State concerned has transposed Article 6(2) into national law incorrectly, that provision satisfies the conditions which would enable an individual to rely on it before the national courts in circumstances such as those in the main proceedings.

89
Those two issues must be examined in turn.

The import of Article 6(2) of Directive 93/104

90
As a preliminary point, it must be observed that Article 6(2) of Directive 93/104 requires the Member States to take the measures necessary to ensure, as a function of the requirement for the protection of workers' safety and health, that the average working time for each 7-day period, including overtime, does not exceed 48 hours.

91
It is apparent from Article 118a of the Treaty, which is the legal basis for Directive 93/104, from the first, fourth, seventh and eighth recitals in the preamble to the directive, from the Community Charter of the Fundamental Social Rights of Workers, adopted at the meeting of the European Council held at Strasbourg on 9 December 1989, points 8 and 19, first subparagraph, thereof, which are referred to in the fourth recital to the directive, and from the actual wording of Article 1(1) of the directive that the latter's purpose is to lay down minimum requirements intended to improve the living and working conditions of workers through approximation of national provisions concerning, in particular, the duration of working time. This Community-level harmonisation of the organisation of working time seeks to guarantee a better level of protection of the safety and health of workers by ensuring that they are entitled to minimum rest periods – particularly daily and weekly – and adequate breaks (see *Jaeger*, paragraphs 45 to

47).

92
Thus, Directive 93/104 imposes more specifically (in Article 6(2)) a 48-hour limit for the average working week, a maximum which is expressly stated to include overtime.

93
In that context, the Court has already held that on-call time ('Bereitschaftsdienst'), where the worker is required to be physically present at a place specified by his employer, must be regarded as wholly working time for the purposes of Directive 93/104, irrespective of the fact that, during periods of on-call time, the person concerned is not continuously carrying on any professional activity (see *Jaeger*, paragraphs 71, 75 and 103).

94
The same must be true of periods of duty time ('Arbeitsbereitschaft') completed by emergency workers in the framework of an emergency service, which necessarily entails periods of inactivity of varying length in between calls.

95
Such periods of duty time must accordingly be taken into account in their totality in the calculation of maximum daily and weekly working time.

96
Furthermore, it is evident that under the system established by Directive 93/104, although Article 15 allows generally for the application or introduction of national provisions more favourable to the protection of the safety and health of employees, only certain specifically mentioned provisions of the directive may form the subject-matter of derogations by the Member States or social partners (see *Jaeger*, paragraph 80).

97
However, in the first place, Article 6 of Directive 93/104 is referred to only in Article 17(1) and it is undisputed that the latter provision covers activities which bear no relation at all to those carried out by emergency workers such as the claimants in the main proceedings. By contrast, Article 17(2), point 2.1(c)(iii), refers to 'activities involving the need for continuity of service', including in particular 'ambulance services', but this provision gives scope for derogating from only Articles 3, 4, 5, 8 and 16 of the directive.

98
In the second place, Article 18(1)(b)(i) of Directive 93/104 provides that the Member States have the right not to apply Article 6 provided that they observe the general principles of protection of the safety and health of workers and that they satisfy a number of conditions set out cumulatively in Article 18(1)(b)(i), but it is not disputed that the Federal Republic of Germany has not availed itself of that option to derogate (see *Jaeger*, paragraph 85).

99
Moreover, by virtue of the Court's case-law the Member States cannot unilaterally determine the scope of the provisions of Directive 93/104 by attaching conditions or restrictions to the implementation of the workers' right under Article 6(2) of the directive not to work more than 48 hours per week (see, to that effect, *Jaeger*, paragraphs 58 and 59). Any other interpretation would misconstrue the purpose of the directive, which is intended to secure effective protection of the safety and health of workers by allowing them to enjoy minimum periods of rest (see *Jaeger*, paragraphs 70 and 92).

100
In those circumstances, it must be concluded that, in view of both the wording of Article 6(2) of Directive 93/104 and the purpose and scheme of the directive, the 48-hour upper limit on average weekly working time, including overtime, constitutes a rule of Community social law of particular importance from which every worker must benefit, since it is a minimum requirement necessary to ensure protection of his safety and health (see, by analogy, Case C-173/99 *BECTU* [2001] ECR I-4881, paragraphs 43 and 47), and therefore national legislation, such as that at issue in the main proceedings, which authorises weekly working time in excess of 48 hours, including periods of duty time ('Arbeitsbereitschaft'), is not compatible with the requirements of Article 6(2) of the directive.

101
Accordingly, the answer to the third question, as regards the first aspect, is that Article 6(2) of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time ('Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded.

The direct effect of Article 6(2) Directive 93/104 and the ensuing consequences in the cases before the national court

102
Since, in circumstances such as those in the main proceedings, the relevant national legislation is not compatible with the requirements of Directive 93/104 as regards maximum weekly working time, it remains to be considered whether Article 6(2) of the directive fulfils the conditions for it to have direct effect.

103
In that regard, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 11, and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25).

104
Article 6(2) of Directive 93/104 satisfies those criteria, since it imposes on Member States in unequivocal terms a precise obligation as to the result to be achieved, which is not coupled with any condition regarding application of the rule laid down by it, which provides for a 48-hour maximum, including overtime, as regards average weekly working time.

105
Even though Directive 93/104 leaves the Member States a degree of latitude when they adopt rules in order to implement it, particularly as regards the reference period to be fixed for the purposes of applying Article 6 of that directive, and even though it also permits them to derogate from Article 6, those factors do not alter the precise and unconditional nature of Article 6(2). First, it is clear from the wording of Article 17(4) of the directive that the reference period can never exceed 12 months and, second, the Member States' right not to apply Article 6 is subject to compliance with all the conditions set out in Article 18(1)(b)(i) of the directive. It is

therefore possible to determine the minimum protection which must be provided in any event (see, to that effect, *Simap*, paragraphs 68 and 69).

106
As a consequence, Article 6(2) of Directive 93/104 fulfils all the conditions necessary for it to produce direct effect.

107
It still remains to determine the legal consequences which a national court must derive from that interpretation in circumstances such as those in the main proceedings, which involve individuals.

108
In that regard, the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual (see, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 48; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; and Case C-201/02 *Wells* [2004] ECR I-0000, paragraph 56).

109
It follows that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties.

110
However, it is apparent from case-law which has also been settled since the judgment of 10 April 1984 in Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, that the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 10 EC to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see, inter alia, Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8; *Faccini Dori*, paragraph 26; Case C-126/96 *Inter-Environnement Wallonie* [1997] ECR I-7411, paragraph 40; and Case C-131/97 *Carbonari and Others* [1999] ECR I-1103, paragraph 48).

111
It is the responsibility of the national courts in particular to provide the legal protection which individuals derive from the rules of Community law and to ensure that those rules are fully effective.

112
That is *a fortiori* the case when the national court is seised of a dispute concerning the application of domestic provisions which, as here, have been specifically enacted for the purpose of transposing a directive intended to confer rights on individuals. The national court must, in the light of the third paragraph of Article 249 EC, presume that the Member State, following its exercise of the discretion afforded it under that provision, had the intention of fulfilling entirely the obligations arising from the directive concerned (see Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20).

113
Thus, when it applies domestic law, and in particular legislative provisions specifically adopted for the purpose of implementing the requirements of a directive, the national court is bound to interpret national law, so far as possible, in the light of the wording and the purpose of the

directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 249 EC (see to that effect, inter alia, the judgments cited above in *Von Colson and Kamann*, paragraph 26; *Marleasing*, paragraph 8, and *Faccini Dori*, paragraph 26; see also Case C-63/97 *BMW* [1999] ECR I-905, paragraph 22; Joined Cases C-240/98 to C-244/98 *Océano Grupo Editorial and Salvat Editores* [2000] ECR I-4941, paragraph 30; and Case C-408/01 *Adidas-Salomon and Adidas Benelux* [2003] ECR I-0000, paragraph 21).

114
The requirement for national law to be interpreted in conformity with Community law is inherent in the system of the Treaty, since it permits the national court, for the matters within its jurisdiction, to ensure the full effectiveness of Community law when it determines the dispute before it (see, to that effect, Case C-160/01 *Mau* [2003] ECR I-4791, paragraph 34).

115
Although the principle that national law must be interpreted in conformity with Community law concerns chiefly domestic provisions enacted in order to implement the directive in question, it does not entail an interpretation merely of those provisions but requires the national court to consider national law as a whole in order to assess to what extent it may be applied so as not to produce a result contrary to that sought by the directive (see, to that effect, *Carbonari*, paragraphs 49 and 50).

116
In that context, if the application of interpretative methods recognised by national law enables, in certain circumstances, a provision of domestic law to be construed in such a way as to avoid conflict with another rule of domestic law or the scope of that provision to be restricted to that end by applying it only in so far as it is compatible with the rule concerned, the national court is bound to use those methods in order to achieve the result sought by the directive.

117
In such circumstances, the national court, when hearing cases which, like the present proceedings, fall within the scope of Directive 93/104 and derive from facts postdating expiry of the period for implementing the directive, must, when applying the provisions of national law specifically intended to implement the directive, interpret those provisions so far as possible in such a way that they are applied in conformity with the objectives of the directive (see, to that effect, the judgment in Case C-456/98 *Centrosteel* [2000] ECR I-6007, paragraphs 16 and 17).

118
In this instance, the principle of interpretation in conformity with Community law thus requires the referring court to do whatever lies within its jurisdiction, having regard to the whole body of rules of national law, to ensure that Directive 93/104 is fully effective, in order to prevent the maximum weekly working time laid down in Article 6(2) of the directive from being exceeded (see, to that effect, *Marleasing*, paragraphs 7 and 13).

119
Accordingly, it must be concluded that, when hearing a case between individuals, a national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2)

of Directive 93/104, is not exceeded.

120
In view of all the foregoing reasoning, the answer to the third question must be that:

– Article 6(2) of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time ('Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded;

– the provision fulfils all the conditions necessary for it to have direct effect;

– when hearing a case between individuals, the national court is required, when applying the provisions of domestic law adopted for the purpose of transposing obligations laid down by a directive, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. In the main proceedings, the national court must thus do whatever lies within its jurisdiction to ensure that the maximum period of weekly working time, which is set at 48 hours by Article 6(2) of Directive 93/104, is not exceeded.

Costs

121
Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. The costs incurred by parties other than those to the main proceedings in submitting observations to the Court are not recoverable.

On those grounds, the Court (Grand Chamber) rules:

1. (a) Article 2 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work and Article 1(3) of Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time must be construed as meaning that the activity of emergency workers, carried out in the framework of an emergency medical service, such as that at issue before the national court, falls within the scope of the directives.

b) On a proper construction, the concept of 'road transport' in Article 1(3) of Directive 93/104 does not encompass the activity of an emergency medical service, even though the latter includes using a vehicle and accompanying a patient on the journey to hospital.

2. – The first indent of Article 18(1)(b)(i) of Directive 93/104 is to be construed as

requiring consent to be expressly and freely given by each worker individually if the 48-hour maximum period of weekly working time, as laid down in Article 6 of the directive, is to be validly extended. In that connection, it is not sufficient that the relevant worker's employment contract refers to a collective agreement which permits such an extension.

3. − **Article 6, point 2, of Directive 93/104 must be interpreted, in circumstances such as those in the main proceedings, as precluding legislation in a Member State the effect of which, as regards periods of duty time ('Arbeitsbereitschaft') completed by emergency workers in the framework of the emergency medical service of a body such as the Deutsches Rotes Kreuz, is to permit, including by means of a collective agreement or works agreement based on such an agreement, the 48-hour maximum period of weekly working time laid down by that provision to be exceeded;**

Signatures.

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1 – Language of the case: German.

JUDGMENT OF THE COURT (First Chamber)

24 June 2004 *

In Case C-350/02,

Commission of the European Communities, represented by M. Shotter and W. Wils, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by S. Terstal, acting as Agent,

defendant,

APPLICATION for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to transpose into national law Articles 6 and 9 of Directive 97/66/EC of the European Parliament and of the Council of 15

* Language of the case: Dutch.

December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1) or, at least, by not communicating those provisions to the Commission, the Kingdom of the Netherlands has failed to fulfil its obligations under the EC Treaty,

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. La Pergola, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 13 November 2003 at which the Commission was represented by W. Wils, assisted by P. Gerard, expert, and the Kingdom of the Netherlands, by C. Wissels, acting as Agent, assisted by R.J. I. Dielemans, expert,

after hearing the Opinion of the Advocate General at the sitting on 29 January 2004,

gives the following

Judgment

1 By application lodged at the Court Registry on 1 October 2002, the Commission of the European Communities brought an action under Article 226 EC for a declaration that, by failing to adopt all the laws, regulations and administrative provisions necessary to transpose into national law Articles 6 and 9 of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector (OJ 1998 L 24, p. 1) or, at least, by not communicating those provisions to the Commission, the Kingdom of the Netherlands has failed to fulfil its obligations under the EC Treaty.

Legal framework

Community provisions

2 Under Article 1(1) thereof, Directive 97/66, which was in force at the material time, provided for 'the harmonisation of the provisions of the Member States required to

ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the telecommunications sector and to ensure the free movement of such data and of telecommunications equipment and services in the Community'.

3 Article 6 of Directive 97/66 provided:

'1. Traffic data relating to subscribers and users processed to establish calls and stored by the provider of a public telecommunications network and/or publicly available telecommunications service must be erased or made anonymous upon termination of the call without prejudice to the provisions of paragraphs 2, 3 and 4.

2. For the purpose of subscriber billing and interconnection payments, data indicated in the Annex may be processed. Such processing is permissible only up to the end of the period during which the bill may lawfully be challenged or payment may be pursued.

3. For the purpose of marketing its own telecommunications services, the provider of a publicly available telecommunications service may process the data referred to in paragraph 2, if the subscriber has given his consent.

4. Processing of traffic and billing data must be restricted to persons acting under the authority of providers of the public telecommunications networks and/or publicly available telecommunications services handling billing or traffic management, customer enquiries, fraud detection and marketing the provider's own telecommunications services and it must be restricted to what is necessary for the purposes of such activities.

5. Paragraphs 1, 2, 3 and 4 shall apply without prejudice to the possibility for competent authorities to be informed of billing or traffic data in conformity with applicable legislation in view of settling disputes, in particular interconnection or billing disputes.'

4 Article 9 of Directive 97/66 was worded as follows:

'Member States shall ensure that there are transparent procedures governing the way in which a provider of a public telecommunications network and/or a publicly available telecommunications service may override the elimination of the presentation of calling line identification:

(a) on a temporary basis, upon application of a subscriber requesting the tracing of malicious or nuisance calls; in this case, in accordance with national law, the

data containing the identification of the calling subscriber will be stored and be made available by the provider of a public telecommunications network and/or publicly available telecommunications service;

(b) on a per-line basis for organisations dealing with emergency calls and recognised as such by a Member State, including law enforcement agencies, ambulance services and fire brigades, for the purpose of answering such calls.'

5 The annex to Directive 97/66 stated:

'For the purpose referred to in Article 6(2) the following data may be processed:

Data containing the:

— number or identification of the subscriber station,

— address of the subscriber and the type of station,

— total number of units to be charged for the accounting period,

— called subscriber number,

— type, starting time and duration of the calls made and/or the data volume transmitted,

— date of the call/service,

— other information concerning payments such as advance payment, payments by instalments, disconnection and reminders.'

6 Under the first subparagraph of Article 15(1) of Directive 97/66 the Member States were to bring into force the laws, regulations and administrative provisions necessary for them to comply with this directive not later than 24 October 1998. Under Article 15(4) thereof, the Member States were to communicate to the Commission the text of the provisions of national law adopted by them in the field governed by the directive.

National provisions

7 The Wet houdende regels inzake de telecommunicatie (law governing the telecommunications sector, hereinafter the 'Telecommunicatiewet'), promulgated on 19 October 1998 (*Staatsblad* 1998, p. 610), contains a Chapter 11 seeking to transpose Directive 97/66.

8 Article 11(5) of the Telecommunicatiewet, which concerns the transposition of Article 6 of Directive 97/66, is worded as follows:

'1. In order to safeguard personal and private data, providers of a public telecommunications network and providers of a public telecommunications network shall ensure that, upon termination of a communication, traffic data processed concerning subscribers and users, as may be determined by general administrative measure, are to be subject to erasure or anonymity.

2. By way of exception to paragraph 1 above, traffic data may be processed only if and in so far as is necessary:

(a) to calculate the bill of a subscriber or of the person who has undertaken in law to the provider to pay that bill, or for the purpose of payments for interconnection or other forms of access;

(b) to enable the provider to undertake market research or to market its own telecommunications services, if the subscriber has given his consent thereto;

(c) to examine disputes or determine them under Article 12(1) or to define the rules under Article 6(3),

(d) to manage traffic,

(e) to provide customers with traffic data provided such data relates to such customers,

(f) to detect fraud; or

(g) it is lawful by or under a law.

3. Measures implementing this article shall be adopted by general administrative measure. Such provisions may relate only to data which may be processed in conjunction with traffic data, to the purposes for which processing may take place, to the period within which processing is lawful, and to the persons who may be entrusted with processing.'

Pre-litigation procedure

9 By letter of 7 January 1999 the Kingdom of the Netherlands communicated to the Commission the text of the Telecommunicatiewet, stating that it should be regarded as constituting the transposition into national law of Directive 97/66.

10 In accordance with Article 226 EC, the Commission, taking the view that the Telecommunicatiewet did not correctly transpose Articles 6, 9, 11 and 12 of Directive 97/66, put the Kingdom of the Netherlands on formal notice to submit its observations.

11 By letter of 8 January 2001 the Netherlands Government replied to that letter of formal notice, stating in particular that legislative measures were being drawn up which would fully satisfy its obligations under Directive 97/66.

12 On 18 July 2001 the Commission sent the Kingdom of the Netherlands a reasoned opinion in which it submitted that, upon examination of the national provisions at issue and the legislative measures being drawn up, it was of the view that the Netherlands had failed to fulfil its obligations under Articles 6 and 9 of Directive 97/66. The Kingdom of the Netherlands was requested to comply with that reasoned opinion within a period of two months of its notification.

13 The Kingdom of the Netherlands replied to the reasoned opinion by letter of 29 October 2001. Since it was not satisfied by that reply, the Commission decided to bring this action.

The action

Admissibility

14 In support of its application, the Commission raised four grounds of complaint concerning the Netherlands legislation transposing directive 97/66. Three of them relate to Article 6 of the directive and the fourth to Article 9 thereof.

15 One of the grounds of complaint relating to Article 6 of Directive 97/66 alleges the incorrect transposition in Article 11(5)(2) of the Telecommunicatiewet of Article 6 (2) to (5) of the directive. The Commission maintains that the provision of Netherlands law is not in conformity with Directive 97/66 inasmuch as it provides for a greater number of derogations from the principle laid down in Article 6(1) of the directive than are permitted under the terms thereof.

16 The Kingdom of the Netherlands argues that that ground of complaint was not mentioned in the reasoned opinion and is therefore inadmissible.

17 At the hearing the Commission submitted that the reasoned opinion had to be read in the light of the letter of formal notice which expressly mentioned the ground of complaint at issue.

18 In that regard it should be pointed out that in an action for failure to fulfil obligations the purpose of the pre-litigation procedure is to give the Member State

concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (see, in particular, Case 293/85 *Commission* v *Belgium* [1988] ECR 305, paragraph 13; Case C-96/95 *Commission* v *Germany* [1997] ECR I-1653, paragraph 22; and Case C-439/99 *Commission* v *Italy* [2002] ECR I-305, paragraph 10).

19 The proper conduct of that procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also so as to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter (see Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraph 53, and Case C-287/00 *Commission* v *Germany* [2002] ECR I-5811, paragraph 17).

20 It follows that the subject-matter of proceedings under Article 226 EC is delimited by the pre-litigation procedure governed by that provision. The Commission's reasoned opinion and the application must be based on the same grounds and pleas, with the result that the Court cannot examine a ground of complaint which was not formulated in the reasoned opinion (Case 76/86 *Commission* v *Germany* [1989] ECR 1021, paragraph 8), which for its part must contain a cogent and detailed exposition of the reasons which led the Commission to the conclusion that the Member State concerned had failed to fulfil one of its obligations under the Treaty (see, in particular, *Commission* v *Italy*, paragraph 12, and Case C-287/00 *Commission* v *Germany*, paragraph 19).

21 It should also be emphasised that, whilst the formal letter of notice which comprises an initial succinct résumé of the alleged infringement, may be useful in construing the reasoned opinion, the Commission is none the less obliged to specify precisely in that opinion the grounds of complaint which it already raised more generally in the

letter of formal notice and alleges against the Member State concerned, after taking cognizance of any observations submitted by it under the first paragraph of Article 226 EC. That requirement is essential in order to delimit the subject-matter of the dispute prior to any initiation of the contentious procedure provided for in the second paragraph of Article 226 and in order to ensure that the Member State in question is accurately apprised of the grounds of complaint maintained against it by the Commission and can thus bring an end to the alleged infringements or put forward its arguments in defence prior to any application to the Court by the Commission.

22 In the present case it must be stated that in the letter of formal notice of 6 November 2000 the Commission set out three specific grounds of complaint concerning the transposition into Netherlands law of Article 6 of Directive 97/66. The first ground of complaint concerns the transposition of Article 6(1) of Directive 97/66 by Article 11(5)(1) of the Telecommunicatiewet. The second ground of complaint relates to the non-conformity of Article 11(5)(2) of the Telecommunicatiewet with Article 6(2) to (5) of Directive 97/66 and alleges that the Netherlands provision includes more derogations than those permitted by those paragraphs of Article 6. The third ground of complaint alleges a failure to notify the implementing provisions mentioned at Article 11(5)(3) of the Telecommunicatiewet.

23 In its reply of 8 January 2001 to the letter of formal notice, the Netherlands Government acknowledged that the grounds of complaint concerning transposition of Article 6(1) of Directive 97/66 and the failure to notify the implementing provisions mentioned in Article 11(5)(3) of the Telecommunicatiewet were well founded, at the same time pointing out that legislative measures were being drawn up in order to correct those deficiencies. Conversely, the Netherlands Government denied that Article 11(5)(2) of the Telecommunicatiewet provides for more derogations than those permitted by Article 6(2) to (5) of that directive.

24 It cannot but be noted that the Commission did not reproduce in its reasoned opinion of 18 July 2001 the ground of complaint based on the incorrect transposition of Article 6(2) to (5) of Directive 97/66 by Article 11(5)(2) of the Telecommunicatiewet. Furthermore, that reasoned opinion does not include any assessment concerning the objections formulated concerning that ground of complaint by the Netherlands authorities in their reply to the letter of formal notice.

25 In the reasoned opinion the Commission relies solely on the incompleteness of the transposition of Article 6 of Directive 97/66 owing to the fact the legislative measures mentioned in the reply by the Netherlands Government to the letter of formal notice were not communicated to it. Unlike the letter of formal notice, the reasoned opinion gives no indication such as to convey that Article 11(5)(2) of the Telecommunicatiewet is not in conformity with the provisions of Article 6(2) to (5) of that directive. Although the reasoned opinion refers to Article 6(1) thereof, and to the implementing provisions mentioned in Article 11(5)(3) of the Telecommunicatiewet, conversely it refers neither to paragraphs 2 to 5 of that article nor to paragraph 2 of Article 11(5).

26 In its reasoned opinion, the Commission accordingly clearly gave the impression that, unlike the two other grounds of complaint concerning Article 6 of Directive 97/66 mentioned in the letter of formal notice, the ground of complaint based on the incorrect transposition of paragraphs 2 to 5 of that provision by Article 11(5)(2) of the Telecommunicatiewet had been abandoned, in the same way as the grounds of complaint concerning transposition of Articles 11 and 12 of that directive. Thus, in their reply of 29 October 2001 to that reasoned opinion, the Netherlands authorities merely gave an account of progress in the enactment of the legislation mentioned in their letter of 8 January 2001 without expressing a view on the ground of complaint at issue.

27 The general reference to the letter of formal notice in the reasoned opinion in regard to Article 6 of Directive 97/66 cannot in that context be regarded as a sufficient indication enabling the Kingdom of the Netherlands to understand that the Commission had maintained against it the ground of complaint alleging incorrect transposition of Article 6(2) to (5) of that directive.

28 Under those circumstances the ground of complaint alleged in the Commission's application concerning the incorrect transposition of Article 6(2) to (5) of Directive 97/66 by Article 11(5)(2) of the Telecommunicatiewet must be regarded as irregular inasmuch as, on the one hand, it constitutes an extension of the subject-matter of the dispute as opposed to its extent as specified in the reasoned opinion and inasmuch as, on the other, the Kingdom of the Netherlands was deprived, owing to the failure to mention that ground of complaint in that opinion, of the opportunity of bringing an end to the infringement of which it was accused or of explaining itself in that regard prior to an application to the Court by the Commission.

29 Accordingly, the action must be declared inadmissible in so far as it concerns the ground of complaint alleging incorrect transposition of Article 6(2) to (5) of Directive 97/66 by Article 11(5)(2) of the Telecommunicatiewet.

Substance

30 The three other grounds of complaint formulated in the application are based, in the case of the first two, on the incomplete transposition of Article 6 of Directive 97/66 and, in the case of the third, on the incomplete transposition of Article 9 of that directive.

31 Before those complaints are examined, it should be recalled at the outset that, as the Court has repeatedly held, the question whether a Member State has failed to fulfil its obligations must be determined as at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-384/97 *Commission* v *Greece* [2000] ECR I-3823, paragraph 35, and Case C-152/98 *Commission* v *Netherlands* [2001] ECR I-3463, paragraph 21).

32 Accordingly, the matters relied on by the Netherlands in its pleadings concerning, on the one hand, repeal of Directive 97/66 by Article 19 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ 2002 L 201, p. 37) with effect from 31 October 2003 and, on the other, the existence of a bill to transpose the latter directive into Netherlands law, cannot affect the assessment to be made of the obligations of the Kingdom of the Netherlands as at expiry of the period of two months laid down in the reasoned opinion.

Grounds of complaint concerning incomplete transposition of Article 6 of Directive 97/66

33 In the first place, the Commission maintains that Article 11(5)(1) of the Telecommunicatiewet derogates from the general principle set out in Article 6(1) of Directive 97/66. It stresses that for that national provision to be in conformity with that directive the general administrative measure envisaged should include an exhaustive list of information. Since no measure containing such a list was communicated to it, the Commission considers that Article 6 of Directive 97/66 was not completely transposed.

34 Since the Netherlands Government acknowledges that not all the provisions necessary for the transposition of Article 6(1) of Directive 97/66 have been adopted, the ground of complaint raised by the Commission must be regarded as well founded.

35 Secondly, the Commission submits that, although Article 11(5)(3) of the Telecommunicatiewet refers to implementing provisions, none of them have been communicated to it. Consequently, it is of the view that Article 6 of Directive 97/66 was not fully transposed.

36 The Netherlands authorities retort that, since those implementing provisions have not been adopted, they could not be communicated to the Commission.

37 None the less, it should be pointed out that the Netherlands Government does not dispute that, in light of the wording in force at that time of Article 11(5) of the Telecommunicatiewet, the adoption of the implementing provisions mentioned in paragraph 3 of that article was necessary in order to support a finding that Article 6 of Directive 97/66 had been fully transposed.

38 Given that, first, the Netherlands Government has acknowledged that, as at the expiry of the period laid down in the reasoned opinion, the implementing provisions at issue had not been communicated to the Commission and that, second, failure to

adopt those provisions by that date cannot reasonably be relied on to justify that infringement, it must be concluded that the ground of complaint raised by the Commission is well founded.

39 It follows from the foregoing that the Commission is legally entitled to take the view that Article 6 of Directive 97/66 has not been fully transposed into Netherlands law on the ground that, on the one hand, Article 11(5)(1) of the Telecommunicatiewet refers to a list of information to be determined by a general administrative measure which was not communicated to it and that, second, the implementing provisions mentioned in paragraph 3 of Article 11(5) aforesaid were not communicated to it.

Ground of complaint based on the incomplete transposition of Article 9 of Directive 97/66

40 The Commission alleges that Article 9(a) of Directive 97/66 has not been transposed into Netherlands law with the result that that article has not been fully transposed.

41 Since there have in fact been no Netherlands provisions transposing Article 9(a) of Directive 97/66, as the Netherlands Government has moreover acknowledged, the

Commission's ground of complaint alleging incomplete transposition of Article 9 aforesaid must be regarded as well founded.

42 It must therefore be held that, by incompletely transposing Article 6 of Directive 97/66, in that, first, Article 11(5)(1) of the Telecommunicatiewet refers to a general administrative measure which was not communicated to the Commission and in that, second, the implementing provisions mentioned in Article 11(5)(3) of the Telecommunicatiewet were not communicated to the Commission, and by incompletely transposing Article 9 of that directive, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive.

Costs

43 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Under Article 69(3) thereof, the Court may order that costs be shared or that the parties are to bear their own costs if each party succeeds on some and fails on other heads. Since the Kingdom of the Netherlands has been unsuccessful in respect of three of the four grounds of complaint raised by the Commission, it must, in accordance with the form of order sought by the Commission, be ordered to bear three quarters of the Commission's costs. Since the Kingdom of the Netherlands made no request concerning costs, as to the remainder the parties are to bear their own costs.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Declares that, by incompletely transposing Article 6 of Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector, in that, first, Article 11(5)(1) of the Wet houdende regels inzake de telecommunicatie (Telecommunicatiewet) refers to a general administrative measure which was not communicated to the Commission of the European Communities and in that, second, the implementing provisions mentioned in Article 11(5)(3) of the Telecommunicatiewet were not communicated to the Commission, and by incompletely transposing Article 9 of that directive, the Kingdom of the Netherlands has failed to fulfil its obligations under that directive;**

2. **Dismisses the remainder of the action;**

3. **Orders the Kingdom of the Netherlands to bear, in addition to its own costs, three quarters of the Commission's costs;**

4. As to the remainder of the action orders the Commission to bear its own costs.

Jann La Pergola von Bahr

Silva de Lapuerta Lenaerts

Delivered in open court in Luxembourg on 24 June 2004.

R. Grass P. Jann

Registrar President of the Chamber

Case C-461/03

Gaston Schul Douane-expediteur BV

v

Minister van Landbouw, Natuur en Voedselkwaliteit

(Reference for a preliminary ruling from the College van Beroep voor het bedrijfsleven)

(Article 234 EC – Obligation on a national court to seek a preliminary ruling – Invalidity of a provision of Community law – Sugar – Additional import duty – Regulation (EC) No 1423/95 – Article 4)

Summary of the Judgment

1. *Preliminary rulings – Assessment of validity – Finding of invalidity of Community provisions comparable to those already declared invalid by the Court – Lack of jurisdiction of national courts – Duty to refer*

   (Art. 230 EC, Art. 234 EC, third para., and Art. 241 EC)

2. *Agriculture – Common organisation of the markets – Sugar – Trade with non-member countries – Additional import duties – Determination on the basis of the cif import price – Obligation on the importer to make an application – Determination on the basis of the representative price – Not valid*

   (Commission Regulation No 1423/95, Arts 1(2) and 4(1) and (2))

1. The third paragraph of Article 234 EC requires a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation. National courts have no jurisdiction themselves to determine that acts of Community institutions are invalid.

   Although the rule that national courts may not themselves determine that Community acts are invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures, the interpretation adopted in *Cilfit and Others*, referring to questions of interpretation, cannot be extended to questions relating to the validity of Community acts.

   That solution is imposed, first, by the requirement of uniformity in the application of Community law. That requirement is particularly vital where the validity of a Community act is in question. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the essential unity of the Community legal order and undermine the fundamental requirement of legal certainty.

   It is imposed, secondly, by the necessary coherence of the system of judicial protection instituted by the EC Treaty. References for a preliminary ruling on validity constitute, on the same basis as actions for annulment, a means of reviewing the legality of Community acts. By Articles 230 EC and 241 EC, on the one hand, and Article 234 EC, on the other, the Treaty established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions and has entrusted such review to the Community Courts.

(see paras 17-19, 21-22, 25, operative part 1)

2. Paragraphs (1) and (2) of Article 4 of Regulation No 1423/95 laying down detailed implementing rules for the import of products in the sugar sector other than molasses are invalid inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price referred to in Article 1(2) of that regulation and that that duty is established on the basis of the cif import price of the shipment concerned only if the importer so requests.

(see para. 32, operative part 2)

JUDGMENT OF THE COURT (Grand Chamber)

6 December 2005 (*)

(Article 234 EC – Obligation on a national court to seek a preliminary ruling – Invalidity of a provision of Community law – Sugar – Additional import duty – Regulation (EC) No 1423/95 – Article 4)

In Case C-461/03,

REFERENCE for a preliminary ruling under Article 234 EC from the College van Beroep voor het bedrijfsleven (Netherlands), made by decision of 24 October 2003, received at the Court on 4 November 2003, in the proceedings

Gaston Schul Douane-expediteur BV

v

Minister van Landbouw, Natuur en Voedselkwaliteit,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and J. Malenovský, Presidents of Chambers, N. Colneric (Rapporteur), S. von Bahr, J.N. Cunha Rodrigues, R. Silva de Lapuerta, K. Lenaerts, G. Arestis, A. Borg Barthet and M. Ilešič, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Netherlands Government, by H.G. Sevenster and N.A.J. Bel, acting as Agents,

– the Commission of the European Communities, by T. van Rijn and M. van Beek, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 30 June 2005,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 234 EC and the validity of Article 4(1) and (2) of Commission Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses (OJ 1995 L 141, p. 16).

2 The reference was made in proceedings between Gaston Schul Douane-expediteur BV ('Gaston Schul') and the Minister van Landbouw, Natuur en Voedselkwaliteit ('the Minister for Agriculture') regarding the import of cane sugar.

Legal context

3 Pursuant to Article 234 EC:

'The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of this Treaty;

(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;

(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.'

4 The Agreement on Agriculture in Annex 1A to the Agreement establishing the World Trade Organisation ('the WTO') was approved on behalf of the Community by virtue of the first indent of Article 1(1) of Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). Article 5 of the Agreement on Agriculture provides as follows:

'1. Notwithstanding the provisions of paragraph 1(b) of Article II of GATT 1994, any Member may take recourse to the provisions of paragraphs 4 and 5 below ... if:

(a) …

(b) the price at which imports of that product may enter the customs territory of the Member [of the WTO] granting the concession, as determined on the basis of the cif import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price for the product concerned.

…

5. The additional duty imposed under subparagraph 1(b) shall be set according to the following schedule:

…'

5 Article 15(3) of Council Regulation (EEC) No 1785/81 of 30 June 1981 on the common organisation of the markets in the sugar sector (OJ 1981 L 177, p. 4), as amended by Council Regulation (EC) No 3290/94 of 22 December 1994 on the adjustments and transitional arrangements required in the agriculture sector in order to implement the agreements concluded during the Uruguay Round of multilateral trade negotiations (OJ 1994 L 349, p. 105) ('the basic regulation') provides that 'the import prices to be taken into consideration for imposing an additional import duty shall be determined on the basis of the cif import prices of the consignment under consideration' and that 'cif import prices shall be checked to that end against the representative prices for the product on the world market or on the Community import market for that product'.

6 The Commission of the European Communities adopted Regulation (EC) No 1423/95 laying down detailed implementing rules for the basic regulation. Article 4 of Regulation No 1423/95 provides:

'1. In the absence of a request as referred to in paragraph 2 or where the cif import price of the consignment in question as referred to in paragraph 2 is less than the relevant representative price fixed by the Commission, the cif import price of the consignment in question to be taken into account for the imposition of an additional duty shall be the representative price referred to in Article 1(2) or (3).

2. When the cif price of the consignment in question is higher than the relevant representative price as referred to in Article 1(2) or (3), the importer may, on request made to the competent authority of the importing Member State at the time of acceptance of the import declaration, have applied for the purposes of establishing the additional duty either the cif import price of the consignment in question of white sugar or raw sugar converted into the standard quality as defined, respectively, in Article 1 of Regulation (EEC) No 793/72 and Article 1 of Regulation (EEC) No 431/68, or the equivalent price for the product falling within CN code 1702 90 99, as the case may be.

The cif import price of the consignment in question shall be converted into the price of sugar of the standard quality by adjustment pursuant to the relevant provisions of Article 5 of Regulation (EEC) No 784/68.

In such cases the cif import price of the consignment in question shall apply for the purposes of establishing the additional duty, provided that the interested party submits to the competent authorities of the importing Member State at least the following evidence:

– the contract of purchase or equivalent proof,

– the insurance contract,

– the invoice,

– the transport contract (where applicable),

– the certificate of origin,

– in the case of maritime transport, the bill of lading,

within thirty days of the date on which the import declaration was accepted.

The Member State in question may require any other information and documents in support of the request. As soon as the request has been lodged, the additional duty in question as fixed by the Commission shall apply.

However, the difference between the additional duty in question fixed by the Commission and the additional duty established on the basis of the cif import price of the consignment in question

shall give rise, at the request of the interested party, to the lodging by the latter of a security pursuant to Article 248 of Commission Regulation (EEC) No 2454/93.

The security shall be released as soon as the competent authority of the importing Member State accepts the request on the basis of the evidence supplied by the interested party.

The competent authority of the Member State shall refuse the request if it judges that the evidence supplied does not justify it.

If the authority does not accept the request, the security shall be forfeit.

…'

The main proceedings and the questions referred for a preliminary ruling

7 On 6 May 1998 Gaston Schul declared the import of 20 000 kg of raw cane sugar from Brazil at a cif price of NLG 31 916. According to the information sent by the customs authorities on 13 May 1998 with the comment 'check concluded without adjustments', the amount of the import duty due was NLG 20 983.70. On 4 August 1998 the inspector of the Tax Department of Roosendaal Customs District, on behalf of the Minister for Agriculture, requested payment from Gaston Schul of NLG 4 968.30 in respect of an 'agricultural levy'. This levy was calculated as follows: 20 000 kg multiplied by NLG 24.841182 (ECU 11.11) in respect of additional import duty per 100 kg. After making an unsuccessful claim against that notice of duty, Gaston Schul brought an action before the national court.

8 That court has noted, first, that Article 15 of the basic regulation, laying down the system for additional duty in the sugar sector, is identical to Article 5 of Regulation (EEC) No 2777/75 of the Council of 29 October 1975 on the common organisation of the market in poultrymeat (OJ 1975 L 282, p. 77), as amended by Regulation No 3290/94, those two provisions, in their current versions, having been adopted on the same date.

9 In the poultrymeat and egg sector, the Court, in its judgment in Case C-317/99 *Kloosterboer Rotterdam* [2001] ECR I-9863, declared invalid paragraphs (1) and (3) of Article 3 of Commission Regulation (EC) No 1484/95 of 28 June 1995 laying down detailed rules for implementing the system of additional import duties and fixing additional import duties in the poultrymeat and egg sectors and for egg albumin, and repealing Regulation No 163/67/EEC (OJ 1995 L 145, p. 47), inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price laid down in Article 2(1) of that regulation and that the duty is established on the basis of the cif import price of the consignment concerned only if the importer so requests. According to that judgment, the Commission exceeded its executory powers.

10 The national court takes the view that paragraphs (1) and (3) of Article 3 of Regulation No 1484/95, which have been declared invalid by the Court of Justice as a result of these considerations, are identical in the respects considered by the Court of Justice to the provisions of Article 4(1) and (2) of Regulation No 1423/95. In both instances there is a basic regulation specifying, in accordance with Article 5 of the Agreement on Agriculture in Annex 1A to the Agreement establishing the WTO, that the additional import duty is calculated on the basis of the cif price, whereas in a Commission implementing regulation calculation of the additional duty on the basis of the representative price is made the general rule.

11 Paragraphs (1) and (2) of Article 4 of Regulation No 1423/95 are thus incompatible with Article 15 of the basic regulation.

12 On the basis of the Court's judgment in Case 314/85 *Foto-Frost* [1987] ECR 4199, the national court observes that it is for the Court of Justice alone to rule on the invalidity of acts of the Community institutions.

13 It considers, nevertheless, that the question whether the situation could be different in a national dispute such as that in the main proceedings, where the question posed concerns the validity of provisions corresponding to other provisions of Community law which the Court has already declared to be invalid in a preliminary ruling, such as the *Kloosterboer Rotterdam* judgment, requires an interpretation of the third paragraph of Article 234 EC.

14 Under those circumstances, the College van Beroep voor het bedrijfsleven decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Is a court or tribunal as referred to in the third paragraph of Article 234 EC also required under that provision to submit to the Court of Justice a question such as that set out below concerning the validity of provisions of a regulation where the Court of Justice has ruled that analogous provisions of another, comparable regulation are invalid, or may it refrain from applying the first-mentioned provisions in view of the clear analogies between them and the provisions declared invalid?

2. Are paragraphs (1) and (2) of Article 4 of Regulation … No 1423/95 … invalid inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price referred to in Article 1(2) of Regulation … No 1423/95 and that that duty is established on the basis of the cif import price of the shipment concerned only if the importer so requests?’

The questions

The first question

15 By the first question, the national court essentially asks whether the third paragraph of Article 234 EC requires a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation.

16 With regard to questions of interpretation, it is clear from the judgment in Case 283/81 *Cilfit and Others* [1982] ECR 3415, paragraph 21, that a court or tribunal against whose decisions there is no judicial remedy under national law is required, where a question of Community law is raised before it, to comply with its obligation to bring the matter before the Court of Justice, unless it has established that the question raised is irrelevant or that the Community provision in question has already been interpreted by the Court or that the correct application of Community law is so obvious as to leave no scope for any reasonable doubt (see also Case C-495/03 *Intermodal Transports* [2005] ECR I-0000, paragraph 33).

17 However, it is clear from paragraph 20 of the *Foto-Frost* judgment that national courts have no jurisdiction themselves to determine that acts of Community institutions are invalid.

18 The rule that national courts may not themselves determine that Community acts are invalid may have to be qualified in certain circumstances in the case of proceedings relating to an application for interim measures (*Foto-Frost*, paragraph 19; see also, to that effect, Case 107/76 *Hoffmann-La Roche* [1977] ECR 957, paragraph 6; Joined Cases 35/82 and 36/82 *Morson and Jhanjan* [1982] ECR 3723, paragraph 8; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraphs 21 and 33; and Case C-465/93 *Atlanta Fruchthandelsgesellschaft and Others (I)* [1995] ECR I-3761, paragraphs 30, 33 and 51).

19 Nevertheless, the interpretation adopted in the *Cilfit* judgment, referring to questions of interpretation, cannot be extended to questions relating to the validity of Community acts.

20 Firstly, even in cases which at first sight are similar, careful examination may show that a

provision whose validity is in question is not comparable to a provision which has already been declared invalid because, for instance, it has a different legal or factual context, as the case may be.

21 The main purpose of the jurisdiction conferred on the Court by Article 234 EC is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly vital where the validity of a Community act is in question. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the essential unity of the Community legal order and undermine the fundamental requirement of legal certainty (*Foto-Frost*, paragraph 15).

22 The possibility of a national court ruling on the invalidity of a Community act is likewise incompatible with the necessary coherence of the system of judicial protection instituted by the EC Treaty. It is important to note in that regard that references for a preliminary ruling on validity constitute, on the same basis as actions for annulment, a means of reviewing the legality of Community acts. By Articles 230 EC and 241 EC, on the one hand, and Article 234 EC, on the other, the Treaty established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions and has entrusted such review to the Community Courts (see Case 294/83 *Parti écologiste 'Les Verts'* v *Parliament* [1986] ECR 1339, paragraph 23; *Foto-Frost*, paragraph 16; and Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677, paragraph 40).

23 Reducing the length of the proceedings cannot serve as justification for undermining the sole jurisdiction of the Community Courts to rule on the validity of Community law.

24 It must also be emphasised that the Community Courts are in the best position to rule on the validity of Community acts. Under Article 23 of the Statute of the Court of Justice, Community institutions whose acts are challenged are entitled to participate in the proceedings in order to defend the validity of the acts in question. Furthermore, under the second paragraph of Article 24 of that Statute, the Court may require Community institutions which are not participating in the proceedings to supply any information which it considers necessary for the purposes of the case before it (see *Foto-Frost*, paragraph 18).

25 It follows from all the foregoing considerations that the answer to the first question must be that the third paragraph of Article 234 EC requires a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation.

The second question

26 By the second question, the national court asks whether paragraphs (1) and (2) of Article 4 of Regulation No 1423/95 are invalid inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price referred to in Article 1(2) of Regulation No 1423/95 and, moreover, that that duty is established on the basis of the cif import price of the shipment concerned only if the importer so requests.

27 It is clear from the wording of the first subparagraph of Article 15(3) of the basic regulation that only the cif import price of the consignment may serve as a basis for determining any additional duty.

28 No conditions or exceptions are attached to application of that rule.

29 The second subparagraph of Article 15(3) of the basic regulation provides unambiguously that the representative price for the product concerned is taken into account only for the purposes of checking the accuracy of the cif import price.

30 However, under Article 4(1) and (2) of Regulation No 1423/95, the cif import price may be taken

into consideration in establishing the additional duty on condition that the importer submits a formal request to that effect accompanied by certain supporting documents, and in all other cases the price taken into consideration must be the representative price, which is thus to be the general rule.

31 Inasmuch as Article 15(3) of the basic regulation makes no provision for an exception to the rule that additional duty is established on the basis of the cif import price, paragraphs (1) and (2) of Article 4 are contrary to that provision.

32 The answer to the second question must therefore be that paragraphs (1) and (2) of Article 4 of Regulation No 1423/95 are invalid inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price referred to in Article 1(2) of Regulation No 1423/95 and that that duty is established on the basis of the cif import price of the shipment concerned only if the importer so requests.

Costs

33 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **The third paragraph of Article 234 EC requires a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law to seek a ruling from the Court of Justice on a question relating to the validity of the provisions of a regulation even where the Court has already declared invalid analogous provisions of another comparable regulation;**

2. **Paragraphs (1) and (2) of Article 4 of Commission Regulation (EC) No 1423/95 of 23 June 1995 laying down detailed implementing rules for the import of products in the sugar sector other than molasses are invalid inasmuch as they provide that the additional duty referred to therein is, as a general rule, established on the basis of the representative price referred to in Article 1(2) of that regulation and that that duty is established on the basis of the cif import price of the shipment concerned only if the importer so requests.**

[Signatures]

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* Language of the case: Dutch.

Case C-53/03

Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others

v

GlaxoSmithKline plc

and

GlaxoSmithKline AEVE, formerly GlaxoWellcome AEVE

(Reference for a preliminary ruling from the Epitropi Antagonismou)

(Admissibility — Meaning of court or tribunal of a Member State — Abuse of a dominant position — Refusal to supply pharmaceutical products to wholesalers — Parallel trade)

Opinion of Advocate General Jacobs delivered on 28 October 2004

Judgment of the Court (Grand Chamber), 31 May 2005

Summary of the Judgment

Questions referred for a preliminary ruling — Reference to the Court — National court or tribunal for the purposes of Article 234 EC — Meaning — 'Epitropi Antagonismou' (Greek Competition Commission) — Excluded
(Art. 234 EC)

In order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent. In addition, a body may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature.

The Epitropi Antagonismou (Greek Competition Commission) does not satisfy those criteria. First of all, it is subject to the supervision of the Minister for Development, which implies that that minister is empowered, within certain limits, to review the lawfulness of its decisions. Next, even though its members enjoy personal and operational independence, there are no particular safeguards in respect of their dismissal or the termination of their appointment, which does not appear to constitute an effective safeguard against undue intervention or pressure from the executive on those members. In addition, its President is responsible for the coordination and general policy of its secretariat and is the supervisor of the personnel of that secretariat, with the result that, by virtue of the operational link between the Epitropi Antagonismou, a decision-making body, and its secretariat, a fact-finding body on the basis of whose proposal it adopts decisions, the Epitropi Antagonismou is not a clearly distinct third party in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings. Finally, a competition authority such as the Epitropi Antagonismou is required to work in close cooperation with the Commission and may, pursuant to Article 11(6) of Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, be relieved of its competence by a decision of the Commission, with the consequence that the proceedings initiated before it will not lead to a decision of a judicial nature.

(see paras 29-37)

JUDGMENT OF THE COURT (Grand Chamber)

31 May 2005 (*)

(Admissibility – Meaning of court or tribunal of a Member State – Abuse of a dominant position – Refusal to supply pharmaceutical products to wholesalers – Parallel trade)

In Case C-53/03,

REFERENCE under Article 234 EC for a preliminary ruling, by the Epitropi Antagonismou (Greece), by decision of 22 January 2003, received at the Court on 5 February 2003, in the proceedings

Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others,

Panellinios syllogos farmakapothikarion,

Interfarm – A. Agelakos & Sia OE and Others,

K.P. Marinopoulos Anonymos Etairia emporias kai dianomis farmakeftikon proïonton and Others,

v

GlaxoSmithKline plc,

GlaxoSmithKline AEVE, formerly Glaxowellcome AEVE,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas and R. Silva de Lapuerta, Presidents of Chambers, C. Gulmann (Rapporteur), R. Schintgen, N. Colneric and S. von Bahr, Judges

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 18 May 2004,

after considering the observations submitted on behalf of:

– Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others, by P. Kaponis and S. Orfanoudakis, dikigoroi,

– Panellinios syllogos farmakapothikarion and K.P. Marinopoulos Anonymos Etairia emporias kai dianomis farmakeftikon proïonton and Others, by L. Roumanias and G. Papaïoannou, dikigoroi, and W. Rehmann, Rechtsanwalt,

– Farmakeftikos Syndesmos Anonymi Emporiki Etairia, by D. Chatzinikolis, dikigoros,

– Interfarm A. Agelakos & Sia OE and Others, by G. Mastorakos, dikigoros,

– GlaxoSmithKline plc and GlaxoSmithKline AEVE, by D. Kyriakis, dikigoros, I. Forrester QC and A. Schulz, Rechtsanwalt,

– the Swedish Government, by A. Kruse, acting as Agent,

– the Commission of the European Communities, by T. Christoforou and F. Castillo de la Torre, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 October 2004,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 82 EC.

2 The request was made in proceedings before the Epitropi Antagonismou (the Greek Competition Commission), between the complainants, Synetairismos Farmakopoion Aitolias & Akarnanias (Syfait) and Others ('Syfait and Others'), Panellinios syllogos farmakapothikarion ('PSF'), Interfarm – A. Agelakos & Sia OE and Others ('Interfarm and Others') and K.P. Marinopoulos Anonymos Etairia emporias kai dianomis farmakeftikon proïonton and Others ('Marinopoulos and Others'), and GlaxoSmithKline plc ('GSK plc'), a United Kingdom company, and its subsidiary incorporated under Greek law, GlaxoSmithKline AEVE, formerly Glaxowellcome AEVE ('GSK AEVE'), concerning the latter two companies' refusal to meet orders for certain pharmaceutical products on the Greek market.

Law

Community law

3 Article 82 EC provides:

'Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;

(b) limiting production, markets or technical development to the prejudice of consumers;

(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.'

National law

4 Article 2 of Law No 703/1977 on the control of monopolies and oligopolies and the protection of free competition (FEK (Official Gazette) A' 278), as amended by Law No 2941/2001 (FEK A' 201, hereafter 'Law No 703/1977'), essentially corresponds to Article 82 EC.

The dispute in the main proceedings and the questions referred for a preliminary ruling

5 Syfait and Others are associations of pharmacists established in Greece whose main activity is the operation of a joint wholesale repository for pharmaceutical products, which they purchase from various pharmaceutical companies in order to ensure the supply of their members.

6 PSF is an association of wholesalers of pharmaceutical products established in Greece, which defends the interests of its members.

7 Interfarm and Others are wholesalers of pharmaceutical products established in Greece. Marinopoulos and Others are distributors of pharmaceutical products operating in Greece.

8 GSK AEVE is established in Greece and is wholly owned by GSK plc, a manufacturer of pharmaceutical products established in the United Kingdom resulting from the merger in 2000 of Glaxowellcome plc and SmithKline Beecham.

9 GSK AEVE imports and distributes numerous proprietary medicinal products including Imigran, Lamictal and Serevent. Those are newly created medicines resulting from research and technology and are classified as prescription medicines.

10 The members of Syfait and Others, and of PSF, and Interfarm and Others and Marinopoulos and Others buy those medicines, amongst others, in all forms from GSK AEVE and then distribute them on the national market and abroad.

11 Until November 2000, GSK AEVE met all orders which it received. A large proportion of the supplies corresponding to those orders was re-exported to other Member States, especially to the United Kingdom because of the much lower price of Imigran, Lamictal and Serevent in Greece.

12 From early November 2000, invoking significant shortages on the Greek market, which it attributed to re-exports by third parties, GSK AEVE changed its system of distribution in Greece and stopped meeting the orders of the complainants in the main proceedings and of third parties, stating that it would supply hospitals and pharmacies directly.

13 In February 2001, considering that the supply of medicinal products had to some extent been normalised, and that the stocks of hospitals and pharmacies had been rebuilt, GSK AEVE replaced the previous sales system with another system of distribution.

14 The complainants in the main proceedings brought before the Epitropi Antagonismou the question of GSK AEVE's marketing of Imigran, Lamictal and Serevent on the Greek market under successive systems of distribution since November 2000. They alleged that that company had not met in full the orders it had received and that such conduct is an abuse of a dominant position within the meaning of Article 2 of Law No 703/1977 and Article 82 EC.

15 By Decision No 193/111 of 3 August 2001 ordering interim measures, the Epitropi Antagonismou temporarily required GSK AEVE, pending adoption of the decision in the main proceedings, to meet the orders for the three medicinal products in question. GSK AEVE applied to the Diikitiko Efetio Athinon (Administrative Appeal Court, Athens) for an order suspending that decision, but it was confirmed on 10 January 2002 and was still in force at the date of the referring decision.

16 The Epitropi Antagonismou states that GSK AEVE complied with the interim measures prescribed by Decision No 193/111 at least to the extent that that company was supplied by GSK plc. That supply exceeded the consumption needs of the domestic market. The evidence provided to the Epitropi Antagonismou by GSK AEVE shows, however, that orders were considerably higher than that level, in particular in September 2001, so that not all orders could be met.

17 In the referring decision, the Epitropi Antagonismou states that GSK AEVE and GSK plc comply with the circular adopted on 27 November 2001 by the Ethnikos Organismos Farmakon (National Organisation for Medicines), which provides that all participants in the distribution of prescribed medicines 'must supply to the domestic market quantities at least equal to current prescription levels … plus an amount (25%) to cover any emergencies and changes of circumstance'.

18 Furthermore, on 5 December 2001, GSK AEVE applied to the Epitropi Antagonismou for negative clearance under Article 11 of Law No 703/1977 in respect of its refusal to cover more than 125% of Greek demand.

19 Faced simultaneously with that application by GSK AEVE for negative clearance and the complaints from Syfait and Others, PSF, Interfarm and Others and Marinopoulos and Others against GSK AEVE and GSK plc, the Epitropi Antagonismou asks to what extent the refusal by the latter two companies to meet in full the orders placed by the complainants constitutes an abuse of a dominant position within the meaning of Article 82 EC. If it is not an abuse, the Epitropi Antagonismou states that it will be in a position to consider whether the conditions for the grant of the negative clearance sought by GSK AEVE are satisfied.

20 In those circumstances, the Epitropi Antagonismou decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Where the refusal of an undertaking holding a dominant position to meet fully the orders sent to it by pharmaceutical wholesalers is due to its intention to limit their export activity and, thereby, the harm caused to it by parallel trade, does the refusal constitute per se an abuse within the meaning of Article 82 EC? Is the answer to that question affected by the fact that the parallel trade is particularly profitable for the wholesalers because of the different prices, resulting from State intervention, in the Member States of the European Union, that is to say by the fact that pure conditions of competition do not prevail in the pharmaceuticals market, but a regime which is governed to a large extent by State intervention? Is it ultimately the duty of a national competition authority to apply Community competition rules in the same way to markets which function competitively and those in which competition is distorted by State intervention?

2. If the Court holds that limitation of parallel trade, for the reasons set out above, does not constitute an abusive practice in every case where it is engaged in by an undertaking holding a dominant position, how is possible abuse to be assessed?

In particular:

(a) Do the percentage by which normal domestic consumption is exceeded and/or the loss suffered by an undertaking holding a dominant position compared with its total turnover and total profits constitute appropriate criteria? If so, how are the level of that percentage and the level of that loss determined (the latter as a percentage of turnover and total profits), above which the conduct in question may be abusive?

(b) Is an approach entailing the balancing of interests appropriate, and, if so, what are the interests to be compared?

In particular:

(i) is the answer affected by the fact that the ultimate consumer/patient derives limited financial advantage from the parallel trade? and

(ii) is account to be taken, and to what extent, of the interests of social insurance bodies in cheaper medicinal products?

(c) What other criteria and approaches are considered appropriate in the present

case?'

The jurisdiction of the Court

21 As a preliminary point, it is necessary to ascertain whether the Epitropi Antagonismou is a court or tribunal within the meaning of Article 234 EC and whether the Court therefore has jurisdiction to make a ruling on the questions referred to it.

The national law governing the Epitropi Antagonismou

22 Article 8(1) of Law No 703/1977 provides:

'An Epitropi Antagonismou shall be established which shall operate as an independent authority. Its members shall enjoy personal and operational independence and shall be bound in the exercise of their duties only by the law and their conscience. The Epitropi Antagonismou shall be administratively and economically autonomous subject to the supervision of the Ministry for … [Development].'

23 The Epitropi Antagonismou has nine members appointed pursuant to Article 8(3) of Law No 703/1977. Four members and their deputies are chosen by the minister from lists of three persons which are submitted by each of four professional bodies. The other members include a member of the government legal service or a judge of the highest rank, two academics, one a lawyer and the other an economist, and two persons of acknowledged repute with experience of economic law and competition policy. According to Article 8(5) of Law No 703/1977, the members of the Epitropi Antagonismou and their deputies are appointed by the Minister for Development for a term of three years.

24 Article 8(6) of the same law provides:

'The president of the Epitropi Antagonismou and his deputy shall be appointed by the Minister [for Development] from amongst the members of the [Epitropi Antagonismou]… The president of the Epitropi Antagonismou shall be a member of the national civil service and shall exclusively perform that task for the duration of his term of office …'

25 Article 8(7) of Law No 703/1977 provides:

'During their term of office, the President and the members shall not carry on, whether for remuneration or otherwise, any other public function or professional activity, whether or not in-house, which is incompatible with the role and duties of a member of the Epitropi Antagonismou.'

26 As regards relations between the Epitropi Antagonismou and its secretariat, Article 8C(1)(b) of the same law provides:

'The President shall coordinate and direct the secretariat of the [Epitropi Antagonismou].'

27 Article 8C(1)(d) of the same law provides:

'The President is the immediate superior of the personnel of the secretariat of the Epitropi Antagonismou and shall exercise disciplinary power over them.'

28 According to Article 8C(3), the President of the Epitropi Antagonismou may authorise the Director General or the directors of the secretariat of the Epitropi Antagonismou to exercise some of his powers. The Director General is to be appointed for three years, and the appointment is renewable by decision of the Minister for Development subject to the assent of the Epitropi Antagonismou, as laid down by the second sentence of Article 8D(1) of Law No 703/1977.

Findings of the Court

29 According to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is inter partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23, Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 33, Case C-195/98 *Österreichischer Gewerkschaftsbund* [2000] ECR I-10497, paragraph 24, and Case C-516/99 *Schmid* [2002] ECR I-4573, paragraph 34). Moreover, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, in particular, Case C-134/97 *Victoria Film* [1998] ECR I-7023, paragraph 14, and *Österreichischer Gewerkschaftsbund*, paragraph 25).

30 It should be noted, first of all, in this regard that the Epitropi Antagonismou is subject to the supervision of the Minister for Development. Such supervision implies that that minister is empowered, within certain limits, to review the lawfulness of the decisions adopted by the Epitropi Antagonismou.

31 Next, whilst it is true that the members of the Epitropi Antagonismou enjoy personal and operational independence and are bound in the exercise of their duties only by the law and their conscience within the meaning of Law No 703/1977, it nevertheless remains that there are no particular safeguards in respect of their dismissal or the termination of their appointment. That system does not appear to constitute an effective safeguard against undue intervention or pressure from the executive on the members of the Epitropi Antagonismou (see, to that effect, Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, paragraph 21).

32 It should also be noted that under Article 8C(1)(b) and (d) of Law No 703/1977, the President of the Epitropi Antagonismou is responsible for the coordination and general policy of the secretariat, is the immediate superior of the personnel of that secretariat and exercises disciplinary power over them.

33 It should be noted in this regard that the Tribunales Económico-Administrativos (Economic and Administrative Courts) (Spain) were found by the Court, in paragraphs 39 and 40 of the *Gabalfrisa* judgment, to be third parties in relation to the departments of the tax authority responsible for the management, clearance and recovery of VAT, particularly given the separation of functions between them. However, in so far as there is an operational link between the Epitropi Antagonismou, a decision-making body, and its secretariat, a fact-finding body on the basis of whose proposal it adopts decisions, the Epitropi Antagonismou is not a clearly distinct third party in relation to the State body which, by virtue of its role, may be akin to a party in the course of competition proceedings.

34 Lastly, it should be noted that a competition authority such as the Epitropi Antagonismou is required to work in close cooperation with the Commission of the European Communities and may, pursuant to Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1, p. 1), be relieved of its competence by a decision of the Commission. It should moreover be noted in this context that Article 11(6) of Regulation No 1/2003 essentially maintains the rule in Article 9(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition, 1959-1962 p. 87), that the competition authorities of the Member States are automatically relieved of their competence where the Commission initiates its own proceedings (see in that connection the 17th recital in the preamble to Regulation No 1/2003).

35 A body may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature

(see *Victoria Film*, paragraph 14, and *Österreichischer Gewerkschaftsbund*, paragraph 25).

36 Whenever the Commission relieves a national competition authority such as the Epitropi Antagonismou of its competence, the proceedings initiated before that authority will not lead to a decision of a judicial nature.

37 It follows from the factors examined, considered as a whole, that the Epitropi Antagonismou is not a court or tribunal within the meaning of Article 234 EC.

38 Accordingly, the Court has no jurisdiction to answer the questions referred by the Epitropi Antagonismou.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the Epitropi Antagonismou, the decision on costs is a matter for that body. The costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

The Court of Justice of the European Communities has no jurisdiction to answer the questions referred by the Epitropi Antagonismou by decision of 22 January 2003.

[Signatures]

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* Language of the case: Greek.

JUDGMENT OF THE COURT (Grand Chamber)

12 July 2005 (*)

(Failure of a Member State to fulfil obligations – Fisheries – Control obligations placed on the Member States – Judgment of the Court establishing a breach of obligations – Non-compliance – Article 228 EC – Payment of a lump sum – Imposition of a penalty payment)

In Case C-304/02,

ACTION under Article 228 EC for failure to fulfil obligations, brought on 27 August 2002,

Commission of the European Communities, represented by M. Nolin, H. van Lier and T. van Rijn, acting as Agents, with an address for service in Luxembourg,

applicant,

v

French Republic, represented by G. de Bergues and A. Colomb, acting as Agents,

defendant,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann (Rapporteur) and C.W.A. Timmermans, Presidents of Chambers, C. Gulmann, J.-P. Puissochet, R. Schintgen, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: L.A. Geelhoed,

Registrar: M. Múgica Arzamendi, Principal Administrator, subsequently M.-F. Contet, Principal Administrator, and H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 3 March 2004,

after hearing the Opinion of the Advocate General at the sitting on 29 April 2004,

having regard to the order of 16 June 2004 reopening the oral procedure and further to the hearing on 5 October 2004,

after hearing the oral observations of:

– the Commission, represented by G. Marenco, C. Ladenburger and T. van Rijn, acting as Agents,

– the French Republic, represented by R. Abraham, G. de Bergues and A. Colomb, acting as Agents,

– the Kingdom of Belgium, represented by J. Devadder, acting as Agent,

– the Czech Republic, represented by T. Boček, acting as Agent,

– the Kingdom of Denmark, represented by A.R. Jacobsen and J. Molde, acting as Agents,

– the Federal Republic of Germany, represented by W.D. Plessing, acting as Agent,

– the Hellenic Republic, represented by A. Samoni and E.M. Mamouna, acting as Agents,

– the Kingdom of Spain, represented by N. Diaz Abad, acting as Agent,

– Ireland, represented by D. O'Donnell and P. Mc Cann, acting as Agents,

– the Italian Republic, represented by I.M. Braguglia, acting as Agent,

– the Republic of Cyprus, represented by D. Lissandrou and E. Papageorgiou, acting as Agents,

– the Republic of Hungary, represented by R. Somssich and A. Muller, acting as Agents,

– the Kingdom of the Netherlands, represented by J. van Bakel, acting as Agent,

– the Republic of Austria, represented by E. Riedl, Rechtsanwalt,

– the Republic of Poland, represented by T. Nowakowski, acting as Agent,

– the Portuguese Republic, represented by L. Fernandes, acting as Agent,

– the Republic of Finland, represented by T. Pynnä, acting as Agent,

– the United Kingdom of Great Britain and Northern Ireland, represented by D. Anderson QC,

after hearing the Opinion of the Advocate General at the sitting on 18 November 2004,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests the Court to:

– declare that, by failing to take the necessary measures to comply with the judgment of 11 June 1991 in Case C-64/88 *Commission* v *France* [1991] ECR I-2727, the French Republic has failed to fulfil its obligations under Article 228 EC;

– order the French Republic to pay to the Commission, into the account 'European Community own resources', a penalty payment in the sum of EUR 316 500 for each day of delay in implementing the measures necessary to comply with the judgment in Case C-64/88 *Commission* v *France*, cited above, from delivery of the present judgment until the judgment in Case C-64/88 *Commission* v *France* has been complied with;

– order the French Republic to pay the costs.

Community legislation

Rules regarding controls

2 The Council has established certain control measures for fishing activities by vessels of the Member States. Those measures have been successively set out in Council Regulation (EEC) No 2057/82 of 29 June 1982 establishing certain control measures for fishing activities by vessels of the Member States (OJ 1982 L 220, p. 1), in Council Regulation (EEC) No 2241/87 of

23 July 1987 establishing certain control measures for fishing activities (OJ 1987 L 207, p. 1) which repealed and replaced Regulation No 2057/82, and in Council Regulation (EEC) No 2847/93 of 12 October 1993 establishing a control system applicable to the common fisheries policy (OJ 1993 L 261, p. 1) which repealed and replaced Regulation No 2241/87 on 1 January 1994.

3 The control measures set out in those regulations are essentially identical.

4 Article 1(1) and (2) of Regulation No 2847/93 provides:

‘1. In order to ensure compliance with the rules of the common fisheries policy, a Community system is hereby established including in particular provisions for the technical monitoring of:

– conservation and resource management measures,

– structural measures,

– [measures] concerning the common organisation of the market,

as well as certain provisions relating to the effectiveness of sanctions to be applied in cases where the abovementioned measures are not observed.

2. To this end, each Member State shall adopt, in accordance with Community rules, appropriate measures to ensure the effectiveness of the system. It shall place sufficient means at the disposal of its competent authorities to enable them to perform their tasks of inspection and control as laid down in this Regulation.’

5 Article 2(1) of Regulation No 2847/93 states:

‘In order to ensure compliance with all the rules in force concerning conservation and control measures, each Member State shall, within its territory and within maritime waters subject to its sovereignty or jurisdiction, monitor fishing activity and related activities. It shall inspect fishing vessels and investigate all activities thus enabling verification of the implementation of this Regulation, including the activities of landing, selling, transporting and storing fish and recording landings and sales.’

6 Article 31(1) and (2) of Regulation No 2847/93 provides:

‘1. Member States shall ensure that the appropriate measures be taken, including of administrative action or criminal proceedings in conformity with their national law, against the natural or legal persons responsible where common fisheries policy have [sic] not been respected, in particular following a monitoring or inspection carried out pursuant to this Regulation.

2. The proceedings initiated pursuant to paragraph 1 shall be capable, in accordance with the relevant provisions of national law, of effectively depriving those responsible of the economic benefit of the infringements or of producing results proportionate to the seriousness of such infringements, effectively discouraging further offences of the same kind.’

Technical rules

7 The technical measures for the conservation of fishery resources which are envisaged by the rules regarding controls have been set out inter alia in Council Regulation (EEC) No 171/83 of 25 January 1983 (OJ 1983 L 24, p. 14), repealed and replaced by Council Regulation (EEC) No 3094/86 of 7 October 1986 (OJ 1986 L 288, p. 1), itself repealed and replaced with effect from 1 July 1997 by Council Regulation (EC) No 894/97 of 29 April 1997 (OJ 1997 L 132, p. 1), in turn partially repealed and replaced with effect from 1 January 2000 by Council Regulation (EC) No 850/98 of 30 March 1998 for the conservation of fishery resources through technical measures

for the protection of juveniles of marine organisms (OJ 1998 L 125, p. 1).

8 The technical measures laid down by those regulations are essentially identical.

9 The measures concern, inter alia, the minimum mesh size for nets, the prohibition on attaching to nets certain devices by means of which the mesh is obstructed or diminished, and the prohibition on offering for sale fish of less than the minimum size ('undersized fish') except for catches representing only a limited percentage of the overall catch ('by-catches').

The judgment in Case C-64/88 *Commission* v *France*

10 In the judgment in Case C-64/88 *Commission* v *France*, the Court declared:

'by failing to carry out between 1984 and 1987 controls ensuring compliance with technical Community measures for the conservation of fishery resources, laid down by [Regulation No 171/83] and by [Regulation No 3094/86], the French Republic has failed to fulfil its obligations under Article 1 of [Regulation No 2057/82] and under Article 1 of [Regulation No 2241/87]'.

11 In that judgment, the Court upheld five complaints against the French Republic:

– inadequate controls in relation to the minimum mesh size for nets (paragraphs 12 to 15 of the judgment);

– inadequate controls in relation to the attachment to nets of devices prohibited by the Community rules (paragraphs 16 and 17 of the judgment);

– failure to fulfil control obligations in relation to by-catches (paragraphs 18 and 19 of the judgment);

– failure to fulfil control obligations so far as concerns compliance with the technical measures of conservation prohibiting the sale of undersized fish (paragraphs 20 to 23 of the judgment);

– failure to fulfil the obligation to take action in respect of infringements (paragraph 24 of the judgment).

Pre-litigation procedure

12 By letter of 8 November 1991, the Commission requested the French authorities to inform it of the measures taken to comply with the judgment in Case C-64/88 *Commission* v *France*. On 22 January 1992 the French authorities replied that they '[intended] to do their utmost to comply with the [Community] provisions'.

13 In the course of a number of visits to French ports the Commission inspectors found that the situation had improved, but noted that the French authorities' controls were inadequate in several respects.

14 After requesting the French Republic to submit its observations, on 17 April 1996 the Commission issued a reasoned opinion in which it stated that the judgment in Case C-64/88 *Commission* v *France* had not been complied with in the following respects:

– failure to comply with the Community rules in the measuring of the minimum mesh size of nets;

– inadequate controls, enabling undersized fish to be offered for sale;

– laxness on the part of the French authorities in taking action in respect of infringements.

15 Pointing out that financial penalties could be imposed for failure to comply with a judgment of the Court, the Commission set a time-limit of two months for the French Republic to take all the measures necessary in order to comply with the judgment in Case C-64/88 *Commission* v *France*.

16 In the course of an exchange of correspondence between the French authorities and Commission staff, the former kept the Commission informed of the measures that it had taken and was continuing to implement to strengthen controls.

17 At the same time, inspection visits were made to French ports. On the basis of reports drawn up after visiting Lorient, Guilvinec and Concarneau from 24 to 28 August 1996, Guilvinec, Concarneau and Lorient from 22 to 26 September 1997, Marennes-Oléron, Arcachon and Bayonne from 13 to 17 October 1997, south Brittany and Aquitaine from 30 March to 4 April 1998, Douarnenez and Lorient from 15 to 19 March 1999 and Lorient, Bénodet, Loctudy, Guilvinec, Lesconil and Saint-Guénolé from 13 to 23 July 1999, the Commission staff reached the conclusion that two problems remained, namely inadequate controls enabling undersized fish to be offered for sale and the laxness on the part of the French authorities in taking action in respect of infringements.

18 The inspectors' reports prompted the Commission to issue a supplementary reasoned opinion on 6 June 2000, in which it stated that the judgment in Case C-64/88 *Commission* v *France* had not been complied with as regards the two matters mentioned above. The Commission indicated that, in this context, it regarded as 'particularly serious the fact that public documents relating to sales by auction officially use the code "00" in clear breach of Council Regulation (EC) No 2406/96 of 26 November 1996 laying down common marketing standards for certain fishery products' (OJ 1996 L 334, p. 1). It pointed out that financial penalties could be imposed.

19 In their response of 1 August 2000, the French authorities essentially contended that since the last inspection report national fisheries control had undergone significant change. An internal reorganisation had taken place, with the establishment of a fisheries control 'unit', which subsequently became a fisheries control 'task force', and the means of control had been strengthened, including the provision of patrol boats and of a system for the on-screen surveillance of vessels' positions and the circulation of instructions for the use of control staff.

20 On an inspection visit from 18 to 28 June 2001 to the communes Guilvinec, Lesconil, Saint-Guénolé and Loctudy, the Commission's inspectors recorded poor controls, the presence of undersized fish and the offering for sale of those fish under the code '00'.

21 By letter of 16 October 2001, the French authorities sent to the Commission a copy of an instruction addressed to the regional and departmental maritime directorates, enjoining them to put an end to use of the code '00' by 31 December 2001 and to apply from that date the statutory penalties to economic operators not complying with the instruction. The French authorities referred to an increase since 1998 in the number of proceedings for infringement of the rules on minimum sizes and to the deterrent effect of the penalties imposed. They also informed the Commission of the adoption in 2001 of a general fisheries control plan, which laid down priorities, including implementation of a hake recovery plan and strict control of compliance with minimum sizes.

22 Taking the view that the French Republic still had not complied with the judgment in Case C-64/88 *Commission* v *France*, the Commission brought the present action.

Procedure before the Court

23 In answer to a question asked by the Court with a view to the hearing on 3 March 2004, the Commission informed the Court that, since the present action was brought, its staff had made

three further inspection visits (from 11 to 16 May 2003 to Sète and Port-Vendres, from 19 to 20 June 2003 to Loctudy, Lesconil, Saint-Guénolé and Guilvinec, and from 14 to 22 July 2003 to Port-la-Nouvelle, Sète, Le Grau-du-Roi, Carro, Sanary-sur-Mer and Toulon). According to the Commission, it is apparent from the mission reports on those visits that the number of cases of undersized fish being offered for sale had decreased in Brittany but problems remained on the Mediterranean coast with regard to bluefin tuna, and that inspections on landing were infrequent.

24 The Commission explained that, in order to assess the effectiveness of the measures taken by the French authorities, it would need to have the reports and sets of statistics relating to implementation of the various measures for the general organisation of fisheries control to which the French Government had referred.

25 After being requested by the Court to indicate the number of inspections at sea and on land which the French authorities had carried out since the bringing of the present action with a view to ensuring compliance with the rules relating to the minimum size of fish, the number of infringements recorded and the action taken by the courts in respect of those infringements, on 30 January 2004 the French Government lodged fresh statistics. They show that the number of inspections, findings of infringement and convictions was lower in 2003 than in 2002.

26 The French Government stated that the decrease in inspections at sea was due to the mobilisation of French vessels to fight the pollution caused by the shipwrecking of the oil tanker *Prestige* and that inspections on land had decreased because the discipline of fishermen had improved. It explained that the decrease in the number of convictions was due to the effects of Law No 2002-1062 of 6 August 2002 granting an amnesty (JORF No 185 of 9 August 2002, p. 13647), while pointing out that the average amount of the fines imposed had increased.

The breach of obligations alleged

The geographical area at issue

27 It should be noted as a preliminary point that the declaration made in the operative part of the judgment in Case C-64/88 *Commission* v *France* that the French Republic had failed to carry out controls ensuring compliance with technical Community measures for the conservation of fishery resources, laid down by Regulations Nos 171/83 and 3094/86, only concerned, as is apparent from the delimitation set out in Article 1(1) of those regulations, the taking and landing of fishery resources occurring in certain areas of the north-east Atlantic.

28 As submitted by the French Government and explained by the Commission at the hearing on 3 March 2004, the present action thus relates only to the situation in those areas.

The reference date

29 The Commission sent the first reasoned opinion to the French Republic on 14 April 1996 and, subsequently, a supplementary reasoned opinion on 6 June 2000.

30 It follows that the reference date for assessing the alleged breach of obligations is the date upon which the period laid down in the supplementary reasoned opinion of 6 June 2000 expired, that is to say two months after notification of that opinion (Case C-474/99 *Commission* v *Spain* [2002] ECR I-5293, paragraph 27, and Case C-33/01 *Commission* v *Greece* [2002] ECR I-5447, paragraph 13).

31 Since the Commission has claimed that the Court should impose a penalty payment on the French Republic, it should also be ascertained whether the alleged breach of obligations has continued up to the Court's examination of the facts.

The extent of the obligations on the Member States under the common fisheries policy

32 Article 1 of Regulation No 2847/93, which constitutes a specific embodiment, in the field of fisheries, of the obligations imposed on the Member States by Article 10 EC, provides that the Member States are to adopt appropriate measures to ensure the effectiveness of the Community system for conservation and management of fishery resources.

33 Regulation No 2847/93 imposes in this regard a joint responsibility on Member States (see, in relation to Regulation No 2241/87, Case C-9/89 *Commission* v *Spain* [1990] ECR I-1383, paragraph 10). This joint responsibility means that when a Member State fails to fulfil its obligations, it prejudices the interests of the other Member States and of their economic operators.

34 It is imperative that the Member States fulfil the obligations incumbent on them under the Community rules in order to ensure the protection of fishing grounds, the conservation of the biological resources of the sea and their exploitation on a sustainable basis in appropriate economic and social conditions (see, in relation to failure to comply with the quota system for the fishing years 1991 to 1996, Joined Cases C-418/00 and C-419/00 *Commission* v *France* [2002] ECR I-3969, paragraph 57).

35 To this end, Article 2 of Regulation No 2847/93, which repeats the obligations laid down by Article 1(1) of Regulation No 2241/87, obliges the Member States to monitor fishing activity and related activities. It requires them to inspect fishing vessels and investigate all activities, including the activities of landing, selling, transporting and storing fish and recording landings and sales.

36 Article 31 of Regulation No 2847/93, which takes up the obligations laid down in Article 1(2) of Regulations Nos 2057/82 and 2241/87, requires the Member States to take action in respect of recorded infringements. It states that the proceedings initiated must be capable of effectively depriving those responsible of the economic benefit of the infringements or of producing results proportionate to the seriousness of such infringements, effectively discouraging further offences of the same kind.

37 Regulation No 2847/93 thus provides specific indications as to the content of the measures which must be taken by the Member States and which must seek to ensure that fishery operations are conducted properly with the objective of both preventing any breaches and punishing such breaches. That objective means that the measures implemented must be effective, proportionate and a deterrent. As the Advocate General has observed in point 39 of his Opinion of 29 April 2004, there must be a serious risk, for persons engaging in fishing activity and related activities, that in the event of infringement of the rules of the common fisheries policy, they will be detected and have sufficiently severe penalties imposed on them.

38 It is in light of those considerations that the question whether the French Republic has taken all the necessary measures to comply with the judgment in Case C-64/88 *Commission* v *France* should be examined.

The first complaint: inadequate controls

Arguments of the parties

39 The Commission maintains that it is clear from the findings made by its inspectors that the French authorities' controls regarding compliance with the Community provisions on the minimum size of fish are still deficient.

40 The increase in the number of inspections to which the French Government refers cannot modify those findings since only inspections at sea are involved. The control plans adopted by the French Government in 2001 and 2002 are not, in themselves, capable of bringing the alleged breach of obligations to an end. Implementation of those plans involves the prior setting of objectives, which are necessary in order to be able to assess the effectiveness and operability of the plans. Moreover, the plans must actually be implemented, which the visits

made to French ports since the plans were established have not demonstrated.

41 The French Government observes, first of all, that the inspection reports upon which the Commission relies were never made known to the French authorities, which were not in a position to respond to the statements that they contain. Furthermore, those reports are founded on mere suppositions.

42 It also submits that since delivery of the judgment in Case C-64/88 *Commission* v *France* it has been constantly strengthening its control mechanisms. This strengthening has taken the form of an increase in the number of inspections at sea and the adoption, in 2001, of a general control plan, supplemented, in 2002, by a 'minimum catch sizes' control plan. With regard to the effectiveness of those measures, it points out that it has been possible to record no marketing of undersized fish on several inspection visits made by Commission inspectors.

43 Finally, in the French Government's submission, the Commission merely asserts that the measures taken by it are inappropriate without indicating the measures capable of bringing the alleged breach of obligations to an end.

Findings of the Court

44 Like the procedure laid down in Article 226 EC (see, in relation to failure to comply with the quota system for the fishing years 1988 and 1990, Case C-333/99 *Commission* v *France* [2001] ECR I-1025, paragraph 33), the procedure laid down in Article 228 EC is based on the objective finding that a Member State has failed to fulfil its obligations.

45 In the present instance, the Commission has adduced in support of its complaint mission reports drawn up by its inspectors.

46 The French Government's line of argument, put forward at the stage of its rejoinder, that the reports to which the Commission referred in its application cannot be used as evidence that the breach of obligations has persisted on the ground that they were never made known to the French authorities, cannot be upheld.

47 It can be seen from the reports adduced by the Commission that all the reports subsequent to 1998, which have been put in evidence in their entirety or in the form of extensive extracts, refer to accounts of meetings in the course of which the competent national authorities were informed of the results of the inspection visits and were therefore able to present their observations on the findings of the Commission's inspectors. While this reference is not found in the earlier reports, put in evidence in the form of extracts limited to the findings of fact made by the inspectors, it is sufficient to point out that in its letter of 1 August 2000, sent to the Commission in response to the supplementary reasoned opinion of 6 June 2000, the French Government set out its observations on the content of those reports without putting in issue the circumstances of their disclosure to the French authorities.

48 That being so, it should be examined whether the information contained in the mission reports adduced by the Commission is such as to establish an objective finding that a breach by the French Republic of its control obligations has persisted.

49 As regards the situation on expiry of the period laid down in the supplementary reasoned opinion of 6 June 2000, it is apparent from the reports to which the Commission referred in that opinion (see paragraph 17 of this judgment) that the inspectors were able to record the presence of undersized fish, on each of the six visits that they made. They were able to record, in particular, that there was a market for undersized hake, offered for sale under the name 'merluchons' or 'friture de merluchons' (small hake) and, in breach of the marketing standards laid down by Regulation No 2406/96, under the code '00'.

50 On five of those six visits, the landing and offering for sale of the undersized fish took place without monitoring by the competent national authorities. As the French Government

acknowledged in its response of 1 August 2000 to the supplementary reasoned opinion of 6 June 2000, the persons whom the inspectors were able to meet 'did not fall within the classes of officers empowered to find infringements of the fishery rules and were not attached to the maritime authorities'. On the sixth visit, the inspectors recorded that undersized fish had been landed and offered for sale in the presence of national authorities empowered to find infringements of the fishery rules. However, those authorities refrained from taking action against the offenders.

51 This evidence enables it to be found that, in the absence of effective action by the competent national authorities, a practice of offering undersized fish for sale persisted which was sufficiently constant and widespread to prejudice seriously, by reason of its cumulative effect, the objectives of the Community system for conservation and management of fishery resources.

52 Moreover, the similarity and recurrence of the situations recorded in all the reports enable it to be held that those instances can only have resulted from structural inadequacy of the measures implemented by the French authorities and, consequently, from a failure on their part to fulfil the obligation imposed on them by the Community rules to carry out controls that are effective, proportionate and a deterrent (see, to this effect, Case C-333/99 *Commission* v *France*, cited above, paragraph 35).

53 It must therefore be found that, on expiry of the period laid down in the supplementary reasoned opinion of 6 June 2000, the French Republic, by failing to carry out controls of fishing activities in accordance with the requirements laid down by the Community provisions, had not taken all the necessary measures to comply with the judgment in Case C-64/88 *Commission* v *France* and was accordingly failing to fulfil its obligations under Article 228 EC.

54 As regards the situation on the date of examination of the facts by the Court, the information available shows that significant deficiencies persisted.

55 On the visit made to Brittany in June 2001 (see paragraph 20 of this judgment), the Commission inspectors were once again able to record the presence of undersized fish. A decrease in the number of cases of such fish being offered for sale was recorded on a subsequent visit to the same area in June 2003 (see paragraph 23 of the present judgment). However, that fact is not decisive in light of the concurring findings, set out in the reports drawn up at the time of those two visits, concerning the ineffectiveness of the controls on land.

56 Where the Commission has adduced sufficient evidence to show that the breach of obligations has persisted, it is for the Member State concerned to challenge in substance and in detail the information produced and its consequences (see, to this effect, Case 272/86 *Commission* v *Greece* [1988] ECR 4875, paragraph 21, and Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraphs 84 to 87).

57 In this connection, it is to be noted that the information concerning the increase in inspections in pursuance of the plans adopted in 2001 and 2002, on which the French Government relied in its defence, conflicts with the information supplied by it in answer to the Court's questions (see paragraph 26 of this judgment), according to which the number of inspections at sea and on land was lower in 2003 than in 2002.

58 Even if divergent information of that kind can, as the French Government contends, be regarded as showing an improvement in the situation, the fact remains that the efforts made cannot excuse the failures that occurred (Case C-333/99 *Commission* v *France*, paragraph 36).

59 In this connection, the French Government's argument that the decrease in inspections is justified by the improved discipline of fishermen cannot be upheld either.

60 As the French Government has itself pointed out in its defence, actions designed to change behaviour and mentality involve a long process. It must therefore be considered that the

structural deficiency, extending over a period of more than 10 years, of the controls designed to ensure compliance with the rules relating to the minimum size of fish resulted in behaviour on the part of the economic operators concerned that it will be possible to correct only after action over a lengthy period.

61 Accordingly, in light of the detailed evidence submitted by the Commission, the information adduced by the French Government is not sufficiently substantial to demonstrate that the measures which it has implemented regarding the control of fishing activities display the efficacy necessary to meet its obligation to ensure the effectiveness of the Community system for conservation and management of fishery resources (see paragraphs 37 and 38 of the present judgment).

62 It must therefore be found that, on the date upon which the Court examined the facts which were presented to it, the French Republic, by failing to carry out controls of fishing activities in accordance with the requirements laid down by the Community provisions, had not taken all the necessary measures to comply with the judgment in Case C-64/88 *Commission* v *France* and was accordingly failing to fulfil its obligations under Article 228 EC.

The second complaint: inadequacy of action taken

Arguments of the parties

63 The Commission contends that the proceedings brought by the French authorities for infringement of the Community provisions concerning the minimum size of fish are insufficient. Generally, the inadequacy of the controls is reflected in the number of proceedings. Furthermore, it is apparent from the information provided by the French Government that, even when infringements are recorded, action is not systematically taken.

64 The Commission observes that the statistics submitted by the French Government before the period laid down in the supplementary reasoned opinion of 6 June 2000 expired are too general in that they concern the whole of France and do not specify the nature of the infringements in respect of which proceedings were brought.

65 The information provided subsequently cannot be taken as showing that the French authorities apply a policy of deterrent penalties so far as concerns infringements of the rules relating to the minimum size of fish. The Commission points out that, for 2001, the French Government notified, pursuant to Council Regulation (EC) No 1447/1999 of 24 June 1999 establishing a list of types of behaviour which seriously infringe the rules of the common fisheries policy (OJ 1999 L 167, p. 5) and Commission Regulation (EC) No 2740/1999 of 21 December 1999 laying down detailed rules for the application of Regulation No 1447/1999 (OJ 1999 L 328, p. 62), 73 cases of infringement of the rules relating to the minimum size of fish. However, only eight cases, that is to say 11%, resulted in imposition of a fine.

66 While the Commission acknowledges that the circular of the Minister for Justice of 16 October 2002, to which the French Government refers, constitutes an appropriate measure, it considers nevertheless that the way in which the circular will be applied should be checked. In this connection, it observes that the latest figures notified by the French Government for 2003 show a reduction in the number of convictions.

67 The French Government contends that since 1991 the number of infringements in respect of which proceedings have been brought, and the sentences, have been constantly increasing. It stresses, however, that a purely statistical examination of the number of infringements in respect of which proceedings are brought cannot, by itself, give an account of the effectiveness of a control system since it rests on the entirely unproven presupposition that the number of infringements is stable.

68 The French Government refers to a circular which the Minister for Justice addressed on 16 October 2002 to the Principal State Prosecutors at the cours d'appel (Courts of Appeal) of

Rennes, Poitiers, Bordeaux and Pau, recommending that proceedings be systematically brought in respect of infringements and that deterrent penalties be demanded. It acknowledges, however, that the circular could not have full effect in 2002 or 2003 because of Law No 2002-1062, which granted an amnesty in respect of infringements committed before 17 May 2002 in so far as the fine did not exceed EUR 750.

Findings of the Court

69 The obligation on the Member States to make sure that penalties which are effective, proportionate and a deterrent are imposed for infringements of Community rules is of fundamental importance in the field of fisheries. If the competent authorities of a Member State were systematically to refrain from taking action against the persons responsible for such infringements, both the conservation and management of fishery resources and the uniform application of the common fisheries policy would be jeopardised (see, in relation to failure to comply with the quota system for the fishing years 1991 and 1992, Case C-52/95 *Commission* v *France* [1995] ECR I-4443, paragraph 35).

70 So far as concerns, in this instance, the situation on expiry of the period laid down in the supplementary reasoned opinion of 6 June 2000, it is sufficient to recall the findings made in paragraphs 49 to 52 of the present judgment. Since it has been established that infringements which the national authorities could have found to exist were not recorded and since reports were not drawn up in respect of offenders, it is clear that those authorities failed to fulfil the obligation to take action, which the Community rules impose on them (see, to this effect, Case C-64/88 *Commission* v *France*, paragraph 24).

71 As regards the situation on the date upon which the Court examined the facts, reference should be made to the findings in paragraphs 54 to 61 of the present judgment, according to which significant deficiencies in the controls persisted. In light of those findings, the increase in the number of infringements in respect of which proceedings were brought, to which the French Government has referred, cannot be considered sufficient. As the French Government has observed, a purely statistical examination of the number of infringements in respect of which proceedings are brought cannot, by itself, give an account of the effectiveness of a control system.

72 Furthermore, as the Commission has pointed out, it is clear from the information provided by the French Government that proceedings are not brought in respect of all the infringements that are recorded. It is also apparent that deterrent penalties are not imposed in respect of all the infringements in respect of which proceedings are brought. The fact that numerous fisheries infringements were eligible to benefit from Law No 2002-1062 attests that, in all those cases, fines of less than EUR 750 were imposed.

73 Accordingly, in light of the detailed evidence submitted by the Commission, the information adduced by the French Government is not sufficiently substantial to demonstrate that the measures which it has implemented so far as concerns the taking of action in respect of infringements of the fisheries rules display the efficacy, proportionality and deterrence necessary to meet its obligation to ensure the effectiveness of the Community system for conservation and management of fishery resources (see paragraphs 37 and 38 of the present judgment).

74 It must therefore be found that, both on expiry of the period laid down in the supplementary reasoned opinion of 6 June 2000 and on the date upon which the Court examined the facts which were presented to it, the French Republic, by failing to ensure that action was taken in respect of infringements of the rules governing fishing activities in accordance with the requirements laid down by the Community provisions, had not taken all the necessary measures to comply with the judgment in Case C-64/88 *Commission* v *France* and was accordingly failing to fulfil its obligations under Article 228 EC.

Financial penalties for the breach of obligations

75 To punish the failure to comply with the judgment in Case C-64/88 *Commission* v *France*, the Commission suggested that the Court should impose a daily penalty payment on the French Republic from delivery of the present judgment until the day on which the breach of obligations is brought to an end. In light of the particular features of the breach that has been established, the Court considers that it should examine in addition whether imposition of a lump sum could constitute an appropriate measure.

The possibility of imposing both a penalty payment and a lump sum

Arguments of the parties and submissions made to the Court

76 When invited to give their views on whether, in proceedings brought under Article 228(2) EC, the Court may, where it finds that the Member State concerned has not complied with the Court's judgment, impose both a lump sum and a penalty payment on it, the Commission and the Danish, Netherlands, Finnish and United Kingdom Governments answered in the affirmative.

77 Their reasoning is based, essentially, on the fact that those two measures are complementary, in that each of them respectively seeks to achieve a deterrent effect. A combination of those measures should be regarded as one and the same means of achieving the objective laid down by Article 228 EC, that is to say not only to induce the Member State concerned to comply with the initial judgment but also, from a wider viewpoint, to reduce the possibility of similar infringements being committed again.

78 The French, Belgian, Czech, German, Greek, Spanish, Irish, Italian, Cypriot, Hungarian, Austrian, Polish and Portuguese Governments have put forward a contrary view.

79 They rely on the wording of Article 228(2) EC and on the use of the conjunction 'or', to which they accord a disjunctive sense, and on the objective of this provision. The provision is not punitive in nature, since Article 228(2) EC does not seek to punish the defaulting Member State, but only to induce it to comply with a judgment establishing a breach of obligations. It is not possible to distinguish several periods of a breach of obligations; only its entire duration is to be taken into consideration. The imposition of more than one financial penalty is contrary to the principle prohibiting the same conduct from being punished twice. Furthermore, in the absence of Commission guidelines concerning the applicable criteria for calculating a lump sum, imposition of such a sum by the Court would conflict with the principles of legal certainty and transparency. It would also compromise equal treatment between Member States, since such a measure was not envisaged in the judgments in Case C-387/97 *Commission* v *Greece* [2000] ECR I-5047 and Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141.

Findings of the Court

80 The procedure laid down in Article 228(2) EC has the objective of inducing a defaulting Member State to comply with a judgment establishing a breach of obligations and thereby of ensuring that Community law is in fact applied. The measures provided for by that provision, namely a lump sum and a penalty payment, are both intended to achieve this objective.

81 Application of each of those measures depends on their respective ability to meet the objective pursued according to the circumstances of the case. While the imposition of a penalty payment seems particularly suited to inducing a Member State to put an end as soon as possible to a breach of obligations which, in the absence of such a measure, would tend to persist, the imposition of a lump sum is based more on assessment of the effects on public and private interests of the failure of the Member State concerned to comply with its obligations, in particular where the breach has persisted for a long period since the judgment which initially established it.

82 That being so, recourse to both types of penalty provided for in Article 228(2) EC is not

precluded, in particular where the breach of obligations both has continued for a long period and is inclined to persist.

83 This interpretation cannot be countered by reference to the use in Article 228(2) EC of the conjunction 'or' to link the financial penalties capable of being imposed. As the Commission and the Danish, Netherlands, Finnish and United Kingdom Governments have submitted, that conjunction may, linguistically, have an alternative or a cumulative sense and must therefore be read in the context in which it is used. In light of the objective pursued by Article 228 EC, the conjunction 'or' in Article 228(2) EC must be understood as being used in a cumulative sense.

84 The objection raised, in particular by the German, Greek, Hungarian, Austrian and Polish Governments, that imposition of both a penalty payment and a lump sum, taking into consideration the same period of breach twice, would infringe the principle *non bis in idem* must also be rejected. Since each penalty has its own function, it is to be determined in such a way as to fulfil that function. It follows that, where the Court imposes a penalty payment and a lump sum simultaneously, the duration of the breach is taken into consideration as one of a number of criteria, in order to determine the appropriate level of coercion and deterrence.

85 The argument, relied on by the Belgian Government in particular, that, in the absence of guidelines adopted by the Commission for calculating a lump sum, imposition of a lump sum would conflict with the principles of legal certainty and transparency cannot be upheld either. While such guidelines do help to ensure that the Commission acts in a manner which is transparent, foreseeable and consistent with legal certainty (see, in relation to the guidelines concerning calculation of penalty payments, Case C-387/97 *Commission* v *Greece*, cited above, paragraph 87), the fact remains that exercise of the power conferred on the Court by Article 228(2) EC is not subject to the condition that the Commission adopts such rules, which, in any event, cannot bind the Court (Case C-387/97 *Commission* v *Greece*, paragraph 89, and Case C-278/01 *Commission* v *Spain*, cited above, paragraph 41).

86 As to the objection, raised by the French Government, that imposition of both a penalty payment and a lump sum in the present case would compromise equal treatment since it was not envisaged in the judgments in Case C-387/97 *Commission* v *Greece* and Case C-278/01 *Commission* v *Spain*, it is for the Court, in each case, to assess in light of its circumstances the financial penalties to be imposed. Accordingly, the fact that both measures were not imposed in the cases decided previously cannot in itself constitute an obstacle to the imposition of both in a subsequent case, if, having regard to the nature, seriousness and persistence of the breach of obligations established, that appears appropriate.

The Court's discretion as to the financial penalties that can be imposed

Arguments of the parties and submissions made to the Court

87 The Commission and the Czech, Hungarian and Finnish Governments have answered in the affirmative the question whether the Court may, where appropriate, depart from the Commission's suggestions and impose a lump sum on a Member State although the Commission did not suggest this. In their submission, the Court has a discretion in the matter, which extends to determining the penalty considered to be the most appropriate, irrespective of the Commission's suggestions in this regard.

88 The French, Belgian, Danish, German, Greek, Spanish, Irish, Italian, Netherlands, Austrian, Polish and Portuguese Governments take an opposing view. They put forward substantive and procedural arguments. With regard to substance, they submit that exercise by the Court of such a discretion would infringe the principles of legal certainty, predictability, transparency and equal treatment. The German Government adds that the Court in any event lacks the political legitimacy necessary to exercise such a power in a field where assessments of political expediency play a considerable role. At the procedural level, the aforementioned governments stress that so extensive a power is incompatible with the general principle of civil procedure common to all the Member States that courts cannot go beyond the parties' claims, and dwell

upon the need for an *interpartes* procedure enabling the Member State concerned to exercise its rights of defence.

Findings of the Court

89 With regard to the arguments derived from the principles of legal certainty, predictability, transparency and equal treatment, reference should be made to the findings made in paragraphs 85 and 86 of this judgment.

90 So far as concerns the German Government's argument as to the Court's lack of political legitimacy to impose a financial penalty not suggested by the Commission, the various stages involved in the procedure laid down in Article 228(2) EC should be distinguished. Once the Commission has exercised its discretion as to the initiation of infringement proceedings (see, inter alia, in relation to Article 226 EC, the judgment in Case C-74/02 *Commission* v *Germany* [2003] ECR I-9877, paragraph 17, and the judgment of 21 October 2004 in Case C-477/03 *Commission* v *Germany*, not published in the ECR, paragraph 11), the question of whether or not the Member State concerned has complied with a previous judgment of the Court is subjected to a judicial procedure in which political considerations are irrelevant. It is in performance of its judicial function that the Court assesses the extent to which the situation prevailing in the Member State in question complies with the initial judgment and, where appropriate, assesses the seriousness of a persisting breach of obligations. It follows that, as the Advocate General has observed in point 24 of his Opinion of 18 November 2004, the appropriateness of imposing a financial penalty and the choice of the penalty most suited to the circumstances of the case can be appraised only in the light of the findings made by the Court in the judgment to be delivered under Article 228(2) EC and therefore fall outside the political sphere.

91 The argument that, in departing from or going beyond the Commission's suggestions, the Court infringes a general principle of procedural law which prohibits courts from going beyond the parties' claims is not well founded either. The procedure provided for in Article 228(2) EC is a special judicial procedure, peculiar to Community law, which cannot be equated with a civil procedure. The order imposing a penalty payment and/or a lump sum is not intended to compensate for damage caused by the Member State concerned, but to place it under economic pressure which induces it to put an end to the breach established. The financial penalties imposed must therefore be decided upon according to the degree of persuasion needed in order for the Member State in question to alter its conduct.

92 As regards the rights of defence that the Member State concerned must be able to exercise, which have been dwelt upon by the French, Belgian, Netherlands, Austrian and Finnish Governments, the procedure laid down in Article 228(2) EC must, as the Advocate General has observed in point 11 of his Opinion of 18 November 2004, be regarded as a special judicial procedure for the enforcement of judgments, in other words as a method of enforcement. It is in this context, therefore, that the procedural guarantees which must be available to the Member State in question are to be assessed.

93 It follows that, once it has been found in *interpartes* proceedings that a breach of Community law persists, the rights of defence which are to be accorded to the defaulting Member State so far as concerns the financial penalties envisaged must take account of the objective pursued, namely securing and guaranteeing that the law is again complied with.

94 In the present case, so far as concerns the truth with regard to the conduct liable to give rise to the imposition of financial penalties, the French Republic had the opportunity to defend itself throughout a pre-litigation procedure which lasted nearly nine years and gave rise to two reasoned opinions, and, in the present proceedings, in the course of the written procedure and at the hearing of 3 March 2004. That examination of the facts led the Court to find that a breach by the French Republic of its obligations persisted (see paragraph 74 of the present judgment).

95 The Commission which, in the two reasoned opinions, had drawn the risk of financial penalties

to the attention of the French Republic (see paragraphs 15 and 18 of the present judgment), indicated to the Court the criteria (see paragraph 98 of the present judgment) capable of being taken into consideration when determining the financial penalties intended to exert sufficient economic pressure on the French Republic to prompt it to put an end to its breach of obligations as rapidly as possible, and the respective weightings to be given to those criteria. The French Republic set out its views on the criteria in the written procedure and at the hearing on 3 March 2004.

96 By order of 16 June 2004, the Court requested the parties to give their views on whether, where the Court finds that a Member State has not taken the necessary measures to comply with a previous judgment and the Commission has requested the Court to impose a penalty payment on that State, the Court may impose on the Member State a lump sum or, as the case may be, a lump sum and a penalty payment. The parties stated their views at the hearing on 5 October 2004.

97 It follows that the French Republic has been able to make its submissions on all the matters of law and of fact necessary for establishing that the breach of obligations alleged against it has persisted and for deciding upon the seriousness of the breach and the measures which may be adopted in order to bring it to an end. On the basis of those matters, which have been the subject of *inter partes* proceedings, it is for the Court to determine, according to the degree of persuasion and deterrence which appears to it to be required, the financial penalties appropriate for making sure that the judgment in Case C-64/88 *Commission* v *France* is complied with as rapidly as possible and preventing similar infringements of Community law from recurring.

The financial penalties appropriate in the present case

Imposition of a penalty payment

98 On the basis of the method of calculation which it has set out in its communication 97/C 63/02 of 28 February 1997 on the method of calculating the penalty payments provided for pursuant to Article [228] of the EC Treaty (OJ 1997 C 63, p. 2), the Commission suggested that the Court should impose on the French Republic a penalty payment of EUR 316 500 for each day of delay by way of penalty for non-compliance with the judgment in Case C-64/88 *Commission* v *France*, from the date of delivery of the judgment in the present case until the day on which the judgment in Case C-64/88 *Commission* v *France* has been complied with.

99 The Commission considers that an order imposing a penalty payment is the most appropriate instrument for putting an end as soon as possible to the infringement which has been established and that, in the present case, a penalty payment of EUR 316 500 for each day of delay fits the seriousness and duration of the infringement, due regard being had to the need to make the penalty effective. That sum is calculated by multiplying a uniform basic amount of EUR 500 by a coefficient of 10 (on a scale of 1 to 20) for the seriousness of the infringement, by a coefficient of 3 (on a scale of 1 to 3) for the duration of the infringement and by a coefficient of 21.1 (based on the gross domestic product of the Member State in question and the weighting of votes in the Council of the European Union), which is deemed to reflect the ability to pay of the Member State concerned.

100 The French Government submits that there is no reason to impose a penalty payment because it has brought the breach of obligations to an end and, in the alternative, that the amount of the penalty payment requested is disproportionate.

101 It points out that, so far as the seriousness of the infringement is concerned, in Case C-387/97 *Commission* v *Greece* the Commission suggested a coefficient of 6, although the breach of obligations compromised public health and no measure had been taken with a view to complying with the previous judgment, two factors which are absent here. Accordingly, the coefficient of 10 suggested by the Commission in the present case is not acceptable.

102 The French Government also maintains that the measures required to comply with the

judgment in Case C-64/88 *Commission* v *France* were unable to produce immediate effects. Given the inevitable time-lag between the adoption of the measures and their impact becoming perceptible, the Court cannot take into account the whole of the period passing between delivery of the first judgment and that of the forthcoming judgment.

103 As to those submissions, while it is clear that a penalty payment is likely to encourage the defaulting Member State to put an end as soon as possible to the breach that has been established (Case C-278/01 *Commission* v *Spain*, paragraph 42), it should be remembered that the Commission's suggestions cannot bind the Court and are only a useful point of reference (Case C-387/97 *Commission* v *Greece*, paragraph 89). In exercising its discretion, it is for the Court to set the penalty payment so that it is appropriate to the circumstances and proportionate both to the breach that has been established and to the ability to pay of the Member State concerned (see, to this effect, Case C-387/97 *Commission* v *Greece*, paragraph 90, and Case C-278/01 *Commission* v *Spain*, paragraph 41).

104 In that light, and as the Commission has suggested in its communication of 28 February 1997, the basic criteria which must be taken into account in order to ensure that penalty payments have coercive force and Community law is applied uniformly and effectively are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State to pay. In applying those criteria, regard should be had in particular to the effects of failure to comply on private and public interests and to the urgency of getting the Member State concerned to fulfil its obligations (Case C-387/97 *Commission* v *Greece*, paragraph 92).

105 As regards the seriousness of the infringement and, in particular, the effects of failure to comply on private and public interests, it is to be remembered that one of the key elements of the common fisheries policy consists in rational and responsible exploitation of aquatic resources on a sustainable basis, in appropriate economic and social conditions. In this context, the protection of juvenile fish proves decisive for reestablishing stocks. Failure to comply with the technical measures of conservation prescribed by the common policy, in particular the requirements regarding the minimum size of fish, therefore constitutes a serious threat to the maintenance of certain species and certain fishing grounds and jeopardises pursuit of the fundamental objective of the common fisheries policy.

106 Since the administrative measures adopted by the French authorities have not been implemented in an effective manner, they cannot reduce the seriousness of the breach established.

107 Having regard to those factors, the coefficient of 10 (on a scale of 1 to 20) is therefore an appropriate reflection of the degree of seriousness of the infringement.

108 As regards the duration of the infringement, suffice it to state that it is considerable, even if the starting date be that on which the Treaty on European Union entered into force and not the date on which the judgment in Case C-64/88 *Commission* v *France* was delivered (see, to this effect, Case C-387/97 *Commission* v *Greece*, paragraph 98). Accordingly, the coefficient of 3 (on a scale of 1 to 3) suggested by the Commission appears appropriate.

109 The Commission's suggestion of multiplying a basic amount by a coefficient of 21.1 based on the gross domestic product of the French Republic and on the number of votes which it has in the Council is an appropriate way of reflecting that Member State's ability to pay, while keeping the variation between Member States within a reasonable range (see Case C-387/97 *Commission* v *Greece*, paragraph 88, and Case C-278/01 *Commission* v *Spain*, paragraph 59).

110 Multiplying the basic amount of EUR 500 by the coefficients of 21.1 (for ability to pay), 10 (for the seriousness of the infringement) and 3 (for the duration of the infringement) gives a sum of EUR 316 500 per day.

111 As regards the frequency of the penalty payment, account should, however, be taken of the fact that the French authorities have adopted administrative measures which could serve as a

framework for implementation of the measures required to comply with the judgment in Case C-64/88 *Commission* v *France*. Nevertheless, it is not possible for the necessary adjustments to previous practices to be instantaneous or their impact to be perceived immediately. It follows that any finding that the infringement has come to an end could be made only after a period allowing an overall assessment to be made of the results obtained.

112 Having regard to those considerations, the penalty payment must be imposed not on a daily basis, but on a half-yearly basis.

113 In light of all of the foregoing, the French Republic should be ordered to pay to the Commission, into the account 'European Community own resources', a penalty payment of 182.5 x EUR 316 500, that is to say of EUR 57 761 250, for each period of six months from delivery of the present judgment at the end of which the judgment in Case C-64/88 *Commission* v *France* has not yet been fully complied with.

Imposition of a lump sum

114 In a situation such as that which is the subject of the present judgment, in light of the fact that the breach of obligations has persisted for a long period since the judgment which initially established it and of the public and private interests at issue, it is essential to order payment of a lump sum (see paragraph 81 of the present judgment).

115 The specific circumstances of the case are fairly assessed by setting the amount of the lump sum which the French Republic will have to pay at EUR 20 000 000.

116 The French Republic should therefore be ordered to pay to the Commission, into the account 'European Community own resources', a lump sum of EUR 20 000 000.

Costs

117 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the French Republic has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Grand Chamber) hereby:

1. Declares that:

– by failing to carry out controls of fishing activities in accordance with the requirements laid down by the Community provisions, and

– by failing to ensure that action is taken in respect of infringements of the rules governing fishing activities in accordance with the requirements laid down by the Community provisions,

the French Republic has not implemented all the necessary measures to comply with the judgment of 11 June 1991 in Case C-64/88 *Commission* v *France* and has accordingly failed to fulfil its obligations under Article 228 EC;

2. Orders the French Republic to pay to the Commission of the European Communities, into the account 'European Community own resources', a penalty payment of EUR 57 761 250 for each period of six months from delivery of the present judgment at the end of which the judgment in Case C-64/88 *Commission* v *France* has not yet been fully complied with;

3. Orders the French Republic to pay to the Commission of the European Communities, into the account 'European Community own resources', a lump sum of EUR 20 000 000;

4. Orders the French Republic to pay the costs.

[Signatures]

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* Language of the case: French.

Case C-466/04

Manuel Acereda Herrera

v

Servicio Cántabro de Salud

(Reference for a preliminary ruling from the
Tribunal Superior de Justicia de Cantabria)

(Social security — Hospital costs incurred in another Member State — Travel, accommodation and subsistence costs — Article 22 of Regulation (EEC) No 1408/71)

Opinion of Advocate General Geelhoed delivered on 19 January 2006 . . . . I - 5344
Judgment of the Court (First Chamber), 15 June 2006 . . . . . I - 5359

Summary of the Judgment

1. *Social security for migrant workers — Sickness insurance — Benefits provided in another Member State — Articles 22(1)(c) and 36 of Regulation No 1408/71*

(Art. 49 EC; Council Regulation No 1408/71, Arts 22(1)(c) and (2) and 36)

2. *Social security for migrant workers — Sickness insurance — Benefits provided in another Member State*

(Art. 10 EC; Council Regulation No 1408/71, Art. 22(1)(a) and (c))

3. *Preliminary rulings — Jurisdiction of the Court — Limits*

(Art. 234 EC)

1. Article 22(1)(c) and (2) and Article 36 of Regulation No 1408/71, as amended and updated by Regulation No 118/97, must be interpreted as meaning that authorisation by the competent institution for an insured person to go to another Member State in order there to receive hospital treatment appropriate to his medical condition does not confer on such a person the right to be reimbursed by the competent institution for the costs of travel, accommodation and subsistence which that person and any person accompanying him incurred in the territory of that latter Member State, with the exception of the costs of accommodation and meals in hospital for the insured person himself.

First, the obligation imposed on the competent institution by Article 22(1)(c)(i) of Regulation No 1408/71, so far as benefits in kind are concerned, relates exclusively to the expenditure connected with the healthcare received by the insured person in the host Member State, namely, in the case of hospital treatment, the cost of medical services strictly defined and the inextricably linked costs relating to the stay and meals in the hospital. Likewise, the concept of 'cash benefits' within the meaning of that article does not refer to the reimbursement of expenditure already incurred, such as ancillary costs like travel, accommodation and subsistence costs incurred in the territory of that Member State by the insured person and the person accompanying him.

Secondly, Article 36 of Regulation No 1408/71 is exclusively concerned with the issue of reimbursements between institutions and does not confer any entitlement on persons insured.

That interpretation is without prejudice to the outcome which would result were Article 49 EC found to be applicable. That article precludes national legislation which excludes reimbursement of the ancillary costs incurred by a patient authorised to go to another Member State in order there to receive hospital treatment whilst providing for the reim-

bursement of those costs where the treatment is provided in a hospital covered by the national system.

(see paras 28, 33, 36, 38-39, operative part 1)

2. National legislation in which provision is made for entitlement to benefits additional to those provided for in Article 22(1) of Regulation No 1408/71, as amended and updated by Regulation No 118/97, in the situation covered by paragraph (1)(a) of that article, but not in that covered by paragraph (1)(c) thereof, does not obstruct the direct effect of that provision or infringe the principle of cooperation in good faith stemming from Article 10 EC.

(see para. 45, operative part 2)

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

Nevertheless, the Court cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical. The justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute.

(see paras 47-49)

Case C-344/04

The Queen on the application of:

International Air Transport Association

and

European Low Fares Airline Association

v

Department for Transport

(Reference for a preliminary ruling from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court))

(Carriage by air – Regulation (EC) No 261/2004 – Articles 5, 6 and 7 – Compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights – Validity – Interpretation of Article 234 EC)

Summary of the Judgment

1. *Preliminary rulings – Reference to the Court – Challenge to the validity of a Community act before a national court*

   (Art. 234, para. 2, EC)

2. *Transport – Carriage by air – Regulation No 261/2004 – Measures to assist and take care of passengers in the event of a long delay to a flight*

   (European Parliament and Council Regulation No 261/2004, Art. 6; Montreal Convention 1999)

3. *Acts of the institutions – Statement of reasons – Obligation – Scope*

   (Art. 253 EC; European Parliament and Council Regulation No 261/2004, Arts 5, 6 and 7)

4. *Transport – Carriage by air – Regulation No 261/2004 – Measures to assist, take care of and compensate passengers in the event of cancellation of, or a long delay to, a flight*

   (European Parliament and Council Regulation No 261/2004, Arts 5, 6 and 7)

5. *Transport – Carriage by air – Regulation No 261/2004 – Measures to assist, take care of and compensate passengers in the event of cancellation of, or a long delay to, a flight*

   (European Parliament and Council Regulation No 261/2004, Arts 5, 6 and 7)

1. The fact that the validity of a Community act is contested before a national court is not in itself sufficient to warrant referral of a question to the Court of Justice for a preliminary ruling.

   Courts against whose decisions there is a judicial remedy under national law may examine the validity of a Community act and, if they consider that the arguments put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the act is completely valid, given that, in so doing, they are not

calling into question the existence of the Community act.

On the other hand, where such a court considers that one or more arguments for invalidity of a Community act which have been put forward by the parties or, as the case may be, raised by it of its own motion are well founded, it must stay proceedings and make a reference to the Court for a preliminary ruling on the act's validity.

(see paras 28-30, 32, operative part 1)

2. The measures to assist and take care of passengers in the event of a long delay to a flight which are prescribed in Article 6 of Regulation No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights constitute standardised and immediate measures to redress the damage which is linked to the inconvenience that delay in the carriage of passengers by air causes.

These measures are not among those the institution of which is regulated by the Montreal Convention for the Unification of Certain Rules for International Carriage by Air and cannot therefore be considered inconsistent with the Convention.

That Convention governs the conditions under which, after a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis from the carriers liable for damage resulting from that delay, but does not shield those carriers from any other form of intervention.

The standardised and immediate measures prescribed in Article 6 of Regulation No 261/2004 do not prevent the passengers concerned, should the same delay also cause them damage conferring entitlement to compensation, from being able to bring in addition actions to redress that damage under the conditions laid down by the Montreal Convention.

(see paras 44-48)

3. Articles 5, 6 and 7 of Regulation No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights are not invalid by reason of breach of the obligation to state reasons.

Regulation No 261/2004 clearly discloses the essential objective pursued by the institutions and thus cannot be required to contain a specific statement of reasons for each of the technical choices made. Since the objective of protecting passengers required acceptance of standardised and effective compensatory measures which could not give rise to discussion at the very moment when they were to be applied, a situation which the defence of extraordinary circumstances would not have failed to bring about, the Community legislature was able, without breaching its obligation to state reasons, to refrain from setting out the reasons why it considered that operating air carriers could not rely on such a defence in order to be exempted from their obligations to assist and take care of passengers laid down in Articles 5 and 6 of the regulation. Likewise, the Community legislature was able, without rendering the act in question unlawful, to lay down in Article 7 the principle that fixed compensation was payable in the event of cancellation of a flight and the amount of the compensation without setting out the reasons why it had chosen that measure and that amount.

(see paras 69-70, 72, 77)

4. Given that the Community legislature is allowed a broad discretion in the field of the common transport policy, the legality, from the point of view of observance of the principle of proportionality, of a measure adopted in that field can be affected only if the

measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.

The measures to assist, care for and compensate passengers that are prescribed in Articles 5, 6 and 7 of Regulation No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights do not appear manifestly inappropriate to the objective pursued by the Community legislature, which relates to strengthening protection for passengers who suffer cancellation of, or long delays to, flights. On the contrary, the measures prescribed by Articles 5 and 6 of the regulation are in themselves capable of immediately redressing some of the damage suffered by those passengers and therefore enable a high level of passenger protection to be ensured. Furthermore, the criteria adopted for determining the passengers' entitlement to those measures, namely the length of the delay and the wait for the next flight or the time taken to inform them of the flight's cancellation, do not appear in any way unrelated to the requirement for proportionality. Also, given that the standardised and immediate compensatory measures at issue vary according to the significance of the damage suffered by the passengers, they likewise do not appear to be manifestly inappropriate merely because carriers cannot rely on the defence of extraordinary circumstances.

Next, it has not been established that if passengers were to take out voluntary insurance to cover the risks inherent in flight delays and cancellations, that would in any event make it possible to remedy the damage suffered by passengers on the spot. Such a measure cannot, therefore, be regarded as being more appropriate to the objective pursued than those chosen by the Community legislature.

Also, since the harmful consequences to which a delay gives rise are in no way related to the price paid for a ticket, the argument that the measures chosen to alleviate those consequences should have been determined in proportion to the cost of the ticket cannot be upheld.

Finally, the compensation prescribed in Article 7 of the regulation, which passengers may claim when they have been informed of a flight cancellation too late, does not appear manifestly inappropriate to the objective pursued, given the existence of the extraordinary circumstances defence enabling air carriers to be exempted from paying that compensation and of the conditions restricting the application of this obligation. Furthermore, the amount of the compensation, set on the basis of the distance of the flights concerned, likewise does not appear excessive.

(see paras 80, 82, 84-88, 91)

5. Articles 5, 6 and 7 of Regulation No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, which impose the same obligations on all air carriers, are not invalid by reason of a breach of the principle of equal treatment, even though such obligations are not placed on other means of transport.

First, the situations of undertakings operating in different transport sectors are not comparable since modes of transport are not interchangeable as regards the conditions of their use.

Second, with regard to air transport, passengers whose flights are cancelled or subject to a long delay are in an objectively different situation from that experienced by passengers on other means of transport in the event of incidents of the same nature.

Furthermore, the damage suffered by passengers of air carriers in the event of cancellation of, or a long delay to, a flight is similar whatever the airline with which they have a contract and is unrelated to the pricing policies operated by the airline.

Accordingly, if the Community legislature is not to infringe the principle of equality, having regard to the aim pursued by the regulation of increasing protection for all passengers of air carriers, it is incumbent upon it to treat all airlines identically.

(see paras 96-99)

JUDGMENT OF THE COURT (Grand Chamber)

10 January 2006 (*)

(Carriage by air – Regulation (EC) No 261/2004 – Articles 5, 6 and 7 –Compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights – Validity – Interpretation of Article 234 EC)

In Case C-344/04,

REFERENCE for a preliminary ruling under Article 234 EC from the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), made by decision of 14 July 2004, received at the Court on 12 August 2004, in the proceedings

The Queen on the application of:

International Air Transport Association,

European Low Fares Airline Association

v

Department for Transport,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Schiemann and J. Malenovský (Rapporteur), Presidents of Chambers, C. Gulmann, R. Silva de Lapuerta, K. Lenaerts, P. Kūris, E. Juhász, G. Arestis and A. Borg Barthet, Judges**,**

Advocate General: L.A. Geelhoed,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 June 2005,

after considering the observations submitted on behalf of:

– the International Air Transport Association, by M. Brealey QC and M. Demetriou, Barrister, instructed by J. Balfour, Solicitor,

– the European Low Fares Airline Association, by G. Berrisch, Rechtsanwalt, and C. Garcia Molyneux, abogado,

– the United Kingdom Government, by M. Bethell, acting as Agent, and C. Lewis, Barrister,

– the European Parliament, by K. Bradley and M. Gómez Leal, acting as Agents,

– the Council of the European Union, by E. Karlsson, K. Michoel and R. Szostak, acting as Agents,

– the Commission of the European Communities, by F. Benyon and M. Huttunen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns, first, the validity of Articles 5, 6 and 7 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91 (OJ 2004 L 46, p. 1). It concerns, secondly, the interpretation of the second paragraph of Article 234 EC.

2 The reference was made in proceedings brought by the International Air Transport Association ('IATA') and the European Low Fares Airline Association ('ELFAA') against the Department for Transport concerning the implementation of Regulation No 261/2004.

Legal context

International rules

3 The Convention for the Unification of Certain Rules for International Carriage by Air ('the Montreal Convention') was approved by decision of the Council of 5 April 2001 (OJ 2001 L 194, p. 38).

4 Chapter III of the Montreal Convention, headed 'Liability of the carrier and extent of compensation for damage', is comprised by Articles 17 to 37.

5 Article 19 of the Convention, headed 'Delay', provides:

'The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.'

6 Article 22(1) of the Convention limits the liability of the carrier for delay to 4 150 Special Drawing Rights (SDRs) for each passenger. Article 22(5) essentially provides that this limit is not to apply if the damage results from an act or omission of the carrier, done with intent to cause damage or recklessly and with knowledge that damage would probably result.

7 Article 29 of the Convention, headed 'Basis of claims', reads as follows:

'In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory

damages shall not be recoverable.'

Community rules

Regulation (EC) No 2027/97

8 Council Regulation (EC) No 2027/97 of 9 October 1997 on air carrier liability in the event of accidents (OJ 1997 L 285, p. 1) was amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council of 13 May 2002 (OJ 2002 L 140, p. 2) ('Regulation No 2027/97').

9 Article 3(1) of Regulation No 2027/97 provides:

'The liability of a Community air carrier in respect of passengers and their baggage shall be governed by all provisions of the Montreal Convention relevant to such liability.'

10 The annex to Regulation No 2027/97 contains inter alia the following provisions, under the heading 'Passenger delays':

'In case of passenger delay, the air carrier is liable for damage unless it took all reasonable measures to avoid the damage or it was impossible to take such measures. The liability for passenger delay is limited to 4 150 SDRs (approximate amount in local currency).'

Regulation No 261/2004

11 The first and second recitals in the preamble to Regulation No 261/2004 are worded as follows:

'(1) Action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers. Moreover, full account should be taken of the requirements of consumer protection in general.

(2) Denied boarding and cancellation or long delay of flights cause serious trouble and inconvenience to passengers.'

12 The 12th recital in the preamble states:

'The trouble and inconvenience to passengers caused by cancellation of flights should also be reduced. This should be achieved by inducing carriers to inform passengers of cancellations before the scheduled time of departure and in addition to offer them reasonable re-routing, so that the passengers can make other arrangements. Air carriers should compensate passengers if they fail to do this, except when the cancellation occurs in extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.'

13 The 14th recital states:

'As under the Montreal Convention, obligations on operating air carriers should be limited or excluded in cases where an event has been caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Such circumstances may, in particular, occur in cases of political instability, meteorological conditions incompatible with the operation of the flight concerned, security risks, unexpected flight safety shortcomings and strikes that affect the operation of an operating air carrier.'

14 Article 5 of Regulation No 261/2004, headed 'Cancellation', states:

'1. In case of cancellation of a flight, the passengers concerned shall:

(a) be offered assistance by the operating air carrier in accordance with Article 8; and

(b) be offered assistance by the operating air carrier in accordance with Article 9(1)(a) and 9(2), as well as, in event of re-routing when the reasonably expected time of departure of the new flight is at least the day after the departure as it was planned for the cancelled flight, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(c) have the right to compensation by the operating air carrier in accordance with Article 7, unless:

(i) they are informed of the cancellation at least two weeks before the scheduled time of departure; or

(ii) they are informed of the cancellation between two weeks and seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than two hours before the scheduled time of departure and to reach their final destination less than four hours after the scheduled time of arrival; or

(iii) they are informed of the cancellation less than seven days before the scheduled time of departure and are offered re-routing, allowing them to depart no more than one hour before the scheduled time of departure and to reach their final destination less than two hours after the scheduled time of arrival.

2. When passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport.

3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.'

15 Article 6 of Regulation No 261/2004, headed 'Delay', is worded as follows:

'1. When an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure:

(a) for two hours or more in the case of flights of 1 500 kilometres or less; or

(b) for three hours or more in the case of all intra-Community flights of more than 1 500 kilometres and of all other flights between 1 500 and 3 500 kilometres; or

(c) for four hours or more in the case of all flights not falling under (a) or (b),

passengers shall be offered by the operating air carrier:

(i) the assistance specified in Article 9(1)(a) and 9(2); and

(ii) when the reasonably expected time of departure is at least the day after the time of departure previously announced, the assistance specified in Article 9(1)(b) and 9(1)(c); and

(iii) when the delay is at least five hours, the assistance specified in Article 8(1)(a).

2. In any event, the assistance shall be offered within the time-limits set out above with respect to each distance bracket.'

16 Article 7 of Regulation No 261/2004, headed 'Right to compensation', provides:

‘1. Where reference is made to this Article, passengers shall receive compensation amounting to:

(a) EUR 250 for all flights of 1 500 kilometres or less;

(b) EUR 400 for all intra-Community flights of more than 1 500 kilometres, and for all other flights between 1 500 and 3 500 kilometres;

(c) EUR 600 for all flights not falling under (a) or (b).

In determining the distance, the basis shall be the last destination at which the denial of boarding or cancellation will delay the passenger’s arrival after the scheduled time.

2. When passengers are offered re-routing to their final destination on an alternative flight pursuant to Article 8, the arrival time of which does not exceed the scheduled arrival time of the flight originally booked

(a) by two hours, in respect of all flights of 1 500 kilometres or less; or

(b) by three hours, in respect of all intra-Community flights of more than 1 500 kilometres and for all other flights between 1 500 and 3 500 kilometres; or

(c) by four hours, in respect of all flights not falling under (a) or (b),

the operating air carrier may reduce the compensation provided for in paragraph 1 by 50%.

3. The compensation referred to in paragraph 1 shall be paid in cash, by electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

4. The distances given in paragraphs 1 and 2 shall be measured by the great circle route method.’

17 Article 8 of Regulation No 261/2004, headed ‘Right to reimbursement or re-routing’, states:

‘1. Where reference is made to this Article, passengers shall be offered the choice between:

(a) – reimbursement within seven days, by the means provided for in Article 7(3), of the full cost of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger’s original travel plan, together with, when relevant,

– a return flight to the first point of departure, at the earliest opportunity;

(b) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or

(c) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger’s convenience, subject to availability of seats.

2. Paragraph 1(a) shall also apply to passengers whose flights form part of a package, except for the right to reimbursement where such right arises under Directive 90/314/EEC.

3. When, in the case where a town, city or region is served by several airports, an operating air carrier offers a passenger a flight to an airport alternative to that for which the booking was made, the operating air carrier shall bear the cost of transferring the passenger from that alternative airport either to that for which the booking was made, or to another close-by

destination agreed with the passenger.'

18 Article 9 of Regulation No 261/2004, headed 'Right to care', provides:

'1. Where reference is made to this Article, passengers shall be offered free of charge:

(a) meals and refreshments in a reasonable relation to the waiting time;

(b) hotel accommodation in cases

– where a stay of one or more nights becomes necessary, or

– where a stay additional to that intended by the passenger becomes necessary;

(c) transport between the airport and place of accommodation (hotel or other).

2. In addition, passengers shall be offered free of charge two telephone calls, telex or fax messages, or e-mails.

3. In applying this Article, the operating air carrier shall pay particular attention to the needs of persons with reduced mobility and any persons accompanying them, as well as to the needs of unaccompanied children.'

The main proceedings and the questions referred for a preliminary ruling

19 IATA is an association comprising 270 airlines from 130 countries, which carry 98% of scheduled international air passengers worldwide. ELFAA was established as an unincorporated association in January 2004 and represents the interests of 10 low-fare airlines from 9 European countries. These two associations each brought before the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), judicial review proceedings against the Department for Transport relating to the implementation of Regulation No 261/2004.

20 The High Court of Justice, satisfied that the claimants' arguments were not without substance, decided to refer to the Court of Justice the seven questions put forward by them contesting the validity of Regulation No 261/2004. Since the Department for Transport doubted that a reference on six of those questions was necessary as they did not, in its view, raise any real doubt as to the validity of the regulation, the High Court of Justice wished to ascertain what test had to be satisfied, or what threshold passed, before a question concerning the validity of a Community instrument had to be referred to the Court of Justice on the basis of the second paragraph of Article 234 EC. In those circumstances, the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court), decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Whether Article 6 of Regulation No 261/2004 is invalid on grounds that it is inconsistent with the … Montreal Convention …, and in particular Articles 19, 22 and 29 [thereof], and whether this (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(2) Whether the amendment of Article 5 of the Regulation during consideration of the draft text by the Conciliation Committee was done in a manner that is inconsistent with the procedural requirements provided for in Article 251 EC and, if so, whether Article 5 of the Regulation is invalid and, if so, whether this (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(3) Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they are inconsistent with the principle of legal certainty, and if so whether

this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(4) Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they are not supported by any or any adequate reasoning, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(5) Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they are inconsistent with the principle of proportionality required of any Community measure, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(6) Whether Articles 5 and 6 of Regulation No 261/2004 (or part thereof) are invalid on grounds that they discriminate, in particular, against the members of the second Claimant organisation in a manner that is arbitrary or not objectively justified, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(7) Is Article 7 of the Regulation (or part thereof) void or invalid on grounds that the imposition of a fixed liability in the event of flight cancellation for reasons that are not covered by the extraordinary circumstances defence is discriminatory, fails to meet the standards of proportionality required of any Community measure, or is not based on any adequate reasoning, and if so whether this invalidity (in conjunction with any other relevant factors) affects the validity of the Regulation as a whole?

(8) In circumstances where a national court has granted permission to bring a claim in that national court, which raises questions as to the validity of provisions of a Community instrument and which it considers is arguable and not unfounded, are there any principles of Community law in connection with any test or threshold which the national court should apply when deciding under [the second paragraph of Article 234] EC whether to refer those questions of validity to the [Court of Justice of the European Communities]?'

21 By order of the President of the Court of 24 September 2004, the referring court's request that the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure be applied to the present case was rejected.

The questions

Question 8

22 By its eighth question, which it is appropriate to examine first, the referring court asks, in essence, whether the second paragraph of Article 234 EC is to be interpreted as requiring a national court to refer a question as to the validity of a Community act to the Court of Justice for a preliminary ruling only if there is more than a certain degree of doubt concerning its validity.

Admissibility

23 The European Parliament contends that the question is inadmissible since no answer which the Court might provide to the question would be of any assistance for the decision in the case before the referring court, which relates to the validity of Regulation No 261/2004.

24 It is settled case-law that a reference from a national court may be refused only if it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose, or where the problem is hypothetical or the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; Case

C-105/94 *Celestini* [1997] ECR I-2971, paragraph 22; and Case C-355/97 *Beckand Bergdorf* [1999] ECR I-4977, paragraph 22). Save for such cases, the Court is, in principle, bound to give a preliminary ruling on questions concerning the interpretation of Community law (see *Bosman*, paragraph 59).

25 In the main proceedings, when the claimants contested the validity of Regulation No 261/2004 before the referring court the question arose for the latter as to whether that challenge to the regulation's validity warranted a reference to the Court for a preliminary ruling as provided in Article 234 EC. Accordingly, the interpretation of that article which the referring court seeks by means of the present question cannot be considered to bear no relation to the purpose of the main action. The fact that the referring court has at the same time also referred to the Court questions concerning the validity of Regulation No 261/2004 and that the answers which will be provided to them may dispose of the main proceedings cannot call into question the relevance which the question on the interpretation of Article 234 EC possesses in itself.

26 The question asked should therefore be answered.

Substance

27 It is settled case-law that national courts do not have the power to declare acts of the Community institutions invalid. The main purpose of the jurisdiction conferred on the Court by Article 234 EC is to ensure that Community law is applied uniformly by national courts. That requirement of uniformity is particularly vital where the validity of a Community act is in question. Differences between courts of the Member States as to the validity of Community acts would be liable to jeopardise the very unity of the Community legal order and undermine the fundamental requirement of legal certainty (Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 15; Case C-27/95 *Bakers of Nailsea* [1997] ECR I-1847, paragraph 20; and Case C-461/03 *Gaston Schul Douane-expediteur* [2005] ECR I-0000, paragraph 21). The Court of Justice alone therefore has jurisdiction to declare a Community act invalid (Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 17, and Case C-6/99 *Greenpeace France and Others* [2000] ECR I-1651, paragraph 54).

28 Article 234 EC does not constitute a means of redress available to the parties to a case pending before a national court and therefore the mere fact that a party contends that the dispute gives rise to a question concerning the validity of Community law does not mean that the court concerned is compelled to consider that a question has been raised within the meaning of Article 234 EC (see, to this effect, Case 283/81 *Cilfit* [1982] ECR 3415, paragraph 9). Accordingly, the fact that the validity of a Community act is contested before a national court is not in itself sufficient to warrant referral of a question to the Court for a preliminary ruling.

29 The Court has held that courts against whose decisions there is a judicial remedy under national law may examine the validity of a Community act and, if they consider that the arguments put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the act is completely valid. In so doing, they are not calling into question the existence of the Community act (*Foto-Frost*, paragraph 14).

30 On the other hand, where such a court considers that one or more arguments for invalidity, put forward by the parties or, as the case may be, raised by it of its own motion (see, to this effect, Case 126/80 *Salonia* [1981] ECR 1563, paragraph 7), are well founded, it is incumbent upon it to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity.

31 In addition, the spirit of cooperation which must prevail in the operation of the preliminary reference procedure means that the national court is to set out in its order for reference the reasons why it considers such a reference to be necessary.

32 Consequently, the answer to the eighth question must be that, where a court against whose decisions there is a judicial remedy under national law considers that one or more arguments

for invalidity of a Community act which have been put forward by the parties or, as the case may be, raised by it of its own motion are well founded, it must stay proceedings and make a reference to the Court for a preliminary ruling on the act's validity .

The other questions

33 By its first seven questions, the referring court asks, in essence, whether Articles 5, 6 and 7 of Regulation No 261/2004 are invalid and, if relevant, whether their invalidity is liable to result in invalidity of that regulation as a whole.

The consistency of Article 6 of Regulation No 261/2004 with the Montreal Convention

34 By its first question, the referring court essentially asks whether Article 6 of Regulation No 261/2004 is inconsistent with Articles 19, 22 and 29 of the Montreal Convention.

35 Article 300(7) EC provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case-law, those agreements prevail over provisions of secondary Community legislation (Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 52, and Case C-286/02 *Bellio F.lli* [2004] ECR I-3465, paragraph 33).

36 The Montreal Convention, signed by the Community on 9 December 1999 on the basis of Article 300(2) EC, was approved by Council decision of 5 April 2001 and entered into force, so far as concerns the Community, on 28 June 2004. Therefore from that last date the provisions of that Convention have, in accordance with settled case-law, been an integral part of the Community legal order (Case 181/73 *Haegeman* [1974] ECR 449, paragraph 5, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7). It was after that date that, by decision of 14 July 2004, the High Court of Justice made the present order for reference in the judicial review proceedings before it.

37 Article 6 of Regulation No 261/2004 provides that, in the event of a long delay to a flight, the operating air carrier must offer to assist and take care of the passengers concerned. It does not provide that the carrier may escape such obligations in the event of extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

38 IATA and ELFAA submitted in their applications to the referring court and submit before this Court that Article 6 of Regulation No 261/2004 is accordingly incompatible with the Montreal Convention which contains, in Articles 19 and 22(1), clauses excluding and limiting the air carrier's liability in the event of delay in the carriage of passengers and which provides, in Article 29, that any action for damages, however founded, can only be brought subject to the conditions and limits set out in the Convention.

39 As to those submissions, Articles 19, 22 and 29 of the Montreal Convention are among the rules in the light of which the Court reviews the legality of acts of the Community institutions since, first, neither the nature nor the broad logic of the Convention precludes this and, second, those three articles appear, as regards their content, to be unconditional and sufficiently precise.

40 It is to be noted with regard to the interpretation of those articles that, in accordance with settled case-law, an international treaty must be interpreted by reference to the terms in which it is worded and in the light of its objectives. Article 31 of the Vienna Convention of 23 May 1969 on the Law of Treaties and Article 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations or between International Organisations, which express, to this effect, general customary international law, state that a treaty is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (see, to this effect, Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 35).

41 It is clear from the preamble to the Montreal Convention that the States party thereto recognised 'the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution'. It is therefore in the light of this objective that the scope which the authors of the Convention intended to give to Articles 19, 22 and 29 is to be assessed.

42 It is apparent from those provisions of the Montreal Convention, which are contained in Chapter III headed 'Liability of the carrier and extent of compensation for damage', that they lay down the conditions under which any actions for damages against air carriers may be brought by passengers who invoke damage sustained because of delay. They limit the carrier's liability to 4 150 SDRs for each passenger.

43 Any delay in the carriage of passengers by air, and in particular a long delay, may, generally speaking, cause two types of damage. First, excessive delay will cause damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned, through the provision, for example, of refreshments, meals and accommodation and of the opportunity to make telephone calls. Second, passengers are liable to suffer individual damage, inherent in the reason for travelling, redress for which requires a case-by-case assessment of the extent of the damage caused and can consequently only be the subject of compensation granted subsequently on an individual basis.

44 It is clear from Articles 19, 22 and 29 of the Montreal Convention that they merely govern the conditions under which, after a flight has been delayed, the passengers concerned may bring actions for damages by way of redress on an individual basis, that is to say for compensation, from the carriers liable for damage resulting from that delay.

45 It does not follow from these provisions, or from any other provision of the Montreal Convention, that the authors of the Convention intended to shield those carriers from any other form of intervention, in particular action which could be envisaged by the public authorities to redress, in a standardised and immediate manner, the damage that is constituted by the inconvenience that delay in the carriage of passengers by air causes, without the passengers having to suffer the inconvenience inherent in the bringing of actions for damages before the courts.

46 The Montreal Convention could not therefore prevent the action taken by the Community legislature to lay down, in exercise of the powers conferred on the Community in the fields of transport and consumer protection, the conditions under which damage linked to the abovementioned inconvenience should be redressed. Since the assistance and taking care of passengers envisaged by Article 6 of Regulation No 261/2004 in the event of a long delay to a flight constitute such standardised and immediate compensatory measures, they are not among those whose institution is regulated by the Convention. The system prescribed in Article 6 simply operates at an earlier stage than the system which results from the Montreal Convention.

47 The standardised and immediate assistance and care measures do not themselves prevent the passengers concerned, should the same delay also cause them damage conferring entitlement to compensation, from being able to bring in addition actions to redress that damage under the conditions laid down by the Montreal Convention.

48 Those measures, which enhance the protection afforded to passengers' interests and improve the conditions under which the principle of restitution is applicable to passengers, cannot therefore be considered inconsistent with the Montreal Convention.

The validity of Article 5 of Regulation No 261/2004 in the light of Article 251 EC

49 By its second question, the referring court essentially asks whether, in amending Article 5 of the draft at the origin of Regulation No 261/2004, as resulting from Common Position (EC) No 27/2003 of 18 March 2003 (OJ 2003 C 125 E, p. 63) ('the draft regulation'), the Conciliation

Committee provided for in Article 251 EC complied with the procedural requirements which that article entails.

50 It is necessary, first of all, to set out the context in which the Conciliation Committee acted in the procedure for adoption of Regulation No 261/2004, having regard in particular to the concerns of the Community legislature relating to whether or not account was to be taken of circumstances allowing air carriers to be exempted from their obligations to take care of and assist passengers in the event of cancellation of, or a long delay to, a flight.

51 In Common Position No 27/2003, the Council decided that air carriers could be exempted from their compensation and care obligations imposed, in the event of cancellation of flights, by Article 5 of the draft regulation and from their care obligations imposed, in the event of a long delay, by Article 6 of that draft, if they could prove that the cancellation or delay was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.

52 When the Parliament considered that common position on 3 July 2003, at second reading, it did not propose any amendment to Article 5 of the draft regulation. On the other hand, it adopted, inter alia, Amendment 11 on Article 6 of the draft, in particular removing all reference to the exemption clause relating to extraordinary circumstances ('the extraordinary circumstances defence').

53 By letter of 22 September 2003 the Council gave notice that it was unable to approve all the Parliament's amendments, and the President of the Council, in agreement with the President of the Parliament, convened a meeting of the Conciliation Committee.

54 At its meeting of 14 October 2003, the Conciliation Committee reached agreement on a joint text, approved on 1 December 2003, under which, in particular, all reference in Article 5 of the draft regulation to the extraordinary circumstances defence allowing air carriers to be exempted from their care obligations in the event of flight cancellations was removed. The regulation was adopted, in accordance with the joint text of the Conciliation Committee, by the Parliament at third reading, on 18 December 2003, and by the Council, on 26 January 2004.

55 The claimants in the main proceedings contend that, in amending Article 5 of the draft regulation when no amendment had been made to that article by the Parliament at second reading, the Conciliation Committee exceeded the powers conferred upon it by Article 251 EC.

56 In the co-decision procedure, the Conciliation Committee is convened if the Council does not agree to the amendments proposed by the Parliament at second reading. It is common ground that there was such a disagreement in the procedure for adoption of Regulation No 261/2004, justifying the convening of the Conciliation Committee.

57 Contrary to IATA's submissions, once the Conciliation Committee has been convened, it has the task not of coming to an agreement on the amendments proposed by the Parliament but, as is clear from the very wording of Article 251 EC, 'of reaching agreement on a joint text', by addressing, on the basis of the amendments proposed by the Parliament, the common position adopted by the Council. The wording of Article 251 EC does not therefore itself include any restriction as to the content of the measures chosen that enable agreement to be reached on a joint text.

58 In using the term 'conciliation', the authors of the Treaty intended to make the procedure adopted effective and to confer a wide discretion on the Conciliation Committee. In adopting such a method for resolving disagreements, their very aim was that the points of view of the Parliament and the Council should be reconciled on the basis of examination of all the aspects of the disagreement, and with the active participation in the Conciliation Committee's proceedings of the Commission of the European Communities, which has the task of taking 'all the necessary initiatives with a view to reconciling the positions of the … Parliament and the Council'.

59 In this light, taking account of the power to mediate thus conferred on the Commission and of the freedom which the Parliament and the Council finally have as to whether or not to accept the joint text approved by the Conciliation Committee, Article 251 EC cannot be read as limiting on principle the power of that committee. The mere fact that, in the present case, Article 5 of the draft regulation was not amended by the Parliament at second reading does not show that the committee exceeded the powers conferred upon it by Article 251 EC.

60 The claimants in the main proceedings further contend that, since meetings of the Conciliation Committee are not public in nature, the principles of representative democracy are undermined.

61 It is true that genuine participation of the Parliament in the legislative process of the Community, in accordance with the procedures laid down by the Treaty, represents an essential factor in the institutional balance intended by the Treaty. However, it is not in dispute that the Parliament is itself represented on the Conciliation Committee and that this representation is indeed made up in accordance with the relative size of each political group in the Parliament. Furthermore, under Article 251(5) EC the joint text adopted by the Conciliation Committee must still be examined by the Parliament itself with a view to its approval. This examination, which necessarily takes place in the conditions of transparency normal for the proceedings of that assembly, thus ensures in any event the genuine participation of the Parliament in the legislative process in compliance with the principles of representative democracy.

62 It should be noted, having regard to the documents before the Court, that in the present case the disagreement brought before the Conciliation Committee related in particular to whether or not air carriers could rely on the extraordinary circumstances defence in order to be exempted from their obligations to assist and take care of passengers, imposed by Article 6 of the draft regulation, in the event of a long delay to a flight. The Conciliation Committee reached an agreement under which all reference to the extraordinary circumstances defence was removed from Article 6 of the draft, in order to ensure that passengers were taken care of and assisted immediately whatever the cause of the flight delay. The committee then also agreed, in order to ensure a coherent and symmetrical approach, to remove from Article 5 of the draft the same reference, with regard to obligations to take care of passengers in the event of cancellation of a flight.

63 Accordingly, the Conciliation Committee did not exceed the limits of its powers in amending Article 5 of the draft regulation.

The obligation to state reasons and observance of the principle of legal certainty

64 By its third and fourth questions, the referring court essentially asks whether Articles 5 and 6 of Regulation No 261/2004 are invalid in that they are inconsistent with the principle of legal certainty or do not satisfy the obligation to state reasons. By its seventh question, it also enquires whether Article 7 of the regulation complies with that obligation.

65 The claimants in the main proceedings plead that the contested regulation contains ambiguities, gaps and contradictions which affect its legality having regard to both the obligation to state reasons and observance of the principle of legal certainty.

66 It is to be remembered that, while the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court to exercise its powers of review, it is not required to go into every relevant point of fact and law (see, inter alia, Case C-122/94 *Commission* v *Council* [1996] ECR I-881, paragraph 29; Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 63; and Joined Cases C-154/04 and C-155/04 *Alliance for Natural Health and Others* [2005] ECR I-0000, paragraph 133).

67 In addition, the question whether a statement of reasons satisfies the requirements must be

assessed with reference not only to the wording of the measure but also to its context and to the whole body of legal rules governing the matter in question. In the case of a measure intended to have general application, as in the main proceedings, the preamble may be limited to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other (see, inter alia, Case C-342/03 *Spain* v *Council* [2005] ECR I-1975, paragraph 55). If the contested measure clearly discloses the essential objective pursued by the institutions, it would be excessive to require a specific statement of reasons for each of the technical choices made by them (see, inter alia, Case C-100/99 *Italy* v *Council andCommission* [2001] ECR I-5217, paragraph 64, and *Alliance for Natural Health*, paragraph 134).

68 The principle of legal certainty is a fundamental principle of Community law which requires, in particular, that rules should be clear and precise, so that individuals may ascertain unequivocally what their rights and obligations are and may take steps accordingly (see Case 169/80 *Gondrand Frèresand Garancini* [1981] ECR 1931; Case C-143/93 *Van Es Douane Agenten* [1996] ECR I-431, paragraph 27; and Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30).

69 In light of the case-law cited above, it must be stated, first, that Articles 5 and 6 of Regulation No 261/2004 lay down precisely and clearly the obligations owed by an operating air carrier in the event of cancellation of, or a long delay to, a flight. The objective of those provisions is apparent, with equal clarity, from the first and second recitals in the preamble to the regulation, according to which action by the Community in the field of air transport should aim, among other things, at ensuring a high level of protection for passengers and take account of the requirements of consumer protection in general, inasmuch as cancellation of, or long delay to, flights causes serious inconvenience to passengers.

70 Furthermore, the 12th and 13th recitals in the preamble to the regulation state that passengers whose flights are cancelled should be able to obtain compensation if they are not informed in good time of the cancellation, be able either to obtain reimbursement of their tickets or to obtain re-routing under satisfactory conditions, and be adequately cared for while awaiting a later flight. The 17th recital states that passengers whose flights are delayed for a specified time should be adequately cared for and should be able to cancel their flights with reimbursement of their tickets or to continue them under satisfactory conditions. These details thus clearly disclose the essential objective pursued.

71 It is also not in dispute that the various kinds of damage suffered by passengers in the event of cancellation of, or a long delay to, a flight exist. It has not been established, nor indeed has it been asserted, that incidents of this nature amount to no more than an insignificant phenomenon. Neither Article 253 EC nor any other provision indicates that, in order for the Community measure at issue to be valid, it would have to contain precise figures justifying the need for action on the part of the Community legislature.

72 Nor can Regulation No 261/2004 be required to contain a specific statement of reasons for each of the technical choices made. Since the objective of protecting passengers required acceptance of standardised and effective compensatory measures which could not give rise to discussion at the very moment when they were to be applied, a situation which, quite evidently, the extraordinary circumstances defence would not have failed to bring about, the Community legislature was able, without breaching its obligation to state reasons, to refrain from setting out the reasons why it considered that operating air carriers could not rely on such a defence in order to be exempted from their obligations laid down in Articles 5 and 6 of the regulation. Likewise, contrary to ELFAA's submissions, the Community legislature was able, without rendering the act in question unlawful, to lay down in Article 7 the principle that fixed compensation was payable in the event of cancellation of a flight and the amount of the compensation without setting out the reasons why it had chosen that measure and that amount.

73 Second, the standardised and immediate measures laid down in Article 6 of Regulation No 261/2004 are not among those whose institution is regulated by the Montreal Convention, and

are not inconsistent with that Convention. It follows that the provisions of Regulation No 261/2004 governing in this way certain rights of passengers in the event of long delays to flights were capable of being made subject to conditions different from those laid down by the Convention with regard to other rights. Accordingly, they are not in any way contrary to the provisions which are contained in Regulation No 2027/97 and were adopted, in accordance with Article 1 thereof, in order to implement the relevant provisions of the Montreal Convention.

74 In those circumstances, the claimants in the main proceedings cannot maintain that, by not referring to Regulation No 2027/97, Regulation No 261/2004 was adopted in breach of the obligation to state reasons. Nor can Article 6 of Regulation No 261/2004 be read as having, in breach of the principle of legal certainty, denied the undertakings represented by the claimants in the main proceedings the ability to ascertain unequivocally the obligations owed by them as a consequence of the system resulting from Regulation No 2027/97.

75 Third, the claimants in the main proceedings submit that Regulation No 261/2004 envisages, in an inconsistent manner in the 14th and 15th recitals in its preamble, that extraordinary circumstances may limit or exclude an operating air carrier's liability in the event of cancellation of, or long delays to, flights whereas Articles 5 and 6 of the regulation, which govern its obligations in such a case, do not accept such a defence to liability except with regard to the obligation to pay compensation.

76 However, it must be stated with regard to those submissions, first, that while the preamble to a Community measure may explain the latter's content (see *Alliance for Natural Health*, paragraph 91), it cannot be relied upon as a ground for derogating from the actual provisions of the measure in question (Case C-162/97 *Nilsson andOthers* [1998] ECR I-7477, paragraph 54, and Case C-136/04 *DeutschesMilch-Kontor* [2005] ECR I-0000, paragraph 32). Second, the wording of those recitals indeed gives the impression that, generally, operating air carriers should be released from all their obligations in the event of extraordinary circumstances, and it accordingly gives rise to a certain ambiguity between the intention thus expressed by the Community legislature and the actual content of Articles 5 and 6 of Regulation No 261/2004 which do not make this defence to liability so general in character. However, such an ambiguity does not extend so far as to render incoherent the system set up by those two articles, which are themselves entirely unambiguous.

77 It follows from the foregoing considerations that Articles 5, 6 and 7 of Regulation No 261/2004 are not invalid by reason of breach of the principle of legal certainty or of the obligation to state reasons.

Observance of the principle of proportionality

78 By its fifth and seventh questions, the referring court asks, in essence, whether Articles 5, 6 and 7 of Regulation No 261/2004 are invalid by reason of an infringement of the principle of proportionality.

79 The principle of proportionality, which is one of the general principles of Community law, requires that measures implemented through Community provisions should be appropriate for attaining the objective pursued and must not go beyond what is necessary to achieve it (see, inter alia, Case C-210/00 *KäsereiChampignon Hofmeister* [2002] ECR I-6453, paragraph 59; Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, paragraph 122; and *SwedishMatch*, paragraph 47).

80 With regard to judicial review of the conditions referred to in the previous paragraph, the Community legislature must be allowed a broad discretion in areas which involve political, economic and social choices on its part, and in which it is called upon to undertake complex assessments. Consequently, the legality of a measure adopted in those fields can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (see, to this effect, Case C-84/94 *United Kingdom* v *Council* [1996] ECR I-5755, paragraph 58; Case C-233/94 *Germany* v *Parliament and Council*

[1997] ECR I-2405, paragraphs 55 and 56; Case C-157/96 *National Farmers' Union and Others* [1998] ECR I-2211, paragraph 61; and *British American Tobacco (Investments) and Imperial Tobacco*, paragraph 123). That is so, in particular, in the field of the common transport policy (see, to this effect, in particular, Joined Cases C-248/95 and C-249/95 *SAM Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 23, and Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 63).

81 The claimants in the main proceedings submit that the measures to assist, care for and compensate passengers that are prescribed by Articles 5, 6 and 7 of Regulation No 261/2004 in the event of cancellation of, or a long delay to, a flight do not enable the objective of reducing such instances of cancellation or delay to be achieved and are in any event, by reason of the considerable financial charges which they will impose on Community air carriers, totally disproportionate to the objective pursued.

82 In assessing whether the measures in question are necessary, it should be noted that the immediate objective pursued by the Community legislature, as apparent from the first four recitals in the preamble to Regulation No 261/2004, is to strengthen protection for passengers who suffer cancellation of, or long delays to, flights, by redressing, in an immediate and standardised manner, certain damage caused to passengers placed in such circumstances.

83 Admittedly, in addition to this direct objective explicitly set out by the Community legislature, the regulation, like any other generally applicable legislation, may implicitly involve other, secondary, objectives such as, as the claimants in the main proceedings submit, that of reducing, through preventive action, the number of flights that are cancelled or subject to a long delay. The Court has the task of assessing first of all whether the measures adopted are manifestly inappropriate in the light of the regulation's explicit objective, that relating to strengthening protection for passengers, the legitimacy of which is not in itself contested.

84 It must be stated, first, that the measures prescribed by Articles 5 and 6 of Regulation No 261/2004 are in themselves capable of immediately redressing some of the damage suffered by passengers in the event of cancellation of, or a long delay to, a flight and therefore enable a high level of passenger protection, sought by the regulation, to be ensured.

85 Second, it is not in dispute that the extent of the various measures chosen by the Community legislature varies according to the significance of the damage suffered by the passengers, its significance being assessed by reference either to the length of the delay and the wait for the next flight or to the time taken to inform them of the flight's cancellation. The criteria thus adopted for determining the passengers' entitlement to those measures do not therefore appear in any way unrelated to the requirement for proportionality.

86 Third, the standardised and immediate compensatory measures such as the re-routing of passengers, the supply of refreshments, meals or accommodation or the making available of means of communication with third parties are designed to cater for passengers' immediate needs on the spot, whatever the cause of the flight's cancellation or delay. Given that these measures vary, as stated in the previous paragraph of this judgment, according to the significance of the damage suffered by the passengers, they likewise do not appear to be manifestly inappropriate merely because carriers cannot rely on the extraordinary circumstances defence.

87 Fourth, it has not been established that if, as advocated by ELFAA, passengers were to take out voluntary insurance to cover the risks inherent in flight delays and cancellations, that would in any event make it possible to remedy the damage suffered by passengers on the spot. Such a measure cannot, therefore, be regarded as being more appropriate to the objective pursued than those chosen by the Community legislature.

88 Fifth, the harmful consequences to which a delay gives rise and which Regulation No 261/2004 seeks to remedy are in no way related to the price paid for a ticket. Therefore, the argument that the measures chosen to alleviate those consequences should have been determined in

proportion to the cost of the ticket cannot be upheld.

89 Sixth, while IATA and ELFAA contend that the abovementioned measures could well have significant consequences for carriers' financial burdens and are not appropriate to the regulation's secondary objective of reducing the number of flights that are cancelled or subject to a long delay, it must be stated that figures on the frequency of those delays and cancellations have not been given in the proceedings before the Court. Accordingly, the theoretical costs which those measures involve for airlines, as put forward by the parties concerned, do not in any event enable it to be regarded as established that those effects would be out of proportion to the interest in the measures.

90 Moreover, the discharge of obligations pursuant to Regulation No 261/2004 is without prejudice to air carrier's rights to seek compensation from any person, including third parties, in accordance with national law, as Article 13 of the regulation provides. Such compensation accordingly may reduce or even remove the financial burden borne by the carriers in consequence of those obligations. Nor does it appear unreasonable for those obligations initially to be borne, subject to the abovementioned right to compensation, by the air carriers with which the passengers concerned have a contract of carriage that entitles them to a flight that should be neither cancelled nor delayed.

91 Seventh, so far as concerns the compensation prescribed in Article 7 of Regulation No 261/2004, which passengers may claim by virtue of Article 5 when they have been informed of a flight cancellation too late, air carriers can be exempted from payment of that compensation if they prove that the cancellation was caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken. Given the existence of such a ground for exemption and of the conditions restricting the application of this obligation to which air carriers are not subject if the information is provided sufficiently early or accompanied by offers of re-routing, the obligation does not appear manifestly inappropriate to the objective pursued. Furthermore, the amount of the compensation, set at EUR 250, 400 or 600 depending on the distance of the flights concerned, likewise does not appear excessive and indeed, as maintained by the Commission in its observations without being contradicted, essentially amounts to an update of the level of compensation laid down by Council Regulation (EEC) No 295/91 of 4 February 1991 establishing common rules for a denied-boarding compensation system in scheduled air transport (OJ 1991 L 36, p. 5), taking account of inflation since its entry into force.

92 It follows from the foregoing considerations that Articles 5, 6 and 7 of Regulation No 261/2004 are not invalid by reason of infringement of the principle of proportionality.

Observance of the principle of equal treatment

93 By its sixth and seventh questions, the referring court asks, in essence, whether Articles 5, 6 and 7 of Regulation No 261/2004 are invalid by reason of an infringement of the principle of equal treatment.

94 ELFAA submits that the low-fare airlines which it represents suffer discriminatory treatment since the measures prescribed in those articles impose the same obligations on all air carriers without distinction on the basis of their pricing policies and the services that they offer. Furthermore, Community law does not impose the same obligations on other means of transport.

95 It is settled case-law that the principle of equal treatment or non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified (*Swedish Match*, paragraph 70).

96 First, having regard in particular to the manner in which they operate, the conditions governing their accessibility and the distribution of their networks, different modes of transport are not

interchangeable as regards the conditions of their use (see, to this effect, *SAM Schiffahrt and Stapf*, paragraph 34). The situation of undertakings operating in each of those different transport sectors is accordingly not comparable.

97 Second, with regard to air transport, passengers whose flights are cancelled or subject to a long delay are in an objectively different situation from that experienced by passengers on other means of transport in the event of incidents of the same nature. Because, in particular, of the location of airports, which are generally outside urban centres, and of the particular procedures for checking-in and reclaiming baggage, the inconvenience suffered by passengers when such incidents occur is not comparable.

98 Finally, the damage suffered by passengers of air carriers in the event of cancellation of, or a long delay to, a flight is similar whatever the airline with which they have a contract and is unrelated to the pricing policies operated by the airline. Accordingly, if the Community legislature was not to infringe the principle of equality, having regard to the aim pursued by Regulation No 261/2004 of increasing protection for all passengers of air carriers, it was incumbent upon it to treat all airlines identically.

99 It follows that Articles 5, 6 and 7 of Regulation No 261/2004 are not invalid by reason of a breach of the principle of equal treatment.

100 In view of all the foregoing considerations, the answer to the first seven questions referred to the Court must be that examination thereof has revealed no factor of such a kind as to affect the validity of Articles 5, 6 and 7 of Regulation No 261/2004.

Costs

101 Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Where a court against whose decisions there is a judicial remedy under national law considers that one or more arguments for invalidity of a Community act which have been put forward by the parties or, as the case may be, raised by it of its own motion are well founded, it must stay proceedings and make a reference to the Court of Justice for a preliminary ruling on the act's validity.**

2. **Examination of the questions referred to the Court has revealed no factor of such a kind as to affect the validity of Articles 5, 6 and 7 of Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91.**

[Signatures]

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* Language of the case: English.

Case C-221/04

Commission of the European Communities

v

Kingdom of Spain

(Failure by a Member State to fulfil obligations – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Protection of species – Hunting using stopped snares in private hunting areas – Castilla y León)

Summary of the Judgment

1. *Actions for failure to fulfil obligations – Examination of merits by the Court – Situation to be taken into consideration – Situation on expiry of the period laid down in the reasoned opinion*

   (Art. 226, second para. EC)

2. *Actions for failure to fulfil obligations – Subject-matter of the dispute – Determination during the procedure prior to the action*

   (Art. 226 EC)

3. *Actions for failure to fulfil obligations – Proof of failure – Burden of proof on Commission*

   (Art. 226 EC; Council Directive 92/43)

4. *Environment – Conservation of natural habitats and of wild fauna and flora – Directive 92/43*

   (Council Directive 92/43, Art. 12(1))

1. Under the second paragraph of Article 226 EC, an action for failure to fulfil obligations can be brought before the Court only if the Member State concerned has failed to comply with the reasoned opinion within the period laid down by the Commission for that purpose.

   Furthermore, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion.

   (see paras 22-23)

2. In an action for failure to fulfil obligations, the purpose of the pre-litigation procedure is to give the State concerned the opportunity, on the one hand, to comply with its obligations under Community law and, on the other hand, to avail itself of its right to defend itself against the complaints formulated by the Commission.

   Therefore, in its action for failure to fulfil obligations, the Commission is permitted to limit the subject-matter of the proceedings. Even though the aim of letter of formal notice is to delimit the subject-matter of the dispute and the Commission is obliged to specify precisely in the reasoned opinion the grounds of complaint which it has already raised more generally in the letter of formal notice, that does not, however, prevent it, at the stage of the proceedings before the Court, from restricting the subject-matter of the

dispute or expanding it to cover subsequent measures that are essentially the same as the measures challenged in the formal notice.

(see paras 33, 36-37)

3. In an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove that the obligation has not been fulfilled without being able to rely on any presumption.

Thus, it is for the Commission, in the context of a failure to fulfil obligations relating to Directive 92/43 on the conservation of natural habitats and of wild fauna and flora, to adduce proof of the presence of the protected animal species in the area concerned and not only evidence which proves at the very most that there is a possibility that they are to be found in that area.

(see paras 59, 63)

4. A Member State fails to fulfil its obligations under Article 12(1)(b) and (d) of Directive 92/43 on the conservation of natural habitats and of wild fauna and flora where it does not take all the requisite specific measures to prevent the deliberate disturbance of the animal species concerned during its breeding period or the deterioration or destruction of its breeding sites.

The condition as to 'deliberate' action in Article 12(1)(a) of Directive 92/43 is met where it is proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.

It follows that a Member State does not fail to fulfil those obligations if it permits the hunting of an animal species which is different from those protected by the directive.

(see paras 70-72)

JUDGMENT OF THE COURT (Second Chamber)

18 May 2006 (*)

(Failure by a Member State to fulfil obligations – Directive 92/43/EEC – Conservation of natural habitats and of wild fauna and flora – Protection of species – Hunting using stopped snares in private hunting areas – Castilla y León)

In Case C-221/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 27 May 2004,

Commission of the European Communities, represented by G. Valero Jordana and M. van Beek, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Spain, represented by F. Díez Moreno, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J. Makarczyk, R. Schintgen, P. Kūris (Rapporteur) and G. Arestis, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 1 December 2005,

after hearing the Opinion of the Advocate General at the sitting on 15 December 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities asks the Court for a declaration that, owing to the authorisation by the authorities in Castilla y Léon of the setting of stopped snares in several private hunting areas, the Kingdom of Spain has failed to fulfil its obligations under Article 12(1) of and Annex VI to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the directive').

Legal context

2 The aim of the directive, according to Article 2(1) thereof, is 'to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies'.

3 Article 12(1) of the directive provides that:

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

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

…'

4 Annex IV to the directive, entitled 'Animal and plant species of Community interest in need of strict protection', cites *Lutra lutra* ('the otter') under (a), 'Animals'.

5 Annex VI to the directive, entitled 'Prohibited methods and means of capture and killing and modes of transport', mentions, as regards mammals, '[t]raps which are non-selective according to their principle or their conditions of use' under (a), 'Non-selective means'.

6 Article 15 of the directive provides that:

‘In respect of the capture or killing of species of wild fauna listed in Annex V(a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV(a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:

(a) use of the means of capture and killing listed in Annex VI(a);

…’

7 Article 16 of the directive provides that:

‘1. Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

…

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

…’

Facts and pre-litigation procedure

8 On 19 April 2001, following a complaint registered in 2000, the Commission sent the Kingdom of Spain a letter of formal notice in which it maintained that that Member State had failed to fulfil its obligations under Article 12(1) of and Annex VI to the directive by authorising the setting of stopped snares in a hunting area in which some of the animal species referred to in Annexes II and IV to that directive are to be found. The Spanish authorities replied by means of a detailed letter of 29 June 2001.

9 Having received two new complaints concerning permits for setting stopped snares in the course of 2001, the Commission, on 21 December 2001, sent a supplementary letter of formal notice to the Spanish authorities, who replied by letter of 25 February 2002.

10 As it considered that the infringements of the directive were persisting, the Commission sent the Kingdom of Spain a reasoned opinion on 3 April 2003 concerning the grant by the Spanish authorities of permits to set stopped snares, which do not constitute a selective hunting method, on various hunting grounds. It requested that that Member State take the measures necessary to comply with that opinion within two months of its notification.

11 In its letter of reply of 15 July 2003, the Spanish Government stated that the Commission had contravened the provisions of Article 226 EC by mentioning in the reasoned opinion a permit of 13 December 2002 which had not been cited either in the initial letter of formal notice or in the supplementary letter of formal notice. Moreover, that government again contested the grounds of complaint put forward by the Commission.

12 As it took the view that the Kingdom of Spain was still failing to fulfil some of the obligations stemming from the directive, the Commission brought this action.

13 The action relates to three permits for the use of stopped snares for fox hunting issued by the authorities of Castilla y Léon on 10 January 2000, 24 May 2001 and 13 December 2002 (‘the contested permits’). The contested permits relate to two hunting areas (‘the areas concerned’), namely the AV-10.198 area situated in the territory of the municipality of Mediana de la Voltoya in the province of Ávila which is referred to in the permit of 24 May 2001 and the SA-10.328 area

situated in the territory of the municipality of Aldeanueva de la Sierra in the province of Salamanca which is referred to in the permits of 10 January 2000 and 13 December 2002.

Admissibility of the action

14 The Spanish Government raises two pleas of inadmissibility. The first concerns alteration of the subject-matter of the application and in the alternative its lack of precision and the second relates to the insufficient statement of grounds in the application.

The plea of inadmissibility concerning alteration of the subject-matter of the application

15 The Spanish Government submits principally that the Commission altered the subject-matter of the application following its submission by alleging that the directive was incorrectly transposed although in earlier correspondence it had restricted itself to alleging that the Kingdom of Spain had infringed the directive by issuing the contested permits.

16 According to the Commission that claim is incorrect as the action for failure to fulfil obligations has the sole aim of challenging the permits.

17 It is clear from the documents in the file that the debate regarding the incorrect transposition of the directive has its origin in the position taken by the Spanish Government in its defence which consisted of justifying the contested permits with regard to the derogations provided for in the directive.

18 The subject-matter of this action is clearly not the possible incorrect transposition into Spanish law of that directive, but the alleged infringement thereof by the grant of the contested permits. Accordingly, that plea of inadmissibility, as set out in the principal argument, must be rejected.

19 In the alternative, the Spanish Government submits that the Commission did not define the subject-matter of the action sufficiently. In that regard, the Spanish Government puts forward five arguments.

20 By its first argument, the Spanish Government objects to the expansion of the subject-matter of the application to include the permits of 24 May 2001 and 13 December 2002. On the one hand, the permit of 24 May 2001 was revoked by the competent authorities on 29 May 2001 and consequently has no legal force or status. On the other hand, the permit of 13 December 2002 was mentioned for the first time in the reasoned opinion so that that government did not have an opportunity to make observations.

21 The Commission contends first of all that the Spanish Government has not proved that the permit of 24 May 2001 was revoked. According to the Commission that permit shows the continuing existence of the administrative practice of issuing permits for hunting using stopped snares in hunting areas in which otters are to be found and should, on that basis, be taken into account in spite of the fact that it was granted only for a very brief period. As regards the permit of 13 December 2002, it was applied for and granted as an extension to the permit of 10 January 2000.

22 It must be borne in mind that it follows from the express terms of the second paragraph of Article 226 EC that the Commission may bring an action for failure to fulfil obligations before the Court only if the Member State concerned has failed to comply with the reasoned opinion within the period laid down by the Commission for that purpose (see, inter alia, Case C-362/90 *Commission* v *Italy* [1992] ECR I-2353, paragraph 9, and Case C-525/03 *Commission* v *Italy* [2005] I-9405, paragraph 13).

23 It is, furthermore, settled case-law that the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-362/90

Commission v *Italy*, paragraph 10; Case C-173/01 *Commission* v *Greece* [2002] ECR I-6129, paragraph 7; Case C-114/02 *Commission* v *France* [2003] ECR I-3783, paragraph 9; and Case C-525/03 *Commission* v *Italy*, paragraph 14).

24 In the present case, it appears that the permit of 24 May 2001 was granted for a limited period ending on 15 June 2001, that is to say well before the reasoned opinion was sent.

25 It has not been shown that that permit continued to produce legal effects after the expiry of the period laid down in the reasoned opinion.

26 It follows that the action is inadmissible in so far as it relates to the permit issued on 24 May 2001.

27 As regards the permit of 13 December 2002, it must be noted that it was granted as an extension to the permit of 10 January 2000.

28 In that regard, it must be borne in mind that, according to the settled case-law of the Court, the subject-matter of a dispute may be extended to events which took place after the reasoned opinion was delivered in so far as they are of the same kind and constitute the same conduct as the events to which the opinion referred (see to that effect Case 42/82 *Commission* v *France* [1983] ECR 1013, paragraph 20, and Case 113/86 *Commission* v *Italy* [1988] ECR 607, paragraph 11).

29 In the present case, it must be noted that the permit of 13 December 2002 is of the same kind as the permit of 10 January 2000, as it states the conditions applicable under the latter for using and setting stopped snares without altering the meaning and scope thereof, and that the grant of those two permits constitutes the same conduct. Consequently, the fact that the permit of 13 December 2002 was cited as an example by the Commission in the reasoned opinion and is referred to again in this application did not deprive the Kingdom of Spain of the rights conferred by Article 226 EC. Therefore, that permit can be incorporated lawfully into the subject-matter of the action.

30 By its second argument, the Spanish Government submits that the Commission did not specify the obligations which the Kingdom of Spain failed to fulfil.

31 However, it is absolutely clear from the Commission's application that it alleges that the Kingdom of Spain failed to fulfil specific obligations stemming from Article 12(1)(a) of and Annex VI to the directive, namely the obligation to establish a system of strict protection for the animal species listed in Annex IV(a) to the directive (among which is to be found the otter) prohibiting all forms of deliberate capture or killing and the obligation to prohibit means of capture and killing which are non-selective according to their principle or their conditions of use. Accordingly, the Kingdom of Spain was aware of the obligations which it is alleged that it failed to fulfil.

32 By its third and fourth arguments, the Spanish Government alleges that the Commission restricted the subject-matter of the application for failure to fulfil obligations. During the pre-litigation procedure the Commission referred, on the one hand, to the protection of five other animal species apart from the otter and, on the other hand, to a variety of hunting methods and not only the use of stopped snares.

33 It must be borne in mind that, as the Commission rightly observes, the Court has already found that it is possible to limit the subject-matter of the proceedings at the stage of the proceedings before the Court (see to that effect Case C-279/94 *Commission* v *Italy* [1997] ECR I-4743, paragraphs 24 and 25; Case C-52/00 *Commission* v *France* [2002] ECR I-3827, paragraph 44; Case C-139/00 *Commission* v *Spain* [2002] ECR I-6407, paragraphs 18 and 19; and Case C-433/03 *Commission* v *Germany* [2005] ECR I-6985, paragraph 28). Accordingly, the Commission could limit the subject-matter of the failure to fulfil obligations alleged in its application to one of the species and one of the hunting methods mentioned during the pre-litigation procedure.

34 By its fifth argument, the Spanish Government submits that the Commission used the pre-litigation procedure as a means of progressively establishing the grounds for the failure to fulfil obligations. The consequence of such conduct is a breach of the principles of legal certainty and of respect for the fundamental rights of the defence.

35 The Commission considers that that argument alleges, on the one hand, the limitation of the subject-matter of the action, and, on the other hand, the absence, in the letter of formal notice, of sufficient evidence to warrant the initiation of infringement proceedings.

36 In this connection, such factors do not however appear capable of affecting the admissibility of the action. First, the Commission was permitted to limit the subject-matter of the proceedings at the stage of the proceedings before the Court, as observed in paragraph 33 of this judgment. Secondly, according to the case-law of the Court the purpose of the pre-litigation procedure is to give the State concerned the opportunity, on the one hand, to comply with its obligations under Community law and, on the other hand, to avail itself of its right to defend itself against the complaints formulated by the Commission (Case C-117/02 *Commission* v *Portugal* [2004] ECR I-5517, paragraph 53). Furthermore, the formal notice cannot be subject to such strict requirements of precision as is the reasoned opinion, since the formal notice cannot, of necessity, contain anything more than an initial brief summary of the complaints (see to that effect Case C-279/94 *Commission* v *Italy*, paragraph 15).

37 As the Advocate General observed at point 24 of her Opinion, whilst it is true that the aim of the letter of formal notice is to delimit the subject-matter of the dispute, the Commission is obliged to specify precisely in the reasoned opinion the grounds of complaint which it has already raised more generally in the letter of formal notice. However, that does not prevent it from restricting the subject-matter of the dispute or expanding it to cover subsequent measures that are essentially the same as the measures challenged in the formal notice.

The plea of inadmissibility alleging an insufficient statement of grounds in the application

38 The second plea of inadmissibility raised by the Spanish Government alleges infringement of Article 38(1)(c) of the Rules of Procedure of the Court of Justice on the one hand and on the other hand an insufficient statement of grounds in the application and failure to prove the alleged failures to fulfil obligations.

39 As regards the first point, it must be stated that the application meets the requirements set out in Article 38(1)(c) of the Rules of Procedure of the Court of Justice as regards the subject-matter of the proceedings and a summary of the pleas in law.

40 With regard to the second point, it must be noted that, as the Commission states, the ground of complaint set out therein falls to be examined in the context of the substance of the case. Therefore, that plea of inadmissibility cannot be upheld.

41 In the light of the foregoing, it must be held that the action is inadmissible to the extent that it is founded on the permit of 24 May 2001 concerning the AV-10.198 hunting area situated in the territory of the municipality of Mediana de la Voltoya in the province of Ávila and is admissible as to the remainder.

The merits of the action

42 It must therefore be considered whether the permit of 13 December 2002 (‘the contested permit’) which relates to the SA-10.328 hunting area situated in the territory of the municipality of Aldeanueva de la Sierra in the province of Salamanca (‘the area concerned’) was issued by the Spanish authorities in breach of the directive.

43 The Commission puts forward two complaints in support of its action. First, the permit to use stopped snares in the area concerned entails the deliberate capture or killing of otters, in breach

of Article 12(1)(a) of the directive. Secondly, the Commission submits that the Kingdom of Spain also infringed the provisions in Annex VI(a) to the directive as that permit relates to a means of hunting which is non-selective according to its principle and its conditions of use.

The complaint concerning infringement of Annex VI(a) to the directive

44 By its second complaint, which it is appropriate to examine first, the Commission submits that the permit to use stopped snares infringes Annex VI(a) to the directive since it involves a means of hunting which is non-selective according to its principle and its conditions of use.

45 Under the directive the methods and means of capture and killing listed in Annex VI(a) are prohibited only as regards the cases referred to in Article 15 of the directive, which is the only article referring to that annex.

46 It is clear from that provision that it is prohibited to use non-selective means, in particular those listed in Annex VI(a) to the directive, to capture or kill species of wild fauna listed in Annex V(a) to the directive and, where in accordance with Article 16, derogations are applied, to take, capture or kill species listed in Annex IV(a) to the directive.

47 It must be borne in mind that the contested permit was issued for fox hunting and that the fox is an animal species which is not referred to in either Annex IV(a) or Annex V(a) to the directive. It follows that the prohibition with regard to non-selective means of hunting is not binding on the Spanish authorities in the present case. Therefore, the complaint concerning infringement of Annex VI(a) to the directive must be rejected.

The complaint concerning infringement of Article 12(1)(a) of the directive

48 It must be borne in mind that under Article 12(1)(a) of the directive Member States are required to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to the directive in their natural range. That system must, according to that provision, prohibit all forms of deliberate capture or killing of the species referred to.

49 In order to assess the validity of the complaint put forward by the Commission, the presence of the otter in the area concerned must be ascertained, and the circumstances under which the capture or killing of that species is deliberate must be established.

The presence of the otter in the area concerned

– Arguments of the parties

50 First, the Commission submits that, in its reply to the reasoned opinion, the Spanish Government acknowledged the presence of the otter in the area concerned as in that response it stated that the otter may be found throughout virtually the whole of the territory of Castilla y Léon.

51 Secondly, the presence of the otter is borne out by the scientific information sheets ‘Natura 2000’ which the Kingdom of Spain submitted to the Commission concerning the sites of Quilamas (Salamanca) and Encinares de los ríos Adaja y Voltoya (Ávila), the site of Quilamas being adjacent to the area concerned.

52 Thirdly, waterways, which are a necessary component of the habitat of otters, cross that area.

53 Lastly, monographs on the position of otters in Spain also confirm that that species is to be found in the area concerned.

54 In view of all those factors, the Commission submits that if the Spanish Government considers that the otter is not to be found in that area, it must prove it by submitting a technical study carried out on site.

55 The Spanish Government submits that there are no otters in the area concerned. In reply to the first argument put forward by the Commission, it observes that acknowledging that a particular animal species is present in a territory does not imply that that species occupies all the habitats in that territory.

56 The Spanish Government also states that waterways are a necessary component of the habitat of otters whereas the area concerned is neither a coastal area nor an area adjoining a river. It adds that the rivers and streams which cross that area are of a seasonal nature as they dry up during the summer months.

57 Furthermore, monographs produced by the Commission prove that there are no otters in the area concerned.

58 Lastly, the Spanish Government considers that there is in that area merely a likelihood that otters are to be found and that the Commission has not established their presence in so far as it does not have either direct evidence, such as the capture of specimens of that species, or indirect evidence, such as the existence of otter tracks.

– Findings of the Court

59 It must be borne in mind that, according to the settled case-law of the Court, in an action for failure to fulfil obligations brought under Article 226 EC it is for the Commission to prove that the obligation has not been fulfilled without being able to rely on any presumption (see to that effect, inter alia, Case 96/81 *Commission* v *Netherlands* [1982] ECR 1791, paragraph 6; Case C-194/01 *Commission* v *Austria* [2004] ECR I-4579, paragraph 34; and Case C-6/04 *Commission* v *United Kingdom* [2005] ECR I-9017, paragraph 75).

60 As regards the scientific information sheets ‘Natura 2000’, it must be stated that, as the Advocate General observed in point 71 of her Opinion, they cover the Quilamas site, which has a surface area of over 10 000 hectares. Admittedly, the area concerned is situated in the immediate vicinity of that site, to the north-west. However, it is common ground that the largest waterways on that site, including the Arroyo de las Quilamas, flow to the south-east and are separated from the area concerned by a range of hills with a height of several hundred metres. Therefore, it is unlikely that otters from the populations living in the network of waterways on the Quilamas site would move into the area concerned.

61 Furthermore, as the Spanish Government, which has not been contradicted on that point by the Commission, has stated, although waterways are a necessary component of the habitat of otters those which cross the area concerned or flow near it are of a seasonal nature.

62 Lastly, as regards the monographs produced by the Commission, it must be stated that they contain contradictory information so that no certainty regarding the presence of the otter in the area concerned is apparent from them.

63 It is clear from the foregoing that the Commission has not furnished evidence to the requisite legal standard as to the presence of otters in the area concerned as the evidence produced proves at the very most that there is a possibility that they are to be found in that area.

Whether the capture of otters is deliberate

– Arguments of the parties

64 The Commission submits that the capture of otters cannot be regarded as accidental and therefore that the condition as to intention which is provided for in Article 12(1)(a) of the directive is met if the Spanish authorities, although they know that otters are present in an area, nevertheless authorise for the purposes of fox hunting the use of a non-selective method of capture there which may adversely affect otters.

65 Thus, by issuing the contested permit, the Kingdom of Spain failed to fulfil the obligation arising out of Article 12(1)(a) of the directive to forestall adverse consequences for otters and created a risk of specimens of that species being deliberately captured.

66 The Spanish Government contends that the contested permit was issued for fox hunting, not otter hunting. It acknowledges the possibility of an indirect effect on otters provided that that animal species is to be found in the area concerned – a circumstance which has not, however, been established.

67 Furthermore, the Spanish Government considers that the stopped snare is a selective means of hunting both according to its principle, as the stop serves to prevent the captured animal's death, and as regards the conditions of use imposed by the contested permit such as the daily inspection of snares, the requirement that any animal which is not covered by that permit be immediately freed or the specific manner in which those snares are set.

– Findings of the Court

68 Under Article 12(1)(a) of the directive, Member States are to take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV(a) to that directive in their natural range, prohibiting all forms of deliberate capture or killing.

69 With respect to the condition as to 'deliberate' action provided for in that provision, it is clear from a reading of the different language versions thereof that 'deliberate' refers to both the capture and the killing of protected animal species.

70 It must also be borne in mind that the Court has categorised as deliberate disturbance within the meaning of Article 12(1)(b) of the directive matters such as the use of mopeds on a beach notwithstanding warnings as to the presence of protected sea turtles' nests and the presence of pedalos and small boats in the sea area of the beaches concerned, and has held that a Member State fails to fulfil its obligations under Article 12(1)(b) and (d) of the directive where it does not take all the requisite specific measures to prevent the deliberate disturbance of the animal species concerned during its breeding period or the deterioration or destruction of its breeding sites (see Case C-103/00 *Commission* v *Greece* [2002] ECR I-1147, paragraphs 36 and 39, and the Opinion of Advocate General Léger in that case, at point 57).

71 For the condition as to 'deliberate' action in Article 12(1)(a) of the directive to be met, it must be proven that the author of the act intended the capture or killing of a specimen belonging to a protected animal species or, at the very least, accepted the possibility of such capture or killing.

72 It is common ground, however, that the contested permit related to fox hunting. Accordingly, the permit in itself is not intended to allow the capture of otters.

73 Furthermore, it must be borne in mind that the presence of otters in the area concerned has not been formally proven, so that it has also not been established that by issuing the contested permit for fox hunting the Spanish authorities knew that they risked endangering otters.

74 It must therefore be held that the requisite criteria, as set out in paragraph 71 of this judgment, for fulfilling the condition relating that the capture or killing of a specimen belonging to a protected animal species is deliberate have not been met in the present case.

75 The Commission's action must therefore be dismissed.

Costs

76 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Spain has applied for costs and the Commission has been unsuccessful, the Commission

must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Dismisses the action;**

2. **Orders the Commission of the European Communities to pay the costs.**

[Signatures]

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* Language of the case: Spanish.

JUDGMENT OF THE COURT (Fourth Chamber)

31 January 2008 (*)

(Freedom to provide services – Electronic communications – Television broadcasting activities – New common regulatory framework – Allocation of radio frequencies)

In Case C-380/05,

REFERENCE for a preliminary ruling under Article 234 EC, from the Consiglio di Stato (Italy), made by decision of 19 April 2005, received at the Court on 18 October 2005, in the proceedings

Centro Europa 7 Srl

v

Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni,

Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni,

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, G. Arestis, R. Silva de Lapuerta, J. Malenovský and T. von Danwitz, Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 30 November 2006,

after considering the observations submitted on behalf of:

– Centro Europa 7 Srl, by A. Pace, R. Mastroianni and O. Grandinetti, avvocati,

– the Italian Government, by I.M. Braguglia, acting as Agent, assisted by P. Gentili, avvocato dello Stato,

– the Commission of the European Communities, by F. Benyon, E. Traversa, M. Shotter and F. Amato, acting as Agents, assisted by L.G. Radicati di Brozolo, avvocato,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2007,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation, in the national terrestrial television

broadcasting sector, of the provisions of the EC Treaty on freedom to provide services and competition, Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ 2002 L 108, p. 33) ('the Framework Directive'), Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ 2002 L 108, p. 21) ('the Authorisation Directive'), Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services (OJ 2002 L 249, p. 21) ('the Competition Directive'), and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950 ('the ECHR'), in so far as Article 6 EU refers thereto.

2 The reference has been made in proceedings between Centro Europa 7 Srl ('Centro Europa 7') and the Ministero delle Comunicazioni, the Autorità per le garanzie nelle comunicazioni and the Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni (collectively, 'the defendants in the main proceedings').

Relevant provisions

Community legislation

3 The new common regulatory framework for electronic communications services, electronic communications networks, associated facilities and associated services ('the NCRF') consists of the Framework Directive and four specific directives, including the Authorisation Directive, which are supplemented by the Competition Directive.

The Framework Directive

4 Article 1(1) of the Framework Directive provides as follows:

'This Directive establishes a harmonised framework for the regulation of electronic communications services, electronic communications networks, associated facilities and associated services. It lays down tasks of national regulatory authorities and establishes a set of procedures to ensure the harmonised application of the regulatory framework throughout the Community.'

5 Article 1(3) of the Framework Directive provides:

'This Directive as well as the Specific Directives are without prejudice to measures taken at Community or national level, in compliance with Community law, to pursue general interest objectives, in particular relating to content regulation and audio-visual policy.'

6 Article 2 of the Framework Directive provides:

'For the purposes of this Directive:

(a) "electronic communications network" means transmission systems … which permit the conveyance of signals by wire, by radio, by optical or by other electromagnetic means, including satellite networks, fixed … and mobile terrestrial networks, … networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed;

…

(c) “electronic communications service” means a service normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting …

…’

7 Article 8 of the Framework Directive, entitled ‘Policy objectives and regulatory principles’, provides:

‘1. Member States shall ensure that in carrying out the regulatory tasks specified in this Directive and the Specific Directives, the national regulatory authorities take all reasonable measures which are aimed at achieving the objectives set out in paragraphs 2, 3 and 4. Such measures shall be proportionate to those objectives.

…

2. The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by inter alia:

…

(b) ensuring that there is no distortion or restriction of competition in the electronic communications sector;

…

(d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

3. The national regulatory authorities shall contribute to the development of the internal market by inter alia:

(a) removing remaining obstacles to the provision of electronic communications networks, associated facilities and services and electronic communications services at European level;

…’

8 Article 9(1) of the Framework Directive provides that ‘Member States shall ensure the effective management of radio frequencies for electronic communication services in their territory’ and ‘that the allocation and assignment of such radio frequencies by national regulatory authorities are based on objective, transparent, non-discriminatory and proportionate criteria’.

9 Article 28(1) of the Framework Directive states that ‘Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive not later than 24 July 2003’ and ‘shall apply those measures from 25 July 2003.’

The Authorisation Directive

10 Article 1 of the Authorisation Directive provides:

‘1. The aim of this Directive is to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the Community.

2. This Directive shall apply to authorisations for the provision of electronic communications networks and services.’

11 Article 2(1) of the Authorisation Directive provides:

‘For the purposes of this Authorisation Directive, the definitions set out in Article 2 of … [the Framework Directive] shall apply.’

12 Article 2(2)(a) of the Authorisation Directive provides that ‘general authorisation’ means ‘a legal framework established by the Member State ensuring rights for the provision of electronic communications networks or services and laying down sector specific obligations that may apply to all or to specific types of electronic communications networks and services, in accordance with this Directive’.

13 Article 3 of the Authorisation Directive, entitled ‘General authorisation of electronic communications networks and services’, provides:

‘1. Member States shall ensure the freedom to provide electronic communications networks and services, subject to the conditions set out in this Directive. To this end, Member States shall not prevent an undertaking from providing electronic communications networks or services, except where this is necessary for the reasons set out in Article 46(1) of the Treaty.

2. The provision of electronic communications networks or the provision of electronic communications services may, without prejudice to the specific obligations referred to in Article 6(2) or rights of use referred to in Article 5, only be subject to a general authorisation. The undertaking concerned may be required to submit a notification but may not be required to obtain an explicit decision or any other administrative act by the national regulatory authority before exercising the rights stemming from the authorisation. Upon notification, when required, an undertaking may begin activity, where necessary subject to the provisions on rights of use in Articles 5, 6 and 7.

…’

14 Article 5 of the Authorisation Directive, entitled ‘Rights of use for radio frequencies and numbers’, reads as follows:

‘1. Member States shall, where possible, in particular where the risk of harmful interference is negligible, not make the use of radio frequencies subject to the grant of individual rights of use but shall include the conditions for usage of such radio frequencies in the general authorisation.

2. Where it is necessary to grant individual rights of use for radio frequencies and numbers, Member States shall grant such rights, upon request, to any undertaking providing or using networks or services under the general authorisation, subject to the provisions of Articles 6, 7 and 11(1)(c) of this Directive and any other rules ensuring the efficient use of those resources in accordance with … [the Framework Directive].

Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to

pursuing general interest objectives in conformity with Community law, such rights of use shall be granted through open, transparent and non-discriminatory procedures …

…

5. Member States shall not limit the number of rights of use to be granted except where this is necessary to ensure the efficient use of radio frequencies in accordance with Article 7.'

15 Article 7 of the Authorisation Directive, entitled 'Procedure for limiting the number of rights of use to be granted for radio frequencies', provides:

'1. Where a Member State is considering whether to limit the number of rights of use to be granted for radio frequencies, it shall inter alia:

(a) give due weight to the need to maximise benefits for users and to facilitate the development of competition;

…

(c) publish any decision to limit the granting of rights of use, stating the reasons therefore;

(d) after having determined the procedure, invite applications for rights of use; and

(e) review the limitation at reasonable intervals or at the reasonable request of affected undertakings.

…

3. Where the granting of rights of use for radio frequencies needs to be limited, Member States shall grant such rights on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate. Any such selection criteria must give due weight to the achievement of the objectives of Article 8 of … [the Framework Directive].

…'

16 Article 17 of the Authorisation Directive, entitled 'Existing authorisations', reads as follows:

'1. Member States shall bring authorisations already in existence on the date of entry into force of this Directive into line with the provisions of this Directive by at the latest the date of application referred to in Article 18(1), second subparagraph.

…'

17 Article 18(1) of the Authorisation Directive states that the 'Member States shall adopt and publish the laws, regulations and administrative provisions necessary to comply with this Directive by 24 July 2003 at the latest' and 'shall apply those measures from 25 July 2003.'

The Competition Directive

18 According to points 1 and 3 of Article 1 of the Competition Directive, that directive is to apply to electronic communications networks and electronic communications services, as defined in Article 2(a) and (c) of the Framework Directive.

19 Article 2 of the Competition Directive, entitled ‘Exclusive and special rights for electronic communications networks and electronic communications services’, provides:

‘1. Member States shall not grant or maintain in force exclusive or special rights for the establishment and/or the provision of electronic communications networks, or for the provision of publicly available electronic communications services.

2. Member States shall take all measures necessary to ensure that any undertaking is entitled to provide electronic communications services or to establish, extend or provide electronic communications networks.

…

4. Member States shall ensure that a general authorisation granted to an undertaking to provide electronic communications services or to establish and/or provide electronic communications networks, as well as the conditions attached thereto, shall be based on objective, non-discriminatory, proportionate and transparent criteria.

…’

20 Article 4 of the Competition Directive, entitled ‘Rights of use of frequencies’, states:

‘Without prejudice to specific criteria and procedures adopted by Member States to grant rights of use of radio frequencies to providers of radio or television broadcast content services with a view to pursuing general interest objectives in conformity with Community law:

1. Member States shall not grant exclusive or special rights of use of radio frequencies for the provision of electronic communications services.

2. The assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria.’

21 Article 9 of the Competition Directive provides:

‘Member States shall supply to the Commission not later than 24 July 2003 such information as will allow the Commission to confirm that the provisions of this Directive have been complied with.’

National legislation

Law No 249 of 31 July 1997

22 Law No 249 of 31 July 1997 (Ordinary Supplement to GURI No 177 of 31 July 1997) (‘Law No 249/1997’), which came into force on 1 August 1998, set up the Autorità per le garanzie nelle comunicazioni (Communications Regulatory Authority; ‘the Autorità’).

23 Article 2(6) of Law No 249/1997 imposed restrictions on concentrations in the television broadcasting sector, prohibiting the same operator from holding rights permitting it to broadcast at national level on more than 20% of the television channels operating on terrestrial frequencies.

24 Article 3(1) of Law No 249/1997 provided that operators authorised to broadcast under the previous legal framework could continue to broadcast at national and local level until new rights were granted or applications for new rights were rejected but, in any event, not after 30 April 1998.

25 Article 3(2) of Law No 249/1997 provided for the adoption by the Autorità of a national plan for the allocation of radio frequencies for broadcast television ('the national allocation plan for radio frequencies') by 31 January 1998 at the latest and, on the basis of that plan, the allocation of new rights by 30 April 1998 at the latest.

26 According to the information in the decision making the reference, borne out by the observations of the Italian Government and the Commission of the European Communities, the national allocation plan for radio frequencies was adopted on 30 October 1998 by Decision No 68/98 of the Autorità, and that authority adopted, by Decision No 78/98 of 1 December 1998, the regulation concerning the conditions and detailed rules governing the grant of television broadcasting rights on analogue terrestrial frequencies.

27 Article 3(6) of Law No 249/1997 provided for transitional arrangements for the existing national television channels exceeding the limits for concentration imposed in Article 2(6) of that Law ('the channels in breach of the threshold') by allowing those channels to continue to broadcast on terrestrial radio frequencies on a transitional basis after 30 April 1998, in compliance with the obligations imposed on the channels holding rights, provided that the programmes were broadcast on satellite or cable at the same time.

28 Under Article 3(7) of Law No 249/1997, the Autorità was entrusted with determining the period within which, having regard to the real and significant increase in users watching programmes by cable or satellite, the channels in breach of the threshold were to broadcast their programmes only by satellite or cable, thus relinquishing terrestrial radio frequencies.

29 According to the information in the decision making the reference and supported by the observations of the Italian Government and the Commission, by judgment No 466 of the Corte costituzionale (Constitutional Court) (Italy) of 20 November 2002 (GURI of 27 November 2002), that deadline was fixed at 31 December 2003.

Law No 66 of 20 March 2001

30 According to the case-file, under Decree-Law No 5 of 23 January 2001 (GURI No 19 of 24 January 2001, p. 5), converted into law and amended by Law No 66 of 20 March 2001 (GURI No 70 of 24 March 2001, p. 3), the operators lawfully engaged in television broadcasting activities on terrestrial frequencies were authorised to continue to broadcast until the national allocation plan for radio frequencies for digital television was implemented.

Law No 43 of 24 February 2004 and Law No 112 of 3 May 2004

31 Article 1 of Decree-Law No 352 of 24 December 2003 (GURI No 300 of 29 December 2003, p. 4; 'Decree-Law No 352/2003'), converted into law and amended by Law No 43 of 24 February 2004 (GURI No 47 of 26 February 2004, p. 4), authorised the channels in breach of the threshold to continue their broadcasts on the televised analogue and digital networks pending the completion of an inquiry into the development of digital television channels.

32 Law No 112 of 3 May 2004 (Ordinary Supplement to GURI No 82 of 5 May 2004) ('Law No 112/2004') specified the different stages for the launch of the phase of digital broadcasting on terrestrial radio frequencies.

33 Article 23 of Law No 112/2004 provides:

1. ‘Until the national allocation plan for radio frequencies for digital television has been implemented, the operators exercising, on any basis, television broadcasting activities at national or local level who fulfil the conditions necessary to obtain authorisation for experimental digital broadcasting on terrestrial frequencies, under … Decree-Law No 5 [of 23 January 2001], now, after amendment, Law No 66 [of 20 March 2001], may carry out, including by simultaneous repeats of programmes already broadcast using analogue technology, the experimentation in question, until the conversion of the networks has been completed, and apply, from the date of entry into force of this Law, … for the licences and authorisations necessary to broadcast using digital technology on terrestrial frequencies.

2. Experimental digital broadcasting may be carried out by means of installations lawfully exercising analogue activities on the date of the entry into force of this Law.

3. In order to allow digital networks to be set up, transfers of installations or branches of undertakings between operators lawfully televising at national or local level shall be authorised, on condition that acquisitions are intended for digital broadcasting.

…

5. With effect from the date of entry into force of this Law, the licence to operate a television network shall be issued, upon request, to persons lawfully engaged in television broadcasting pursuant to a grant of rights or under the general consent provided for in subparagraph 1, where they show that they have attained a coverage of not less than 50% of the population or of the local catchment area.

…

9. In order to facilitate the conversion of the analogue system to the digital system, the broadcasting of television programmes shall be carried on through installations lawfully operating on the date of the entry into force of this Law …’

The dispute in the main proceedings and the questions referred for a preliminary ruling

34 The dispute in the main proceedings relates to compensation for the harm which Centro Europa 7 claims to have suffered as a result of the fact that the defendants in the main proceedings did not allocate to it radio frequencies for terrestrial analogue television broadcasting.

35 On 28 July 1999, Centro Europa 7 was granted by the competent Italian authorities, pursuant to Law No 249/1997, rights for terrestrial television broadcasting at national level authorising the installation and use of a television network using analogue technology. For the allocation of radio frequencies, the rights referred to the national allocation plan for radio frequencies, which was adopted on 30 October 1998. According to the national court, however, that plan has not been implemented, with the result that, although it has rights, Centro Europa 7 has never been in a position to broadcast for lack of radio frequencies.

36 Centro Europa 7 brought an action before the Tribunale amministrativo regionale (Regional Administrative Court) del Lazio (Italy) seeking, inter alia, a declaration that it was entitled to the allocation of frequencies and to compensation for the damage suffered.

37 That court dismissed that application by judgment of 16 September 2004.

38 According to the decision making the reference, in the appeal brought by Centro Europa 7 against that

judgment before the Consiglio di Stato (Council of State) (Italy), the defendants in the main proceedings invoke against it, inter alia, Law No 112/2004.

39 While stating, in that decision, that it restricted its examination to Centro Europa 7's application for damages and did not intend to rule at that stage on the application for the grant of radio frequencies, the Consiglio di Stato observes that the failure to allocate radio frequencies to Centro Europa 7 was caused by essentially legislative factors.

40 It notes that Article 3(2) of Law No 249/1997 enabled the 'de facto users' of radio frequencies, authorised to carry on their activity under the earlier system, to continue broadcasting until new rights were granted or applications for new rights were rejected and, in any event, not after 30 April 1998.

41 It notes, also, that Article 3(7) of Law No 249/1997 authorised the continuation of those broadcasts by referring back to the Autorità to fix a deadline, on the sole condition that the programmes are broadcast simultaneously on terrestrial radio frequencies and by satellite or cable. In the absence of a date fixed by the Autorità, the Corte costituzionale set 31 December 2003 as the date by which the programmes broadcast by the channels in breach of the threshold would have to be broadcast only by satellite or cable, so that, according to the national court, the radio frequencies to be allocated to Centro Europa 7 would be freed up.

42 According to the national court, that deadline was, however, not complied with following the intervention of the national legislature, as Article 1 of Decree-Law No 352/2003, now Law No 43 of 24 February 2004, extended the activities of the channels in breach of the threshold pending the completion of an inquiry by the Autorità into the development of digital channels, then by virtue of Law No 112/2004, in the light of, inter alia, Article 23(5) thereof.

43 Law No 112/2004 extended, by a general authorisation mechanism, the possibility for the channels in breach of the threshold to continue to broadcast on the terrestrial radio frequencies until the national allocation plan for radio frequencies for digital television was implemented, with the result that those channels were not required to free up the radio frequencies intended for allocation to the rights holders.

44 According to the national court, that Law therefore had the effect of blocking the radio frequencies intended for allocation to the rights holders and of preventing operators other than those de facto broadcasting on terrestrial frequencies from participating in the digital television experimentation.

45 Since Centro Europa 7 disputed the compatibility of Decree-Law No 352/2003 and Law No 112/2004 with Community law, the Consiglio di Stato asks whether the Italian legislation, starting from Law No 249/1997, is compatible with the Treaty provisions on freedom to provide services and on competition, Articles 8 and 9(1) of the Framework Directive, Articles 5, 7 and 17 of the Authorisation Directive and the principle of pluralism of information sources, part of Article 10 of the ECHR, as a general principle of Community law.

46 In those circumstances, the Consiglio di Stato decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does Article 10 of the ECHR, as referred to in Article 6 of the [EU] Treaty, guarantee pluralism in the broadcasting sector, thus requiring the Member States to secure pluralism and competition in the sector based on an antitrust system which, in step with technological development, secures network access and a multiplicity of operators and renders duopolistic market behaviour unlawful?

2. Do the provisions of the … Treaty which secure freedom to provide services and competition, on

the interpretation provided by the Commission in the interpretative communication of 29 April 2000 on grants of rights under Community law, require the principles governing that matter to be capable of ensuring equal non-discriminatory treatment, as well as transparency, proportionality and respect for the rights of individuals; and are those provisions and principles of the Treaty infringed by Article 3(7) of Italian Law No 249/1997, and by Article 1 of Decree-Law [No 352/2003], inasmuch as those provisions enabled individuals operating networks in breach of the limits laid down by competition law to continue to operate, thereby excluding operators, such as the appellant undertaking, which, though in possession of the relevant rights granted following a regular competitive procedure, were unable to carry on the activity in respect of which such rights were granted because of a failure to allocate frequencies owing to their insufficient number or scarcity as a result of the continued exercise of rights by the owners of networks in breach of the limits on concentrations under antitrust law?

3. With effect from 25 July 2003, does Article 17 of [the Authorisation Directive] render that directive directly effective in the internal legal order and oblige a Member State which has granted broadcasting rights (right to install networks or provide electronic communication services or the right to use frequencies) to bring them into line with Community rules; and does that entail the need actually to allocate the frequencies necessary for carrying on the activity in question?

4. Do Article 9 of [the Framework Directive] and Article 5 of the Authorisation Directive providing for transparent and non-discriminatory public procedures (Article 5) conducted on the basis of objective, transparent, non-discriminatory and proportionate criteria (Article 9) preclude a system providing for general authorisation under national law (Article 23(5) of Law No 112/2004); by permitting the continued operation, under that system of networks in breach of limits and not selected under a competitive procedure, do those provisions ultimately impinge on the Community-law rights under (Article 17(2) of the … Authorisation Directive) of other undertakings which are prevented from operating even though they have been successful in competitive procedures?

5. Do Article 9 of the [Framework Directive], the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive, and Article 4 of the [Competition Directive], require the Member States to arrange for the cessation, at least as from 25 July 2003 (see Article 17 of the Authorisation Directive), of a situation of de facto use of frequencies (use of facilities without grant of rights or authorisations issued following a selection procedure), on the basis of the broadcasting system already in place, so that broadcasting cannot be undertaken where there is no proper planning in regard to matters concerning the airwaves and no logical increase in pluralism, in contravention of rights awarded by the Member State following a public procedure?

6. Is the derogation in the second subparagraph of Article 5(2) of the … Authorisation Directive, and in Article 4 of the [Competition Directive], available to be relied on by the Member State solely in order to protect pluralism of information and to guarantee the protection of cultural or linguistic diversity and not in favour of operators of networks in breach of the antitrust limits laid down in national competition legislation?

7. In order to benefit from the derogation under Article 5 of [the Authorisation Directive], does the Member State have to indicate the objectives actually pursued by the national derogatory rules?

8. May that derogation be applied, in addition to the case of the concessionary of the public broadcasting service (RAI in Italy), in favour also of private operators who have been unsuccessful in competitive procedures and to the detriment of undertakings who may have duly been granted rights following a competitive procedure?

9. Under Community rules (primary and secondary legislation) on workable competition in the broadcasting sector, ought the national legislature to have avoided extending the old transitory analogue system on the advent of the terrestrial digital system (and the attendant generalised transition to digital)? Only if analogue broadcasting is ended and replaced by the switch to digital will it be possible to reallocate frequencies freed for various uses. If terrestrial digital is merely operated alongside analogue, there will be an attendant accentuating of the scarcity of available frequencies owing to the existence of analogue and digital transmission in parallel (simulcast)?

10. Lastly, is the pluralism of sources of information and of competition in the broadcasting sector, which is guaranteed by European law, secured by national rules, such as Law No 112/2004 providing for a new limit of 20 per cent of resources linked to a new very wide criterion (the ICS – integrated communications system – Article 2(g) and Article 15 of Law No 112/2004)? This criterion also brings in activities which do not affect media pluralism, whereas under antitrust law the "relevant market" is constructed normally by differentiating the markets in the broadcasting sector by drawing a distinction between pay TV and non-pay TV operating via the airwaves (reference is made inter alia to [Commission Decision of 21 March 2000 declaring a concentration to be compatible with the common market (Case No COMP/JV. 37 – BSKYB/Kirch Pay TV], based on [Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings] Merger Procedure 21/03/2000 and [Commission Decision of 2 April 2003 declaring a concentration to be compatible with the common market and the EEA Agreement (Case No COMP/M. 2876 – Newscorp/Telepiù), based on [Regulation No 4064/89].'

The questions

47 By its questions, the national court asks the Court, essentially, to rule on the interpretation of the provisions of the Treaty on freedom to provide services and competition, the Framework Directive, the Authorisation Directive, the Competition Directive and Article 10 of the ECHR, in so far as Article 6 EU refers thereto.

The jurisdiction of the Court and the admissibility of the questions

48 As a preliminary point, it must be stated, first, that by some of its questions the national court is inviting the Court to give a ruling on the compatibility with Community law of certain provisions of the Italian legislation relevant in this case.

49 It is not the task of the Court, in preliminary ruling proceedings, to rule upon the compatibility of provisions of national law with Community law or to interpret national legislation or regulations (see Case C-151/02 *Jaeger* [2003] ECR I-8389, paragraph 43, and Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 24 and the case-law cited).

50 The Court has, however, repeatedly held that it is competent to give the national court full guidance on the interpretation of Community law in order to enable it to determine the issue of compatibility for the purposes of the case before it (see, inter alia, Case C-292/92 *Hünermundand Others* [1993] ECR I-6787, paragraph 8, and *Enirisorse*, paragraph 24).

51 It is therefore appropriate for the Court, in the present case, to restrict its analysis to the provisions of Community law by providing an interpretation of them which will be of use to the national court, which has the task of determining the compatibility of the provisions of national law with Community law, for the purposes of deciding the dispute before it.

52 Secondly, it must be recalled that, according to settled case-law, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59, and Case C-466/04 *Acereda Herrera* [2006] ECR I-5341, paragraph 47).

53 None the less, the Court has no jurisdiction to give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation of a Community rule bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (*Bosman*, paragraph 61; *Acereda Herrera*, paragraph 48; and Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25).

54 In that regard, the decision making the reference must set out the precise reasons why the national court was unsure as to the interpretation of Community law and why it considered it necessary to refer questions to the Court for a preliminary ruling. Against that background, it is essential that the national court provide at the very least some explanation of the reasons for the choice of the Community provisions which it requires to be interpreted and of the link it establishes between those provisions and the national legislation applicable to the dispute in the main proceedings (order in Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, paragraph 9; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04 *ABNA and Others* [2005] ECR I-10423, paragraph 46; Joined Cases C-338/04, C-359/04 and C-360/04 *Placanica and Others* [2007] ECR I-1891, paragraph 34; and Case C-295/05 *Asemfo* [2007] ECR I-2999, paragraph 33).

55 It must be stated, however, that as regards its tenth question, the national court does not give any indication as to the Community provisions which it requires to be interpreted or any explanation of the link it establishes between those provisions and the dispute in the main proceedings or the subject-matter of that dispute.

56 The tenth question is for that reason inadmissible.

57 Thirdly, the need to provide an interpretation of Community law which will be of use to the national court makes it necessary that the referring court should define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393, paragraph 6; Case C-341/95 *Bettati* [1998] ECR I-4355, paragraph 67; Case C-67/96 *Albany International* [1999] ECR I-5751, paragraph 39; and *Cipolla and Others*, paragraph 25).

58 Those requirements are of particular importance in the area of competition, which is characterised by complex factual and legal situations (see *Telemarsicabruzzo and Others*, paragraph 7; *Bettati*, paragraph 68; and *Albany International*, paragraph 39).

59 In this case, as the Advocate General notes in point 27 of his Opinion, it seems that, by asking for an interpretation of the provisions of the Treaty on competition in its second question, the referring court has in mind, essentially, Article 86(1) EC, read in conjunction with Article 82 EC.

60 In accordance with the Court's case-law, a Member State infringes the prohibitions laid down by those two provisions where the undertaking in question, merely by exercising the special or exclusive

rights conferred on it, is led to abuse its dominant position or where such rights are liable to create a situation in which that undertaking is led to commit such abuses (Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 127; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089, paragraph 39; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 23).

61 However, the decision making the reference does not contain any indication regarding, inter alia, the definition of the relevant market, the calculation of the market shares held by the various undertakings operating on that market, and the supposed abuse of a dominant position.

62 Consequently, it must be held that, in so far as it relates to the Treaty provisions on competition, the second question is inadmissible (see, to that effect, Case C-134/03 *Viacom Outdoor* [2005] ECR I-1167, paragraphs 25 to 29).

63 The ninth question must be regarded as being inadmissible on the same grounds.

64 Fourthly, it is necessary to determine whether the Court has jurisdiction in the present case to give a ruling on Article 49 EC, since it is common ground that all aspects of the main proceedings are confined within only one Member State.

65 National legislation such as that at issue in the main proceedings, which applies without distinction to Italian nationals and to nationals of other Member States, is generally likely to fall within the scope of the provisions on freedom to provide services established by the Treaty only to the extent to which it applies to situations related to intra-Community trade (see, to that effect, Case 286/81 *Oosthoek's Uitgeversmaatschappij* [1982] ECR 4575, paragraph 9, and Case C-6/01 *Anomar and Others* [2003] ECR I-8621, paragraph 39).

66 It is possible, in the main proceedings, that undertakings established in Member States other than the Italian Republic have been or would be interested in providing the services concerned (see, to that effect, Case C-87/94 *Commission* v *Belgium* [1996] ECR I-2043, paragraph 33, and Case C-458/03 *Parking Brixen* [2005] ECR I-8585, paragraph 55).

67 The finding of a link with intra-Community trade will be presumed if the market in question has a certain cross-border interest (Case C-507/03 *Commission* v *Ireland* [2007] ECR I-0000, paragraph 29), which it is for the national court to determine.

68 In any event, it is necessary to answer the second question referred to the Court in this case since it relates to Article 49 EC.

69 Such a reply might be useful to the national court if its national law were to require that an Italian national must be allowed to enjoy the same rights as those which a national of another Member State would derive from Community law in the same situation (Case C-448/98 *Guimont* [2000] ECR I-10663, paragraph 23; Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99 *Reisch and Others* [2002] ECR I-2157, paragraph 26; *Anomar and Others*, paragraph 41; *Servizi Ausiliari Dottori Commercialisti*, paragraph 29; and *Cipolla and Others*, paragraph 30).

70 Consequently, the Court has jurisdiction to give a ruling on the interpretation of Article 49 EC.

71 The second question is therefore admissible in so far as it relates to Article 49 EC.

The second, fourth and fifth questions

72 The second, fourth and fifth questions all relate, essentially, to whether the provisions of Article 49 EC or the NCRF preclude, in television broadcasting matters, national legislation the application of which means that it is impossible for an operator holding rights to broadcast without the allocation of broadcasting radio frequencies.

73 It is true that, in respect of the second question, the Court can answer from the point of view of Article 49 EC only in so far as that question relates to Italian legislation, namely Article 3(7) of Law No 249/1997, which pre-dates the application of the NCRF, as is clear from Article 28(1) of the Framework Directive, Article 18(1) of the Authorisation Directive and Article 9 of the Competition Directive.

74 Likewise, the fourth and fifth questions refer only to the NCRF, since they concern national legislation subsequent to the date of application of the NCRF, namely the provisions of Law No 112/2004.

75 First, however, the second question also relates to Italian legislation subsequent to the applicability of the NCRF, namely Article 1 of Decree-Law No 352/2003.

76 Secondly, as pointed out by the Commission in its observations to the Court, the NCRF implemented provisions of the Treaty, in particular those on freedom to provide services, in the area of electronic communications networks and services, as defined in Articles 2(a) and (c) of the Framework Directive, Article 2(1) of the Authorisation Directive and points 1 and 3 of Article 1 of the Competition Directive.

77 The second, fourth and fifth questions must therefore be dealt with together, since the answers relating to the NCRF are relevant only from its date of application, as set out in Article 28(1) of the Framework Directive, Article 18(1) of the Authorisation Directive and Article 9 of the Competition Directive.

78 In order to provide an answer which is of use to the national court, it should be recalled that the Treaty does not require national monopolies having a commercial character to be abolished completely, but requires them to be adjusted in such a way as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States (Case C-189/95 *Franzén* [1997] ECR I-5909, paragraph 38 and the case-law cited).

79 However, Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 30).

80 In the area of electronic communications networks and services, those principles were implemented by the NCRF.

81 Article 8 of the Framework Directive places on the Member States the obligation to ensure that the national regulatory authorities take all reasonable measures aimed at promoting competition in the provision of electronic communications services, ensuring that there is no distortion or restriction of competition in the electronic communications sector and removing remaining obstacles to the provision of those services at European level.

82 Likewise, Article 2(2) of the Competition Directive requires the Member States to take all measures necessary to ensure that any undertaking is entitled to provide electronic communications services or to establish, extend or provide electronic communications networks.

83 Article 3(1) of the Authorisation Directive also enjoins the Member States to ensure the freedom to provide electronic communications networks and services and prohibits them from preventing an undertaking from providing those networks or services, except where this is necessary for the reasons set out in Article 46(1) EC.

84 For that purpose, Article 3(2) of the Authorisation Directive states that the provision of electronic communications networks or electronic communications services may be subject only to a general authorisation.

85 On that point, it must be stated that, in the area of television broadcasting, freedom to provide services, as enshrined in Article 49 EC and implemented in this area by the NCRF, requires not only the grant of broadcasting authorisations, but also the grant of broadcasting radio frequencies.

86 An operator cannot exercise effectively the rights which it derives from Community law in terms of access to the television broadcasting market without broadcasting radio frequencies.

87 To that end, Article 9(1) of the Framework Directive provides that the 'Member States shall ensure the effective management of radio frequencies for electronic communication services in their territory'.

88 Similarly, Article 5(1) of the Authorisation Directive states that, where possible, Member States may not, in particular where the risk of harmful interference is negligible, make the use of radio frequencies subject to the grant of individual rights of use but are to include the conditions for usage of such radio frequencies in the general authorisation.

89 Moreover, point 1 of Article 4 of the Competition Directive prohibits the Member States from granting exclusive or special rights of use of radio frequencies for the provision of electronic communications services.

90 In the present case, the national court questions the Court on the criteria applied for the grant of radio frequencies for the purpose of operating on the analogue television broadcasting market.

91 The national court is not questioning the Court on the criteria which have been applied, pursuant to Law No 249/1997, for the grant of rights to operate on the analogue television broadcasting market. Nor are those criteria disputed by Centro Europa 7, either before the national court or in the observations it has submitted to the Court, since Centro Europa 7 was granted rights in accordance with those criteria.

92 There is therefore no need for the Court to give a ruling on those criteria.

93 The national court has doubts as to the compatibility of Law No 249/1997 with Community law only in so far as Article 3(7) of that Law set up transitional arrangements in favour of the incumbent networks, which had the effect of preventing operators without radio frequencies, such as Centro Europa 7, from accessing the market in question.

94 The national court is also questioning the Court on the criteria applied, pursuant to Law No 112/2004, for granting rights to operate on the digital and analogue television broadcasting market, only in so far as those criteria consolidated the transitional arrangements structured in favour of the existing networks in Article 1 of Decree-Law No 352/2003, which had the effect of precluding the grant to operators of radio frequencies for the purpose of operating on the analogue television broadcasting market, even though they had been granted rights under Law No 249/1997.

95 In that regard, the successive application of the transitional arrangements structured in favour of the incumbent networks in Article 3(7) of Law No 249/1997 and Article 1 of Decree-Law No 352/2003 had the effect of preventing operators without broadcasting radio frequencies from accessing the market in question.

96 The view must also be taken that, by issuing a general authorisation to operate on the broadcasting services market only to the incumbent networks, Article 23(5) of Law No 112/2004 consolidated the restrictive effect confirmed in the preceding paragraph.

97 First, by limiting de facto the number of operators able to broadcast on the market in question, those measures are and/or were likely to hinder the provision of services in the area of television broadcasting.

98 Secondly, those measures have and/or have had the effect of freezing the structures on the national market and protecting the position of the operators already active on that market.

99 Consequently, Article 49 EC and, from the date on which they became applicable, Article 9(1) of the Framework Directive, Article 5(1) of the Authorisation Directive and point 1 of Article 4 of the Competition Directive preclude such measures unless they are justified.

100 In that respect, it is clear from the case-law of the Court that a licensing system which restricts the number of operators in the national territory is capable of being justified by general-interest objectives (see, to that effect, *Placanica and Others*, paragraph 53), on condition that the restrictions resulting from them are appropriate and do not go beyond what is necessary to attain those objectives.

101 Thus, the NCRF expressly allows the Member States, under Article 1(3) of the Framework Directive, to adopt or maintain, in compliance with Community law, provisions pursuing general-interest objectives, in particular relating to audio-visual policy.

102 Likewise, the first subparagraph of Article 5(2) of the Authorisation Directive allows the Member States to grant rights to the use of radio frequencies on an individual basis with a view to complying with the objective of the efficient use of radio frequencies, as referred to by the Framework Directive.

103 However, as the Advocate General stated in points 34 and 37 of his Opinion, in order for such arrangements, which generally adversely affect Article 49 EC and the NCRF, to be justified they must not only comply with general-interest objectives but also be structured on the basis of objective, transparent, non-discriminatory and proportionate criteria (see, to that effect, *Placanica and Others*, paragraph 49 and the case-law cited).

104 Accordingly, Article 9(1) of the Framework Directive provides that the Member States are to ensure that the allocation and assignment of radio frequencies by the national regulatory authorities are based on objective, transparent, non-discriminatory and proportionate criteria.

105 Furthermore, where it is necessary to grant individual rights to the use of radio frequencies, those rights must be granted, under the second subparagraph of Article 5(2) of the Authorisation Directive, ‘through open, transparent and non-discriminatory procedures’.

106 Likewise, pursuant to Article 7(3) of the Authorisation Directive, ‘[w]here the granting of rights of use for radio frequencies needs to be limited, Member States shall grant such rights on the basis of selection criteria which must be objective, transparent, non-discriminatory and proportionate’.

107 That requirement is backed up by point 2 of Article 4 of the Competition Directive, under which 'the assignment of radio frequencies for electronic communication services shall be based on objective, transparent, non-discriminatory and proportionate criteria'.

108 In the main proceedings, according to the information supplied by the national court, under Law No 249/1997 the allocation of radio frequencies to a limited number of operators was not carried out in accordance with such criteria.

109 First, those radio frequencies were allocated de facto to the incumbent networks under the transitional arrangements adjusted in Article 3(7) of Law No 249/1997, even though some of those networks had not been granted rights under that Law.

110 Secondly, operators such as Centro Europa 7 were not allocated radio frequencies even though they had been granted rights under that Law.

111 Consequently, irrespective of the objectives pursued by Law No 249/1997 with regard to the system for the grant of radio frequencies to a limited number of operators, the view must be taken that Article 49 EC precluded such a system.

112 The same conclusion must be drawn as regards the system for the grant of radio frequencies to a limited number of operators under Law No 112/2004, in the sense that that scheme was not implemented on the basis of objective, transparent, non-discriminatory and proportionate criteria, in breach of Article 49 EC and, from the date on which they became applicable, Article 9(1) of the Framework Directive, the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive and point 2 of Article 4 of the Competition Directive.

113 Under Law No 112/2004, radio frequencies were granted to the incumbent operators and the latter were authorised to broadcast under the transitional arrangements adjusted in Article 1 of Decree-Law No 352/2003, which merely extended the transitional arrangements set up by Law No 249/1997.

114 In any event, the restrictions established above cannot be justified by the need to ensure a swift transformation to digital television broadcasting.

115 Irrespective of whether such an objective may constitute a general-interest objective capable of justifying such restrictions, it is clear, as the Commission rightly pointed out in the observations which it submitted to the Court, that the Italian legislation, in particular Law No 112/2004, does not merely allocate to the incumbent operators a priority right to obtain radio frequencies, but reserves them that right exclusively, without restricting in time the privileged position assigned to those operators and without providing for any obligation to relinquish the radio frequencies in breach of the threshold after the transfer to digital television broadcasting.

116 Having regard to all of the foregoing considerations, the answer to the second, fourth and fifth questions, taken together, must be that Article 49 EC and, from the date on which they became applicable, Article 9(1) of the Framework Directive, Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive and Article 4 of the Competition Directive must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.

The first and third questions

117 By its first question, the national court asks the Court, essentially, to state whether the provisions of Article 10 of the ECHR, in so far as Article 6 EU refers thereto, preclude, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights, such as Centro Europa 7, to broadcast without the grant of broadcasting radio frequencies.

118 By its third question, the national court questions the Court in regard to the obligation, arising from the possible direct effect of Article 17 of the Authorisation Directive from the date on which it became applicable, on the Member State which has granted rights for television broadcasting activity, to bring those rights into line with Community law and, therefore, to allocate to Centro Europa 7 the broadcasting radio frequencies necessary for it to carry on that activity.

119 By those questions, the national court is thus seeking to determine whether there are infringements of Community law for the purpose of ruling on an application for compensation for the losses flowing from such infringements.

120 It follows from the answer to the second, fourth and fifth questions that Article 49 EC and, from the date on which they became applicable, Article 9(1) of the Framework Directive, Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) of the Authorisation Directive and Article 4 of the Competition Directive must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.

121 That answer, by itself, thus enables the national court to rule on the application made by Centro Europa 7 for compensation for the losses suffered.

122 Consequently, regard being had to the Court's answer to the second, fourth and fifth questions, it is not necessary to rule on the first and third questions.

The sixth, seventh and eighth questions

123 By its sixth, seventh and eighth questions, the national court questions the Court, essentially, in regard to the conditions for the application by the Member States of the derogation laid down in the second subparagraph of Article 5(2) of the Authorisation Directive and Article 4 of the Competition Directive.

124 It follows from the answer to the fourth and fifth questions that, from the date on which they became applicable, the second subparagraph of Article 5(2) of the Authorisation Directive and Article 4 of the Competition Directive must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.

125 Accordingly, it follows from that reply that compliance with objective, transparent, non-discriminatory and proportionate criteria constitutes a necessary condition for the application of the derogation laid down in the second subparagraph of Article 5(2) of the Authorisation Directive and Article 4 of the Competition Directive.

126 There is therefore no need to rule on any other potential conditions for the application of that derogation, such as those referred to in the sixth, seventh and eighth questions.

127 Consequently, having regard to the Court's answer to the fourth and fifth questions, taken together with the second question, there is no need to give a ruling on the sixth, seventh and eighth questions.

Costs

128 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Article 49 EC and, from the date on which they became applicable, Article 9(1) of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), Article 5(1), the second subparagraph of Article 5(2) and Article 7(3) of Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive), and Article 4 of Commission Directive 2002/77/EC of 16 September 2002 on competition in the markets for electronic communications networks and services must be interpreted as precluding, in television broadcasting matters, national legislation the application of which makes it impossible for an operator holding rights to broadcast in the absence of broadcasting radio frequencies granted on the basis of objective, transparent, non-discriminatory and proportionate criteria.

[Signatures]

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* Language of the case: Italian.

Case C-210/06

Cartesio Oktató és Szolgáltató bt

(Reference for a preliminary ruling from the Szegedi Ítélőtábla)

(Transfer of a company seat to a Member State other than the Member State of incorporation − Application for amendment of the entry regarding the company seat in the commercial register − Refusal − Appeal against a decision of a court entrusted with maintaining the commercial register − Article 234 EC − Reference for a preliminary ruling − Admissibility – Definition of 'court or tribunal' − Definition of 'a court or tribunal against whose decisions there is no judicial remedy under national law' − Appeal against a decision making a reference for a preliminary ruling – Jurisdiction of appellate courts to order revocation of such a decision – Freedom of establishment − Articles 43 EC and 48 EC)

Summary of the Judgment

1. *Preliminary rulings – Reference to the Court – National court or tribunal for the purposes of Article 234 EC – Definition*

   (Art. 234 EC)

2. *Preliminary rulings – Admissibility – Limits*

   (Art. 234 EC)

3. *Preliminary rulings – Reference to the Court – Obligation to refer*

   (Art. 234, third para., EC)

4. *Preliminary rulings – Reference to the Court – Jurisdiction of the national courts*

   (Art. 234 EC)

5. *Freedom of movement for persons – Freedom of establishment*

   (Arts 43 EC and 48 EC)

1. A court hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of *inter partes* proceedings.

   Where a court responsible for maintaining a register makes an administrative decision without being required to resolve a legal dispute, it cannot be regarded as exercising a judicial function. In contrast, a court hearing an appeal which has been brought against a decision of a lower court responsible for maintaining a register, rejecting such an application, and which seeks the setting aside of that decision, which allegedly adversely affects the rights of the applicant, is called upon to give judgment in a dispute and is exercising a judicial function. Accordingly, in such a case, the appellate court must, in principle, be regarded as a court or tribunal within the meaning of Article 234 EC, with jurisdiction to refer a question to the Court for a preliminary ruling

   (see paras 57-59, 63, operative part 1)

2. There is a presumption of relevance in favour of questions on the interpretation of Community law referred by a national court, and it is a matter for the national court to define, and not for the Court to verify, in which factual and legislative context they operate. The Court declines to rule on a reference for a preliminary ruling from a national court only where it is quite obvious that the interpretation of Community law that is sought is unrelated to the actual facts of the main action or to its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it.

The presumption of relevance is not rebutted by the fact that, in the case of a reference for a preliminary ruling on the question whether a court is to be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC, the court has already submitted its reference to the Court. It would be contrary to the spirit of cooperation which must guide all relations between national courts and the Court of Justice, and contrary also to the requirements of procedural economy, to require a national court first to seek a preliminary ruling on the sole question whether that court is one of those referred to in the third paragraph of Article 234 EC, before, where appropriate, having to formulate – not until then and by a second reference for a preliminary ruling – questions concerning the provisions of Community law relating to the substance of the dispute before it.

Nor is that presumption of relevance rebutted where uncertainty exists as to whether the dispute is hypothetical. Such uncertainty exists where the evidence at the Court's disposal for the purpose of ruling on the possible incompatibility with Article 234 EC of a national rule governing appeals against a decision making a reference to the Court does not permit it to be found that that decision was not and can no longer be appealed against and now accordingly has the authority of res judicata, in which case the question of that incompatibility would in fact be hypothetical.

(see paras 67, 70, 73, 83-86)

3. A court whose decisions in disputes may be appealed on points of law, cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC, even though the procedural system under which the dispute is to be decided imposes restrictions with regard to the nature of the pleas which may be raised before such a court which must allege a breach of law.

Such restrictions, just as the lack of suspensory effect of the appeal on a point of law, do not have the effect of depriving the parties in a case before a court whose decisions are amenable to such an appeal on a point of law of the possibility of exercising effectively their right to appeal the decision handed down by that court in a dispute. Those restrictions or that lack of suspensory effect do not mean therefore that that court must be classified as a court handing down a decision against which there is no judicial remedy.

(see paras 77-79, operative part 2)

4. Where rules of national law apply relating to the right of appeal against an order for reference, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred on any national court or tribunal by that provision of the Treaty to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.

Although Article 234 EC does not preclude a decision of a court making a reference to the Court from remaining subject to the remedies normally available under national law, nevertheless the outcome of such an appeal cannot limit the jurisdiction conferred by Article 234 EC on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court.

In a situation where a case is pending, for the second time, before a court sitting at the first instance after a judgment originally delivered by that court has been quashed by a supreme court, the court at first instance remains free to refer questions to the Court pursuant to Article 234 EC, regardless of the existence of a rule of national law whereby a court is bound on points of law by the rulings of a superior court.

Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the autonomous jurisdiction which Article 234 EC confers on the referring court to make a reference to the Court would be called into question, if – by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings – the appellate court could prevent the referring court from exercising the right, conferred on it by the EC Treaty, to make a reference to the Court.

In accordance with Article 234 EC, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

It follows that, in a situation where an appeal may be brought against the decision by the referring court to make an order for reference, the Court must – also in the interests of clarity and legal certainty – abide by the decision to make a reference for a preliminary ruling, which must have its full effect so long as it has not been revoked or amended by the referring court, such revocation or amendment being matters on which that court alone is able to take a decision.

(see paras 93-98, operative part 3)

5. As Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

In accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a Member State, and hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.

Moreover, the legislation and agreements in the field of company law envisaged in Articles 44(2)(g) EC and 293 EC have not as yet addressed the differences between the legislation of the various Member States concerning the place of connection of the companies and thus have not yet brought an end to them. Although certain regulations, such as Regulation No 2137/85 on the European Economic Interest Grouping, Regulation No 2157/2001 on the Statute for a European company and Regulation No 1435/2003 on the Statute for a European Cooperative Society, adopted on the basis of Article 308 EC, in fact lay down a set of rules under which it is possible for the new legal entities which they establish to transfer their registered office (*siège statutaire*) and, accordingly, also their real seat (*siège réel*) – both of which must, in effect, be situated in the same Member State – to another Member State without it being compulsory to wind up the original legal person or to create a new legal person, such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer.

Where the company merely wishes to transfer its real seat from one Member State to another, while remaining a company governed by national law, hence without any change as to the national law applicable, the application mutatis mutandis of those regulations cannot in any event lead to the predicted result in such circumstances.

(see paras 109-110, 114-115, 117, 119, operative part 4)

JUDGMENT OF THE COURT (Grand Chamber)

16 December 2008 (*)

(Transfer of a company seat to a Member State other than the Member State of incorporation − Application for amendment of the entry regarding the company seat in the commercial register − Refusal − Appeal against a decision of a court entrusted with maintaining the commercial register − Article 234 EC − Reference for a preliminary ruling − Admissibility – Definition of ‘court or tribunal’ − Definition of ‘a court or tribunal against whose decisions there is no judicial remedy under national law’ − Appeal against a decision making a reference for a preliminary ruling – Jurisdiction of appellate courts to order revocation of such a decision – Freedom of establishment − Articles 43 EC and 48 EC)

In Case C-210/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Szegedi Ítélőtábla (Hungary), made by decision of 20 April 2006, received at the Court on 5 May 2006, in the proceedings in the case of

Cartesio Oktató és Szolgáltató bt,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans (Rapporteur), A. Rosas, K. Lenaerts, A. Ó Caoimh and J.-C. Bonichot, Presidents of Chambers, K. Schiemann, J. Makarczyk, P. Kūris, E. Juhász, L. Bay Larsen and P. Lindh, Judges,

Advocate General: M. Poiares Maduro,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 10 July 2007,

after considering the observations submitted on behalf of:

– CARTESIO Oktató és Szolgáltató bt, by G. Zettwitz and P. Metzinger, ügyvédek,

– the Hungarian Government, by J. Fazekas and P. Szabó, acting as Agents,

– the Czech Government, by T. Boček, acting as Agent,

– Ireland, by D. O'Hagan, acting as Agent, A. Collins SC and N. Travers BL,

– the Netherlands Government, by H.G. Sevenster and M. de Grave, acting as Agents,

– the Polish Government, by E. Ośniecka-Tamecka, acting as Agent,

– the Slovenian Government, by M. Remic, acting as Agent,

– the United Kingdom Government, by T. Harris, acting as Agent, and J. Stratford, Barrister,

– the Commission of the European Communities, by G. Braun and V. Kreuschitz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 22 May 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 48 EC and 234 EC.

2 The reference was made in the context of proceedings brought by CARTESIO Oktató és Szolgáltató bt ('Cartesio'), a limited partnership established in Baja (Hungary), against the decision rejecting its application for registration in the commercial register of the transfer of its company seat to Italy.

National legal context

The law relating to civil procedure

3 Article 10(2) of Law No III of 1952 on civil procedure (a Polgári perrendtartásról szóló 1952. évi III. törvény: 'the Law on civil procedure') states:

‘At second instance:

…

(b) appeals arising from cases dealt with by regional courts or courts of Budapest shall be heard by appeal courts.’

4 Article 155/A of the Law on civil procedure provides that:

‘(1) The court may ask the Court of Justice of the European Communities for a preliminary ruling in accordance with the rules laid down in the Treaty establishing the European Community.

(2) The court shall make the reference for a preliminary ruling by order and shall stay the proceedings …

(3) An appeal may be brought against a decision to make a reference for a preliminary ruling. An appeal cannot be brought against a decision dismissing a request for a reference for a preliminary ruling.

…’

5 Under Article 233(1) of the Law on civil procedure:

‘Save as otherwise provided, appeal proceedings may be brought against the decisions of courts of first instance …’

6 Article 233/A of that law provides that:

‘An appeal may be brought against orders made at second instance in respect of which a right of appeal exists under the rules applicable to proceedings at first instance …’

7 Article 249/A of the Law on civil procedure states that:

‘Appeal proceedings may also be brought against a decision made at second instance dismissing a request for a reference for a preliminary ruling (Article 155/A).’

8 Article 270 of the Law on civil procedure is worded as follows:

‘(1) Save as otherwise provided, the Legfelsőbb Bíróság [Supreme Court] shall hear appeals on points of law. The general rules shall apply mutatis mutandis.

(2) The parties, interveners and persons affected by the decision may, in respect of the part of that decision which refers to them, bring an appeal on a point of law before the Legfelsőbb Bíróság against final judgments and orders which bring proceedings an end, pleading infringement of the law.

…’

9 Article 271(1) of the Law on civil procedure provides that:

‘No appeal shall lie:

(a) against decisions which have become final at first instance, except in cases which are permitted by law;

(b) where one party has failed to exercise the right to bring an appeal and the court of second instance, hearing the appeal brought by the other party, confirms the decision at first

instance;

…’

10 Under Article 273(3) of that law:

‘The institution of appeal proceedings shall not have suspensory effect but, where a party so requests, the Legfelsőbb Bíróság may exceptionally suspend enforcement of the judgment …’

Company law

11 Article 1(1) of Law No CXLIV of 1997 on commercial companies (a gazdasági társaságokról szóló 1997. évi CXLIV. törvény) provides that:

‘This Law shall govern the incorporation, organisation and functioning of commercial companies which have their seat in Hungary; the rights, duties and responsibilities of the founders and members (shareholders) of those companies; and the conversion, merger and demerger of commercial companies … and their liquidation.’

12 Under Article 11 of that law:

‘The articles of association (the instrument of incorporation, the statutes of the company) shall specify:

(a) the name and seat of the commercial company

…’

13 Article 1(1) of Law No CXLV of 1997 on the commercial register, company advertising and legal procedures in commercial registration matters (a cégnyilvántartásról, a cégnyilvánosságról és a bírósági cégeljárásról szóló 1997. évi CXLV. Törvény; ‘the Law on the commercial register’) provides that:

‘A company is a commercial organisation … or other legal entity of a commercial nature … which, save where a law or government order provides otherwise, is incorporated through its registration in the commercial register for the purpose of carrying on a commercial activity for financial gain …’

14 Under Article 2(1) of that law:

‘The legal entities referred to in Article 1 may be entered in the commercial register only if their registration is possible or compulsory under [Hungarian] law.’

15 Article 11 of the Law on the commercial register provides that:

‘(1) The regional courts or the courts of Budapest, acting as commercial courts, shall register companies in the commercial registers which they are responsible for maintaining …

(2) … the courts within the jurisdiction of which a company has its seat shall have jurisdiction to register that company and to deal with any proceedings concerning such companies provided for by statute.

…’

16 Article 12(1) of that law provides that:

‘The information on companies referred to in this Law shall be entered in the commercial register. For all companies, the register shall specify:

...

(d) the company seat …'

17 Under Article 16(1) of the Law on the commercial register:

'The seat … shall be the place where [the company's] central administration is situated …'

18 Article 29(1) of that law provides that:

'Save as otherwise provided, any application for registration of amendments to information registered in relation to companies must be presented to the commercial court within 30 days of the event giving rise to the amendment.'

19 Article 34(1) of the Law provides that:

'Every transfer of a company seat to the jurisdiction of another court responsible for maintaining the commercial register must, by reason of the change entailed, be submitted to the court with jurisdiction in respect of the former seat. After examining the applications for amendment of the information in the register prior to the change of company seat, the latter court shall endorse the transfer.'

Private international law

20 Article 18 of Decree-Law No 13 of 1979 on private international law rules (a nemzetközi magánjogról szóló 1979. évi 13. törvényerejű rendelet) provides that:

'(1) The legal capacity of a legal person, its commercial status, the rights derived from its personality and the legal relationships between its members shall be determined in accordance with its personal law.

(2) The personal law of a legal person shall be the law of the State in the territory of which it is registered.

(3) If a legal person has been lawfully registered in accordance with the laws of several States or if, under the rules applicable in the place where the seat designated in its articles of association is situated, registration is not required, its personal law shall be that applicable in the State of the seat.

(4) If a legal person has no seat designated in its articles of association or has seats in several States, and, in accordance with the law of one of those States, registration is not required, its personal law shall be the law of the State in which its central administration is situated.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

21 Cartesio was formed on 20 May 2004 as a 'betéti társaság' (limited partnership) under Hungarian law. Its seat was established in Baja (Hungary). Cartesio was registered in the commercial register on 11 June 2004.

22 Cartesio has two partners both of whom are natural persons resident in Hungary and holding Hungarian nationality: a limited partner, whose only commitment is to invest capital, and an unlimited partner, with unlimited liability for the company's debts. Cartesio is active, inter alia, in the field of human resources, secretarial activities, translation, teaching and training.

23 On 11 November 2005, Cartesio filed an application with the Bács-Kiskun Megyei Bíróság

(Regional Court, Bács-Kiskun), sitting as a cégbíróság (commercial court), for registration of the transfer of its seat to Gallarate (Italy) and, in consequence, for amendment of the entry regarding Cartesio's company seat in the commercial register.

24 By decision of 24 January 2006, that application was rejected on the ground that the Hungarian law in force did not allow a company incorporated in Hungary to transfer its seat abroad while continuing to be subject to Hungarian law as its personal law.

25 Cartesio lodged an appeal against that decision with the Szegedi Ítélőtábla (Regional Court of Appeal, Szeged).

26 Relying on the judgment in Case C-411/03 *SEVIC Systems* [2005] ECR I-10805, Cartesio claimed before the Szegedi Ítélőtábla that, to the extent that Hungarian law draws a distinction between commercial companies according to the Member State in which they have their seat, that law is contrary to Articles 43 EC and 48 EC. It follows from those articles that Hungarian law cannot require Hungarian companies to choose to establish their seat in Hungary.

27 Cartesio also maintained that the Szegedi Ítélőtábla was required to refer that question for a preliminary ruling, since it constitutes a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law.

28 The Szegedi Ítélőtábla points out that, under Hungarian law, proceedings before the courts responsible for maintaining the commercial register and before courts hearing appeals against decisions of the commercial register courts are not *inter partes*. It therefore wishes to know whether it may be classified as a 'court or tribunal' within the meaning of Article 234 EC.

29 Moreover, if the answer to this question is in the affirmative, the Szegedi Ítélőtábla is of the view that it is still unclear whether, for the purposes of the third paragraph of Article 234 EC, it should be classified as a court or tribunal against whose decisions there is no judicial remedy under national law.

30 It states in that regard that although, according to Hungarian law, its decisions on appeal are final and enforceable, they may nevertheless be the subject of an extraordinary appeal – an appeal on a point of law – before the Legfelsőbb Bíróság.

31 However, as the purpose of an appeal on a point of law is to ensure the consistency of case-law, the possibility of bringing such an appeal is limited, in particular by the condition governing the admissibility of pleas, which is linked to the obligation to allege a breach of law.

32 The Szegedi Ítélőtábla further notes that, in Hungarian academic legal writing and case-law, questions have been raised as to the compatibility with Article 234 EC of the provisions laid down in Articles 155/A and 249/A of the Law on civil procedure concerning appeals against decisions by which a question is referred to the Court of Justice for a preliminary ruling.

33 In that regard, the Szegedi Ítélőtábla points out that those provisions might result in an appellate court preventing a court which has decided to make a reference to the Court from doing so, even though an interpretation by the Court of a provision of Community law is needed to resolve the dispute in the main proceedings.

34 As regards the merits of the case before it, the Szegedi Ítélőtábla, referring to the judgment in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, notes that the freedom of establishment laid down in Articles 43 EC and 48 EC does not include the right, for a company incorporated under the legislation of a Member State and registered therein, to transfer its central administration, and thus its principal place of business, to another Member State whilst retaining its legal personality and nationality of origin, should the competent authorities object to this.

35 However, according to the Szegedi Ítélőtábla, this principle may have been further refined in the

later case-law of the Court.

36 In that regard, the Szegedi Ítélőtábla points out that, according to the case-law of the Court, all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment constitute a restriction on that freedom, and it refers in that regard, inter alia, to Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraphs 11 and 12).

37 The Szegedi Ítélőtábla moreover points out that, in *SEVIC Systems*, the Court ruled that Articles 43 EC and 48 EC preclude registration in the national commercial register of the merger by dissolution without liquidation of one company and transfer of the whole of its assets to another company from being refused in general in a Member State where one of the two companies is established in another Member State, whereas such registration is possible, on compliance with certain conditions, where the two companies participating in the merger are both established in the territory of the first Member State.

38 Moreover, it is settled case-law of the Court that national laws cannot differentiate between companies according to the nationality of the person seeking their registration in the commercial register.

39 Lastly, the Szegedi Ítélőtábla states that Council Regulation (EEC) No 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG) (OJ 1985 L 199, p. 1) and Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ 2001 L 294, p. 1) lay down, for the forms of Community undertaking which they introduce, more flexible and less costly provisions which enable those undertakings to transfer their seat or establishment from one Member State to another without first going into liquidation.

40 In those circumstances, on the view that resolution of the dispute before it depended on the interpretation of Community law, the Szegedi Ítélőtábla decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Is a court of second instance which has to give a decision on an appeal against a decision of a commercial court (cégbíróság) in proceedings to amend a registration [of a company] entitled to make a reference for a preliminary ruling under Article 234 [EC], where neither the action before the commercial court nor the appeal procedure is *inter partes*?

(2) In so far as an appeal court is included in the concept of a “court or tribunal which is entitled to make a reference for a preliminary ruling” under Article 234 [EC], must that court be regarded as a court against whose decisions there is no judicial remedy, which has an obligation, under Article 234 [EC], to submit questions on the interpretation of Community law to the Court of Justice of the European Communities?

(3) Does a national measure which, in accordance with domestic law, confers a right to bring an appeal against an order making a reference for a preliminary ruling limit the power of the Hungarian courts to refer questions for a preliminary ruling or could it limit that power – derived directly from Article 234 [EC] – if, in appeal proceedings, the national superior court may amend the order, render the request for a preliminary ruling inoperative and order the court which issued the order for reference to resume the national proceedings which had been suspended?

(4) (a) If a company, [incorporated] in Hungary under Hungarian company law and entered in the Hungarian commercial register, wishes to transfer its seat to another Member State of the European Union, is the regulation of this field within the scope of Community law or, in the absence of the harmonisation of laws, is national law exclusively applicable?

(b) May a Hungarian company request transfer of its seat to another Member State of the European Union relying directly on Community law (Articles 43 [EC] and 48

[EC])? If the answer is affirmative, may the transfer of the seat be made subject to any kind of condition or authorisation by the Member State of origin or the host Member State?

(c) May Articles 43 [EC] and 48 [EC] be interpreted as meaning that national rules or national practices which differentiate between commercial companies with respect to the exercise of their rights, according to the Member State in which their seat is situated, are incompatible with Community law?

[(d)] May Articles 43 [EC] and 48 [EC] be interpreted as meaning that, in accordance with those articles, national rules or practices which prevent a Hungarian company from transferring its seat to another Member State of the European Union are incompatible with Community law?'

The application to have the oral procedure reopened

41 By document lodged at the Registry of the Court of Justice on 9 September 2008, Ireland requested the Court to order that the oral procedure be reopened, pursuant to Article 61 of the Rules of Procedure, with regard to the fourth question referred for a preliminary ruling.

42 In support of its request, Ireland states that, contrary to the view adopted by the Advocate General in his Opinion, the fourth question in the order for reference should not be understood as relating to the transfer of the seat, defined by Hungarian law as the place where the company has its central administration, and thus the real seat (*siège réel*) of the company.

43 According to Ireland, it follows from the English translation of the order for reference that that question concerns the transfer of the registered office (*siège statutaire*).

44 Thus, Ireland claims essentially that one of the factual premisses on which the Advocate General's analysis is based is incorrect.

45 Ireland is, moreover, of the view that, if the Court relies on the same premiss, it should reopen the oral procedure in order to give the interested parties an opportunity to submit observations on the basis of that premiss.

46 It is clear from the case-law that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, inter alia, Case C-284/06 *Burda* [2008] ECR I-0000, paragraph 37 and the case-law cited).

47 In that regard, it should be pointed out, first, that it is apparent from the order for reference as a whole that the fourth question relates not to the transfer of the registered office of the company concerned in the main proceedings but to the transfer of its 'real seat'.

48 As stated in the order for reference, it follows from the Hungarian legislation on company registration that, for the purposes of applying that legislation, a company's seat is defined as the place where it has its central administration.

49 Moreover, the referring court placed the case before it in the context of the situation at issue in *Daily Mail and General Trust*, which it describes as relating to a company, incorporated in accordance with the legislation of a Member State and registered therein, wishing to transfer its central administration, and thus its principal place of business, to another Member State whilst retaining its legal personality and nationality of origin, where the competent authorities object to this. More specifically, the referring court asks whether the principle laid down in that judgment – that Articles 43 EC and 48 EC do not confer on companies the right to transfer their central

administration in such a way, whilst retaining their legal personality as conferred on them in the State under whose laws they were incorporated – has been further refined in the later case-law of the Court.

50 Secondly, the interested parties, including Ireland, were expressly requested by the Court to focus their pleadings on the premiss that the issue raised in the main proceedings related to the transfer to another Member State of the real seat of the company concerned, in other words, of the place where it has its administrative seat.

51 Although Ireland nevertheless focused in its pleadings on the premiss that the issue in the case before the referring court concerned the transfer of a company's registered office, it also set out its position – albeit briefly – on the basis that that issue concerned the transfer of the company's real seat, a position which, moreover, it set out again in its request that the oral procedure be reopened.

52 Against that background, the Court, having heard the Advocate General, considers that it has all the evidence necessary to enable it to reply to the questions referred and that the present case does not thereby fall to be decided on the basis of an argument which has not been debated between the parties.

53 Accordingly, it is not necessary to order that the oral procedure be reopened.

The questions referred for a preliminary ruling

The first question

54 By this question, the Court is essentially asked whether a court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration by the referring court of the appeal against that decision takes place in the context of *inter partes* proceedings.

55 In that regard, it should be borne in mind that, according to settled case-law, in order to determine whether the body making a reference is a 'court or tribunal' for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, inter alia, Case C-96/04 *Standesamt Stadt Niebüll* [2006] ECR I-3561, paragraph 12 and the case-law cited).

56 With regard to the *inter partes* nature of the proceedings before the national court, Article 234 EC does not make reference to the Court subject to those proceedings being *inter partes*. None the less, it follows from that article that a national court may make a reference to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see to that effect, inter alia, Case C-182/00 *Lutz and Others* [2002] ECR I-547, paragraph 13 and the case-law cited).

57 Thus, where a court responsible for maintaining a register makes an administrative decision without being required to resolve a legal dispute, it cannot be regarded as exercising a judicial function. Such is the case, for example, where it decides an application for registration of a company in proceedings which do not have as their object the annulment of a measure which allegedly adversely affects the applicant (see to that effect, inter alia, *Lutz and Others*, paragraph 14 and the case-law cited).

58 In contrast, a court hearing an appeal which has been brought against a decision of a lower

court responsible for maintaining a register, rejecting such an application, and which seeks the setting-aside of that decision, which allegedly adversely affects the rights of the applicant, is called upon to give judgment in a dispute and is exercising a judicial function.

59 Accordingly, in such a case, the appellate court must, in principle, be regarded as a court or tribunal within the meaning of Article 234 EC, with jurisdiction to refer a question to the Court for a preliminary ruling (see for similar situations, inter alia, Case C-300/01 *Salzmann* [2003] ECR I-4899; *SEVIC Systems*; and Case C-117/06 *Möllendorf and Others* [2007] ECR I-8361).

60 It is apparent from the court file that, in the main proceedings, the referring court is sitting in an appellate capacity in an action for the setting-aside of a decision by which a lower court, responsible for maintaining the commercial register, rejected an application by a company for registration of the transfer of its seat, requiring the amendment of an entry in that register.

61 Accordingly, in the main proceedings, the referring court is hearing a dispute and is exercising a judicial function, regardless of the fact that the proceedings before that court are not *inter partes*.

62 Consequently, in the light of the case-law cited in paragraphs 55 and 56 above, the referring court must be regarded as a court or tribunal for the purposes of Article 234 EC.

63 In the light of the foregoing, the answer to the first question must be that a court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of *interpartes* proceedings.

The second question

64 By this question, the Court is essentially being asked whether a court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, falls to be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.

Admissibility

65 The Commission of the European Communities contends that this question is inadmissible as it is manifestly irrelevant to the resolution of the dispute in the main proceedings, since the order for reference has already been submitted to the Court, rendering any examination of whether there is an obligation to make a reference devoid of interest.

66 That objection must be rejected.

67 According to settled case-law, there is a presumption of relevance in favour of questions on the interpretation of Community law referred by a national court, and it is a matter for the national court to define, and not for the Court to verify, in which factual and legislative context they operate. The Court declines to rule on a reference for a preliminary ruling from a national court only where it is quite obvious that the interpretation of Community law that is sought is unrelated to the actual facts of the main action or to its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, to that effect, Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22 and the case-law cited).

68 As stated in paragraph 27 above, Cartesio claimed before the referring court that that court was required to make a reference to the Court for a preliminary ruling, since it fell to be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within

the meaning of the third paragraph of Article 234 EC.

69 As the referring court had doubts concerning that plea, it decided to refer a question on that issue to the Court for a preliminary ruling.

70 It would be contrary to the spirit of cooperation which must guide all relations between national courts and the Court of Justice, and contrary also to the requirements of procedural economy, to require a national court first to seek a preliminary ruling on the sole question whether that court is one of those referred to in the third paragraph of Article 234 EC, before, where appropriate, having to formulate – subsequently and by a second reference for a preliminary ruling – the questions concerning the provisions of Community law relating to the substance of the dispute before it.

71 Moreover, the Court has already replied to a question relating to the characteristics of national courts in the light of the third paragraph of Article 234 EC in a context offering certain similarities with that of the present reference for a preliminary ruling, without the admissibility of that question being disputed (Case C-99/00 *Lyckeskog* [2002] ECR I-4839).

72 In those circumstances, it does not appear – at least not prima facie – that the interpretation of Community law sought is unrelated to the actual facts of the main action or to its purpose.

73 Accordingly, the presumption of relevance in favour of references for a preliminary ruling is not, as regards the present question, rebutted by the objection put forward by the Commission (see, inter alia, *van der Weerd and Others*, paragraphs 22 and 23).

74 It follows that the second question is admissible.

Substance

75 The issue raised by this question is thus whether the referring court falls to be classified as ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’, within the meaning of the third paragraph of Article 234 EC. It is clear from the order for reference that this question is raised in view of the fact, referred to in paragraphs 30 and 31 above, that, although Hungarian law provides that decisions delivered on appeal by the referring court may be the subject of an extraordinary appeal – in other words, an appeal on a point of law before the Legfelsőbb Bíróság, the purpose of which is to ensure the consistency of the case-law – the possibilities of bringing such an appeal are limited, in particular, by the condition governing the admissibility of pleas, which is linked to the obligation to allege a breach of law, and in view of the fact, also pointed out in the order for reference, that under Hungarian law an appeal on a point of law does not, in principle, have the effect of suspending enforcement of the decision delivered on appeal.

76 The Court has already held that decisions of a national appellate court which can be challenged by the parties before a supreme court are not decisions of ‘a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law’ within the meaning of the third paragraph of Article 234 EC. The fact that the examination of the merits of such challenges is conditional upon a preliminary declaration of admissibility by the supreme court does not have the effect of depriving the parties of a judicial remedy (*Lyckeskog*, paragraph 16).

77 That is true a fortiori in the case of a procedural system such as that under which the case before the referring court must be decided, since that system makes no provision for a preliminary declaration by the supreme court that the appeal is admissible and, instead, merely imposes restrictions with regard, in particular, to the nature of the pleas which may be raised before such a court, which must allege a breach of law.

78 In common with the lack of suspensory effect of appeals on a point of law before the Legfelsőbb Bíróság, such restrictions do not have the effect of depriving the parties in a case before a court whose decisions are amenable to an appeal on a point of law of the possibility of

exercising effectively their right to appeal the decision handed down by that court in a dispute such as that in the main proceedings. It does not follow, therefore, from those restrictions or from the lack of suspensory effect that that court falls to be classified as a court handing down a decision against which there is no judicial remedy.

79 In the light of the foregoing, the answer to the second question must be that a court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.

The third question

Admissibility

80 Ireland argues that this question is hypothetical, hence inadmissible, since no appeal on a point of law has been brought against the order for reference and, in consequence, an answer to that question would be of no use to the referring court.

81 The Commission also asks the Court to declare that it is not appropriate to give a reply to the third question because, given that the order for reference has the authority of *res judicata* and has reached the Court, that question is hypothetical.

82 Those objections cannot be upheld.

83 As was pointed out in paragraph 67 above, the presumption of relevance enjoyed by references for a preliminary ruling may, in certain circumstances, be rebutted, in particular where the Court holds that the problem is hypothetical.

84 Ireland and the Commission maintain that the problem raised by this question – the possible incompatibility with the second paragraph of Article 234 EC of national rules governing appeals against a decision making a reference to the Court – is hypothetical, since, in fact, the order for reference has not been appealed against and now has the authority of *res judicata*.

85 However, neither that decision nor the file sent to the Court permits the inference that there has been no appeal against that decision or that there can no longer be any appeal against it.

86 In the light of the settled case-law cited in paragraph 67 above, since, in such a situation of uncertainty, responsibility for defining and verifying the factual and legislative context in which the question referred arises lies with the national court, the presumption of relevance which this question enjoys has not been rebutted.

87 It follows that the third question is admissible.

Substance

88 Article 234 EC gives national courts the right – and, where appropriate, imposes on them the obligation – to make a reference for a preliminary ruling, as soon as the national court perceives either of its own motion or at the request of the parties that the substance of the dispute raises one of the points referred to in the first paragraph of Article 234 EC. It follows that national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of Community law, or consideration of their validity, necessitating a decision on their part (Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 3).

89 It is also clear from the case-law of the Court that, in the case of a court or tribunal against whose decisions there is a judicial remedy under national law, Article 234 EC does not preclude decisions of such a court by which questions are referred to the Court for a preliminary ruling

from remaining subject to the remedies normally available under national law. Nevertheless, in the interests of clarity and legal certainty, the Court must abide by the decision to refer, which must have its full effect so long as it has not been revoked (Case 146/73 *Rheinmühlen-Düsseldorf* [1974] ECR 139, paragraph 3).

90 Moreover, the Court has already held that the system established by Article 234 EC with a view to ensuring that Community law is interpreted uniformly throughout the Member States instituted direct cooperation between the Court of Justice and the national courts by means of a procedure which is completely independent of any initiative by the parties (Case C-2/06 *Kempter* [2008] ECR I-411, paragraph 41).

91 The system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment as to whether a reference is appropriate and necessary (*Kempter*, paragraph 42).

92 It is clear from the order for reference that, under Hungarian law, a separate appeal may be brought against a decision making a reference to the Court for a preliminary ruling, although the main proceedings remain pending in their entirety before the referring court, proceedings being stayed until the Court gives a ruling. The appellate court thus seised has, under Hungarian law, power to vary that decision, to set aside the reference for a preliminary ruling and to order the first court to resume the domestic law proceedings.

93 As is clear from the case-law cited in paragraphs 88 and 89 above, concerning a national court or tribunal against whose decisions there is a judicial remedy under national law, Article 234 EC does not preclude a decision of such a court, making a reference to the Court, from remaining subject to the remedies normally available under national law. Nevertheless, the outcome of such an appeal cannot limit the jurisdiction conferred by Article 234 EC on that court to make a reference to the Court if it considers that a case pending before it raises questions on the interpretation of provisions of Community law necessitating a ruling by the Court.

94 It should be pointed out, moreover, that the Court has already held that, in a situation where a case is pending, for the second time, before a court sitting at first instance after a judgment originally delivered by that court has been quashed by a supreme court, the court at first instance remains free to refer questions to the Court pursuant to Article 234 EC, regardless of the existence of a rule of national law whereby a court is bound on points of law by the rulings of a superior court (Case 146/73 *Rheinmühlen-Düsseldorf*).

95 Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the autonomous jurisdiction which Article 234 EC confers on the referring court to make a reference to the Court would be called into question, if – by varying the order for reference, by setting it aside and by ordering the referring court to resume the proceedings – the appellate court could prevent the referring court from exercising the right, conferred on it by the EC Treaty, to make a reference to the Court.

96 In accordance with Article 234 EC, the assessment of the relevance and necessity of the question referred for a preliminary ruling is, in principle, the responsibility of the referring court alone, subject to the limited verification made by the Court in accordance with the case-law cited in paragraph 67 above. Thus, it is for the referring court to draw the proper inferences from a judgment delivered on an appeal against its decision to refer and, in particular, to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it.

97 It follows that, in a situation such as that in the case before the referring court, the Court must – also in the interests of clarity and legal certainty – abide by the decision to make a reference for a preliminary ruling, which must have its full effect so long as it has not been revoked or amended by the referring court, such revocation or amendment being matters on which that

court alone is able to take a decision.

98 In the light of the foregoing, the answer to the third question must be that, where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred by that provision of the Treaty on any national court or tribunal to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.

The fourth question

99 By its fourth question, the referring court essentially asks whether Articles 43 EC and 48 EC are to be interpreted as precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

100 It is clear from the order for reference that Cartesio – a company which was incorporated in accordance with Hungarian legislation and which, at the time of its incorporation, established its seat in Hungary – transferred its seat to Italy but wished to retain its status as a company governed by Hungarian law.

101 Under the Hungarian Law on the commercial register, the seat of a company governed by Hungarian law is to be the place where its central administration is situated.

102 The referring court states that the application filed by Cartesio for amendment of the entry in the commercial register regarding its company seat was rejected by the court responsible for maintaining that register on the ground that, under Hungarian law, a company incorporated in Hungary may not transfer its seat, as defined by the Law on the commercial register, abroad while continuing to be subject to Hungarian law as the law governing its articles of association.

103 Such a transfer would require, first, that the company cease to exist and, then, that the company reincorporate itself in compliance with the law of the country where it wishes to establish its new seat.

104 In that regard, the Court observed in paragraph 19 of *Daily Mail and General Trust* that companies are creatures of national law and exist only by virtue of the national legislation which determines its incorporation and functioning.

105 In paragraph 20 of *Daily Mail and General Trust*, the Court stated that the legislation of the Member States varies widely in regard to both the factor providing a connection to the national territory required for the incorporation of a company and the question whether a company incorporated under the legislation of a Member State may subsequently modify that connecting factor. Certain States require that not merely the registered office but also the real seat (*siège réel*) – that is to say, the central administration of the company – should be situated in their territory, and the removal of the central administration from that territory thus presupposes the winding-up of the company with all the consequences that winding-up entails under company law. The legislation of other States permits companies to transfer their central administration to a foreign country but certain of them make that right subject to certain restrictions, and the legal consequences of a transfer vary from one Member State to another.

106 The Court added, in paragraph 21 of *Daily Mail and General Trust*, that the EEC Treaty had taken account of that variety in national legislation. In defining, in Article 58 of that Treaty (later Article 58 of the EC Treaty, now Article 48 EC), the companies which enjoy the right of establishment, the EEC Treaty placed on the same footing, as connecting factors, the

registered office, central administration and principal place of business of a company.

107 In Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 70, the Court, whilst confirming those dicta, inferred from them that the question whether a company formed in accordance with the legislation of one Member State can transfer its registered office or its actual centre of administration to another Member State without losing its legal personality under the law of the Member State of incorporation, and, in certain circumstances, the rules relating to that transfer, are determined by the national law in accordance with which the company was incorporated. The Court concluded that a Member State is able, in the case of a company incorporated under its law, to make the company's right to retain its legal personality under the law of that Member State subject to restrictions on the transfer to a foreign country of the company's actual centre of administration.

108 It should be pointed out, moreover, that the Court also reached that conclusion on the basis of the wording of Article 58 of the EEC Treaty. In defining, in that article, the companies which enjoy the right of establishment, the EEC Treaty regarded the differences in the legislation of the various Member States both as regards the required connecting factor for companies subject to that legislation and as regards the question whether — and, if so, how — the registered office (*siège statutaire*) or real seat (*siège réel*) of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment, but which must be dealt with by future legislation or conventions (see, to that effect, *Daily Mail and General Trust*, paragraphs 21 to 23, and *Überseering*, paragraph 69).

109 Consequently, in accordance with Article 48 EC, in the absence of a uniform Community law definition of the companies which may enjoy the right of establishment on the basis of a single connecting factor determining the national law applicable to a company, the question whether Article 43 EC applies to a company which seeks to rely on the fundamental freedom enshrined in that article – like the question whether a natural person is a national of a Member State, hence entitled to enjoy that freedom – is a preliminary matter which, as Community law now stands, can only be resolved by the applicable national law. In consequence, the question whether the company is faced with a restriction on the freedom of establishment, within the meaning of Article 43 EC, can arise only if it has been established, in the light of the conditions laid down in Article 48 EC, that the company actually has a right to that freedom.

110 Thus a Member State has the power to define both the connecting factor required of a company if it is to be regarded as incorporated under the law of that Member State and, as such, capable of enjoying the right of establishment, and that required if the company is to be able subsequently to maintain that status. That power includes the possibility for that Member State not to permit a company governed by its law to retain that status if the company intends to reorganise itself in another Member State by moving its seat to the territory of the latter, thereby breaking the connecting factor required under the national law of the Member State of incorporation.

111 Nevertheless, the situation where the seat of a company incorporated under the law of one Member State is transferred to another Member State with no change as regards the law which governs that company falls to be distinguished from the situation where a company governed by the law of one Member State moves to another Member State with an attendant change as regards the national law applicable, since in the latter situation the company is converted into a form of company which is governed by the law of the Member State to which it has moved.

112 In fact, in that latter case, the power referred to in paragraph 110 above, far from implying that national legislation on the incorporation and winding-up of companies enjoys any form of immunity from the rules of the EC Treaty on freedom of establishment, cannot, in particular, justify the Member State of incorporation, by requiring the winding-up or liquidation of the company, in preventing that company from converting itself into a company governed by the law of the other Member State, to the extent that it is permitted under that law to do so.

113 Such a barrier to the actual conversion of such a company, without prior winding-up or liquidation, into a company governed by the law of the Member State to which it wishes to relocate constitutes a restriction on the freedom of establishment of the company concerned which, unless it serves overriding requirements in the public interest, is prohibited under Article 43 EC (see to that effect, inter alia, *CaixaBank France*, paragraphs 11 and 17).

114 It should also be noted that, following the judgments in *Daily Mail and General Trust* and *Überseering*, the developments in the field of company law envisaged in Articles 44(2)(g) EC and 293 EC, respectively, as pursued by means of legislation and agreements, have not as yet addressed the differences, referred to in those judgments, between the legislation of the various Member States and, accordingly, have not yet eradicated those differences.

115 The Commission maintains, however, that the absence of Community legislation in this field – noted by the Court in paragraph 23 of *Daily Mail and General Trust* – was remedied by the Community rules, governing the transfer of the company seat to another Member State, laid down in regulations such as Regulation No 2137/85 on the EEIG and Regulation No 2157/2001 on the SE or, moreover, Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European cooperative society (SCE) (OJ 2003 L 207, p. 1), as well as by the Hungarian legislation adopted subsequent to those regulations.

116 The Commission argues that those rules may – and should – be applied mutatis mutandis to the cross-border transfer of the real seat of a company incorporated under the law of a Member State.

117 In that regard, it should be noted that although those regulations, adopted on the basis of Article 308 EC, in fact lay down a set of rules under which it is possible for the new legal entities which they establish to transfer their registered office (*siège statutaire*) and, accordingly, also their real seat (*siège réel*) – both of which must, in effect, be situated in the same Member State – to another Member State without it being compulsory to wind up the original legal person or to create a new legal person, such a transfer nevertheless necessarily entails a change as regards the national law applicable to the entity making such a transfer.

118 That is clear, for example, in the case of a European company, from Articles 7 to 9(1)(c)(ii) of Regulation No 2157/2001.

119 As it is, in the case before the referring court, Cartesio merely wishes to transfer its real seat from Hungary to Italy, while remaining a company governed by Hungarian law, hence without any change as to the national law applicable.

120 Accordingly, the application mutatis mutandis of the Community legislation to which the Commission refers – even if it were to govern the cross-border transfer of the seat of a company governed by the law of a Member State – cannot in any event lead to the predicted result in circumstances such as those of the case before the referring court.

121 Further, as regards the implications of *SEVIC Systems* for the principle established in *Daily Mail and General Trust* and *Überseering*, it should be pointed out that those judgments do not relate to the same problem and that, consequently, *SEVIC Systems* cannot be said to have qualified the scope of *Daily Mail and General Trust* or *Überseering*.

122 The case which gave rise to the judgment in *SEVIC Systems* concerned the recognition, in the Member State of incorporation of a company, of an establishment operation carried out by that company in another Member State by means of a cross-border merger, which is a situation fundamentally different from the circumstances at issue in the case which gave rise to the judgment in *Daily Mail and General Trust*, but similar to the situations considered in other judgments of the Court (see Case C-212/97 *Centros* [1999] ECR I-1459; *Überseering*; and Case C-167/01 *InspireArt* [2003] ECR I-10155).

123 In such situations, the issue which must first be decided is not the question, referred to in

paragraph 109 above, whether the company concerned may be regarded as a company which possesses the nationality of the Member State under whose legislation it was incorporated but, rather, the question whether or not that company – which, it is common ground, is a company governed by the law of a Member State – is faced with a restriction in the exercise of its right of establishment in another Member State.

124 In the light of all the foregoing, the answer to the fourth question must be that, as Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.

Costs

125 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **A court such as the referring court, hearing an appeal against a decision of a lower court, responsible for maintaining the commercial register, rejecting an application for amendment of information entered in that register, must be classified as a court or tribunal which is entitled to make a reference for a preliminary ruling under Article 234 EC, regardless of the fact that neither the decision of the lower court nor the consideration of the appeal by the referring court takes place in the context of *inter partes* proceedings.**

2. **A court such as the referring court, whose decisions in disputes such as that in the main proceedings may be appealed on points of law, cannot be classified as a court or tribunal against whose decisions there is no judicial remedy under national law, within the meaning of the third paragraph of Article 234 EC.**

3. **Where rules of national law apply which relate to the right of appeal against a decision making a reference for a preliminary ruling, and under those rules the main proceedings remain pending before the referring court in their entirety, the order for reference alone being the subject of a limited appeal, the second paragraph of Article 234 EC is to be interpreted as meaning that the jurisdiction conferred on any national court or tribunal by that provision of the Treaty to make a reference to the Court for a preliminary ruling cannot be called into question by the application of those rules, where they permit the appellate court to vary the order for reference, to set aside the reference and to order the referring court to resume the domestic law proceedings.**

4. **As Community law now stands, Articles 43 EC and 48 EC are to be interpreted as not precluding legislation of a Member State under which a company incorporated under the law of that Member State may not transfer its seat to another Member State whilst retaining its status as a company governed by the law of the Member State of incorporation.**

[Signatures]

* Language of the case: Hungarian.

JUDGMENT OF THE COURT (Third Chamber)

22 October 2009 (*)

(Visas, asylum and immigration – Measures concerning the crossing of external borders – Article 62(1) and (2)(a) EC – Convention implementing the Schengen Agreement – Articles 6b and 23 – Regulation (EC) No 562/2006 – Articles 5, 11 and 13 – Presumption concerning the duration of the stay – Unlawful presence of third-country nationals on the territory of a Member State – National legislation allowing for either a fine or expulsion, depending on the circumstances)

In Joined Cases C-261/08 and C-348/08,

REFERENCES for preliminary rulings under Articles 68 EC and 234 EC from the Tribunal Superior de Justicia de Murcia (Spain), made by decisions of 12 June and 22 July 2008, received at the Court on 19 June and 30 July 2008 respectively, in the proceedings

María Julia Zurita García (C-261/08),

Aurelio Choque Cabrera (C-348/08)

v

Delegado del Gobierno en la Región de Murcia,

THE COURT (Third Chamber),

composed of P. Lindh, President of the Sixth Chamber, acting as President of the Third Chamber, A. Rosas, U. Lõhmus (Rapporteur), A. Ó Caoimh and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

having regard to the request of the national court of 13 June 2008, received at the Court on 19 June 2008, that the urgent procedure be applied to the order for reference in Case C-261/08 *Zurita García* under Article 104b of the Rules of Procedure,

having regard to the decision of the Third Chamber of the Court of 25 June 2008 not to apply the urgent procedure to that order for reference,

after considering the observations submitted on behalf of:

– Mr Choque Cabrera, by E. Bermejo Garrés, procuradora, and A. Corbalán Maiquez, abogado,

– the Spanish Government, by N. Díaz Abad, acting as Agent,

– the Italian Government, by I. Bruni, acting as Agent, and by G. Fiengo and W. Ferrante, avvocati dello Stato,

– the Austrian Government, by E. Riedl, acting as Agent,

– the Commission of the European Communities, by M. Wilderspin and E. Adsera Ribera, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 May 2009,

gives the following

Judgment

1 The present references for preliminary rulings concern the interpretation of Article 62(1) and (2)(a) EC, and Articles 5, 11 and 13 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

2 The references have been made in the course of two actions brought by Bolivian nationals, namely Ms Zurita García (Case C-261/08) and Mr Choque Cabrera (Case C-348/08), against the Delegado del Gobierno en la Región de Murcia (government representative for the region of Murcia; 'the Delgado del Gobierno') relating to orders for expulsion from Spanish territory, with a prohibition on entry into the Schengen area for five years, adopted against Ms Zurita García and Mr Choque Cabrera.

Legal context

Community legislation

The Schengen Protocol

3 Under Article 1 of the Protocol integrating the Schengen *acquis* into the framework of the European Union, annexed to the Treaty on European Union and the Treaty establishing the European Community by the Treaty of Amsterdam ('the Protocol'), 13 Member States of the European Union are authorised to establish closer cooperation among themselves within the scope of the Schengen *acquis*, as defined in the annex to that protocol. That cooperation is conducted within the institutional and legal framework of the European Union and with respect for the relevant provisions of the Treaty on European Union and of the Treaty establishing the European Community.

4 Under the first subparagraph of Article 2(1) of the Protocol, from the date of entry into force of the Treaty of Amsterdam, that is to say, from 1 May 1999, the Schengen *acquis* was to apply immediately to the 13 Member States referred to in Article 1 of the Protocol.

5 Both the Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 14 June 1985 (OJ 2000 L 239, p. 13), and the Convention implementing the Schengen Agreement, signed at Schengen on 19 June 1990 (OJ 2000 L 239, p. 19), as amended by Council Regulation (EC) No 2133/2004 of 13 December 2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third-country nationals when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen Agreement and the common manual to this

end (OJ 2004 L 369, p. 5) ('the CISA'), form part of that *acquis*.

6 Pursuant to the second sentence of the second subparagraph of Article 2(1) of the Protocol, the Council of the European Union adopted, on 20 May 1999, Decision 1999/436/EC determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal basis for each of the provisions or decisions which constitute the Schengen *acquis* (OJ 1999 L 176, p. 17). It follows from Article 2 of Decision 1999/436, in conjunction with Annex A thereto, that the Council selected Articles 62 EC and 63 EC, which form part of Title IV of the EC Treaty, entitled 'Visas, asylum, immigration and other policies related to free movement of persons', as the legal bases for Article 23 of the CISA.

The CISA

7 Article 6b of the CISA provides:

'1. If the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that the holder does not fulfil, or no longer fulfils, the conditions of duration of stay applicable within the Member State concerned.

2. This presumption may be rebutted where the third-country national provides, by any means, credible evidence such as transport tickets or proof of his or her presence outside the territory of the Member States, which shows that he or she has respected the conditions relating to the duration of a short stay.

...

3. Should the presumption referred to in paragraph 1 not be rebutted, the third-country national may be expelled by the competent authorities from the territory of the Member States concerned.'

8 Article 23 of the CISA states:

'1. Aliens who do not fulfil or who no longer fulfil the short-stay conditions applicable within the territory of a Contracting Party shall normally be required to leave the territories of the Contracting Parties immediately.

...

3. Where such aliens have not left voluntarily or where it may be assumed that they will not do so or where their immediate departure is required for reasons of national security or public policy, they must be expelled from the territory of the Contracting Party in which they were apprehended, in accordance with the national law of that Contracting Party. If under that law expulsion is not authorised, the Contracting Party concerned may allow the persons concerned to remain within its territory.

...

5. Paragraph 4 shall not preclude the application of national provisions on the right of asylum, the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, paragraph 2 of this Article or Article 33(1) of this Convention.'

Regulation No 562/2006

9 Regulation No 562/2006 codifies the existing texts on border controls and seeks to consolidate and

develop the legislative aspect of the policy of integrated management of borders by detailing rules on the crossing of external borders.

10 Under Article 5 of that regulation, relating to entry conditions for third-country nationals:

‘1. For stays not exceeding three months per six-month period, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document or documents authorising them to cross the border;

(b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [OJ 2001 L 81, p. 1], except where they hold a valid residence permit;

(c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;

(d) they are not persons for whom an alert has been issued in the [Schengen Information System] for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States’ national databases for the purposes of refusing entry on the same grounds.

…’

11 The wording of Article 11(1) and (3) of Regulation No 562/2006, concerning the presumption as regards fulfilment of conditions of duration of stay, adopted that of Article 6b(1) and (3) of the CISA, except in the Spanish-language version, which provides as follows in Article 11(3) of the regulation:

‘Should the presumption referred to in paragraph 1 not be rebutted, the competent authorities shall expel the third-country national from the territories of the Member States concerned.’

12 Article 13 of Regulation No 562/2006, concerning the refusal of entry, states:

‘1. A third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas.

…’

13 Under Article 39(1) of that regulation, Articles 2 to 8 of the CISA were repealed with effect from 13 October 2006.

14 Pursuant to its Article 40, Regulation No 562/2006 entered into force on 13 October 2006.

National legislation

15 Framework Law 4/2000 on the rights and freedoms of aliens in Spain and their social integration (Ley Orgánica sobre derechos y libertades de los extranjeros en España y su integración social) of 11 January 2000 (BOE No 10 of 12 January 2000, p. 1139) was amended by Framework Law 8/2000 of 22 December 2000 (BOE No 307 of 23 December 2000, p. 45508), and by Framework Law 14/2003 of 20 November 2003 (BOE No 279 of 21 November 2003, p. 41193) ('the Law on Aliens').

16 Article 28(3) of the Law on Aliens, which governs the departure of aliens from Spain, provides:

'Departure [from Spanish territory] is obligatory in the following situations:

...

(c) in the event of administrative refusal of applications to remain on Spanish territory submitted by an alien, or in the absence of authorisation to be in Spain.'

17 Pursuant to Article 51 of the Law on Aliens, offences under the provisions relating to the entry and stay of aliens are classified according to their gravity as 'less serious', 'serious' and 'very serious'.

18 Article 53(a) of that law defines a serious offence as:

'Being unlawfully present on Spanish territory, on the ground that the person concerned has not obtained an extension of permission to stay or a residence permit, or on the ground that these have expired more than three months previously, and that person has not applied for renewal of that permission to stay or residence permit within the period laid down by law.'

19 Under Article 55 of the Law on Aliens, the penalty for a serious offence is a maximum fine of EUR 6 000. When imposing the penalty, the competent authority must apply criteria of proportionality, taking into account the degree of culpability, the damage caused, and the risk arising from the offence and its repercussions.

20 Article 57 of the Law on Aliens, concerning expulsion from the territory, provides:

'1. If the offender is a foreign national and behaves in a manner defined by law as very serious, or serious, within the meaning of Article 53(a), (b), (c), (d) and (f) of this Framework Law, it is possible, instead of imposing a fine, to expel that person from Spanish territory, at the conclusion of the corresponding administrative procedure.

2. Where the alien has been found guilty, in Spain or abroad, of intentional conduct which constitutes a criminal offence in Spain punishable by a prison sentence of longer than one year, that shall constitute a further legal basis for expulsion at the end of the corresponding administrative procedure, save where the previous conviction has been removed from the criminal record.

3. Under no circumstances may the penalties of expulsion and a fine be imposed together.

...'

21 Article 158 of Royal Decree 2393/2004, which adopted rules for the implementation of the Law on Aliens (Reglamento de la Ley de Extranjería) of 30 December 2004 (BOE No 6 of 7 January 2005, p. 485), provides:

'1. In the absence of authorisation to be in Spain, inter alia, because the conditions for entry or

residence are not met, or are no longer met, or in the event of an administrative refusal of an application for permission to stay, a residence permit or any other documentation necessary so that the alien may remain on Spanish territory … the administrative decision shall inform the person concerned of the obligation on him to leave the country, without prejudice to the possibility of that warning also being indicated on his passport or similar document, or even being indicated on a separate document if the person concerned is present in Spain on the basis of an identification document which does not allow for a suitable statement to be inserted.

...

2. The compulsory departure must take place within the period prescribed by the decision refusing the request or, if appropriate and at the latest, within 15 days of the notification of the decision of refusal, save for exceptional circumstances and where the person concerned is able to prove that he has sufficient means of subsistence; in such a situation, the period may be extended by 90 days at most. If the period expires and the departure has not taken place, the provisions laid down in the present rules for the cases referred to in Article 53(a) of the Law [on Aliens] shall be applied.

3. If the aliens to whom the present article refers in fact leave Spanish territory in accordance with the provisions of the foregoing paragraphs, they shall not be prohibited from entering the country and they may return to Spain, on condition that they comply with the rules governing access to Spanish territory.

...'

22 It is apparent from the orders for reference that the abovementioned national provisions are interpreted by the Tribunal Supremo (Supreme Court) as meaning that, since expulsion is a criminal penalty, the decision which imposes it must be specifically reasoned and must comply with the principle of proportionality.

23 It is apparent from the files before the Court that, in practice, where a third-country national does not have the right to enter or remain in Spain and his conduct has not given rise to aggravating circumstances, the penalty imposed is to be restricted to a fine, except where there is an additional factor which would justify replacing the fine with expulsion.

The disputes in the main proceedings and the question referred for preliminary ruling

24 In Case C-261/08, on 26 September 2006, the competent authorities initiated an administrative procedure for infringement of Article 53(a) of the Law on Aliens against Ms Zurita García, a Bolivian national who was unlawfully present in Spain, either on the ground that she had not obtained an extension of her permission to stay or residence permit, or on the ground that the validity of those documents had expired more than three months previously and she had not sought to have them renewed.

25 That procedure led, on 15 November 2006, to the adoption of a decision by the Delgado del Gobierno announcing that Ms Zurita García was to be expelled from Spanish territory. That penalty was accompanied by a prohibition on entry to the Schengen area for a period of five years.

26 Ms Zurita García challenged that decision before the Juzgado de lo Contencioso-Administrativo nº 6 de Murcia (Court for Contentious Administrative Proceedings No 6 of Murcia), which rejected the action at first instance. On appeal, Ms Zurita García claimed that that decision should be quashed

because the administration had not correctly applied the principle of proportionality when assessing the circumstances of the case, which in no way justified the replacement of a fine by expulsion.

27 In Case C-348/08, by decision of 30 July 2007, the Delgado del Gobierno ordered the expulsion from Spanish territory of Mr Choque Cabrera, a Bolivian national who was unlawfully in Spain, within the meaning of Article 53(a) of the Law on Aliens, either on the ground that he had not obtained an extension of his permission to stay or residence permit, or on the ground that the validity of those documents had expired more than three months previously and he had not sought to have them renewed. That penalty was accompanied with a prohibition on entry to the Schengen area for a period of five years.

28 Mr Choque Cabrera challenged that decision before the Juzgado de lo Contencioso-Administrativo nº 4 de Murcia (Court for Contentious Administrative Proceedings No 4 of Murcia), which rejected the action at first instance. On appeal, Mr Choque Cabrera claimed that that decision should be quashed because the administration had not applied the principle of proportionality when assessing the circumstances of the case, and did not give reasons for replacing a fine with expulsion.

29 In those circumstances, the Tribunal Superior de Justicia de Murcia (High Court of Justice of Murcia) decided to stay both actions before it and to refer the following question, worded identically in each case, to the Court for a preliminary ruling:

‘Should Article 62(1) and (2)(a) of the Treaty establishing the European Community and Articles 5, 11 and 13 of Regulation (EC) No 562/2006 … be interpreted as precluding national legislation, and the case-law which interprets it, which permits the substitution of the expulsion of any “third-country national” who does not have documentation authorising him to enter and remain in the territory of the European Union by imposition of a fine?’

30 By order of the President of the Third Chamber of 27 March 2009, Cases C-261/08 and C-348/08 were joined for the purposes of the oral procedure and of judgment.

The question referred for a preliminary ruling

Admissibility of the question referred in Case C-261/08

31 The Spanish Government submits that the question referred in Case C-261/08 is inadmissible on the ground that it is purely hypothetical.

32 It claims that the principle of non-retroactivity in criminal law precludes the application *ratione temporis* of the obligation, which may be laid down in Article 11(3) of Regulation No 562/2006, to penalise the facts of the case in the main proceedings by expulsion, inasmuch as that regulation entered into force only on 13 October 2006, whereas the appellant in the main proceedings had already been accused of being unlawfully present on Spanish territory on 26 September 2006.

33 In the Spanish Government’s view, as the case in the main proceedings concerns an administrative penalty, to which the same principles apply as those which apply to criminal proceedings, in particular the principle of legality and that of incrimination, the applicable legislation should be that which was in force on the date of the facts alleged, and not that which was applicable on the date on which the expulsion decision was taken by the national authorities, namely 15 November 2006, a position which the referring court appears to share.

34 In that regard, it should be recalled that, in proceedings under Article 234 EC, which are based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court. Similarly, it is solely for the national court, before which the dispute has been brought and which must assume responsibility for the ultimate judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-326/00 *IKA* [2003] ECR I-1703, paragraph 27; Case C-145/03 *Keller* [2005] ECR I-2529, paragraph 33; Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 19; and Case C-537/07 *Gómez-Limón* [2009] ECR I-0000, paragraph 24).

35 The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 19; and *Gómez-Limón*, paragraph 25).

36 However, the Court has also held that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia* [1981] ECR 3045, paragraph 21). The spirit of cooperation which must prevail in the preliminary ruling procedure requires the national court, for its part, to have regard to the function entrusted to the Court of Justice, which is to assist in the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (*Foglia*, paragraphs 18 and 20; Case 149/82 *Robards* [1983] ECR 171, paragraph 19; and Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25).

37 In the present context, it must be held that, on the date on which the appellant in the main proceedings in Case C-261/08 was officially accused of being unlawfully present on Spanish territory, namely 26 September 2006, Regulation No 562/2006 had not yet entered into force, with the result that the issue as to whether that regulation needs to be interpreted may arise in relation to the facts giving rise to that case.

38 It is Article 6b of the CISA, and not Article 11(3) of Regulation No 562/2006, which will be applicable if the date of the facts were to be the criterion for determining the law applicable *ratione temporis* in Case C-261/08. Article 6b of the CISA is among those provisions which were repealed under Article 39 of Regulation No 562/2006 with effect from 13 October 2006.

39 In any event, however, as the Advocate General notes in point 27 of her Opinion, Article 11(3) of Regulation No 562/2006 merely repeats the wording of Article 6b(3) of the CISA, which was in force when the appellant in the main proceedings was officially accused of being unlawfully present on Spanish territory.

40 Moreover, it should be pointed out that the referring court has submitted a question for a preliminary ruling to the Court with the same wording, in the course of the proceedings giving rise to the case which is joined to Case C-261/08, that is to say, Case C-348/08, the facts of which occurred when Regulation No 562/2006 was already in force.

41 Therefore, the question referred in each of the two joined cases must be held to be admissible.

Substance

42 At the outset, it should be pointed out that the request for interpretation concerns Article 62(1) and (2)(a) EC, and Articles 5, 11 and 13 of Regulation No 562/2006.

43 It must be specified, firstly, that Article 62(1) and (2)(a) EC constitutes the legal basis for the Council's action with a view to the adoption of measures ensuring the absence of any checks on persons when crossing internal borders, and measures on the crossing of the external borders of the Member States, and does not have the objective, in and of itself, of granting rights to third-country nationals, or of imposing obligations on Member States.

44 Next, Article 5 of Regulation No 562/2006 establishes the entry conditions for third-country nationals when they cross an external border for stays not exceeding three months per six-month period, while Article 13 of that regulation concerns the refusal of entry, to the territory of the Member States, to third-country nationals who do not fulfil all of those conditions.

45 Consequently, Articles 5 and 13 of Regulation No 562/2006 likewise do not govern the situation of third-country nationals, such as Ms Zurita García and Mr Choque Cabrera, who were already on Spanish territory, since an unspecified date, when the expulsion order was made against them on grounds of their unlawful stay.

46 Lastly, having regard to the fact that it cannot be ruled out that Articles 6b and 23 of the CISA may be applicable, *ratione temporis*, in Case C-261/08 (see paragraphs 37 and 38 of this judgment), as the Austrian Government and the Commission of the European Communities suggest, it is appropriate to take those articles of the CISA into account when examining the question referred for a preliminary ruling in order to provide the referring court with an answer which will be of use to it (see, by analogy, Case C-275/06 *Promusicae* [2008] ECR I-271, paragraph 46, and Case C-346/06 *Rüffert* [2008] ECR I-1989, paragraph 18).

47 As is clear from its wording, Article 23 of the CISA applies to all those who are not nationals of a Member State and who do not fulfil, or no longer fulfil, the short-stay conditions applicable within the territory of one of the Member States, which, according to the factual account given in the orders for reference, would appear to be the situation of both Ms Zurita García and Mr Choque Cabrera.

48 It follows that, by its question, the referring court is asking, in essence, whether Articles 6b and 23 of the CISA and Article 11 of Regulation No 562/2006 must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the short-stay conditions applicable in that Member State, that Member State is obliged to adopt a decision to expel that person.

49 Both Article 6b(1) of the CISA and Article 11(1) of Regulation No 562/2006 establish a rebuttable presumption under which, if the travel document of a third-country national does not bear an entry stamp, the competent national authorities may presume that the holder does not fulfil, or no longer fulfils, the conditions of duration of stay applicable within the Member State concerned.

50 Article 6b(2) of the CISA, like Article 11(2) of Regulation No 562/2006, allows for that presumption to be rebutted where the third-country national provides, by any means, credible evidence, such as transport tickets or proof of his or her presence outside the territory of the Member States, that he or she has respected the conditions relating to the duration of a short stay.

51 Pursuant to Article 6b(3) of the CISA and Article 11(3) of Regulation No 562/2006, should the presumption referred to in paragraph 1 of both of those articles not be rebutted, the third-country national may be expelled by the competent authorities from the territory of the Member States concerned.

52 The Commission points out, correctly, that there is a discrepancy between the wording of the Spanish-language version of Article 11(3) of Regulation No 562/2006 and that of the other language versions.

53 In the Spanish-language version, that provision imposes an obligation, inasmuch as it provides that the competent authorities of the Member State 'shall expel', from the territory of that Member State, a third-country national if the presumption is not rebutted. By contrast, in all the other language versions, expulsion appears as an option for those authorities.

54 It must be borne in mind in this regard that, according to settled case-law, the necessity for uniform application and accordingly for uniform interpretation of a Community measure makes it impossible to consider one version of the text in isolation, but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, in the light, in particular, of the versions in all languages (see, inter alia, Case 29/69 *Stauder* [1969] ECR 419, paragraph 3; Case 55/87 *Moksel Import und Export* [1988] ECR 3845, paragraph 15; Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 47; and Case C-188/03 *Junk* [2005] ECR I-885, paragraph 33).

55 It also follows from settled case-law that the wording used in one language version of a Community provision cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of Community law (see Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16; Case C-187/07 *Endendijk* [2008] ECR I-2115, paragraph 23; and Case C-239/07 *Sabatauskas and Others* [2008] ECR I-7523, paragraph 38).

56 In the present cases, as the Spanish-language version of Article 11(3) of Regulation No 562/2006 is the only one which diverges from the wording of the other language versions, it must be concluded that the real intention of the legislature was not to impose an obligation on the Member States concerned to expel, from their territory, third-country nationals in the event that they have not succeeded in rebutting the presumption referred to in Article 11(1), but to grant those Member States the option of so doing.

57 That interpretation is confirmed, as the Advocate General states in point 43 of her Opinion, by the fact that the Spanish-language version of Article 6b of the CISA, the wording of which was repeated in Article 11 of Regulation No 562/2006, accords with the other language versions as regards the discretionary nature of the power, for the Member States concerned, to expel a third-country national who does not succeed in rebutting the abovementioned presumption.

58 It remains to be examined whether, as the Austrian Government claims, it follows from Article 23 of the CISA that the Member States must expel from their territory any third-country national who is unlawfully present there, unless there is a reason to grant that person asylum or international protection. That provision would then preclude the option for a Member State to replace an expulsion order with the imposition of a fine.

59 That interpretation of Article 23 of the CISA cannot be upheld.

60 It should be pointed out, in that regard, that the wording of Article 23 of the CISA does not mention an obligation to expel in such strict terms, in the light of the exceptions therein.

61 First, Article 23(1), which forms part of Chapter 4, concerning the conditions governing the movement of aliens, under Title II on the abolition of checks at internal borders and movement of persons, favours the voluntary departure of a third-country national who does not fulfil, or no longer fulfils, the short-stay conditions applicable within the territory of the Member State concerned.

62 The same applies for Article 23(2), according to which a third-country national who holds a valid residence permit or provisional residence permit issued by another Member State is required to go to the territory of that Member State immediately.

63 Second, to the extent to which Article 23(3) of the CISA provides that, in certain circumstances, a third-country national must be expelled from a Member State on the territory of which he was apprehended, that consequence is subordinate to the conditions laid down in the national law of the Member State concerned. In the event that the application of that national law does not permit expulsion, that Member State may allow the person concerned to remain on its territory.

64 It is thus for the national law of each Member State to adopt, particularly with regard to the conditions under which expulsion may take place, the means for applying the basic rules established in Article 23 of the CISA relating to third-country nationals who do not fulfil, or no longer fulfil, the short-stay conditions for its territory.

65 In the cases in the main proceedings, it is apparent from the information provided to the Court in the course of the written procedure that, under national law, a decision imposing a fine is not a permit for a third-country national who is unlawfully present in Spain to remain legally on Spanish territory. It is also apparent that, irrespective of whether that fine is paid or not, that decision is notified to the person concerned with a warning that he should leave the territory within 15 days and, that, should he fail to comply, he may be prosecuted under Article 53(a) of the Law on Aliens and risks being expelled with immediate effect.

66 Consequently, the reply to the question referred is that Articles 6b and 23 of the CISA and Article 11 of Regulation No 562/2006 must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the conditions of duration of stay applicable there, that Member State is not obliged to adopt a decision to expel that person.

Costs

67 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Articles 6b and 23 of the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen on 19 June 1990, as amended by Council Regulation (EC) No 2133/2004 of 13 December 2004 on the requirement for the competent authorities of the Member States to stamp systematically the travel documents of third-country nationals

when they cross the external borders of the Member States and amending the provisions of the Convention implementing the Schengen Agreement and the common manual to this end, and Article 11 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) must be interpreted as meaning that, where a third-country national is unlawfully present on the territory of a Member State because he or she does not fulfil, or no longer fulfils, the conditions of duration of stay applicable there, that Member State is not obliged to adopt a decision to expel that person.

[Signatures]

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* Language of the cases: Spanish.

Case C-445/06

Danske Slagterier

v

Bundesrepublik Deutschland

(Reference for a preliminary ruling from the Bundesgerichtshof)

(Measures having equivalent effect – Animal health – Intra-Community trade – Fresh meat – Veterinary checks – Non-contractual liability of a Member State – Limitation period – Determination of the loss or damage)

Summary of the Judgment

1. *Agriculture – Approximation of laws on animal health – Intra-Community trade in fresh meat – Veterinary checks – Directives 64/433 and 89/662 – Incorrect transposition and application – Obligation on the Member State to make good damage caused to individuals*

   (Art. 28 EC; Council Directive 64/433, as amended by Directive 91/497, and Council Directive 89/662)

2. *Community law – Rights conferred on individuals – Breach by a Member State – Obligation to make good damage caused to individuals*

3. *Community law – Rights conferred on individuals – Breach by a Member State – Obligation to make good damage caused to individuals*

   (Art. 226 EC)

4. *Community law – Rights conferred on individuals – Breach by a Member State of the obligation to transpose a directive – Obligation to make good damage caused to individuals*

5. *Community law – Rights conferred on individuals – Breach by a Member State – Obligation to make good damage caused to individuals*

   (Arts 226 EC and 234 EC)

1. The principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty. Individuals harmed have a right to reparation where three conditions are met: the rule of Community law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals.

   With regard to the first condition, Article 28 EC has direct effect in the sense that it confers on individuals rights upon which they are entitled to rely directly before the national courts and breach of that provision may give rise to reparation.

   The right conferred by Article 28 EC is defined and given concrete expression by Directive 64/433 on health conditions for the production and marketing of fresh meat, as amended by Directive 91/497, and Directive 89/662 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market. The free

movement of goods is one of the objectives of those directives, which, through the elimination of the differences existing between the Member States with regard to health requirements for fresh meat, are designed to encourage intra-Community trade. In particular, the prohibition on the Member States' preventing imports of fresh meat except where the goods do not meet the conditions laid down by Community directives or in certain very specific circumstances such as in the event of epidemics gives individuals the right to market in another Member State fresh meat that complies with the Community requirements.

It follows that individuals who have been harmed by the incorrect transposition and application of Directives 64/433 and 89/662 may rely on the right to the free movement of goods in order to be able to render the State liable for the breach of Community law.

(see paras 19-20, 22-24, 26, operative part 1)

2. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law. It is thus on the basis of the rules of national law on liability that the State must make reparation for the consequences of loss or damage caused to individuals by the breach of Community law, provided that the conditions, including time-limits, for reparation of loss or damage laid down by national law comply with the principles of equivalence and effectiveness.

As regards the latter principle, it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty. Such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law. In that regard, a national limitation period of three years appears to be reasonable.

However, in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty. It is for the national court, taking account of all the features of the legal and factual situation at the material time, to determine, in light of the principle of effectiveness, whether the application by analogy of a time-limit laid down by a national rule to claims for reparation of loss or damage caused as a result of the breach of Community law by the Member State concerned was sufficiently foreseeable for individuals.

So far as concerns whether the application by analogy of such a time-limit is compatible with the principle of equivalence, it is likewise for the national court to determine whether, as a result of its application, the conditions for reparation of loss or damage caused to individuals by the breach of Community law by that Member State would have been less favourable than those applicable to the reparation of similar domestic loss or damage.

(see paras 31-35)

3. Where the Commission of the European Communities has brought infringement proceedings under Article 226 EC, Community law does not require the limitation period laid down by national legislation for a claim seeking reparation on account of State liability for breach of Community law to be interrupted or suspended during those proceedings.

The fact that institution of infringement proceedings does not have the effect of interrupting or suspending the limitation period does not make it impossible or excessively difficult for individuals to exercise the rights which they derive from

Community law, given that an individual may bring an action seeking reparation under the detailed rules laid down for that purpose by national law without having to wait until a judgment finding that the Member State has infringed Community law has been delivered.

Furthermore, having regard to the specific features of proceedings under Article 226 EC compared with national procedural rules, national legislation which does not provide that the limitation period is interrupted or suspended when such proceedings have been brought by the Commission observes the principle of equivalence.

(see paras 39, 42, 45-46, operative part 2)

4. Community law does not preclude the limitation period applicable to an action for damages against the State for incorrect transposition of a directive from beginning to run on the date on which the first injurious effects of the incorrect transposition have been produced and the further injurious effects thereof are foreseeable, even if that date is prior to the correct transposition of the directive.

The fact that the limitation period laid down by national law begins to run on that date is not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law.

(see paras 49, 56, operative part 3)

5. Community law does not preclude the application of national legislation which lays down that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy, provided that utilisation of that remedy can reasonably be required of the injured party, a matter which is for the referring court to determine in light of all the circumstances of the main proceedings.

The likelihood that a national court will make a reference for a preliminary ruling under Article 234 EC or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.

First, the guidance obtained by a national court following a reference for a preliminary ruling facilitates its application of Community law, so that utilisation of that instrument of cooperation between the Court of Justice and the national courts does not in any way contribute to making it excessively difficult for individuals to exercise the rights which they derive from Community law. Accordingly, it would not be reasonable not to utilise a legal remedy solely because that remedy would be likely to give rise to a reference for a preliminary ruling.

Second, the procedure under Article 226 EC is entirely independent of national procedures and does not replace them. Infringement proceedings amount in fact to an objective review of legality in the general interest. Although the result of such proceedings may serve an individual's interests, it none the less remains reasonable for him to avert the loss or damage by applying all the means available to him, that is to say utilising the available legal remedies.

(see paras 65, 67, 69, operative part 4)

JUDGMENT OF THE COURT (Grand Chamber)

24 March 2009 (*)

(Measures having equivalent effect – Animal health – Intra-Community trade – Fresh meat – Veterinary checks – Non-contractual liability of a Member State – Limitation period – Determination of the loss or damage)

In Case C-445/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesgerichtshof (Germany), made by decision of 12 October 2006, received at the Court on 6 November 2006, in the proceedings

Danske Slagterier

v

Bundesrepublik Deutschland,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, M. Ilešič and A. Ó Caoimh, Presidents of Chambers, G. Arestis, A. Borg Barthet (Rapporteur), J. Malenovský, J. Klučka, U. Lõhmus and E. Levits, Judges,

Advocate General: V. Trstenjak,

Registrar: K. Sztranc-Sławiczek, Administrator,

having regard to the written procedure and further to the hearing on 21 May 2008,

after considering the observations submitted on behalf of:

– Danske Slagterier, by R. Karpenstein, Rechtsanwalt,

– the German Government, by M. Lumma and C. Blaschke, acting as Agents, assisted by L. Giesberts, Rechtsanwalt,

– the Czech Government, by T. Boček, acting as Agent,

– the Greek Government, by V. Kontolaimos, S. Kharitaki and S. Papaioannou, acting as Agents,

– the French Government, by G. de Bergues and A.-L. During, acting as Agents,

– the Italian Government, by I.M. Braguglia, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,

– the Polish Government, by E. Ośniecka-Tamecka and P. Kucharski, acting as Agents,

– the United Kingdom Government, by S. Lee, barrister,

– the Commission of the European Communities, by F. Erlbacher and H. Krämer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 September 2008,

gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Articles 5(1)(o) and 6(1)(b)(iii) of Council Directive 64/433/EEC of 26 June 1964 on health conditions for the production and marketing of fresh meat (OJ, English Special Edition 1963-64, p. 185), as amended by Council Directive 91/497/EEC of 29 July 1991 (OJ 1991 L 268, p. 69) ('Directive 64/433'), of Articles 5(1), 7 and 8 of Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market (OJ 1989 L 395, p. 13) and of Article 28 EC.

2 The reference was made in proceedings between Danske Slagterier and the Bundesrepublik Deutschland concerning a claim for compensation in respect of loss.

Legal context

Community legislation

3 Article 5(1) of Directive 64/433 provides:

'Member States shall ensure that the official veterinarian declares unfit for human consumption:

...

(o) meat which gives off a pronounced sexual odour.'

4 Article 6(1) of that directive provides:

'Member States shall ensure that:

...

(b) meat from:

...

(iii) without prejudice to the cases provided for in Article 5(1)(o) uncastrated male pigs with a carcase weight in excess of 80 kilograms, except where the establishment is able to guarantee by means of a method recognised by the procedure laid down in Article 16, or in the absence of such a method by a method recognised by the competent authority concerned, that carcases giving off a pronounced boar taint may be detected,

bears the special mark provided for by [Commission] Decision 84/371/EEC [of 3 July 1984 establishing the characteristics of the special mark for fresh meat referred to in Article 5(a) of Directive 64/433/EEC (OJ 1984 L 196, p. 46)] and undergoes one of the treatments provided for in [Council] Directive 77/99/EEC [of 21 December 1976 on health problems affecting intra-Community trade in meat products (OJ 1977, L 26, p. 85)];

...

(g) the treatment provided for in the preceding points is carried out in the establishment of

origin or in any other establishment designated by the official veterinarian;

...'

5 The provisions of Directive 64/433 had to be transposed into national law by 1 January 1993.

6 Article 5(1) of Directive 89/662 provides:

'Member States of destination shall implement the following measures:

(a) The competent authority may, at the places of destination of goods, check by means of non-discriminatory veterinary spot-checks that the requirements of Article 3 have been complied with; it may take samples at the same time.

Furthermore, where the competent authority of the Member State of transit or of the Member State of destination has information leading it to suspect an infringement, checks may also be carried out during the transport of goods in its territory, including checks on compliance as regards the means of transport;

...'

7 Article 7(1) of Directive 89/662 states:

'If, during a check carried out at the place of destination of a consignment or during transport, the competent authorities of a Member State establish:

...

(b) that the goods do not meet the conditions laid down by Community directives, or, in the absence of decisions on the Community standards provided for by the directives, by national standards, they may, provided that health and animal-health considerations so permit, give the consignor or his representative the choice of:

– destroying the goods, or

– using the goods for other purposes, including returning them with the authorisation of the competent authority of the country of the establishment of origin.

...'

8 Finally, Article 8 of Directive 89/662 provides:

'1. In the cases provided for in Article 7, the competent authority of the Member State of destination shall contact the competent authorities of the Member State of dispatch without delay. The latter authorities shall take all necessary measures and notify the competent authority of the first Member State of the nature of the checks carried out, the decisions taken and the reasons for such decisions.

...

2. …

Decisions taken by the competent authority of the State of destination and the reasons for such decisions shall be notified to the consignor or his representative and to the competent authority of the Member State of dispatch.

If the consignor or his representative so requests, the said decisions and reasons shall be forwarded to him in writing with details of the rights of appeal which are available to him under

the law in force in the Member State of destination and of the procedure and time-limits applicable.

...'

National legislation

9 Paragraph 839 of the German Civil Code (Bürgerliches Gesetzbuch), in the version in force until 31 December 2001 ('the BGB'), stated:

'(1) If an official wilfully or negligently breaches the official duty incumbent upon him as against a third party, he shall compensate the third party for the damage arising therefrom. If the official is only negligent, a claim can be made against him only if the injured party is unable to obtain compensation in another way.

(2) If an official commits a breach of official duty in giving judgment in legal proceedings, he shall be liable for the damage arising therefrom only if that breach of duty constitutes a criminal offence. This provision shall not apply to a wrongful refusal to exercise official duties or to a wrongful delay in exercising them.

(3) The obligation to compensate shall not arise if the injured party has wilfully or negligently failed to avert the damage by utilising a legal remedy.'

10 Paragraph 852 of the BGB provided:

'(1) The limitation period in respect of a claim for compensation for damage that has arisen from an unlawful act shall expire three years from the date on which the injured party became aware of the damage and of the identity of the person liable to pay compensation and, irrespective of any such awareness, 30 years from the date on which the unlawful act was committed.

(2) If negotiations on the amount of compensation payable have commenced between the person liable to pay the compensation and the person entitled to it, the limitation period shall be suspended until one or other of the parties refuses to continue the negotiations.

(3) If through his unlawful act the person liable to pay compensation has acquired anything to the injured party's detriment, he shall be required even after the expiry of the limitation period to make restitution in accordance with the provisions on restitution in the case of unjust enrichment.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Danske Slagterier, an industry association of Danish slaughterhouse companies organised in the form of cooperatives and pig farmers, which is acting pursuant to a right assigned to it by its members, claims from the Bundesrepublik Deutschland compensation for loss due to an infringement of Community law. It alleges that, in breach of Community law, the Bundesrepublik Deutschland imposed an import ban on meat from uncastrated male pigs from 1993 to 1999. In its view, the ban led to a loss of at least DEM 280 000 000 for the pig farmers and slaughterhouse companies over the period concerned.

12 At the beginning of the 1990s, a project called the 'Male-Pig-Projekt', whose objective was the farming of uncastrated male pigs, was launched in Denmark. This type of farming, which is financially attractive, entails the risk of the meat, when heated, giving off a pronounced sexual odour. According to Danish researchers, the presence of this taint can already be determined in the course of slaughter, by measuring the skatol content. Accordingly, in Denmark all slaughter lines were fitted with skatol measuring equipment to enable meat affected by the taint in

question to be identified and rejected. At the time, the Federal Republic of Germany considered, however, this taint to be attributable to the hormone androstenone, the formation of which can be avoided by castration at an earlier stage, and that the skatol content considered in isolation cannot in itself constitute a reliable method of detecting the sexual odour.

13 In January 1993, the Federal Republic of Germany informed the highest veterinary authorities of the Member States that the rule laid down in Article 6(1)(b) of Directive 64/433 had been transposed into national law in such a way that, irrespective of the weight limit, a threshold of 0.5 µg/g was fixed for androstenone; if that threshold were exceeded, the meat would give off a pronounced boar taint and would thus be unfit for human consumption. The Federal Republic of Germany also stated then that only Professor Claus's modified enzyme immunoassay was recognised as a specific method for identifying androstenone and that meat from uncastrated male pigs exceeding that threshold could not be transported as fresh meat into Germany.

14 Thus, numerous consignments of pigmeat from Denmark were subsequently checked by the German authorities and rejected because they exceeded the threshold for androstenone. Also, the pig farmers and slaughterhouse companies which had almost ceased production of castrated male pigs had to resume such production in order not to put exports to Germany at risk. Danske Slagterier submits that if the pigmeat exported had come from uncastrated pigs as envisaged by the Male-Pig-Projekt, costs savings of at least DEM 280 000 000 could have been achieved.

15 On 6 December 1999, Danske Slagterier brought an action for damages against the Bundesrepublik Deutschland before the Landgericht (Regional Court) Bonn. The Landgericht held that the action was well founded in respect of the period commencing on 7 December 1996 and dismissed the action as time-barred in so far as it claimed compensation for losses which had arisen before that date. The Oberlandesgericht (Higher Regional Court) Cologne, before which an appeal was brought, upheld the entire claim on the merits. By its appeal on a point of law to the Bundesgerichtshof (Federal Court of Justice), the Bundesrepublik Deutschland seeks the dismissal of the claim in its entirety.

16 Also, by judgment of 12 November 1998 in Case C-102/96 *Commission* v *Germany* [1998] ECR I-6871, the Court held that the Federal Republic of Germany had failed to fulfil its obligations under Articles 5(1)(o) and 6(1)(b) of Directive 64/433 and under Articles 5(1), 7 and 8 of Directive 89/662 by imposing the obligation of marking the carcases of uncastrated male pigs and subjecting them to heat treatment whenever the meat, regardless of carcase weight, had an androstenone content of more than 0.5 µg/g, as shown by Professor Claus's modified enzyme immunoassay, and by regarding the meat as giving off a pronounced sexual odour and consequently unfit for human consumption if the threshold of 0.5 µg/g of androstenone was exceeded.

17 In that context, the Bundesgerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Do Article 5(1)(o) and Article 6(1)(b)(iii) of … Directive 64/433 … in conjunction with Article 5(1), Article 7 and Article 8 of Directive 89/662 … place producers and distributors of pigmeat in a legal position which can give rise to a claim seeking to establish State liability under Community law in the event of errors of transposition or application?

(2) May the producers and distributors of pigmeat – irrespective of the answer to the first question – rely on an infringement of Article 30 of the EC Treaty (Article 28 EC) in order to substantiate a claim seeking to establish State liability under Community law where the transposition and application of the abovementioned directives are contrary to Community law?

(3) Does Community law require the limitation period for a claim seeking to establish State liability under Community law to be interrupted in the light of Treaty infringement proceedings under Article 226 EC or at any rate to be suspended pending the end of

those proceedings where there is no effective domestic legal remedy to compel the Member State to transpose a directive?

(4) Does the limitation period for a claim which seeks to establish State liability under Community law and is based on the inadequate transposition of a directive and an accompanying (de facto) import ban commence, irrespective of the applicable national law, only with the full transposition of the directive, or can the limitation period begin to run, in accordance with national law, when the first injurious effects have already been produced and further injurious effects are foreseeable? If full transposition has a bearing on the commencement of the limitation period, is this true in general or only if the directive confers a right on individuals?

(5) Given that the Member States may not frame the conditions for reparation of loss and damage in respect of claims seeking to establish State liability under Community law less favourably than those relating to similar domestic actions and it may not be made in practice impossible or excessively difficult to obtain reparation, are there, generally, objections to a national rule under which an obligation to pay compensation does not arise if the injured party has wilfully or negligently failed to avert the damage by utilising a legal remedy? Are there also objections to this "primacy of primary legal protection" where it is subject to the proviso that it must be reasonable for the party concerned? Is the fact that the relevant court is likely to be unable to answer the questions of Community law at issue without making a reference to the Court of Justice … or that Treaty infringement proceedings under Article 226 EC are already pending sufficient to make it unreasonable under European Community law?'

Consideration of the questions

Questions 1 and 2

18 By the first two questions, which it is appropriate to deal with together, the referring court essentially asks whether Articles 5(1)(o) and 6(1)(b)(iii) of Directive 64/433 in conjunction with Articles 5(1), 7 and 8 of Directive 89/662 place producers and distributors of pigmeat, in the event of incorrect transposition or application of those directives, in a legal position which can give rise to a claim seeking reparation on account of State liability for the breach of Community law and whether, in those circumstances, they can rely on a breach of Article 28 EC in order to substantiate a claim seeking reparation on account of such State liability.

19 It is to be recalled first of all that, in accordance with settled case-law, the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the EC Treaty (Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 35; Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 31; Case C-5/94 *Hedley Lomas* [1996] ECR I-2553, paragraph 24; and Joined Cases C-178/94, C-179/94 and C-188/94 to C-190/94 *Dillenkofer and Others* [1996] ECR I-4845, paragraph 20).

20 The Court has held that individuals harmed have a right to reparation where three conditions are met: the rule of Community law infringed must be intended to confer rights on them; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals (see *Brasserie du pêcheur and Factortame*, paragraph 51; *Hedley Lomas*, paragraph 25; and *Dillenkofer and Others*, paragraph 21).

21 With regard to the first condition, the Court has had the opportunity to examine Member State liability for breach of Community law in the case of failure to transpose directives designed to complete the internal market (see, in particular, *Francovich and Others* and *Dillenkofer and Others*). However, unlike the cases giving rise to those two judgments, where only secondary

law had created a legal framework according rights to individuals, the main proceedings concern an instance in which one of the parties thereto, namely Danske Slagterier, submits that Article 28 EC already confers upon it the rights which it invokes.

22 It should be recalled that it is undisputed that Article 28 EC has direct effect in the sense that it confers on individuals rights upon which they are entitled to rely directly before the national courts and that breach of that provision may give rise to reparation (*Brasserie du pêcheur and Factortame*, paragraph 23).

23 Danske Slagterier also relies on the provisions of Directives 64/433 and 89/662. As is apparent from the wording of the title of Directive 89/662 and of the first recital in its preamble, that directive was adopted with a view to the completion of the internal market, and so was Directive 91/497 amending Directive 64/433, as made clear by the third recital in the preamble to Directive 91/497. The free movement of goods is thus one of the objectives of those directives, which, through the elimination of the differences existing between the Member States with regard to health requirements for fresh meat, are designed to encourage intra-Community trade. The right conferred by Article 28 EC is thus defined and given concrete expression by those directives.

24 Regarding the content of Directives 64/433 and 89/662, it should be noted that they govern, amongst other matters, health controls for, and certification of, fresh meat produced in one Member State and delivered to another. As is apparent in particular from Article 7(1)(b) of Directive 89/662, the Member States can prevent imports of fresh meat only where the goods do not meet the conditions laid down by Community directives or in certain very specific circumstances such as in the event of epidemics. The prohibition on the Member States' preventing importation gives individuals the right to market in another Member State fresh meat that complies with the Community requirements.

25 It is, moreover, apparent from Directive 64/433 in conjunction with Directive 89/662 that measures for the detection of a pronounced sexual odour from uncastrated male pigs have been harmonised at Community level (Case C-102/96 *Commission* v *Germany*, paragraph 29). This harmonisation consequently prevents the Member States, in the field harmonised exhaustively, from justifying an obstacle to the free movement of goods on grounds other than those envisaged by Directives 64/433 and 89/662.

26 Accordingly, the answer to the first two questions is that individuals who have been harmed by the incorrect transposition and application of Directives 64/433 and 89/662 may rely on the right to the free movement of goods in order to be able to render the State liable for the breach of Community law.

Question 3

27 By its third question, the referring court essentially asks whether, where the Commission of the European Communities has brought infringement proceedings under Article 226 EC, Community law requires the limitation period laid down by national legislation for a claim seeking reparation on account of State liability for breach of Community law to be interrupted or suspended during those proceedings, if there is no effective legal remedy in the State in question to compel it to transpose a directive.

28 Light can be shed on this question by setting out the chronology of the facts in the main proceedings. It is apparent from the order for reference that the infringement proceedings against the Federal Republic of Germany which gave rise to the judgment in Case C-102/96 *Commission* v *Germany* were brought on 27 March 1996. The first harmful effects were sustained by the injured parties in 1993, but it was not until December 1999 that they brought an action for damages against that State. If, as the referring court envisages, the three-year limitation period laid down in Paragraph 852(1) of the BGB is applied, that period would begin to run in the middle of 1996, when, according to the referring court, the injured parties became aware of the damage and the identity of the person liable to pay compensation. Consequently, in

the main proceedings, the action against the State for damages is liable to be time-barred. For that reason, it is relevant for deciding the main proceedings to know whether the institution of infringement proceedings by the Commission had effects on that limitation period.

29 However, in order to give an answer that is helpful for the referring court, it is appropriate to examine first of all the question implicitly raised by it, namely whether Community law precludes the application by analogy of the three-year limitation period laid down by Paragraph 852(1) of the BGB in the main proceedings.

30 Regarding the application of Paragraph 852(1) of the BGB, Danske Slagterier has bemoaned the lack of clarity in the legal position in Germany as to the national limitation rule applicable to claims seeking reparation on account of State liability for breach of Community law, stating that this question has not yet been dealt with by any legislative measure or any decision of the highest court, while academic legal writers are also divided on the issue as several legal bases are possible. In its view, application, for the first time and by analogy, of the time-limit laid down in Paragraph 852 of the BGB to actions for damages against a State for breach of Community law would infringe the principles of legal certainty and legal clarity as well as the principles of effectiveness and equivalence.

31 In that regard, it is settled case-law that, in the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law. It is thus on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss or damage caused, provided that the conditions, including time-limits, for reparation of loss or damage laid down by national law are not less favourable than those relating to similar domestic claims (principle of equivalence) and are not so framed as to make it in practice impossible or excessively difficult to obtain reparation (principle of effectiveness) (see, inter alia, *Francovich and Others*, paragraphs 42 and 43, and Case C-261/95 *Palmisani* [1997] ECR I-4025, paragraph 27).

32 As regards the latter principle, the Court has stated that it is compatible with Community law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the authorities concerned (Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 19 and the case-law cited). Such time-limits are not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law. In that regard, a national limitation period of three years appears to be reasonable (see, in particular, *Aprile*, paragraph 19, and Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 35).

33 However, it is also apparent from *Marks & Spencer*, paragraph 39, that in order to serve their purpose of ensuring legal certainty, limitation periods must be fixed in advance. A situation marked by significant legal uncertainty may involve a breach of the principle of effectiveness, because reparation of the loss or damage caused to individuals by breaches of Community law for which a Member State can be held responsible could be rendered excessively difficult in practice if the individuals were unable to determine the applicable limitation period with a reasonable degree of certainty.

34 It is for the national court, taking account of all the features of the legal and factual situation at the time material to the main proceedings, to determine, in light of the principle of effectiveness, whether the application by analogy of the time-limit laid down in Paragraph 852(1) of the BGB to claims for reparation of loss or damage caused as a result of the breach of Community law by the Member State concerned was sufficiently foreseeable for individuals.

35 In addition, so far as concerns whether the application by analogy of that time-limit is compatible with the principle of equivalence, it is likewise for the national court to determine whether, as a result of its application, the conditions for reparation of loss or damage caused to individuals by the breach of Community law by that Member State would have been less favourable than those applicable to the reparation of similar domestic loss or damage.

36 As regards interruption or suspension of the limitation period when infringement proceedings are brought, it follows from the foregoing considerations that it is for the Member States to determine detailed procedural matters of this type in so far as the principles of equivalence and effectiveness are observed.

37 It should be observed that reparation of loss or damage cannot be made conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to the State (see *Brasserie du pêcheur and Factortame*, paragraphs 94 to 96, and *Dillenkofer and Others*, paragraph 28).

38 The finding of an infringement is admittedly an important factor, but is not indispensable when verifying that the condition that the breach of Community law must be sufficiently serious is met. Nor can rights for individuals depend on the Commission's assessment of the expediency of taking action against a Member State pursuant to Article 226 EC or on the delivery by the Court of any judgment finding an infringement (see *Brasserie du pêcheur and Factortame*, paragraphs 93 and 95).

39 An individual may therefore bring an action seeking reparation under the detailed rules laid down for that purpose by national law without having to wait until a judgment finding that the Member State has infringed Community law has been delivered. Consequently, the fact that institution of infringement proceedings does not have the effect of interrupting or suspending the limitation period does not make it impossible or excessively difficult for individuals to exercise the rights which they derive from Community law.

40 In addition, Danske Slagterier pleads a breach of the principle of equivalence since German law provides for interruption of the limitation period when a domestic action under Paragraph 839 of the BGB is brought in parallel and proceedings under Article 226 EC must be treated in the same way as such an action.

41 As to those submissions, in order to decide whether procedural rules are equivalent, it is necessary to verify objectively, in the abstract, whether the rules at issue are similar taking into account the role played by them in the procedure as a whole, as well as the operation of that procedure and any special features of the rules (see, to this effect, Case C-78/98 *Preston and Others* [2000] ECR I-3201, paragraph 63).

42 When assessing whether the rules at issue here are similar, account must be taken of the specific features of proceedings under Article 226 EC.

43 In exercising its powers under Article 226 EC the Commission does not have to show that there is a specific interest in bringing an action (see Case 167/73 *Commission* v *France* [1974] ECR 359, paragraph 15, and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany* [2003] ECR I-3609, paragraph 29). The Commission's function is to ensure, of its own motion and in the general interest, that the Member States give effect to Community law and to obtain a declaration of any failure to fulfil the obligations deriving therefrom with a view to bringing it to an end (see *Commission* v *France*, paragraph 15, and Joined Cases C-20/01 and C-28/01 *Commission* v *Germany*, paragraph 29).

44 Article 226 EC is not therefore intended to protect the Commission's own rights. It is for the Commission alone to decide whether or not it is appropriate to bring proceedings against a Member State for a declaration that it has failed to fulfil its obligations and, as the case may be, because of what conduct or omission those proceedings should be brought (Case C-394/02 *Commission* v *Greece* [2005] ECR I-4713, paragraph 16 and the case-law cited). The Commission consequently has a discretion in this regard which excludes the right for individuals to require it to adopt a specific position (see Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11).

45 It must accordingly be concluded that the principle of equivalence is observed by national legislation which does not provide that the limitation period for a claim seeking reparation on

account of State liability for breach of Community law is interrupted or suspended when proceedings under Article 226 EC have been brought by the Commission.

46 In view of all the foregoing considerations, the answer to the third question is that, where the Commission has brought infringement proceedings under Article 226 EC, Community law does not require the limitation period laid down by national legislation for a claim seeking reparation on account of State liability for breach of Community law to be interrupted or suspended during those proceedings.

Question 4

47 By its fourth question, the referring court essentially asks whether the limitation period applicable to an action for damages against the State for incorrect transposition of a directive begins to run, irrespective of the applicable national law, only when the directive has been fully transposed, or whether that period begins to run, in accordance with national law, on the date on which the first injurious effects of the incorrect transposition have been produced and further injurious effects thereof are foreseeable. If full transposition has a bearing on the course of the limitation period, the referring court asks whether that is true generally or whether it applies only where the directive confers a right on individuals.

48 It should be recalled that, as is apparent from paragraphs 31 and 32 of the present judgment, in the absence of Community legislation, it is for the Member States to lay down the detailed procedural rules for legal proceedings intended to safeguard the rights which individuals derive from Community law, including the provisions governing limitation, in so far as those rules observe the principles of equivalence and effectiveness. It should further be recalled that the setting of reasonable time-limits for bringing proceedings observes those principles and cannot, in particular, be considered to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law.

49 The fact that the limitation period laid down by national law begins to run when the first injurious effects have been produced, although other effects of that kind are foreseeable, is likewise not liable to make it in practice impossible or excessively difficult to exercise the rights conferred by Community law.

50 The judgment in Joined Cases C-295/04 to C-298/04 *Manfredi and Others* [2006] ECR I-6619, to which Danske Slagterier refers, cannot cast doubt on that conclusion.

51 In paragraphs 78 and 79 of that judgment, the Court held that it is conceivable that a short limitation period for bringing an action for damages that runs from the day on which an agreement or concerted practice has been adopted could make it impossible in practice to exercise the right to seek compensation for the harm caused by that prohibited agreement or practice. The Court stated that, where there are continuous or repeated infringements, it is thus possible for the limitation period to expire even before the infringement is brought to an end, in which case it would be impossible for any individual who has suffered harm after the expiry of the limitation period to bring an action.

52 However, that is not the situation in the main proceedings. It is clear from the order for reference that the limitation period at issue in the main proceedings cannot begin to run until the injured party has become aware of the loss or damage and of the identity of the person required to pay compensation. In such circumstances, it is thus impossible for a person who has sustained loss or damage to find himself in a situation in which the limitation period begins to run, or indeed expires, without his even knowing that he has been harmed, as could have been the position in the context of the case which gave rise to the judgment in *Manfredi and Others*, where the limitation period began to run on the adoption of the agreement or concerted practice, of which certain persons concerned may not have been aware until much later.

53 As regards the possibility of setting the point at which a limitation period begins to run as being before the directive in question has been fully transposed, it is true that the Court held in Case

C-208/90 *Emmott* [1991] ECR I-4269, paragraph 23, that, until such time as a directive has been properly transposed, a defaulting Member State may not rely on an individual's delay in initiating proceedings against it in order to protect rights conferred upon him by the provisions of the directive and that a period laid down by national law within which proceedings must be initiated cannot begin to run before that time.

54 However, as was confirmed in Case C-410/92 *Johnson* [11994] ECR I-5483, paragraph 26, it is clear from the judgment in Case C-338/91 *Steenhorst-Neerings* [1993] ECR I-5475 that the solution adopted in *Emmott* was justified by the particular circumstances of that case, in which a time-bar had the result of depriving the applicant in the main proceedings of any opportunity whatsoever to rely on her right to equal treatment under a directive (see also Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 52; Joined Cases C-114/95 and C-115/95 *Texaco and Olieselskabet Danmark* [1997] ECR I-4263, paragraph 48; and Joined Cases C-279/96 to C-281/96 *Ansaldo Energia and Others* [1998] ECR I-5025, paragraph 20).

55 It is not apparent either from the documents before the court or from the hearing which took place in the oral procedure that, in the main proceedings, the existence of the time-limit at issue had the result, as in the proceedings which gave rise to the judgment in *Emmott*, of depriving the injured parties of any opportunity whatsoever to rely on their rights before the national courts.

56 Accordingly, the answer to the fourth question is that Community law does not preclude the limitation period applicable to an action for damages against the State for incorrect transposition of a directive from beginning to run on the date on which the first injurious effects of the incorrect transposition have been produced and the further injurious effects thereof are foreseeable, even if that date is prior to the correct transposition of the directive.

57 In the light of the answer given to the first part of the fourth question, there is no need to answer the second part.

Question 5

58 By its fifth question, the referring court essentially asks whether Community law precludes a rule such as that laid down in Paragraph 839(3) of the BGB which provides that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy. The referring court elaborates upon its question by asking whether such a national rule would be contrary to Community law in so far as it were applied subject to the proviso that recourse to that remedy be reasonable for the person concerned. The referring court would like, finally, to ascertain whether recourse to a legal remedy may be regarded as reasonable when it is likely that the court before which a case is brought will make a reference for a preliminary ruling under Article 234 EC or when infringement proceedings under Article 226 EC have been brought.

59 As has been recalled when answering the previous two questions, it is for the Member States, in the absence of Community legislation, to lay down the detailed procedural rules for legal proceedings intended to safeguard the rights which individuals derive from Community law, in so far as those rules observe the principles of equivalence and effectiveness.

60 As regards utilisation of the available legal remedies, the Court held in *Brasserie du pêcheur and Factortame*, paragraph 84, in relation to liability of a Member State for breach of Community law, that the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.

61 Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the loss or damage himself (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33, and *Brasserie du pêcheur and Factortame*, paragraph 85).

62 It would, however, be contrary to the principle of effectiveness to oblige injured parties to have recourse systematically to all the legal remedies available to them even if that would give rise to excessive difficulties or could not reasonably be required of them.

63 In Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 106, the Court indeed held that the exercise of rights conferred on private persons by directly applicable provisions of Community law would be rendered impossible or excessively difficult if their claims for compensation based on Community law were rejected or reduced solely because the persons concerned did not apply for grant of the right which was conferred by Community provisions, and which national law denied them, with a view to challenging the refusal of the Member State by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law. In a case of that kind, it would not have been reasonable to require the injured parties to utilise the legal remedies available to them, since they would in any event have had to make the payment at issue in advance, and even if the national court had held the fact that payment had to be made in advance incompatible with Community law, the persons in question would not have been able to obtain interest on that sum and they would have laid themselves open to the possibility of penalties (see, to this effect, *Metallgesellschaft and Others*, paragraph 104).

64 Consequently, it is to be concluded that Community law does not preclude the application of a national rule such as that laid down in Paragraph 839(3) of the BGB, provided that utilisation of the legal remedy in question can reasonably be required of the injured party. It is for the referring court to determine in light of all the circumstances of the main proceedings whether that is so.

65 As regards the possibility that the legal remedy utilised will give rise to a reference for a preliminary ruling, and the effect which that would have on the reasonableness of that legal remedy, it should be recalled that, in accordance with settled case-law, the procedure provided for by Article 234 EC is an instrument of cooperation between the Court of Justice and the national courts, by means of which the Court provides the national courts with the points of interpretation of Community law which they need in order to decide the disputes before them (see Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 22, and Case C-380/01 *Schneider* [2004] ECR I-1389, paragraph 20). The guidance thus obtained by the national court therefore facilitates its application of Community law, so that utilisation of that instrument of cooperation does not in any way contribute to making it excessively difficult for individuals to exercise the rights which they derive from Community law. Accordingly, it would not be reasonable not to utilise a legal remedy solely because that remedy would be likely to give rise to a reference for a preliminary ruling.

66 It follows that a strong likelihood that recourse to a legal remedy will give rise to a reference for a preliminary ruling is not in itself a reason for concluding that utilisation of that remedy is not reasonable.

67 As regards the reasonableness of the obligation to utilise the available legal remedies when infringement proceedings are pending before the Court, suffice it to state that the procedure under Article 226 EC is entirely independent of national procedures and does not replace them. As was stated when answering the third question, infringement proceedings amount in fact to an objective review of legality in the general interest. Although the result of such proceedings may serve an individual's interests, it none the less remains reasonable for him to avert the loss or damage by applying all the means available to him, that is to say utilising the available legal remedies.

68 It follows that the existence of infringement proceedings pending before the Court of Justice or the likelihood that the national court will make a reference to the Court of Justice for a preliminary ruling cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.

69 The answer to the fifth question therefore is that Community law does not preclude the application of national legislation which lays down that an individual cannot obtain reparation for

loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy, provided that utilisation of that remedy can reasonably be required of the injured party, a matter which is for the referring court to determine in light of all the circumstances of the main proceedings. The likelihood that a national court will make a reference for a preliminary ruling under Article 234 EC or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.

Costs

70 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Individuals who have been harmed by the incorrect transposition and application of Council Directive 64/433/EEC of 26 June 1964 on health conditions for the production and marketing of fresh meat, as amended by Council Directive 91/497/EEC of 29 July 1991, and Council Directive 89/662/EEC of 11 December 1989 concerning veterinary checks in intra-Community trade with a view to the completion of the internal market may rely on the right to the free movement of goods in order to be able to render the State liable for the breach of Community law.**

2. **Where the Commission of the European Communities has brought infringement proceedings under Article 226 EC, Community law does not require the limitation period laid down by national legislation for a claim seeking reparation on account of State liability for breach of Community law to be interrupted or suspended during those proceedings.**

3. **Community law does not preclude the limitation period applicable to an action for damages against the State for incorrect transposition of a directive from beginning to run on the date on which the first injurious effects of the incorrect transposition have been produced and the further injurious effects thereof are foreseeable, even if that date is prior to the correct transposition of the directive.**

4. **Community law does not preclude the application of national legislation which lays down that an individual cannot obtain reparation for loss or damage which he has wilfully or negligently failed to avert by utilising a legal remedy, provided that utilisation of that remedy can reasonably be required of the injured party, a matter which is for the referring court to determine in light of all the circumstances of the main proceedings. The likelihood that a national court will make a reference for a preliminary ruling under Article 234 EC or the existence of infringement proceedings pending before the Court of Justice cannot, in itself, constitute a sufficient reason for concluding that it is not reasonable to have recourse to a legal remedy.**

[Signatures]

* Language of the case: German.

JUDGMENT OF THE COURT (Grand Chamber)

22 June 2010 (*)

(Reference for a preliminary ruling – Article 267 TFEU – Examination of whether a national law is consistent both with European Union law and with the national constitution – National legislation granting priority to an interlocutory procedure for the review of constitutionality – Article 67 TFEU – Freedom of movement for persons – Abolition of border control at internal borders – Regulation (EC) No 562/2006 – Articles 20 and 21 – National legislation authorising identity checks in the area between the land border of France with States party to the Convention Implementing the Schengen Agreement and a line drawn 20 kilometres inside that border)

In Joined Cases C-188/10 and C-189/10,

REFERENCES for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decisions of 16 April 2010, received at the Court on the same day, in proceedings against

Aziz Melki (C-188/10),

Sélim Abdeli (C-189/10),

THE COURT (Grand Chamber),

composed of V. Skouris, President, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, R. Silva de Lapuerta and C. Toader, Presidents of Chambers, K. Schiemann, E. Juhász, T. von Danwitz (Rapporteur), J.-J. Kasel and M. Safjan, Judges,

Advocate General: J. Mazák,

Registrar: M.-A. Gaudissart, Head of Unit,

having regard to the order of the President of the Court of 12 May 2010 deciding to apply an accelerated procedure to the references for a preliminary ruling in accordance with Article 23a of the Statute of the Court of Justice of the European Union and the first paragraph of Article 104a of the Rules of Procedure,

having regard to the written procedure and further to the hearing on 2 June 2010,

after considering the observations submitted on behalf of:

– Mr Melki and Mr Abdeli, by R. Boucq, avocat,

– the French Government, by E. Belliard, G. de Bergues and B. Beaupère-Manokha, acting as Agents,

– the Belgian Government, by C. Pochet, M. Jacobs and T. Materne, acting as Agents, and by F. Tulkens, avocat,

– the Czech Government, by M. Smolek, acting as Agent,

– the German Government, by J. Möller, B. Klein and N. Graf Vitzthum, acting as Agents,

– the Greek Government, by T. Papadopoulou and L. Kotroni, acting as Agents,

– the Netherlands Government, by C. Wissels and M. de Ree, acting as Agents,

– the Polish Government, by J. Faldyga, M. Jarosz and M. Szpunar, acting as Agents,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the European Commission, by J.-P. Keppenne and M. Wilderspin, acting as Agents,

after hearing the Advocate General,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Articles 67 TFEU and 267 TFEU.

2 The references have been made in the course of two sets of proceedings brought against Mr Melki and Mr Abdeli respectively – both of whom are of Algerian nationality – seeking the extension of their detention in premises not falling within the control of the prison service.

Legal context

European Union law

3 Under the preamble to Protocol (No 19) on the Schengen *acquis* integrated into the framework of the European Union, annexed to the Treaty of Lisbon (OJ 2010 C 83, p. 290; 'Protocol No 19'):

'The High Contracting Parties,

noting that the Agreements on the gradual abolition of checks at common borders signed by some Member States of the European Union in Schengen on 14 June 1985 and on 19 June 1990, as well as related agreements and the rules adopted on the basis of these agreements, have been integrated into the framework of the European Union by the Treaty of Amsterdam of 2 October 1997,

desiring to preserve the Schengen *acquis*, as developed since the entry into force of the Treaty of Amsterdam, and to develop this *acquis* in order to contribute towards achieving the objective of offering citizens of the Union an area of freedom, security and justice without internal borders,

…

have agreed upon the following provisions, which shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union'.

4 Article 2 of that protocol states:

'The Schengen *acquis* shall apply to the Member States referred to in Article 1, without prejudice to Article 3 of the Act of Accession of 16 April 2003 or to Article 4 of the Act of Accession of 25 April 2005. The Council will substitute itself for the Executive Committee established by the Schengen agreements.'

5 The Schengen *acquis* comprises, inter alia, the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic

Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (OJ 2000 L 239, p. 19), signed at Schengen (Luxembourg) on 19 June 1990 ('the CISA'), Article 2 of which concerned the crossing of internal borders.

6 Under Article 2(1) to (3) of the CISA:

'1. Internal borders may be crossed at any point without any checks on persons being carried out.

2. However, where public policy or national security so require a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. If public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof.

3. The abolition of checks on persons at internal borders shall not affect the provisions laid down in Article 22, or the exercise of police powers throughout a Contracting Party's territory by the competent authorities under that Party's law, or the requirement to hold, carry and produce permits and documents provided for in that Party's law.'

7 Article 2 of the CISA was repealed as from 13 October 2006, in accordance with Article 39(1) of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) (OJ 2006 L 105, p. 1).

8 Under Article 2, points 9 to 11, of that regulation:

'For the purposes of this Regulation the following definitions shall apply:

…

9. "border control", means the activity carried out at a border, in accordance with and for the purposes of this Regulation, in response exclusively to an intention to cross or the act of crossing that border, regardless of any other consideration, consisting of border checks and border surveillance;

10. "border checks", means the checks carried out at border crossing points, to ensure that persons, including their means of transport and the objects in their possession, may be authorised to enter the territory of the Member States or authorised to leave it;

11. "border surveillance", means the surveillance of borders between border crossing points and the surveillance of border crossing points outside the fixed opening hours, in order to prevent persons from circumventing border checks'.

9 Article 20 of Regulation No 562/2006, entitled 'Crossing internal borders', provides:

'Internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out.'

10 Article 21 of that regulation, entitled 'Checks within the territory', provides:

'The abolition of border control at internal borders shall not affect:

(a) the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

(i) do not have border control as an objective;

(ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime;

(iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders;

(iv) are carried out on the basis of spot-checks;

…

(c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

…'

National law

Constitution of 4 October 1958

11 Article 61-1 of the Constitution of 4 October 1958, as amended by Constitutional Law No 2008-724 of 23 July 2008 on the modernisation of the institutions of the Fifth Republic (JORF of 24 July 2008, p. 11890) ('the Constitution'), provides:

'If, in the course of proceedings before a court or tribunal, it is claimed that a legislative provision prejudices the rights and freedoms which the Constitution guarantees, the matter may be brought before the Conseil constitutionnel [Constitutional Council] further to a reference from the Conseil d'État [Council of State] or the Cour de Cassation [Court of Cassation], which shall rule within a fixed period.

An Organic Law shall determine the conditions for implementing the present article.'

12 The second and third paragraphs of Article 62 of the Constitution provide:

'A provision declared unconstitutional on the basis of Article 61-1 shall be repealed as of the publication of the decision of the Conseil constitutionnel or as of a subsequent date determined by that decision. The Conseil constitutionnel shall determine the conditions and limits within which the effects produced by the provision may be affected.

No appeal shall lie from the decisions of the Conseil constitutionnel. They shall be binding on public authorities and on all administrative authorities and courts.'

13 Under Article 88-1 of the Constitution:

'The Republic shall participate in the European Union constituted by States which have freely chosen to exercise some of their powers in common pursuant to the Treaty on European Union and the Treaty on the Functioning of the European Union, as they result from the treaty signed in Lisbon on 13 December 2007.'

Order No 58-1067

14 Organic Law No 2009-1523 of 10 December 2009 on the application of Article 61-1 of the Constitution (JORF of 11 December 2009, p. 21379) inserted a new Chapter IIa, entitled 'Priority Questions on Constitutionality', into Title II of Order No 58-1067 of 7 November 1958 on the organic law governing the Conseil constitutionnel. That Chapter IIa provides:

'Section 1

Provisions applicable before the courts and tribunals subject to the authority of the Conseil d'État or the Cour de cassation

Article 23-1

Before the courts and tribunals subject to the authority of the Conseil d'État or the Cour de cassation, a plea alleging that a legislative provision prejudices the rights and freedoms guaranteed by the Constitution shall be submitted in a separate, reasoned document, failing which it shall be inadmissible. Such a plea may be raised for the first time in appeal proceedings. A court or tribunal may not raise the issue of its own motion.

…

Article 23-2

The court or tribunal shall rule without delay, by way of reasoned decision, on whether to submit the priority question on constitutionality to the Conseil d'État or the Cour de cassation. The question shall be so submitted if the following conditions are met:

1. The contested provision is applicable to the dispute or to the proceedings, or forms the basis of the action;

2. It has not already been declared constitutional in the grounds or the operative part of a decision of the Conseil constitutionnel, except where there has been a change in circumstances;

3. The question is not devoid of substance.

In any event, where pleas are made before the court or tribunal challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on whether to submit the question on constitutionality to the Conseil d'État or the Cour de cassation.

The decision to submit the question shall be sent to the Conseil d'État or to the Cour de cassation within eight days of its being made, together with the pleadings or the submissions of the parties. It shall not be open to appeal. A refusal to submit the question may be challenged only at the time of an appeal against the decision disposing of all or part of the case.

Article 23-3

Where the question is submitted, the court or tribunal shall stay proceedings until receipt of the decision of the Conseil d'État or the Cour de cassation or, if the matter has been referred to it, of the Conseil constitutionnel. The preparatory inquiries shall not be suspended and the court or tribunal may take the necessary interim or protective measures.

However, proceedings shall not be stayed either where a person is deprived of his liberty by reason of the proceedings, or where the purpose of the proceedings is to bring to an end a measure depriving someone of his liberty.

The court or tribunal may also rule without awaiting the decision on the priority question on constitutionality if law or regulation provides that it is to rule within a fixed period or as a matter of urgency. If the court at first instance rules without waiting and an appeal is brought against its decision, the appeal court shall stay proceedings. It may, however, not stay the proceedings if it is itself required to rule within a fixed period or as a matter of urgency.

In addition, where a stay of proceedings would risk leading to irreparable or manifestly excessive consequences for the rights of a party, the court or tribunal which decides to submit

the question may rule on those points which must be decided immediately.

If an appeal on a point of law has been brought where the courts adjudicating on the substance have ruled without awaiting the decision of the Conseil d'État or the Cour de cassation or, if the matter has been referred to it, the decision of the Conseil constitutionnel, any decision on that appeal shall be stayed until a ruling has been given on the priority question on constitutionality. That shall not apply where the party concerned is deprived of his liberty by reason of the proceedings and legislation provides that the Cour de cassation is to rule within a fixed period.'

Section 2

Provisions applicable before the Conseil d'État and the Cour de cassation

Article 23-4

Within a period of three months from receipt of the submission provided for in Article 23-2 or in the last paragraph of Article 23-1, the Conseil d'État or the Cour de cassation shall rule on whether to refer the priority question on constitutionality to the Conseil constitutionnel. A reference shall be made where the conditions laid down in Article 23-2(1) and (2) are met and where the question is new or of substance.

Article 23-5

A plea alleging that a legislative provision prejudices the rights and freedoms guaranteed by the Constitution may be raised, including for the first time on appeal on a point of law, in proceedings before the Conseil d'État or the Cour de cassation. The plea shall be submitted in a separate, reasoned document, failing which it shall be inadmissible. The court may not raise the issue of its own motion.

In any event, where pleas are made before the Conseil d'État or the Cour de cassation challenging whether a legislative provision is consistent, first, with the rights and freedoms guaranteed by the Constitution and, secondly, with France's international commitments, it must rule as a matter of priority on the referral of the question on constitutionality to the Conseil constitutionnel.

The Conseil d'État or the Cour de cassation shall have a period of three months from the date on which the plea is submitted to deliver its decision. The priority question on constitutionality shall be referred to the Conseil constitutionnel where the conditions laid down in Article 23-2(1) and (2) are met and the question is new or of substance.

Where a reference has been made to the Conseil constitutionnel, the Conseil d'État or the Cour de cassation shall stay proceedings until it has made its ruling. That shall not apply where the party concerned is deprived of his liberty by reason of the proceedings and legislation provides that the Cour de Cassation is to rule within a fixed period. If the Conseil d'État or the Cour de cassation is required to rule as a matter of urgency, it is possible for the proceedings not to be stayed.

…

Article 23-7

The reasoned decision of the Conseil d'État or the Cour de cassation to refer the matter to the Conseil constitutionnel shall be sent to it together with the pleadings or submissions of the parties. The Conseil constitutionnel shall receive a copy of any reasoned decision of the Conseil d'État or the Cour de cassation not to refer a priority question on constitutionality to it. If the Conseil d'État or the Cour de cassation has not ruled within the periods prescribed in Articles 23-4 and 23-5, the question is submitted to the Conseil constitutionnel.

…

Section 3

Provisions applicable before the Conseil constitutionnel

[…]

Article 23-10

The Conseil constitutionnel shall issue a ruling within three months of the date on which the matter was referred to it. The parties shall be permitted to submit their observations in adversarial proceedings. The hearing shall be public, save in exceptional cases defined in the Rules of Procedure of the Conseil constitutionnel.

…'

The Code of Criminal Procedure

15 Article 78-2 of the Code of Criminal Procedure (code de procédure pénale), in the version in force at the material time, provides:

'Senior police officers and, upon their orders and under their responsibility, the police officers and assistant police officers referred to in Articles 20 and 21-1 may ask any person to prove his identity by any means, where one or more plausible reasons exist for suspecting that:

– the person has committed or attempted to commit an offence;

– or the person is preparing to commit a "crime" [most serious criminal offence] or a "délit" [less serious offence];

– or the person is likely to provide information useful for the investigation in the event of a "crime" or a "délit";

– or the person is the subject of inquiries ordered by a judicial authority.

On the public prosecutor's written recommendations for the purposes of the investigation and prosecution of offences specified by him, the identity of any person may also be checked, in accordance with the same rules, in the places and for a period of time determined by the public prosecutor. The fact that the identity check uncovers offences other than those referred to in the public prosecutor's recommendations shall not constitute a ground for invalidating the related proceedings.

The identity of any person, regardless of his behaviour, may also be checked pursuant to the rules set out in the first paragraph, to prevent a breach of public order, in particular, an offence against the safety of persons or property.

In an area between the land border of France with the States party to the Convention signed at Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas of ports, airports and railway or bus stations open to international traffic, designated by order, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled. Where that control takes place on board an international train, it may be carried out on the section of the journey between the border and the first stop situated beyond the 20 kilometres from the border. However, on international trains on lines with particular service characteristics the control may also be carried out between that stop and a stop situated within the next 50 kilometres. Those lines and those stops shall be designated by Ministerial order. Where there is a section of motorway

starting in the area referred to in the first sentence of this paragraph and the first motorway tollbooth is situated beyond the 20 kilometre line, the control may also take place up to that first tollbooth, on parking areas and on the site of that tollbooth and the adjoining parking areas. The tollbooths concerned by this provision shall be designated by order. The fact that the identity check reveals an offence other than the non-observance of the aforementioned obligations shall not constitute a ground for invalidating the related proceedings.

…'

The actions in the main proceedings and the questions referred for a preliminary ruling

16 Mr Melki and Mr Abdeli, Algerian nationals unlawfully present in France, were subject to a police control, pursuant to Article 78-2, fourth paragraph, of the Code of Criminal Procedure, in the area between the land border of France with Belgium and a line drawn 20 kilometres inside that border. On 23 March 2010, they were each made the subject of a deportation order from the Prefect and a decision for continued detention.

17 Before the juge des libertés et de la détention (Judge deciding on provisional detention), to which the Prefect had made an application for extension of that detention, Mr Melki and Mr Abdeli disputed the lawfulness of the check made on them and raised the issue of the constitutionality of Article 78-2, fourth paragraph, of the Code of Criminal Procedure, on the ground that that provision prejudices the rights and freedoms guaranteed by the Constitution.

18 By two orders of 25 March 2010, the juge des libertés et de la détention ordered, first, that the question whether Article 78-2, fourth paragraph, of the Code of Criminal Procedure prejudices the rights and freedoms guaranteed by the Constitution be submitted to the Cour de Cassation and, second, that the detention of Mr Melki and Mr Abdeli be extended by 15 days.

19 According to the referring court, Mr Melki and Mr Abdeli claim that Article 78-2, fourth paragraph, of the Code of Criminal Procedure is contrary to the Constitution, given that the French Republic's commitments resulting from the Treaty of Lisbon have constitutional value in the light of Article 88-1 of the Constitution, and that that provision of the Code of Criminal Procedure, in so far as it authorises border controls at the borders with other Member States, is contrary to the principle of freedom of movement for persons set out in Article 67(2) TFEU, which provides that the European Union is to ensure the absence of internal border controls for persons.

20 The referring court considers, first, that the issue arises whether Article 78-2, fourth paragraph, of the Code of Criminal Procedure is consistent both with European Union Law ('EU law') and with the Constitution.

21 Second, the Cour de cassation infers from Articles 23-2 and 23-5 of Order No 58-1067, and from Article 62 of the Constitution, that courts adjudicating on the substance, like itself, are denied, by the effect of Organic Law No 2009-1523 which introduced those articles into Order No 58-1067, the opportunity to refer a question to the Court of Justice of the European Union for a preliminary ruling, where a priority question on constitutionality has been referred to the Conseil constitutionnel.

22 As it takes the view that its decision on whether to refer the priority question on constitutionality to the Conseil constitutionnel depends on the interpretation of EU law, the Cour de cassation decided, in both cases which are pending, to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does Article 267 [TFEU] preclude legislation such as that resulting from Article 23-2, paragraph 2, and Article 23-5, paragraph 2, of Order No 58-1067 of 7 November 1958, created by Organic Law No 2009-1523 of 10 December 2009, in so far as those provisions require courts to rule as a matter of priority on the submission to the Conseil constitutionnel of the question on constitutionality referred to them, inasmuch as that

question relates to whether domestic legislation, because it is contrary to European Union law, is in breach of the Constitution?

2. Does Article 67 [TFEU] preclude legislation such as that resulting from Article 78-2, paragraph 4, of the Code of Criminal Procedure, which provides that "in an area between the land border of France with the States party to the Convention signed at Schengen on 19 June 1990 and a line drawn 20 kilometres inside that border, and in the publicly accessible areas of ports, airports and railway or bus stations open to international traffic, designated by order, the identity of any person may also be checked, in accordance with the rules provided for in the first paragraph, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are observed. Where that control takes place on board an international train, it may be carried out on the section of the journey between the border and the first stop situated beyond the 20 kilometres from the border. However, on international trains on lines with particular service characteristics the control may also be carried out between that stop and a stop situated within the next 50 kilometres. Those lines and those stops shall be designated by Ministerial order. Where there is a section of motorway starting in the area referred to in the first sentence of this paragraph and the first motorway tollbooth is situated beyond the 20 kilometre line, the control may also take place up to that first tollbooth, on parking areas and on the site of that tollbooth and the adjoining parking areas. The tollbooths concerned by this provision shall be designated by order".'

23 By order of the President of the Court of 20 April 2010, Cases C-188/10 and C-189/10 were joined for the purposes of the written and oral procedures and of the judgment.

The questions referred for a preliminary ruling

Admissibility

24 The French Government contends that the references for a preliminary ruling are inadmissible.

25 As regards the first question, the French Government submits that it is purely hypothetical. That question is based on the premiss that the Conseil constitutionnel, when examining whether a law is consistent with the Constitution, may find it necessary to examine whether that law is consistent with EU law. However, according to the case-law of the Conseil constitutionnel, it is not for the Conseil, in the context of review of the constitutionality of laws, but rather for the ordinary and administrative courts to examine whether a law is consistent with EU law. It follows that, under national law, the Conseil d'État and the Cour de cassation are not obliged to refer to the Conseil constitutionnel questions on the compatibility of provisions of national law with EU law, since such questions are not related to the review of constitutionality.

26 As regards the second question, the French Government contends that a reply to that question would serve no purpose. Since 9 April 2010, Mr Melki and Mr Abdeli have no longer been the subject of any measure depriving them of their liberty and, as from that date, the two orders of the juge des libertés et de la détention have ceased to have any effect. The issue of the compatibility of Article 78-2, fourth paragraph, of the Code of Criminal Procedure with Article 67 TFEU is also irrelevant for the only set of proceedings still pending before the Cour de cassation, given that, as the Conseil constitutionnel recalled in its decision No 2010-605 DC of 12 May 2010, the Conseil maintains that it does not have jurisdiction to examine the compatibility of legislation with EU law, where it is required to review the constitutionality of that legislation.

27 In that regard, suffice it to point out that, according to settled case-law, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is

sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-333/07 *Regie Networks* [2008] ECR I-10807, paragraph 46; Case C-478/07 *Budejovicky Budvar* [2009] ECR I-0000, paragraph 63; and Case C-56/09 *Zanotti* [2010] ECR I-0000, paragraph 15).

28 In this instance, the questions referred concern the interpretation of Articles 67 TFEU and 267 TFEU. It is not apparent from the grounds of the orders for reference that the orders issued by the juge des libertés et de la détention in respect of Mr Melki and Mr Abdeli have ceased to have any effect. Furthermore, it is not obvious that the Cour de cassation's interpretation of how the priority question on constitutionality functions is clearly precluded in the light of the wording of the provisions of national law.

29 Therefore, the presumption of relevance enjoyed by the reference for a preliminary ruling in each of the cases is not rebutted by the objections submitted by the French Government.

30 In those circumstances, the references for a preliminary ruling made in these cases must be declared admissible.

The first question

31 By its first question, the referring court asks, in essence, whether Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, requiring the courts of that Member State to rule as a matter of priority on whether to refer, to the national court responsible for reviewing the constitutionality of laws, a question on whether a provision of national law is consistent with the Constitution, when at the same time the conflict of that provision with EU law is at issue.

Observations submitted to the Court

32 Mr Melki and Mr Abdeli consider that the national legislation at issue in the main proceedings is consistent with EU law, provided that the Conseil constitutionnel examines EU law and, where there is a doubt on the interpretation of that law, makes a reference to the Court of Justice for a preliminary ruling, requesting that the accelerated procedure be applied to that reference pursuant to Article 104a of the Rules of Procedure of the Court of Justice.

33 The French Government is of the opinion that EU law does not preclude the national legislation at issue, since that legislation does not alter or affect the role and the jurisdiction of the national courts in applying EU law. In support of that line of argument, the French Government relies, in essence, on the same interpretation of that legislation as that given – subsequent to the submission of the orders for reference by the Cour de cassation to the Court of Justice – both by the Conseil constitutionnel in its decision No 2010-605 DC of 12 May 2010, and by the Conseil d'État in its decision No 312305 of 14 May 2010.

34 Under that interpretation, the purpose of a priority question on constitutionality cannot be to refer to the Conseil constitutionnel a question on the compatibility of legislation with EU law. It is not for the Conseil, but for the ordinary and administrative courts to examine whether legislation is consistent with EU law, to apply EU law themselves on the basis of their own assessment, and to refer questions to the Court of Justice for a preliminary ruling at the same time as, or subsequent to, the submission of a priority question on constitutionality.

35 In that regard, the French Government contends in particular that, according to the national legislation at issue in the main proceedings, the national court can either rule, under certain conditions, on the substance of the case without awaiting the decision of the Cour de cassation, the Conseil d'État or the Conseil constitutionnel on the priority question on constitutionality, or take the interim or protective measures necessary to ensure the immediate protection of the rights granted to individuals under EU law.

36 Both the French and Belgian Governments claim that the procedural mechanism of the priority question on constitutionality is designed to guarantee to individuals that their request for an examination of the constitutionality of a national provision will actually be dealt with, without its being possible for referral to the Conseil constitutionnel to be precluded on the basis that the provision in question is incompatible with EU law. In addition, referral to the Conseil constitutionnel has the advantage that the Conseil can repeal a law which is incompatible with the Constitution, and that repeal then has an effect *erga omnes*. By contrast, the effects of a judgment of an ordinary or administrative court, which finds that a national provision is incompatible with EU law, are limited to the specific case decided by that court.

37 The Czech Government suggests that the Court reply that it follows from the principle of primacy of EU law that the national court is required to ensure that EU law is given full effect, by examining whether national law is compatible with EU law and by not applying those provisions of national law which are contrary to EU law, without having first to refer the matter to the national constitutional court or another national court. According to the German Government, the exercise of the right to make a reference to the Court of Justice for a preliminary ruling, which is conferred on every national court or tribunal by Article 267 TFEU, must not be obstructed by a provision of national law which makes a reference to the Court of Justice, for an interpretation of EU law, subject to the decision of another national court. The Polish Government is of the opinion that Article 267 TFEU does not preclude legislation such as that covered by the first question referred, given that the procedure laid down in that legislation does not adversely affect the substance of the rights and obligations of national courts resulting from Article 267 TFEU.

38 The Commission considers that EU law, and in particular the principle of primacy of that law and Article 267 TFEU, precludes national legislation such as that described in the orders for reference, where every challenge to the compatibility of a legislative provision with EU law enables the individual to rely on a breach of the Constitution by that legislative provision. In that case, the burden of ensuring that EU law is observed is implicitly but necessarily transferred from the court ruling on the substance of a case to the Conseil constitutionnel. Consequently, the mechanism of the priority question on constitutionality leads to a situation such as that held to be contrary to EU law by the Court in Case 106/77 *Simmenthal* [1978] ECR 629. The fact that the constitutional court may, itself, refer questions to the Court of Justice for a preliminary ruling does not remedy that situation.

39 If, on the other hand, a challenge to the compatibility of a legislative provision with EU law does not enable the individual *ipso facto* to challenge the compatibility of the same legislative provision with the Constitution, such that the court ruling on the substance of a case retains jurisdiction to apply EU law, then EU law does not preclude national legislation such as that covered by the first question referred, in so far as a number of criteria are met. According to the Commission, the national court must remain free, simultaneously, to refer to the Court of Justice for a preliminary ruling any question which it considers necessary, and to adopt any measure necessary to ensure provisional judicial protection of the rights guaranteed under EU law. It is also necessary, first, that the interlocutory procedure for the review of constitutionality does not lead to a stay of the substantive proceedings for an excessively long period and, second, that, at the end of that interlocutory procedure and irrespective of its outcome, the national court remains entirely free to assess whether the national legislative provision is consistent with EU law, to disapply that provision if that court holds that it is contrary to EU law, and to refer questions to the Court of Justice for a preliminary ruling if it considers that to be necessary.

The Court’s reply

40 Article 267 TFEU confers jurisdiction on the Court to give preliminary rulings concerning both the interpretation of the Treaties and acts of the institutions, bodies, offices or agencies of the Union and the validity of those acts. The second paragraph of that article provides that a national court or tribunal may refer such questions to the Court, if it considers that a decision on the question is necessary to enable it to give judgment, and the third paragraph of that article

provides that the national court or tribunal is bound to make a reference if there is no judicial remedy under national law against its decisions.

41 It follows that, first, while it might be convenient, in certain circumstances, for questions of purely national law to be settled at the time the reference is made to the Court (see Joined Cases 36/80 and 71/80 *Irish Creamery Milk Suppliers Association and Others* [1981] ECR 735, paragraph 6), national courts have the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of EU law, or consideration of their validity, necessitating a decision on their part (see, inter alia, Case 166/73 *Rheinmühlen-Düsseldorf* [1974] ECR 33, paragraph 3; Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 44; and Case C-210/06 *Cartesio* [2008] ECR I-9641, paragraph 88).

42 The Court has concluded therefrom that the existence of a rule of national law whereby courts or tribunals against whose decisions there is a judicial remedy are bound on points of law by the rulings of a court superior to them cannot, on the basis of that fact alone, deprive the lower courts of the right provided for in Article 267 TFEU to refer questions on the interpretation of EU law to the Court of Justice (see, to that effect, *Rheinmühlen-Düsseldorf*, paragraphs 4 and 5, and *Cartesio*, paragraph 94). The lower court must be free, in particular if it considers that a higher court's legal ruling could lead it to give a judgment contrary to EU law, to refer to the Court questions which concern it (Case C-378/08 *ERG and Others* [2010] ECR I-0000, paragraph 32).

43 Second, the Court has already held that a national court which is called upon, within the exercise of its jurisdiction, to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means (see, inter alia, *Simmenthal*, paragraphs 21 and 24; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, paragraph 73; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, paragraph 72; and Case C-314/08 *Filipiak* [2009] ECR I-0000, paragraph 81).

44 Any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of EU law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent European Union rules from having full force and effect are incompatible with those requirements which are the very essence of EU law (see *Simmenthal*, paragraph 22, and Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 20). This would be the case in the event of a conflict between a provision of EU law and a national law, if the solution of the conflict were to be reserved for an authority with a discretion of its own, other than the court called upon to apply EU law, even if such an impediment to the full effectiveness of EU law were only temporary (see, to that effect, *Simmenthal*, paragraph 23).

45 Lastly, the Court has held that a national court which, in a case concerning EU law, considers that a provision of national law is not only contrary to EU law, but also unconstitutional, does not lose the right or escape the obligation under Article 267 TFEU to refer questions to the Court of Justice on the interpretation or validity of EU law by reason of the fact that the declaration, that a rule of national law is unconstitutional, is subject to a mandatory reference to the constitutional court. The effectiveness of EU law would be in jeopardy if the existence of an obligation to refer a matter to a constitutional court could prevent a national court hearing a case governed by EU law from exercising the right conferred on it by Article 267 TFEU to refer to the Court of Justice questions concerning the interpretation or validity of EU law in order to enable it to decide whether or not a provision of national law was compatible with that EU law (see *Mecanarte*, paragraphs 39, 45 and 46).

46 As regards the conclusions to be drawn from the case-law referred to above in relation to

national provisions such as those covered by the first question referred, it should be observed that the referring court starts from the premiss that, under those provisions, when considering a question on constitutionality which is based on the fact that the legislation in question is not consistent with EU law, the Conseil constitutionnel also assesses whether that legislation is compatible with EU law. If that is so, where the court ruling on the substance submits the question on constitutionality, it could, before that submission, neither rule on whether the legislation concerned is compatible with EU law, nor refer a question in relation to that legislation to the Court of Justice for a preliminary ruling. Moreover, if the Conseil constitutionnel were to hold that the legislation in question is consistent with EU law, the court ruling on the substance also could not, after the Conseil constitutionnel's decision – which is binding on all judicial authorities – has been delivered, refer a question to the Court of Justice for a preliminary ruling. The same would be true where the plea alleging that a legislative provision is unconstitutional is raised during proceedings before the Conseil d'État or the Cour de cassation.

47 Under that interpretation, the national legislation at issue in the main proceedings would result in the ordinary and administrative national courts being prevented, both before submitting a question on constitutionality and, as the case may be, after the decision of the Conseil constitutionnel on that question, from exercising their right or fulfilling their obligation, provided for in Article 267 TFEU, to refer questions to the Court of Justice for a preliminary ruling. It must be stated that it follows from the principles set out in the case-law cited in paragraphs 41 to 45 above that Article 267 TFEU precludes national legislation such as that described in the orders for reference.

48 However, as is apparent from paragraphs 33 to 36 above, the French and Belgian Governments have advanced a different interpretation of the French legislation covered by the first question referred, relying on, inter alia, the decision of the Conseil constitutionnel No 2010-605 DC of 12 May 2010, and the decision of the Conseil d'État No 312305 of 14 May 2010, which were delivered after the Cour de cassation submitted its orders for reference to the Court of Justice.

49 In that regard, it should be borne in mind that it is for the referring court to determine, in the cases before it, what the correct interpretation of national law is.

50 Under settled case-law, it is for the national court to interpret the national law which it has to apply, as far as is at all possible, in a manner which accords with the requirements of EU law (Case C-262/97 *Engelbrecht* [2000] ECR I-7321, paragraph 39; Case C-115/08 *ČEZ* [2009] ECR I-0000, paragraph 138; and Case C-91/08 *Wall* [2010] ECR I-0000, paragraph 70). In the light of the aforementioned decisions of the Conseil constitutionnel and the Conseil d'État, such an interpretation of the national provisions which introduced the mechanism for review of constitutionality at issue in the main proceedings cannot be ruled out.

51 An examination of the question whether it is possible to interpret the mechanism of the priority question on constitutionality in accordance with the requirements of EU law cannot undermine the essential characteristics of the system of cooperation between the Court of Justice and the national courts, established by Article 267 TFEU, as they result from the case-law cited in paragraphs 41 to 45 above.

52 According to the settled case-law of the Court, in order to ensure the primacy of EU law, the functioning of that system of cooperation requires the national court to be free to refer to the Court of Justice for a preliminary ruling any question that it considers necessary, at whatever stage of the proceedings it considers appropriate, even at the end of an interlocutory procedure for the review of constitutionality.

53 In so far as national law lays down an obligation to initiate an interlocutory procedure for the review of constitutionality, which would prevent the national court from immediately disapplying a national legislative provision which it considers to be contrary to EU law, the functioning of the system established by Article 267 TFEU nevertheless requires that that court be free, first, to adopt any measure necessary to ensure the provisional judicial protection of the rights

conferred under the European Union's legal order and, second, to disapply, at the end of such an interlocutory procedure, that national legislative provision if that court holds it to be contrary to EU law.

54 It should also be observed that the priority nature of an interlocutory procedure for the review of the constitutionality of a national law, the content of which merely transposes the mandatory provisions of a European Union directive, cannot undermine the jurisdiction of the Court of Justice alone to declare an act of the European Union invalid, and in particular a directive, the purpose of that jurisdiction being to guarantee legal certainty by ensuring that EU law is applied uniformly (see, to that effect, Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraphs 15 to 20; Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 27; and Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 53).

55 To the extent that the priority nature of an interlocutory procedure for the review of constitutionality leads to the repeal of a national law – which merely transposes the mandatory provisions of a European Union directive – on the basis that that law is contrary to the national constitution, the Court could, in practice, be denied the possibility, at the request of the courts ruling on the substance of cases in the Member State concerned, of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law, and in particular the rights recognised by the Charter of Fundamental Rights of the European Union, to which Article 6 TEU accords the same legal value as that accorded to the Treaties.

56 Before the interlocutory review of the constitutionality of a law – the content of which merely transposes the mandatory provisions of a European Union directive – can be carried out in relation to the same grounds which cast doubt on the validity of the directive, national courts against whose decisions there is no judicial remedy under national law are, as a rule, required – under the third paragraph of Article 267 TFEU – to refer to the Court of Justice a question on the validity of that directive and, thereafter, to draw the appropriate conclusions resulting from the preliminary ruling given by the Court, unless the court which initiates the interlocutory review of constitutionality has itself referred that question to the Court pursuant to the second paragraph of Article 267 TFEU. In the case of a national implementing law with such content, the question of whether the directive is valid takes priority, in the light of the obligation to transpose that directive. In addition, imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question.

57 Accordingly, the reply to the first question referred is that Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:

– to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,

– to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and

– to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law.

It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of EU law.

The second question

58 By its second question, the referring court seeks to know, in essence, whether Article 67 TFEU precludes national legislation which permits police authorities, within an area of 20 kilometres from the land border of a Member State with States party to the CISA, to check the identity of any person in order to ascertain whether he fulfils the obligations laid down by law to hold, carry and produce papers and documents.

Observations submitted to the Court

59 Mr Melki and Mr Abdeli are of the opinion that Articles 67 TFEU and 77 TFEU provide, purely and simply, that there should be no internal border controls and that the Treaty of Lisbon, on that basis, made freedom of movement for persons absolute, irrespective of the nationality of the persons concerned. Accordingly, that freedom of movement precludes a restriction such as that provided for in Article 78-2, fourth paragraph, of the Code of Criminal Procedure, which authorises the national authorities to carry out systematic identity checks in border areas. Furthermore, they seek an order that Article 21 of Regulation No 562/2006 is invalid, on the ground that it infringes in itself the absolute nature of the right to come and go as enshrined in Articles 67 TFEU and 77 TFEU.

60 The French Government contends that the national provisions at issue in the main proceedings are justified by the need to combat a specific type of criminality at border crossings and along borders which present specific risks. The identity checks carried out on the basis of Article 78-2, fourth paragraph, of the Code of Criminal Procedure fully comply with Article 21(a) of Regulation No 562/2006. Their purpose is to establish the identity of a person, either in order to prevent the commission of offences or disruption to public order, or to seek the perpetrators of an offence. Those controls are also based on general information and police experience which have shown the particular benefit of checks in those areas. They are carried out on the basis of police information – coming from earlier police inquiries or from information obtained in the context of cooperation between the police forces of different Member States – which guide the placement and timing of the control. Those controls are not fixed, permanent or systematic. On the contrary, they are carried out as spot checks.

61 The German, Greek, Netherlands and Slovak Governments also propose a negative reply to the second question, pointing out that, even after the entry into force of the Treaty of Lisbon, non-systematic police checks in border areas are still permissible in compliance with the conditions laid down in Article 21 of Regulation No 562/2006. Those governments claim, inter alia, that identity checks in those areas, pursuant to the national legislation at issue in the main proceedings, are distinguishable by their purpose, their content, the way they are carried out and their effect from border control for the purpose of Article 20 of Regulation No 562/2006. Those checks can be authorised pursuant to the provisions of Article 21(a) or (c) of that regulation.

62 By contrast, the Czech Government and the Commission consider that Articles 20 and 21 of Regulation No 562/2006 preclude national legislation such as that at issue in the main proceedings. The checks under that legislation constitute disguised border controls which cannot be authorised under Article 21 of Regulation No 562/2006, given that they are only permitted in border areas and are subject to no condition other than that the person checked be in one of those areas.

The Court's reply

63 As a preliminary point, it should be noted that the referring court has not referred for a preliminary ruling a question on the validity of a provision of Regulation No 562/2006. As Article 267 TFEU does not constitute a means of redress available to the parties to a case pending before a national court, the Court cannot be compelled to evaluate the validity of EU law on the sole ground that that question has been put before it by one of the parties (Joined Cases C-376/05 and C-377/05 *Brünsteiner and Autohaus Hilgert* [2006] ECR I-11383, paragraph 28).

64 In relation to the interpretation sought by the referring court of Article 67 TFEU, paragraph 2 of which provides that the Union is to ensure the absence of internal border controls for persons, it should be pointed out that that article is part of Chapter 1, entitled 'General Provisions', of Title V of the Treaty on the Functioning of the European Union, and that it is apparent from the very wording of that article that it is the Union itself which is the addressee of the obligation which it lays down. Chapter 1 also contains Article 72, which reproduces the reservation contained in Article 64(1) EC, relating to the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.

65 Chapter 2 of Title V contains specific provisions on the policy on border checks, and in particular Article 77 TFEU, which is the successor to Article 62 EC. Under Article 77(2)(e), the European Parliament and the Council are to adopt measures concerning the absence of any controls on persons when crossing internal borders. It follows that the provisions adopted on that basis must be taken into account, in particular Articles 20 and 21 of Regulation No 562/2006, in order to determine whether EU law precludes national legislation such as that in Article 78-2, fourth paragraph, of the Code of Criminal Procedure.

66 The Community legislature implemented the principle of the absence of internal border controls by adopting, pursuant to Article 62 EC, Regulation No 562/2006 which seeks, according to Recital 22 in the preamble to that regulation, to build on the Schengen *acquis*. That regulation establishes, in Title III, a Community scheme on the crossing of internal borders, replacing Article 2 of the CISA as from 13 October 2006. The applicability of that regulation has not been affected by the entry into force of the Treaty of Lisbon. Protocol No 19 annexed thereto expressly provides that the Schengen *acquis* remains applicable.

67 Article 20 of Regulation No 562/2006 provides that internal borders may be crossed at any point without a border check on persons, irrespective of their nationality, being carried out. Under Article 2, point 10, of that regulation 'border checks' means the checks carried out at border crossing points, to ensure that persons may be authorised to enter the territory of the Member States or authorised to leave it.

68 As regards the controls provided for in Article 78-2, fourth paragraph, of the Code of Criminal Procedure, it must be observed that they are carried out not 'at borders' but within the national territory and they do not depend on movement across the border by the person checked. In particular, they are not carried out at the time when the border is crossed. Thus, those controls constitute not border checks prohibited under Article 20 of Regulation No 562/2006, but checks within the territory of a Member State, covered by Article 21 of that regulation.

69 Article 21(a) of Regulation No 562/2006 provides that the abolition of border control at internal borders is not to affect the exercise of police powers by the competent authorities of the Member States under national law, in so far as the exercise of those powers does not have an effect equivalent to border checks; that is also to apply in border areas. It follows that controls within the territory of a Member State are, pursuant to Article 21(a), prohibited only where they have an effect equivalent to border checks.

70 The exercise of police powers may not, under the second sentence of that provision, in particular, be considered equivalent to the exercise of border checks when the police measures do not have border control as an objective; are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime; are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders; and, lastly, are carried out on the basis of spot-checks.

71 In relation to the question whether the exercise of the control powers granted by Article 78-2, fourth paragraph, of the Code of Criminal Procedure has an effect equivalent to border checks, it must be held, first, that the objective of the control under that provision is not the same as that of border control within the meaning of Regulation No 562/2006. The objective of that border control, according to Article 2, points 9 to 11, of that regulation, is, first, to ensure that persons may be authorised to enter the territory of the Member State or authorised to leave it and,

second, to prevent persons from circumventing border checks. By contrast, the national provision in question relates to checking whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled. The possibility for a Member State to provide for such obligations in its national law is not, pursuant to Article 21(c) of Regulation No 562/2006, affected by the abolition of border control at internal borders.

72 Second, the fact that the territorial scope of the power granted by the national provision at issue in the main proceedings is limited to a border area does not suffice, in itself, to find that the exercise of that power has an equivalent effect within the meaning of Article 21(a) of Regulation No 562/2006, in view of the wording and objective of Article 21. However, as regards controls on board an international train or on a toll motorway, the national provision at issue in the main proceedings lays down specific rules regarding its territorial scope, a factor which might constitute evidence of the existence of such an equivalent effect.

73 Furthermore, Article 78-2, fourth paragraph, of the Code of Criminal Procedure, which authorises controls irrespective of the behaviour of the person concerned and of specific circumstances giving rise to a risk of breach of public order, contains neither further details nor limitations on the power thus conferred – in particular in relation to the intensity and frequency of the controls which may be carried out on that legal basis – for the purposes of preventing the practical application of that power, by the competent authorities, from leading to controls with an effect equivalent to border checks within the meaning of Article 21(a) of Regulation No 562/2006.

74 In order to comply with Articles 20 and 21(a) of Regulation No 562/2006, interpreted in the light of the requirement of legal certainty, national legislation granting a power to police authorities to carry out identity checks – a power which, first, is restricted to the border area of the Member State with other Member States and, second, does not depend upon the behaviour of the person checked or on specific circumstances giving rise to a risk of breach of public order – must provide the necessary framework for the power granted to those authorities in order, inter alia, to guide the discretion which those authorities enjoy in the practical application of that power. That framework must guarantee that the practical exercise of that power, consisting in carrying out identity controls, cannot have an effect equivalent to border checks, as evidenced by, in particular, the circumstances listed in the second sentence of Article 21(a) of Regulation No 562/2006.

75 In those circumstances, the answer to the second question referred is that Article 67(2) TFEU, and Articles 20 and 21 of Regulation No 562/2006, preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the CISA, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.

Costs

76 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. Article 267 TFEU precludes Member State legislation which establishes an interlocutory procedure for the review of the constitutionality of national laws, in

so far as the priority nature of that procedure prevents – both before the submission of a question on constitutionality to the national court responsible for reviewing the constitutionality of laws and, as the case may be, after the decision of that court on that question – all the other national courts or tribunals from exercising their right or fulfilling their obligation to refer questions to the Court of Justice for a preliminary ruling. On the other hand, Article 267 TFEU does not preclude such national legislation, in so far as the other national courts or tribunals remain free:

– **to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary,**

– **to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and**

– **to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to European Union law.**

It is for the referring court to ascertain whether the national legislation at issue in the main proceedings can be interpreted in accordance with those requirements of European Union law.

2. **Article 67(2) TFEU, and Articles 20 and 21 of Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), preclude national legislation which grants to the police authorities of the Member State in question the power to check, solely within an area of 20 kilometres from the land border of that State with States party to the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, signed at Schengen (Luxembourg) on 19 June 1990, the identity of any person, irrespective of his behaviour and of specific circumstances giving rise to a risk of breach of public order, in order to ascertain whether the obligations laid down by law to hold, carry and produce papers and documents are fulfilled, where that legislation does not provide the necessary framework for that power to guarantee that its practical exercise cannot have an effect equivalent to border checks.**

[Signatures]

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* Language of the case: French.

Case C-240/09

Lesoochranárske zoskupenie VLK

v

Ministerstvo životného prostredia Slovenskej republiky

(Reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky)

(Environment – Aarhus Convention – Public participation in the decision-making process and access to justice in environmental matters – Direct effect)

Summary of the Judgment

1. *Preliminary rulings – Jurisdiction of the Court – Interpretation of an international agreement concluded by the Community and the Member States on the basis of joint competence – Convention on access to information, public participation in decision-making and access to justice on environmental matters (Aarhus Convention) – Jurisdiction to determine the distribution of competences between the Community and the Member States*

   (Art. 234 EC; Aarhus Convention, Art. 9(3); Council Decision 2005/370)

2. *Preliminary rulings – Jurisdiction of the Court – Limits – Interpretation requested on account of the applicability of a provision both to situations falling within the scope of national law and to situations falling within the scope of EU law – Jurisdiction to provide that interpretation*

   (Aarhus Convention, Art. 9(3); Council Decision 2005/370)

3. *International agreements – Agreements concluded by the Community – Convention on access to information, public participation in decision-making and public access to justice on environmental matters (Aarhus Convention) – Article 9(3) – Direct effect – None*

   (Art. 10 EC; Aarhus Convention, Art. 9(3); Council Decision 2005/370)

1. Since the Convention on access to information, public participation in decision-making and public access to justice on environmental matters (Aarhus Convention) was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to draw the line dividing the obligations the Community has assumed from those remaining the sole responsibility of the Member States and to interpret that convention.

   Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that should not be the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, Union law neither requires nor forbids the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply

that rule of their own motion.

However, if it were to be held that the Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, Union law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

In that connection, it must be observed first of all, that, in the field of environmental protection, the Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC.

Furthermore, the Court has held that a specific issue which has not yet been the subject of Union legislation is part of Union law, when that issue is regulated in agreements concluded by the Union and the Member State and concerns a field in large measure covered by Union law.

(see paras 31-33, 35-36)

2. The Court has jurisdiction to interpret the provisions of Article 9(3) of the Convention on access to information, public participation in decision-making and public access to justice on environmental matters (Aarhus Convention) and, in particular, to give a ruling on whether or not they have direct effect.

When a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Union law, there is a certain interest in that provision's being interpreted uniformly, whatever the circumstances in which it is to apply, in order to forestall future differences of interpretation.

(see paras 42-43)

3. Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention) does not have direct effect in Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, so as to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

Failing EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding the rights that individuals derive from Union law, in this case the Habitats Directive, the Member States being responsible for ensuring that those rights are effectively protected in every case.

On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under Union law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by Union law (principle of effectiveness).

(see paras 47-48, 51-52, operative part)

JUDGMENT OF THE COURT (Grand Chamber)

8 March 2011 (*)

(Environment – Aarhus Convention – Public participation in the decision-making process and access to justice in environmental matters – Direct effect)

In Case C-240/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), made by decision of 22 June 2009, received at the Court on 3 July 2009, in the proceedings

Lesoochranárske zoskupenie VLK

v

Ministerstvo životného prostredia Slovenskej republiky,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot (Rapporteur), K. Schiemann and D. Šváby, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, U. Lõhmus, A. Ó Caoimh, M. Safjan and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2010,

after considering the observations submitted on behalf of:

– Lesoochranárske zoskupenie VLK, by I. Rajtáková, advokátka,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the German Government, by M. Lumma and B. Klein, acting as Agents,

– the Greek Government, by G. Karipsiadis and T. Papadopoulou, acting as Agents,

– the French Government, by G. de Bergues and S. Menez, acting as Agents,

– the Polish Government, by M. Dowgielewicz, D. Krawczyk and M. Nowacki, acting as Agents,

– the Finnish Government, by J. Heliskoski and M. Pere, acting as Agents,

– the Swedish Government, by A. Falk, acting as Agent,

– the United Kingdom Government, by L. Seeboruth and J. Stratford, acting as Agents,

– the European Commission, by P. Oliver and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention').

2 The reference has been made in proceedings between Lesoochranárske zoskupenie VLK ('zoskupenie'), an association established in accordance with Slovak law whose objective is the protection of the environment, and the Ministerstvo životného prostredia Slovenskej republiky (Ministry of the Environment of the Slovak Republic) ('the Ministerstvo životného prostredia'), concerning the association's request to be a 'party' to the administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas.

Legal context

International law

3 Article 9 of the Aarhus Convention states:

'1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

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

(a) having a sufficient interest or, alternatively,

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

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

What constitutes a sufficient interest and impairment of a right shall be determined in

accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

…'

4 Article 19(4) and (5) of the Aarhus Convention states:

'4. Any organisation referred to in Article 17 which becomes a Party to this Convention without any of its Member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organisation's Member States is a Party to this Convention, the organisation and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organisation and the Member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organisations referred to in Article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organisations shall also inform the Depositary of any substantial modification to the extent of their competence.'

European Union ('EU') law

5 Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive') provides:

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

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

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

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

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

6 Article 16(1) of the Habitats Directive further states:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in

their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

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

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

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

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

7 Annex IV to the Habitats Directive relating to animal and plant species of Community interest in need of strict protection, mentions, in particular, the species 'Ursus arctos'.

8 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) states in recital 5 in the preamble thereto:

'On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.'

9 Article 6 of Directive 2003/4 implements Article 9(1) of the Aarhus Convention, and reproduces almost word for word its provisions.

10 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC states in recitals 5, 9 and 11 in the preamble thereto:

'(5) On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Århus Convention"). Community law should be properly aligned with that Convention with a view to its ratification by the Community;

…

(9) Article 9(2) and (4) of the Århus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.

…

(11) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [OJ 1985 L 175, p. 40], and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [OJ 1996 L 257, p. 26] should be amended to ensure that they are fully compatible with the provisions of the Århus Convention, in particular Article 6 and Article 9(2) and (4)

thereof.'

11 Articles 3(7) and 4(4) of Directive 2003/35 introduce respectively Article 10a into Directive 85/337 and Article 15a into Directive 96/61 in order to implement Article 9(2) of the Aarhus Convention, which they reproduce in almost identical terms.

12 Decision 2005/370 states, in recitals 4 to 7 in the preamble thereto:

'(4) Under the terms of the Aarhus Convention, a regional economic integration organisation must declare in its instrument of ratification, acceptance, approval or accession, the extent of its competence in respect of the matters governed by the Convention.

(5) The Community, in accordance with the Treaty, and in particular Article 175(1) thereof, is competent, together with its Member States, for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the objectives listed in Article 174 of the Treaty.

(6) The Community and most of its Member States signed the Aarhus Convention in 1998 and since then have pursued their efforts in view of their approval of the Convention. In the meantime, relevant Community legislation is being made consistent with the Convention.

(7) The objective of the Aarhus Convention, as set forth in its Article 1 thereof, is consistent with the objectives of the Community's environmental policy, listed in Article 174 of the Treaty, pursuant to which the Community, which shares competence with its Member States, has already adopted a comprehensive set of legislation which is evolving and contributes to the achievement of the objective of the Convention, not only by its own institutions, but also by public authorities in its Member States.'

13 Article 1 of Decision 2005/370 provides:

'The UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, (Aarhus Convention) is hereby approved on behalf of the Community.'

14 In its declaration of competence made pursuant to Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Commission stated, in particular, 'that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.

15 Articles 10 to 12 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13) aim to ensure access to justice by non-governmental organisations with respect to administrative acts adopted by the institutions and bodies of the European Union or omissions by the latter, in accordance with Article 9(3) of the Aarhus Convention.

Slovak law

16 Pursuant to Article 82(3) of Law No 543/2002 on the protection of nature and the countryside, as amended, (zákon č. 543/2002 Z.z. o ochrane prírody a krajiny), which applies to the dispute in the main proceedings, an association having legal personality is to be regarded as a

'participant' in administrative proceedings, within the meaning of that provision, if, for at least one year, it has had the object of protecting nature and the countryside, and it has given written notice of its participation in those proceedings within the period prescribed in that article. The status of 'participant' confers on it the right to be informed of all pending administrative proceedings relating to the protection of nature and the countryside.

17 In accordance with Article 15a(2) of the Code of Administrative Procedure (Správny poriadok), 'a participant' is entitled to be informed that administrative proceedings have been initiated, to have access to files submitted by the parties to the administrative proceedings, to attend hearings and on-the-spot inspections, and to produce evidence and other information on the basis of which the decision will be taken.

18 Under Article 250(2) of the Code of Civil Procedure (Občiansky súdny poriadok) any natural or legal person who/which claims that his/its rights, as a party to the administrative proceedings, have been prejudiced by the decision taken or by the procedure followed by the administrative authority is to have the status of an applicant. Any natural or legal person not appearing at the administrative proceedings and whose presence, as a party to the proceedings has been requested, may also be an applicant.

19 According to Article 250(m) of the Code of Civil Procedure, persons having the status of parties to the proceedings are those who were parties to the administrative proceedings and the administrative body whose decision is to be reviewed.

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 The zoskupenie was informed of the initiation of a number of administrative proceedings brought by various hunting associations or other persons concerning the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas or the use of chemical substances in such areas.

21 The zoskupenie therefore applied to the Ministerstvo životného prostredia to be a 'party' to the administrative proceedings concerning the grant of those derogations or authorisations and relied on the Aarhus Convention for that purpose. The Ministerstvo životného prostredia rejected that request and the administrative appeal subsequently brought by the zoskupenie against that rejection.

22 The zoskupenie then brought a contentious appeal against the two decisions, arguing in particular that the provisions in Article 9(3) of the Aarhus Convention had direct effect.

23 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention of 25 June 1998, given that the principal objective pursued by that international treaty is to change the classic definition of *locus standi* by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an international treaty ("self-executing effect") in a situation where the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law?

2. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or direct effect of Community law within the meaning of the settled case-law of the Court of Justice?

3. If the answer to the first or the second question is in the affirmative, is it then possible to

interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept "act of a public authority" an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, the unlawfulness of which lies in its effect on the environment?'

24 By order of the President of the Court of 23 October 2009, the referring court's request that the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure be applied to the present case was rejected.

Consideration of the questions referred

Admissibility

25 The Polish and United Kingdom Governments submit that the questions are admissible only in so far as they concern the provisions of Article 9(3) of the Aarhus Convention, and are inadmissible for the remainder on the ground that the interpretation of EU law requested bears no relation to the actual facts of the main action or its purpose.

26 In answer to those arguments, it is sufficient to note that the questions referred relate essentially only to Article 9(3) of the Aarhus Convention, and do not concern the other subparagraphs of that article.

27 In those circumstances, there are no grounds for the Court to rule that the questions referred are partially inadmissible because they concern provisions other than those in Article 9(3) of the Aarhus Convention.

The first and second questions

28 By its first two questions, which it is appropriate to examine together, the referring court asks essentially whether individuals, and in particular environmental protection associations, where they wish to challenge a decision to derogate from a system of environmental protection, such as that put in place by the Habitats Directive for a species mentioned in Annex IV thereto, may derive a right to bring proceedings under EU law, having regard, in particular, to the provisions of Article 9(3) of the Aarhus Convention on direct effect, to which its questions relate.

29 A preliminary point to be made is that Article 300(7) EC provides that '[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'.

30 The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 *Haegeman* [1974] ECR 449, paragraphs 4 to 6, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7).

31 Since the Aarhus Convention was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the EC Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention (see, by analogy, Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307, paragraph 33, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR

I-7001, paragraph 33).

32 Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion (see, by analogy, *Dior and Others*, paragraph 48 and *MerckGenéricos – Produtos Farmacêuticos*, paragraph 34).

33 However, if it were to be held that the European Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, EU law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

34 Therefore, it is appropriate to examine whether, in the particular field into which Article 9(3) of the Aarhus Convention falls, the European Union has exercised its powers and adopted provisions to implement obligations deriving from it (see, by analogy, *MerckGenéricos – Produtos Farmacêuticos*, paragraph 39).

35 In that connection, it must be observed first of all, that, in the field of environmental protection, the European Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC (see, *Commission* v *Ireland*, paragraphs 94 and 95).

36 Furthermore, the Court has held that a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it (see, by analogy, Case C-239/03 *Commission* v *France* [2004] ECR I-9325, paragraphs 29 to 31).

37 In the present case, the dispute in the main proceedings concerns whether an environmental protection association may be a ‘party’ to administrative proceedings concerning, in particular, the grant of derogations to the system of protection for species such as the brown bear. That species is mentioned in Annex IV(a) to the Habitats Directive, so that, under Article 12 thereof, it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Article 16 of that directive.

38 It follows that the dispute in the main proceedings falls within the scope of EU law.

39 It is true that, in its declaration of competence made in accordance with Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Community stated, in particular, that ‘the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations’.

40 However, it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because, as stated in paragraph 36 of this judgment, a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it.

41 In that connection, it is irrelevant that Regulation No 1367/2006, which is intended to implement the provisions of Article 9(3) of the Aarhus Convention, only concerns the institutions of the European Union and cannot be regarded as the adoption by the European Union of provisions implementing the obligations which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial proceedings.

42 Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of the latter that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply (see, in particular, Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28, and Case C-53/96 *Hermès* [1998] ECR I-3603, paragraph 32).

43 It follows that the Court has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention and, in particular, to give a ruling on whether or not they have direct effect.

44 In that connection, a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in particular, Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraph 21, and Case C-372/06 *Asda Stores* [2007] ECR I-11223, paragraph 82).

45 It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.

46 However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 45).

48 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (*Impact*, paragraph 46 and the case-law cited).

49 Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental

protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 44, and *Impact*, paragraph 54).

52 In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

The third question

53 In the light of the reply given to the first and second questions, it is not necessary to reply to the third question.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

[Signatures]

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* Language of the case: Slovak.

JUDGMENT OF THE COURT (Grand Chamber)

24 January 2012 *(1)

(Social policy – Directive 2003/88/EC – Article 7 – Right to paid annual leave – Precondition for entitlement imposed by national rules – Absence of the worker – Length of the leave entitlement based on the nature of the absence – National rules incompatible with Directive 2003/88 – Role of the national court)

In Case C-282/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Cour de cassation (France), made by decision of 2 June 2010, received at the Court on 7 June 2010, in the proceedings

Maribel Dominguez

v

Centre informatique du Centre Ouest Atlantique,

Préfet de la région Centre,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, and U. Lõhmus, Presidents of Chambers, A. Rosas, E. Levits (Rapporteur), A. Ó Caoimh, L. Bay Larsen, T. von Danwitz and A. Arabadjiev, Judges,

Advocate General: V. Trstenjak,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 17 May 2011,

after considering the observations submitted on behalf of:

– Ms Dominguez, by H. Masse-Dessen and V. Lokiec, avocats,

– the Centre informatique du Centre Ouest Atlantique, by D. Célice, avocat,

– the French Government, by G. de Bergues, A. Czubinski and N. Rouam, acting as Agents,

– the Danish Government, by S. Juul Jørgensen, acting as Agent,

– the Netherlands Government, by C. Wissels and M. Noort, acting as Agents,

– the European Commission, by M. van Beek and M. Van Hoof, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 September 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 7 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (OJ 2003 L 299, p. 9).

2 The reference has been made in the proceedings between Ms Dominguez and her employer, the Centre informatique du Centre Ouest Atlantique ('the CICOA'), concerning Ms Dominguez's claim for entitlement to paid annual leave not taken in respect of the period between November 2005 and January 2007 due to absence from work granted after an accident and, in the alternative, for compensation.

Legal context

European Union legislation

3 Article 1 of Directive 2003/88 provides:

'Purpose and scope

1. This Directive lays down minimum safety and health requirements for the organisation of working time.

2. This Directive applies to:

(a) minimum periods of … annual leave …

...'

4 Article 7 of that directive reads as follows:

'Annual leave

1. Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice.

2. The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated.'

5 Article 15 of that directive provides:

'More favourable provisions

This Directive shall not affect Member States' right to apply or introduce laws, regulations or administrative provisions more favourable to the protection of the safety and health of workers or to facilitate or permit the application of collective agreements or agreements concluded between the two sides of industry which are more favourable to the protection of the safety and health of workers.'

6 Article 17 of Directive 2003/88 provides that Member States may derogate from certain provisions of that directive. No derogation is allowed with regard to Article 7 of the directive.

National legislation

7 The first paragraph of Article L. 223-2 of the Code du travail (Labour Code) provides:

‘A worker who, during the reference year, has been employed by the same employer for a period equivalent to a minimum of one month of actual work shall be entitled to leave, the length of which shall be calculated on the basis of two and a half working days for each month worked, provided the total period of leave that may be requested does not exceed thirty working days.’

8 Article L. 223-4 of the Code du travail provides:

‘Periods equivalent to four weeks or twenty-four days of work shall be treated as equivalent to one month of actual work for the purpose of calculating the length of leave. Periods of paid leave, compensatory leave …, periods of maternity leave …, leave acquired by reason of reduced working time and periods of an uninterrupted duration not exceeding one year during which performance of the contract of employment is suspended owing to a work-related accident or occupational disease, shall be treated as periods of actual work ...’

9 The fourth paragraph of Article XIV of the model rules annexed to the national collective labour agreement for staff of social security bodies provides:

‘No annual leave entitlement is given in a particular year in respect of absences as a result of the following: illness or prolonged illness that has resulted in a break in work of twelve consecutive months or more, ... leave entitlement begins again on the date on which work is resumed, the length of leave being calculated in proportion to the time of actual work that has not yet given rise to the allocation of annual leave.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

10 Ms Dominguez, who has been employed by the CICOA since 1987, is covered by the collective labour agreement for staff of social security bodies. Following an accident on the journey between her home and her place of work she was absent from work from 3 November 2005 until 7 January 2007.

11 Ms Dominguez brought a claim before the industrial relations court (juridiction prud’homale) and also the Cour d’appel, Limoges for 22.5 days’ paid leave in respect of that period and, in the alternative, a payment in lieu of leave.

12 Since those courts dismissed her claims, Ms Dominguez brought an appeal on a point of law. She argues that an accident on the journey to or from work is a work-related accident and is covered by the same arrangements as a work-related accident. Thus, under Article L. 223-4 of the Code du travail, the period of suspension of her contract of employment following the accident on the journey to work should be treated as being equivalent to actual work time for the purpose of calculating her paid leave.

13 In the light of the case-law of the Court of Justice relating to Article 7 of Directive 2003/88, the Cour de cassation (French Court of Cassation) was unsure whether the relevant French provisions were compatible with that article.

14 In those circumstances, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1. Must Article 7(1) of Directive 2003/88… be interpreted as precluding national provisions or practices which make entitlement to paid annual leave conditional on a minimum of ten days’ (or one month’s) actual work during the reference period?

2. If the answer to the first question is in the affirmative, does Article 7 of Directive 2003/88…, which imposes a specific obligation on an employer in so far as it creates entitlement to paid leave for a worker who is absent on health grounds for a period of one year or more, require a national court hearing proceedings between individuals to disregard a conflicting national provision which makes entitlement to paid annual leave in such a case conditional on at least ten days’ actual work during the reference year?

3. Since Article 7 of Directive 2003/88/EC does not distinguish between workers according to whether their absence from work during the reference period is due to a work-related accident, an occupational disease, an accident on the journey to or from work or a non-occupational disease, are workers entitled, under that directive, to paid leave of the same length whatever the reason for their absence on health grounds, or must that directive be interpreted as not precluding the length of paid leave differing according to the reason for the worker’s absence, if national law provides that in certain circumstances the length of paid annual leave may exceed the minimum of four weeks provided for by [Directive 2003/88]?’

The first question

15 By its first question, the national court asks, essentially, whether Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions or practices which make entitlement to paid annual leave conditional on a minimum period of ten days’ or one month’s actual work during the reference period.

16 In that regard it should be noted that, according to settled case-law, the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of European Union social law from which there can be no derogations and whose implementation by the competent national authorities must be confined within the limits expressly laid down by Council Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ 1993 L 307, p. 18) itself, that directive being now codified by Directive 2003/88 (see Case C-173/99 *BECTU* [2001] ECR I-4881, paragraph 43; Joined Cases C-350/06 and C-520/06 *Schultz-Hoff and Others* [2009] ECR I-179, paragraph 22; and Case C-214/10 *KHS* [2011] ECR I-0000, paragraph 23).

17 Thus, Directive 93/104 must be interpreted as precluding Member States from unilaterally limiting the entitlement to paid annual leave conferred on all workers by applying a precondition for such entitlement which has the effect of preventing certain workers from benefiting from it (*BECTU*, paragraph 52).

18 Although Member States are free to lay down, in their domestic legislation, conditions for the exercise and implementation of the right to paid annual leave, they are not entitled to make the very existence of that right subject to any preconditions whatsoever (see *Schultz-Hoff and Others*, paragraph 46).

19 Thus, the requisite arrangements for implementation and application of the requirements of Directive 93/104, codified by Directive 2003/88, may display certain divergences as regards the conditions for

exercising the right to paid annual leave, but that directive does not allow Member States to exclude the very existence of a right expressly granted to all workers (*BECTU*, paragraph 55, and *Schultz-Hoff and Others*, paragraph 47).

20 Also, since Directive 2003/88 does not make any distinction between workers who are absent from work on sick leave during the reference period and those who have in fact worked in the course of that period (see *Schultz-Hoff and Others*, paragraph 40) it follows that, with regard to workers on sick leave which has been duly granted, the right to paid annual leave conferred by that directive on all workers cannot be made subject by a Member State to a condition that the worker has actually worked during the reference period laid down by that State (*Schultz-Hoff and Others*, paragraph 41).

21 It follows from the foregoing that Article 7(1) of Directive 2003/88 must be interpreted as precluding national provisions or practices which make entitlement to paid annual leave conditional on a minimum period of ten days' or one month's actual work during the reference period.

The second question

22 By its second question, the national court asks, essentially, whether Article 7 of Directive 2003/88 must be interpreted as meaning that in proceedings between individuals a national provision which makes entitlement to paid annual leave conditional on a minimum period of actual work during the reference period, which is contrary to Article 7, must be disregarded.

23 It should be stated at the outset that the question whether a national provision must be disapplied in as much as it conflicts with European Union law arises only if no compatible interpretation of that provision proves possible.

24 In that regard, the Court has consistently held that when national courts apply domestic law they are bound to interpret it, so far as possible, in the light of the wording and the purpose of the directive concerned in order to achieve the result sought by the directive and consequently comply with the third paragraph of Article 288 TFEU. This obligation to interpret national law in conformity with European Union law is inherent in the system of the Treaty on the Functioning of the European Union, since it permits national courts, for the matters within their jurisdiction, to ensure the full effectiveness of European Union law when they determine the disputes before them (see, inter alia, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 114; Joined Cases C-378/07 to C-380/07 *Angelidaki and Others* [2009] ECR I-3071, paragraphs 197 and 198; and Case C-555/07 *Kücükdeveci* [2010] ECR I-365, paragraph 48).

25 It is true that this principle of interpreting national law in conformity with European Union law has certain limitations. Thus the obligation on a national court to refer to the content of a directive when interpreting and applying the relevant rules of domestic law is limited by general principles of law and it cannot serve as the basis for an interpretation of national law contra legem (see Case C-268/06 *Impact* [2008] ECR I-2483, paragraph 100, and *Angelidaki and Others*, paragraph 199).

26 In the dispute in the main proceedings, the national court states that it has encountered such a limitation. According to that court, the first paragraph of Article L. 223-2 of the Code du travail, which makes entitlement to paid annual leave conditional on a minimum of one month's actual work during the reference period, is not amenable to an interpretation that is compatible with Article 7 of Directive 2003/88.

27 In that regard, it should be noted that the principle that national law must be interpreted in conformity

with European Union law also requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 111, and *Angelidaki and Others*, paragraph 200).

28 In the dispute in the main proceedings, Article L. 223-4 of the Code du travail, which provides an exemption from the requirement of actual work during the reference period in respect of certain periods of absence from work, is an integral part of the domestic law to be taken into consideration by the French courts.

29 If Article L. 223-4 of the Code du travail were to be interpreted by the national court as meaning that a period of absence due to an accident on the journey to or from work must be treated as being equivalent to a period of absence due to an accident at work in order to give full effect to Article 7 of Directive 2003/88, that court would not encounter the limitation, referred to in paragraph 26 above, as regards interpreting Article L. 223-2 of the Code du travail in accordance with European Union law.

30 In that regard, it should be pointed out that Article 7 of Directive 2003/88 does not make any distinction between workers who are absent on sick leave during the reference period and those who have actually worked in the course of that period (see paragraph 20 above). It follows that the right to paid annual leave of a worker who is absent from work on health grounds during the reference period cannot be made subject by a Member State to a condition concerning the obligation actually to have worked during that period. Thus, according to Article 7 of Directive 2003/88, any worker, whether he be on sick leave during the reference period as a result of an accident at his place of work or elsewhere, or as the result of sickness of whatever nature or origin, cannot have his entitlement to at least four weeks' paid annual leave affected.

31 It is clear from the foregoing that it is for the national court to determine, taking the whole body of domestic law into consideration, in particular Article L. 223-4 of the Code du travail, and applying the interpretative methods recognised by domestic law with a view to ensuring that Directive 2003/88 is fully effective and achieving an outcome consistent with the objective pursued by it, whether it can find an interpretation of that law that allows the absence of the worker due to an accident on the journey to or from work to be treated as being equivalent to one of the situations covered by that article of the Code du travail.

32 In the event that such an interpretation is not possible, it is necessary to consider whether Article 7(1) of Directive 2003/88 has a direct effect and, if so, whether Ms Dominguez may rely on that direct effect against the respondents in the main proceedings, in particular her employer, the CICOA, in view of their legal nature.

33 In that regard, it is clear from the settled case-law of the Court that, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied upon before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, *Pfeiffer and Others*, paragraph 103 and the case-law cited).

34 Article 7 of Directive 2003/88 fulfils those criteria as it imposes on Member States, in unequivocal terms, a precise obligation as to the result to be achieved that is not coupled with any condition regarding application of the rule laid down by it, which gives every worker entitlement to at least four

weeks' paid annual leave.

35 Even though Article 7 of Directive 2003/88 leaves the Member States a degree of latitude when they adopt the conditions for entitlement to, and granting of, the paid annual leave which it provides for, that does not alter the precise and unconditional nature of the obligation laid down in that article. It is appropriate to note in that regard that Article 7 of Directive 2003/88 is not one of the provisions of that directive from which Article 17 thereof permits derogation. It is therefore possible to determine the minimum protection which must be provided in any event by the Member States pursuant to that Article 7 (see, *mutatis mutandis*, *Pfeiffer and Others*, paragraph 105).

36 Since Article 7(1) of Directive 2003/88 fulfils the conditions required to produce a direct effect, it should also be noted that the CICOA, one of the two respondents in the main proceedings and Ms Dominguez's employer, is a body operating in the field of social security.

37 It is true that the Court has consistently held that a directive cannot of itself impose obligations on an individual and cannot therefore be relied on as such against an individual (see, inter alia, Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 20; Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, paragraph 15; *Pfeiffer and Others*, paragraph 108; and *Kücükdeveci*, paragraph 46).

38 It should also be recalled however that, where a person is able to rely on a directive not as against an individual but as against the State he may do so regardless of the capacity in which the latter is acting, whether as employer or as public authority. In either case it is necessary to prevent the State from taking advantage of its own failure to comply with European Union law (see, inter alia, Case 152/84 *Marshall* [1986] ECR 723, paragraph 49; Case C-188/89 *Foster and Others* [1990] ECR I-3313, paragraph 17; and Case C-343/98 *Collino and Chiappero* [2000] ECR I-6659, paragraph 22).

39 Thus the entities against which the provisions of a directive that are capable of having direct effect may be relied upon include a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the State, for providing a public service under the control of the State and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals (see, inter alia, *Foster and Others*, paragraph 20; *Collino and Chiappero*, paragraph 23; and Case C-356/05 *Farrell* [2007] ECR I-3067, paragraph 40).

40 It is therefore for the national court to determine whether Article 7(1) of Directive 2003/88 may be relied upon against the CICOA.

41 If that is the case, as Article 7 of Directive 2003/88 fulfils the conditions required to produce a direct effect, the consequence would be that the national court would have to disregard any conflicting national provision.

42 If that is not the case, it should be borne in mind that even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties (see *Pfeiffer and Others*, paragraph 109).

43 In such a situation, the party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357 in order to obtain, if appropriate, compensation for the loss sustained.

44 The answer to the second question is therefore that

– it is for the national court to determine, taking the whole body of domestic law into

consideration, in particular Article L. 223-4 of the Code du travail, and applying the interpretative methods recognised by domestic law, with a view to ensuring that Article 7 of Directive 2003/88 is fully effective and achieving an outcome consistent with the objective pursued by it, whether it can find an interpretation of that law that allows the absence of the worker due to an accident on the journey to or from work to be treated as being equivalent to one of the situations covered by that article of the Code du travail.

– if such an interpretation is not possible, it is for the national court to determine whether, in the light of the legal nature of the respondents in the main proceedings, the direct effect of Article 7(1) of Directive 2003/88 may be relied upon against them.

– if the national court is unable to achieve the objective laid down in Article 7 of Directive 2003/88, the party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment in *Francovich and Others* in order to obtain, if appropriate, compensation for the loss sustained.

The third question

45 By its third question, the national court asks, essentially, whether Article 7 of Directive 2003/88 must be interpreted as precluding a national provision which, depending on the reason for the worker's absence on sick leave, provides for a period of paid annual leave equal to or exceeding the minimum period of four weeks laid down in that directive.

46 In that regard, it should be noted, as was held in paragraph 30 above, that Article 7 of Directive 2003/88 does not make any distinction, on grounds of the reason for the worker's absence on sick leave, duly granted, and any worker, whether he be on sick leave following an accident at his place of work or elsewhere, or as the result of sickness of whatever nature or origin, is entitled to at least four weeks' paid annual leave.

47 However, as stated both by the Advocate General in point 178 of her Opinion and by the European Commission in its written observations, the finding made in the preceding paragraph does not mean that Directive 2003/88 precludes national provisions giving entitlement to more than four weeks' paid annual leave, granted under the conditions for entitlement to, and granting of, the right to paid annual leave laid down by that national law.

48 As appears expressly from Article 1(1) and (2)(a) and from Articles 7(1) and 15 of Directive 2003/88, the purpose of the directive is merely to lay down minimum safety and health requirements for the organisation of working time and it does not affect Member States' right to apply national provisions more favourable to the protection of workers.

49 Thus it is permissible for Member States to provide that entitlement to paid annual leave under national law may vary according to the reason for the worker's absence on health grounds, provided that the entitlement is always equal to or exceeds the minimum period of four weeks laid down in Article 7 of that directive.

50 It follows from the foregoing that Article 7(1) of Directive 2003/88 must be interpreted as not precluding a national provision which, depending on the reason for the worker's absence on sick leave, provides for a period of paid annual leave equal to or exceeding the minimum period of four weeks laid down in that directive.

Costs

51 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Article 7(1) of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time must be interpreted as precluding national provisions or practices which make entitlement to paid annual leave conditional on a minimum period of ten days' or one month's actual work during the reference period;**

2. **It is for the national court to determine, taking the whole body of domestic law into consideration, in particular Article L. 223-4 of the Code du travail, and applying the interpretative methods recognised by domestic law, with a view to ensuring that Article 7 of Directive 2003/88 is fully effective and achieving an outcome consistent with the objective pursued by it, whether it can find an interpretation of that law that allows the absence of the worker due to an accident on the journey to or from work to be treated as being equivalent to one of the situations covered by that article of the Code du travail.**

   If such an interpretation is not possible, it is for the national court to determine whether, in the light of the legal nature of the respondents in the main proceedings, the direct effect of Article 7(1) of Directive 2003/88 may be relied upon against them.

   If the national court is unable to achieve the objective laid down in Article 7 of Directive 2003/88, the party injured as a result of domestic law not being in conformity with European Union law can none the less rely on the judgment of 19 November 1991 in Joined Cases C-6/90 and C-9/90 *Francovich and Others* in order to obtain, if appropriate, compensation for the loss sustained.

3. **Article 7(1) of Directive 2003/88 must be interpreted as not precluding a national provision which, depending on the reason for the worker's absence on sick leave, provides for a period of paid annual leave equal to or exceeding the minimum period of four weeks laid down in that directive.**

[Signatures]

1* Language of the case: French.

JUDGMENT OF THE COURT (Fourth Chamber)

19 December 2012 (*)

(Failure of a Member State to fulfil obligations – Directive 75/442/EEC – Domestic waste waters discharged through septic tanks in the countryside – Judgment of the Court finding that a Member State has failed to fulfil obligations – Article 260(2) TFEU – Measures to ensure compliance with a judgment of the Court – Financial penalties – Penalty payment – Lump sum)

In Case C-374/11,

ACTION under Article 260(2) TFEU for failure to fulfil obligations, brought on 13 July 2011,

European Commission, represented by E. White, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Ireland, represented by D. O'Hagan and E. Creedon, acting as Agents**,** assisted by A. Collins, SC, and M. Gray, BL, with an address for service in Luxembourg,

defendant,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, acting as President of the Fourth Chamber, J.-C. Bonichot (Rapporteur), C. Toader, A. Prechal and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: T. Millett, Deputy Registrar,

having regard to the written procedure and further to the hearing on 4 October 2012,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission requests the Court to:

– declare that, by failing to take the necessary measures to comply with the judgment of the Court of 29 October 2009 in Case C-188/08 *Commission* v *Ireland* concerning the failure of Ireland to fulfil its obligations under Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991

L 78, p. 32) (‘Directive 75/442’), Ireland has failed to fulfil its obligations under Article 260 TFEU;

– order Ireland to pay to the Commission a lump sum of EUR 4 771.20 multiplied by the number of days between the date of delivery of the judgment in Case C-188/08 *Commission* v *Ireland* and the date of the judgment in the present case (or the date of full compliance with the judgment in Case C-188/08 *Commission* v *Ireland*, if such compliance occurs while the present case is pending);

– order Ireland to pay to the Commission a daily penalty payment of EUR 26 173.44 from the date of judgment delivered in the present proceedings to the date of compliance by Ireland with the judgment in Case C-188/08 *Commission* v *Ireland*; and

– order Ireland to pay the costs.

Legal context

2 Article 4 of Directive 75/442 is worded as follows:

‘Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

– without risk to water, air, soil and plants or animals;

– without causing a nuisance through noise or odours;

– without adversely affecting the countryside or places of special interest.

Member States shall also take the necessary measures to prohibit the abandonment, dumping or uncontrolled disposal of waste.’

3 Article 8 of that directive provides:

‘Member States shall take the necessary measures to ensure that any holder of waste:

– has it handled by a private or public waste collector or by an undertaking which carries out the operations listed in Annex II A or II B, or

– recovers or disposes of it himself in accordance with the provisions of this Directive’.

4 Article 13 of Directive 75/442 states:

‘Establishments or undertakings which carry out the operations referred to in Articles 9 to 12 shall be subject to appropriate periodic inspections by the competent authorities’.

The judgment in Case C-188/08 *Commission* v *Ireland*

5 On 6 May 2008, the Commission, pursuant to Article 226 EC, brought an action against Ireland for failure to fulfil obligations by which it sought a declaration that that Member State had failed to fulfil its obligations under Directive 75/442 by failing to transpose, fully and correctly, into its domestic

legislation the requirements of Articles 4 and 8 of that directive, relating to the disposal of domestic waste waters in the countryside through septic tanks and other individual waste water treatment systems ('IWWTS').

6 In paragraph 1 of the operative part of the judgment in Case C-188/08 *Commission* v *Ireland*, the Court held as follows:

'… by failing to adopt, save in County Cavan, all the laws, regulations and administrative provisions necessary to comply with Articles 4 and 8 of [Directive 75/442] … as regards domestic waste waters disposed of in the countryside through [IWWTS], Ireland has failed to fulfil its obligations under that directive'.

The pre-litigation procedure

7 By letter of 23 November 2009, the Commission requested the Irish authorities to notify it of the measures taken to comply with the judgment in Case C-188/08 *Commission* v *Ireland*.

8 The Irish authorities replied by letter of 22 December 2009, proposing to the Commission a timetable for the adoption of the legislative and regulatory provisions envisaged and outlining their main features. That letter also announced, first, the creation of a working group to determine the appropriate performance standards and necessary changes in the planning requirements and building standards and, secondly, the publication by the Environmental Protection Agency (EPA) of a 'Code of Practice' on on-site waste-water treatment and disposal systems.

9 As it was not satisfied with that reply, the Commission, in a letter dated 25 November 2010, sent to Ireland a letter of formal notice calling on it to submit, within two months from the date of notification, its observations on the extent to which the judgment had been complied with.

10 On 3 February 2011, the Irish authorities replied to the letter of formal notice by informing the Commission of the progress of the legislative work. They stated that draft legislation amending the Water Services Act 2007 had been prepared and would be presented as soon as possible to the Government for approval.

11 In an additional reply received by the Commission on 10 May 2011, the Irish authorities stated that the draft legislative text had been approved by the Government.

12 As it was still not satisfied by the replies provided by the Irish authorities, the Commission, in accordance with Article 260(2) TFEU, brought the present action before the Court.

Procedure before the Court

13 In the course of the written procedure, the Irish authorities sent to the Commission the initial version of the 2011 draft legislation amending the 2007 Act (the Water Services (Amendment) Bill 2011). The Commission, basing itself on the provisions of the draft legislation, expressed the view, in its reply, that such measures still did not ensure the correct transposition of Articles 4 and 8 of Directive 75/442.

14 The Irish authorities informed the Court, in their rejoinder, that that draft legislation had been adopted and that the Water Services (Amendment) Act 2012 had entered into force.

The failure to fulfil obligations

Arguments of the parties

15 The Commission, examining the Water Services (Amendment) Bill 2011, considers that the effectiveness of the monitoring and inspection system provided for still depends on ministerial regulations which will be approved at a later date. It points out that the financing of the new inspection system seems to it to be uncertain, that there is no express obligation requiring the competent authorities to ensure that inspections are carried out, that the national inspection plan does not appear to be binding, that the system envisaged for the recruitment of inspectors does not guarantee that there will be a sufficient number of inspectors, and that the inspections are neither systematic nor sufficiently binding.

16 Ireland is of the view that it has taken the measures necessary to comply with the Court's judgment by adopting the Water Services (Amendment) Act 2012. That act provides for the establishment of a new monitoring and inspection system for septic tanks and other on-site systems for the treatment of waste water and drains associated with the discharge of domestic waste water. It also provides that the owners of such systems must ensure that they are registered with the competent water services authority.

17 Ireland claims that, in any event, the action should be dismissed, on the ground that the application was made too early. The period of 21 months between the delivery of the judgment in Case C-188/08 *Commission* v *Ireland* and the Commission's application is, it argues, insufficient in the light of the efforts required by the Irish authorities in order to comply with that judgment and does not take into account either the continuing and constructive dialogue that Ireland has been engaged in with the Commission after that judgment was delivered or the difficulties involved in the adoption of legislation in a particularly complex area.

Findings of the Court

18 According to Article 260(2) TFEU, if the Commission considers that the Member State concerned has not taken the necessary measures to comply with the Court's judgment, it may, after giving that Member State the opportunity to submit its observations, bring the case before the Court specifying the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances.

19 In that respect, the reference date for assessing whether there has been a failure to fulfil obligations under Article 260(1) TFEU is the date of expiry of the period prescribed in the reasoned opinion issued under that provision (see judgment of 11 December 2012 in Case C-610/10 *Commission* v *Spain* [2012] ECR I-0000, paragraph 67).

20 In the present case, it is common ground that, at the time when the period laid down in the reasoned opinion sent by the Commission to Ireland on 25 November 2010 expired, Ireland had not adopted all the measures necessary to ensure full compliance with the obligations resulting from the judgment in Case C-188/08 *Commission* v *Ireland*.

21 Furthermore, with regard to Ireland's argument that the action is premature, it must be pointed out that, even though Article 260(1) TFEU does not specify the period within which a judgment must be complied with, it follows from settled case-law that the importance of immediate and uniform application of European Union law means that the process of compliance must be initiated at once and

completed as soon as possible (see, to that effect, Case C-278/01 *Commission* v *Spain* [2003] ECR I-14141, paragraph 27 and the case-law cited).

22 In the present case, however, a period of approximately 21 months elapsed between the delivery of the judgment in Case C-188/08 *Commission* v *Ireland* and the lodging of the Commission's application. Even though the implementation of the judgment in Case C-188/08 *Commission* v *Ireland* involved complex operations, such a period cannot, in the circumstances of the present case, be considered to be insufficient.

23 In those circumstances, it must be held that, by failing to adopt all of the measures necessary to ensure compliance with the judgment in Case C-188/08 *Commission* v *Ireland*, Ireland has failed to fulfil its obligations under Article 260(1) TFEU.

The financial penalties

Arguments of the parties

24 The Commission, establishing that Ireland has still not complied with the judgment in Case C-188/08 *Commission* v *Ireland*, submits that that Member State should be ordered to pay, firstly, a lump sum of EUR 4 771.20, multiplied by the number of days between the date of delivery of that judgment and the date of the Court's judgment in the present case and, secondly, a daily penalty payment of EUR 26 173.44 from the date of the judgment in the present case to the date of full compliance by Ireland with the first judgment.

25 Referring to the guidelines contained in its Communication SEC (2005) 1658 of 13 December 2005 on the application of Article 228 EC (OJ 2007 C 126, p 15), as updated by Communication SEC (2010) 923/3 of 20 July 2010 entitled 'Application of Article 260 of the Treaty on the Functioning of the European Union. Up-dating of data used to calculate lump sum and penalty payments to be proposed by the Commission to the Court of Justice in infringement proceedings', the Commission proposes to apply penalties calculated on the basis of a seriousness factor of 8 out of 20, taking account of the importance of the European Union rules which were the subject of the infringement, that is to say, the provisions of a directive intended to protect human health and the environment, the large number of IWWTS concerned by the inadequacies of the national provisions with regard to the requirements of that directive, and the extent of the risk of pollution resulting therefrom. The Commission, furthermore, considers that account must be taken of Ireland's repeated engagement in infringing conduct which has given rise to the delivery by the Court of several judgments against that Member State for failure to fulfil its obligations in environmental matters.

26 In order to determine the duration of the infringement, the Commission submits that the amount of the lump sum must be calculated with regard to the period between the date of delivery of the judgment in Case C-188/08 *Commission* v *Ireland*, implementation of which is sought, and the date on which it decided to bring the present proceedings before the Court, that is to say, approximately 18 months, which corresponds, under the terms of its Communication of 13 December 2005, to a duration factor of 1.8.

27 Finally, in order to determine the factor 'n', which corresponds to the financial capacity of individual Member States, the Commission relies on its Communication of 20 July 2010, which fixes that factor, for Ireland, at 2.84. The Commission adds that, while it is true that, in a revision dated 1 September 2011 (SEC (2011) 1024 final), the factor 'n' for Ireland was reduced to 2.71, it is not appropriate to

take account of that factor as the present action was brought prior to that revision.

28 Ireland, for its part, contends that, since the adoption of the Water Services (Amendment) Act 2012, there is no longer any need to order it to pay a lump sum or penalty payment. On the assumption, however, that the Court intends to impose such financial penalties on it, Ireland argues that the lump sum should not be in excess of EUR 630 per day and that the penalty payment should not exceed EUR 5 000 per day.

29 In respect of the criterion of seriousness, Ireland considers that a factor of 3 out of 20 would be more appropriate, in view of the difficulties encountered by the Irish legislature, the existence in Irish legislation of provisions which could not have been taken into account by the Court in 2009, as being subsequent to the date fixed in the reasoned opinion, the establishment by the Environmental Protection Agency of stricter criteria regarding drinking water and, finally, the proven and sincere cooperation of the Irish authorities.

30 Ireland considers that the Court should take into account, in assessing the duration of the infringement, the commitment of the Irish authorities to on-going constructive dialogue with the Commission on the content of the draft legislation, which falls into a complex legislative framework requiring time to enact the legislation necessary to ensure compliance with the judgment in Case C-188/08 *Commission* v *Ireland*.

31 Finally, the Irish authorities take issue with the method employed by the Commission to determine Ireland's capacity-to-pay factor, since this does not take into account the fall in Ireland's gross domestic product between 2008 and 2010 and the deterioration of Ireland's public finances. The reference to a gross domestic product dating back to three years prior to the commencement of the proceedings is, it is submitted, inadequate. The factor 'n' should be reduced to 1. In any event, if the Court should decide to apply the factor 'n' as set out in the Commission's Communications, Ireland argues that it would be appropriate to use the factor indicated in the most recent Communication.

Findings of the Court

32 Having recognised that Ireland has failed to comply with the judgment in Case C-188/08 *Commission* v *Ireland*, compliance with which the Commission is seeking to ensure, the Court may impose on that Member State, pursuant to the second subparagraph of Article 260(2) TFEU, a lump sum or a penalty payment.

The penalty payment

– The principle of the imposition of a penalty payment

33 According to settled case-law, the imposition of a penalty payment is, in principle, justified only in so far as the failure to comply with an earlier judgment of the Court continues up to the time of the Court's examination of the facts (Case C-496/09 *Commission* v *Italy* [2011] ECR I-0000, paragraph 42, and Case C-610/10 *Commission* v *Spain*, paragraph 96).

34 It must be held in the present case that, at the time of that examination, the measures necessary for the implementation of the judgment in Case C-188/08 *Commission* v *Ireland* had not yet been adopted in full. In particular, it is common ground that the Water Services (Amendment) Act 2012 requires implementation of texts not all of which have yet been adopted and that the national inspection plan for IWWTS has still to be developed. It also does not appear that a definitive deadline for the registration of IWWTS has been set.

35 In those circumstances, the Court takes the view that the imposition of a penalty payment on Ireland constitutes an appropriate financial means to ensure full compliance with the judgment in Case C-188/08 *Commission* v *Ireland* (see, to that effect, *Commission* v *Italy*, paragraph 45, and Case C-610/10 *Commission* v *Spain*, paragraph 114).

– The amount of the penalty payment

36 It should be recalled that, in exercising its discretion in the matter, it is for the Court to set the penalty payment so that it is both appropriate to the circumstances and proportionate to the infringement established and the ability of the Member State concerned to pay (see *Commission* v *Italy*, paragraph 56 and the case-law cited).

37 In the assessment carried out by the Court, the criteria which must be taken into account in order to ensure that a penalty payment has coercive force with a view to the uniform and effective application of European Union law are, in principle, the duration of the infringement, its degree of seriousness and the ability of the Member State concerned to pay. For the purpose of applying those criteria, the Court is required to have regard in particular to the effects of non-compliance on the public and private interests at issue and to the urgency of compliance by the Member State concerned with its obligations (see *Commission* v *Italy*, paragraph 57).

38 In the present case, the failure to fulfil obligations identified in the judgment in Case C-188/08 *Commission* v *Ireland* concerns the incomplete transposition of Directive 75/442, Article 2 of which provided for a transposition period expiring no later than 1 April 1993. Since, more than 19 years after that date, Ireland has still not complied with all of its obligations under that directive – the principal objectives of which are the protection of human health and of the environment – the Court cannot but confirm the particularly lengthy character of an infringement which, in the light of such objectives, is also a matter of indisputable gravity.

39 While Ireland claims that the delay in its compliance with the judgment in Case C-188/08 *Commission* v *Ireland* was attributable to internal difficulties connected with the complexity of the implementation of Directive 75/442, it must be pointed out that a Member State cannot plead provisions, practices or situations prevailing in its domestic legal order to justify the failure to observe obligations arising under European Union law (see Case C-407/09 *Commission* v *Greece* [2011] ECR I-0000, paragraph 36).

40 Account must, however, be taken of the adoption of the Water Services (Amendment) Act 2012 and of significant measures such as, in particular, those designed to establish a national register of IWWTS and to ensure the training of inspectors of those systems, which demonstrate the efforts made by the Irish authorities since the delivery of the judgment in Case C-188/08 *Commission* v *Ireland* with a view to full compliance therewith.

41 In addition, Ireland has committed itself to implementing the final steps necessary for the full implementation of that judgment in close collaboration with the Commission. Ireland also states, inter alia, that the recruitment of the inspectors is underway and that the national inspection plan should be finalised by 31 December 2012.

42 In so doing, Ireland does not dispute that it has yet to finalise the measures necessary to ensure compliance with the judgment in Case C-188/08 *Commission* v *Ireland* establishing a failure to fulfil the requirements arising from Articles 4 and 8 of Directive 75/442. It is common ground in this regard that the transposition of that directive by the Water Services (Amendment) Act 2012 can be regarded

as effective only when the measures referred to at paragraph 34 of the present judgment are adopted.

43 Having regard to all of the circumstances of the present case, the Court considers that it is appropriate to impose a daily penalty payment of EUR 12 000 to ensure implementation of the judgment in Case C-188/08 *Commission* v *Ireland*, that sum taking into account Ireland's capacity to pay as it stands at the date of the Court's examination of the facts (see, to that effect, Case C-610/10 *Commission* v *Spain*, paragraph 131).

44 In the present case, the data provided by Ireland, which have not been substantively disputed by the Commission, show that that Member State's capacity to pay was reduced in the context of economic crisis (see also, to that effect, judgment of 19 December 2012 in Case C-279/11 *Commission* v *Ireland* [2012] ECR I-0000, paragraph 79).

45 In those circumstances, Ireland must be ordered to pay to the Commission, into the 'European Union own resources' account, a penalty payment of EUR 12 000 for each day of delay in adopting the measures necessary to ensure compliance with the judgment in Case C-188/08 *Commission* v *Ireland* from the date on which judgment is delivered in the present case until the date of full compliance with the judgment in Case C-188/08 *Commission* v *Ireland*.

The lump sum payment

– The principle of the imposition of a lump sum payment

46 As a preliminary point, it must be pointed out that, in the light of the objectives of the procedure laid down in Article 260(2) TFEU, the Court is empowered, in the exercise of the discretion conferred on it by that article, to impose a penalty payment and a lump sum payment cumulatively (see, to that effect, Case C-304/02 *Commission* v *France* [2005] ECR I-6263, paragraph 83, and Case C-610/10 *Commission* v *Spain*, paragraph 140).

47 The imposition of a lump sum payment must, in each individual case, depend on all the relevant factors relating both to the characteristics of the infringement established and to the conduct of the Member State involved in the procedure initiated under Article 260 TFEU. In that respect, that provision confers a wide discretion on the Court in deciding whether or not to impose such a penalty (Case C-610/10 *Commission* v *Spain*, paragraph 141).

48 With regard to the present case, the Court takes the view that all the legal and factual circumstances pertaining to the infringement established indicate that effective prevention of future repetition of similar infringements of European Union law requires the adoption of a deterrent measure, such as the imposition of a lump sum payment (see, to that effect, Case C-369/07 *Commission* v *Greece* [2009] ECR I-5703, paragraph 145, and Case C-610/10 *Commission* v *Spain*, paragraph 142).

49 Indeed, other than the failure to comply with the judgment in Case C-188/08 *Commission* v *Ireland*, which has given rise to the present proceedings, a finding of a failure on the part of Ireland to fulfil its obligations under European Union law as regards water quality was made, as the Commission points out, in the judgments in Case C-316/00 *Commission* v *Ireland* [2002] ECR I-10527, Case C-396/01 *Commission* v *Ireland* [2004] ECR I-2315 and Case C-282/02 *Commission* v *Ireland* [2005] ECR I-4653. Such a situation reflects the persistent avoidance by that Member State of its European Union obligations in that area.

– The amount of the lump sum payment

50 If the Court decides to order a lump sum payment, it must, in the exercise of its discretion, set that payment in such a way that it is, first, appropriate to the circumstances and, secondly, proportionate both to the infringement that has been established and to the ability of the Member State concerned to pay (*Commission* v *Greece*, paragraph 146).

51 The relevant factors to be taken into account in that regard include, in particular, factors such as how long the breach of obligations has persisted since the judgment which initially established it was delivered and the public and private interests involved (Case C-121/07 *Commission* v *France* [2008] ECR I-9159, paragraph 64 and the case-law cited).

52 In the present case, in the light of all of the foregoing and, in particular, of the considerations set out in paragraphs 38 to 45 of the present judgment, proper account of the circumstances of the present case will be taken by setting the amount of the lump sum which Ireland will have to pay at EUR 2 000 000.

53 It is therefore appropriate to order Ireland to pay to the Commission, into the account 'European Union own resources', a lump sum of EUR 2 000 000.

Costs

54 Under Article 138(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and Ireland's failure to fulfil its obligations has been established, Ireland must be ordered to pay the costs.

On those grounds, the Court (Fourth Chamber) hereby:

1. **Declares that, by failing to adopt all of the measures necessary to ensure compliance with the judgment of 29 October 2009 in Case C-188/08 *Commission* v *Ireland* establishing that Ireland has failed to fulfil its obligations under Articles 4 and 8 of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, Ireland has failed to fulfil its obligations under Article 260(1) TFEU;**

2. **Orders Ireland to pay to the European Commission, into the 'European Union own resources' account, a penalty payment of EUR 12 000 for each day of delay in adopting the measures necessary to ensure compliance with the judgment in Case C-188/08 *Commission* v *Ireland*, with effect from the date on which judgment is delivered in the present case until the date of full compliance with the judgment in Case C-188/08 *Commission* v *Ireland*;**

3. **Orders Ireland to pay to the European Commission, into the 'European Union own resources' account, the lump sum of EUR 2 000 000;**

4. **Orders Ireland to pay the costs.**

[Signatures]

* Language of the case: English.

JUDGMENT OF THE COURT (Fourth Chamber)

31 January 2013 (*)

(Request for a preliminary ruling – Article 267 TFEU – Concept of 'national court' – Lack of jurisdiction of the Court)

In Case C-394/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Komisia za zashtita ot diskriminatsia (Bulgaria), made by decision of 19 July 2011, received at the Court on 25 July 2011, in the proceedings

Valeri Hariev Belov

v

CHEZ Elektro Balgaria AD,

Lidia Georgieva Dimitrova,

Roselina Dimitrova Kostova,

Kremena Stoyanova Stoyanova,

CHEZ Razpredelenie Balgaria AD,

Ivan Kovarzhchik,

Atanas Antonov Dandarov,

Irzhi Postolka,

Vladimir Marek,

Darzhavna Komisia po energiyno i vodno regulirane,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, acting for the President of the Fourth Chamber, J.-C. Bonichot, C. Toader, A. Prechal (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: J. Kokott,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 11 July 2012,

after considering the observations submitted on behalf of:

– Mr Belov, by G. Chernicherska, Адвокат,

– CHEZ Elektro Balgaria AD and CHEZ Razpredelenie Balgaria AD, by A. Ganev and V. Bozhilov, Адвокати,

– the Bulgarian Government, by T. Ivanov and D. Drambozova, acting as Agents,

– the European Commission, by J. Enegren and D. Roussanov, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 September 2012,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 2(2) and (3), 3(1)(h) and 8(1) of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22), Article 3(5) of Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC (OJ 2003 L 176, p. 37), recital 29 in the preamble to and Articles 1 and 13(1) of Directive 2006/32/EC of the European Parliament and of the Council of 5 April 2006 on energy end-use efficiency and energy services and repealing Council Directive 93/76/EEC (OJ 2006 L 114, p. 64), Article 3(7) of Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in electricity and repealing Directive 2003/54/EC (OJ 2009 L 211, p. 55), and Article 38 of the Charter of Fundamental Rights of the European Union.

2 The request has been made in proceedings seeking to establish whether the measure, consisting in placing meters to measure electricity consumption at a height of seven metres on posts situated outside houses connected to the electricity network in two areas of the City of Montana (Bulgaria) mainly inhabited by members of the Roma community, constitutes discrimination based on ethnic origin and, if so, to order the cessation of that discrimination and the payment of fines by the persons responsible.

Legal context

European Union law

3 Article 2(2) and (3) of Directive 2000/43 provides:

‘2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.'

4 Article 3(1)(h) of Directive 2000/43 states:

'Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

…

(h) access to and supply of goods and services which are available to the public, including housing.'

5 Article 8(1) of that directive provides:

'Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.'

6 Article 13 of Directive 2000/43 states:

'1. Member States shall designate a body or bodies for the promotion of equal treatment of all persons without discrimination on the grounds of racial or ethnic origin. These bodies may form part of agencies charged at national level with the defence of human rights or the safeguard of individuals' rights.

2. Member States shall ensure that the competences of these bodies include:

– without prejudice to the right of victims and of associations, organisations or other legal entities referred to in Article 7(2), providing independent assistance to victims of discrimination in pursuing their complaints about discrimination,

– conducting independent surveys concerning discrimination,

– publishing independent reports and making recommendations on any issue relating to such discrimination.'

Bulgarian law

7 Under Article 4 of the Law on protection against discrimination (Zakon za zatschtita ot diskriminatsia, 'the ZZD'):

'1. All direct or indirect discrimination on grounds of … ethnicity is prohibited …

2. Direct discrimination is any treatment of a person based on the characteristics mentioned in subparagraph 1 which is less favourable as compared with the manner in which another person in comparable and similar conditions is, has been or would be treated.

3. Indirect discrimination consists in placing a person, on the basis of the characteristics mentioned in subparagraph 1, in a less favourable position as compared with other persons by way of a measure, criterion or an ostensibly neutral practice, unless that measure, criterion or practice is justified taking account of a legitimate objective and that the means used to achieve are appropriate and necessary.'

8 Article 9 of the ZZD provides that 'in anti-discrimination proceedings, where a party claims that he is the victim of discrimination and establishes the facts from which it may be concluded that there has been discrimination, the defendant must show that there has been no infringement of the right to equal treatment'.

9 Article 37 of the ZZD states that 'it is not permitted to refuse to provide goods or services, to provide goods or services of inferior quality or on less favourable conditions on the basis of the characteristics referred to in Article 4(1).'

10 Paragraph 1 of 'Supplementary provisions' of the ZZD defines 'unfavourable treatment' as being 'any act or omission which adversely affects, directly or indirectly, rights or legitimate interests.'

11 Additionally, the ZZD contains a number of provisions relating to the Komisia za zashtita ot diskriminatsia (Commission for Protection against Discrimination 'the KZD'), for the purpose, inter alia, of setting out the composition, the duties and mode of functioning of that body.

12 In that regard, Article 47 of the ZZD states:

'The [KZD] shall:

1. record infringements of this Law or other laws on equal treatment and shall determine the person responsible for the infringement and the person concerned;

2. order the prevention and cessation of the infringement and the re-establishment of the initial situation;

3. apply the sanctions provided for and adopt coercive administrative measures;

4. give binding instructions concerning compliance with this Law or with other laws on equal treatment;

5. bring actions against administrative acts adopted contrary to this Law or other laws on equal treatment; bring legal proceedings and intervene as an interested party in cases brought under this Law or other laws on equal treatment;

6. formulate proposals and recommendations to State and local authority bodies for the prevention of discriminatory practices and for the annulment of their acts adopted contrary to this Law or other laws on equal treatment;

7. keep a public record of its decisions in force and its binding instructions;

8. give advice as to whether draft legislative acts are consistent with the legislation on the prevention of discrimination and recommend the adoption, repeal, amendment or supplementation of legislative acts;

9. provide independent assistance to victims of discrimination when they bring actions;

10. carry out independent studies on discrimination;

11. publish independent reports and make recommendations on any questions relating to discrimination;

12. exercise any other powers laid down in the legislation governing its organisation and its activity.'

13 Article 48 of the ZZD provides:

'(1) The [KZD] shall examine and decide the cases brought before it in formations determined by its President.

(2) The President of the [KZD] shall determine the permanent formation which specialises in discrimination:

1. on grounds of ethnicity or race;

2. on grounds of sex;

3. based on other characteristics referred to in Article 4(1).

…'

14 According to Article 50 of the ZZD:

'Proceedings before the [KZD] are brought:

1. on application of the persons concerned;

2. on the initiative of the [KZD];

3. by complaints from natural and legal persons or State and local authority bodies.'

15 Article 54 of the ZZD states:

'Once proceedings have been brought, the President of the [KZD] shall allocate the case to a formation, which shall appoint a rapporteur from among its members.'

16 Article 55 of the ZZD provides:

'1. The rapporteur shall open an investigation, during which he shall gather all the written evidence necessary to elucidate the facts of the case, using the services of its employees and external experts.

2. All persons, State and local authority bodies must cooperate with the [KZD] during the investigation and are required to provide the information and documents requested and to give any necessary clarifications.'

17 Article 65 of the ZZD provides:

'In giving its decision, the formation shall:

1. determine the infringement committed;

2. determine the person responsible for the infringement and the person concerned;

3. determine the type and magnitude of the sanction;

4. order coercive administrative measures;

5. find that there has been no infringement of the law and dismiss the action.'

18 Under Article 68(1) of the ZZD:

'The decisions of the [KZD] may be subject to an appeal, in accordance with the Administrative Procedure Code, within 14 days from their notification to the persons concerned.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

19 In 1998 and 1999, the State electricity distribution companies placed meters to measure electricity consumption at a height of seven metres above the ground on posts situated on the outside of houses connected to the electricity network in a certain number of urban districts in Bulgaria which were known to be inhabited primarily by members of the Roma community.

20 Such a measure was adopted, in particular, in the Ogosta and Kosharnik districts in the City of Montana, it being common ground that they are still inhabited primarily by people belonging to the Roma community ('the measure at issue in the main proceedings').

21 Meanwhile, the supply and distribution of electricity in those two districts was taken over, following the privatisation of the energy sector, in particular by CHEZ Elektro Balgaria AD ('CEB'), the company supplying electricity, and CHEZ Razpredelenie Balgaria AD ('CRB'), a company which owns the electricity distribution networks.

22 Article 27 of the general conditions for contracts for the use of CRB's electricity distribution networks ('CRB's general conditions') states, in subparagraph 1 thereof, that 'commercial measuring instruments, including tariff management apparatus are made available so that the consumer may check his consumption'. However, subparagraph 2 thereof provides that '[if], to protect the life and health of citizens and property, the quality of the electricity, the continuity of the supply and the safety and reliability of the electricity supply system, commercial measuring instruments are installed in places to which access is difficult, the electricity distribution company is required to ensure at its own cost the possibility to make a visual inspection within three days of a written request from a consumer'.

23 Mr Belov, who describes himself as Roma, lives in the Ogosta district. As, both in his own opinion and in that of other persons of Roma origin who consume electricity in that district and in the Kosharnik district, the measure at issue in the main proceedings constitutes discrimination on grounds of ethnicity prohibited by Article 37 of the ZZD, Mr Belov made a complaint to the KZD, to which a petition signed by numerous other inhabitants of those districts was joined, which asked the KZD to order that CEB abolish that measure and impose sanctions, as laid down in the ZZD.

24 The KZD takes the view that the action brought by Mr Belov may be regarded both as an application and a complaint within the meaning of Article 50(1) and (3) respectively of the ZZD. As an inhabitant of the Ogosta district concerned by the measure at issue in the main proceedings, he acts on his own behalf and as the applicant in the proceedings and, in so far as he acts on behalf of other inhabitants of the same district and those in the Kosharnik district, he has the status of complainant.

25 As a result, the KZD brought proceedings against CRB, in its capacity of the owner of the electricity meters and the Darzhavna Komisia po energiyno i vodno regulirane (State Energy and Water Regulation Commission) as the authority which approved CRB's general conditions. The same is true for the various natural persons who, in their capacity as legal representatives of CEB and CRB, may be liable to pay fines if the alleged discrimination is established.

26 Before the KZD, CRB submits, first of all, that the measure at issue in the main proceedings cannot be regarded as discrimination if, in particular, it applies indistinctly to all the inhabitants of the districts concerned and that no law provides for the right or legitimate interest of the user to consult the reading on his meter.

27 Next, CRB claims that the applicant in the main proceedings has not produced evidence of the facts which would lead to the conclusion that there had been such discrimination, as required by Article 9 of the ZZD.

28 Finally, CRB contends that the introduction of the measure at issue in the main proceedings has no relationship to the ethnicity of the consumers in the two districts concerned. Moreover, it is justified by the purpose of avoiding damage to the infrastructure and illegal extraction of electricity which might endanger, in particular, the life and health of citizens, safety, the ownership and continuity of the electricity supply, and the extra costs which might result for other consumers.

29 As regards Article 27(2) of CRB's general conditions, the KZD points out that, if, as provided by that provisions, a consumer makes an application for a visual inspection of the meter reading, CRB is required to make available, within three days, a special platform allowing access to the meters. However, in such a case, the consumer cannot take a reading himself as this must be communicated to him by the persons authorised to use the platform. Furthermore, that measure has never been relied on in practice.

30 The possibility, provided for in Article 17(6) of the general conditions, to install an inspection meter at the consumer's residence involves the payment of a rental charge and, even in that case, the main meter is still positioned outside the house at a height of seven metres.

31 The KZD takes the view that the measure at issue in the main proceedings constitutes indirect discrimination on grounds of ethnicity, within the meaning of Articles 4(3) and 37 of the ZZD.

32 While noting that the provisions of the ZZD have been adopted, inter alia, to transpose Directive 2000/43, the KZD takes the view that an interpretation of European Union law is necessary in order to give its decision.

33 In that connection, it states, in particular, that Article 4(2) and (3) of the ZZD, read together with Point 1(7) of the Supplementary Provisions of the ZZD, as interpreted by the Varhoven administrativen sad (Supreme Administrative Court) (Bulgaria), requires, in order to establish the existence of discrimination, that a right or legitimate interest protected by law has been adversely affected. That is not the case as regards the right to access an electricity meter in order to read it. The KZD wonders whether such an interpretation complies with the provisions of Article 2(2)(a) and (b) of Directive 2000/43.

34 Furthermore, the KZD observes that, although Article 8(1) of Directive 2000/43 was transposed almost literally by Article 9 of the ZZD, the Bulgarian-language version of Article 8(1) differs from other language versions of that provision. The Bulgarian-language version provides that the victim must

establish the facts from which it may be ‘concluded’ that there has been discrimination, whereas the other language versions thereof refer to facts from which the existence of such discrimination may be ‘presumed’. The Varhoven administrativen sad also applies Article 9 of the ZZD as a full and complete traditional general rule of evidence, taking the view, in particular, that, having regard to the fact that the Ogosta and Kosharnik districts are not inhabited solely by Roma and the fact that the reasons for the measure at issue in the main proceedings are not based on the ethnicity of the persons concerned by that measure, the existence of discrimination has not been established.

35 Finally, the Varhoven administrativen sad held that, in any event, measures such as that at issue in the main proceedings are necessary and justified having regard to the legitimate objectives pursued. The KZD expresses doubts as to whether such an analysis is well founded.

36 It is in those circumstances that the KZD decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1 Does the case to be considered fall within the scope of Council Directive 2000/43 … of equal treatment between persons irrespective of racial or ethnic origin (here with respect to Article 3(1)(h))?

2 What is meant by “treated less favourably” within the meaning of Article 2(2)(a) of Directive 2000/43 and by “put persons of a racial or ethnic origin at a particular disadvantage” within the meaning of Article 2(2)(b) of Directive 2000/43?

(a) For less favourable treatment to qualify as direct discrimination, is it absolutely essential for the treatment to be more unfavourable and for it to infringe, directly or indirectly, rights or interests explicitly defined in law, or is it to be understood as any form of behaviour (relationship) in the wider sense of the word which is less advantageous than behaviour in a similar situation?

(b) For the fact of being put in a particular unfavourable situation to qualify as indirect discrimination, is it also necessary for it to infringe, directly or indirectly, rights or interests explicitly defined in law, or is it to be understood in the wider sense as any form of being placed in a particular unfavourable/disadvantageous situation?

3 Depending on the answer to the second question, if, for direct or indirect discrimination within the meaning of Article 2(2)(a) and (b) of Directive 2000/43 to be deemed to have occurred, it is necessary for the less favourable treatment or the fact of being put in a particular unfavourable situation to infringe, directly or indirectly, a right or interest defined in law,

(a) do the provisions of Article 38 of the Charter of Fundamental Rights of the European Union, [Directive 2006/32] (Recital 29, Article 1 and Article 13(1)), [Directive 2003/54] (Article 3(5)) and [Directive 2009/72] (Article 3(7)) define, to the benefit of the final consumer of electricity, a right or interest entitling him to check meter readings regularly and capable of being relied on before the national courts in proceedings such as the main proceedings,

and

(b) is national legislation and/or administrative practice approved by the State energy regulatory authority granting a distribution undertaking the freedom to install electricity meters in places to which it is difficult or impossible to gain access, preventing consumers

from checking and monitoring meter readings regularly, compatible with those provisions?

4 Depending on the answer to the second question: If, for direct or indirect discrimination to be deemed to have occurred, it is not absolutely necessary for a right or interest defined in law to have been directly or indirectly infringed,

(a) is, pursuant to Article 2(2)(a) and (b) of Directive 2000/43, national legislation or case-law, as at issue in the main proceedings, admissible if it requires, for discrimination to be deemed to have occurred, that the more unfavourable treatment and the fact of being put in a more unfavourable position infringe, directly or indirectly, rights or interests defined in law;

(b) if they are not admissible, is the national court then obliged not to apply them in the case before it and to refer to the definitions given in [that] directive?

5 Is Article 8(1) of Directive 2000/43 to be interpreted

(a) as meaning that it requires the victim to establish facts which impose an unambiguous, incontestable and certain conclusion or inference that direct or indirect discrimination has occurred, or is it sufficient for the facts to justify only an assumption/presumption of such discrimination?

(b) Do the facts that only in the two parts of the city known as Roma districts are electricity meters attached to electricity poles in the streets at a height at which consumers cannot read them, with known exceptions in some parts of those two urban districts, and in all other districts of the city the electricity meters are placed at a different height (up to 1.7 m) at which they can be read, usually in the consumer's home, on the outside of the building or on surrounding fences, lead to a shift in the burden of proof to the defendant?

(c) Do the facts that not only Roma but also people of a different ethnic origin live in the two parts of the city known as Roma districts and/or accordingly, not all the inhabitants of those two districts actually regard themselves as Roma, and/or the reasons for placing the electricity meters in those two urban districts at a height of 7 m are described by the distribution undertaking as being generally known, preclude a shift in the burden of proof to the defendant?

6 Depending on the answer to Question 5:

(a) If Article 8(1) of Directive 2000/43 is to be interpreted as meaning that an assumption/presumption of the occurrence of discrimination is necessary and if the aforementioned facts lead to a shift in the burden of proof to the defendant, what form of discrimination can be presumed from those facts – direct or indirect discrimination and/or harassment?

(b) Do the provisions of Directive 2000/43 enable direct discrimination and/or harassment to be justified by the pursuit of a legal objective by necessary and suitable means?

(c) In view of the legal objectives which the distribution undertaking emphasises it is pursuing, can the measure taken in the two urban districts be justified in a situation in which

– the measure is taken because of the increasing incidence of unpaid bills in the two

urban districts and the frequent offences committed by consumers which impair or threaten the safety, quality and continuous and secure operation of the electrical installations

and

– the measure is taken across the board, irrespective of whether the individual consumer pays his bills for the distribution and supply of electricity and whether the individual consumer has been found to have committed any offence (manipulation of meter readings, illegal connection and/or extraction and/or consumption of electricity without payment, or any other interference with the network which impairs or threatens its safe, high-quality, continuous and secure operation);

– provision is made in legislation and the General Conditions of the Contract on Distribution ("Distribution Contract") for liability for any similar offence in civil, administrative and criminal law;

– the clause contained in Article 27(2) of the General Conditions of the Distribution Contract – whereby the distribution undertaking gives an assurance that, if explicitly requested by a consumer in writing, it will enable him to make a visual check of the meter readings – does not in fact enable the consumer to check the readings personally and regularly;

– it is possible for an inspection meter to be installed in the consumer's home at his explicit written request, although a fee is payable;

– the measure is a distinctive and visible reference to the dishonesty of the consumer in one or other form in view of what the distribution undertaking refers to as the generally known reasons for the measure being taken;

– other technical methods and means can be used to protect electricity meters against interference;

– the legal representative of the distribution undertaking claims that a similar measure taken in a Roma district of another city was in fact unable to prevent interference;

– it is not assumed that an electrical installation in one of these urban districts, a transformer station, will need to undergo measures similar to those taken to protect electricity meters?'

Jurisdiction of the Court

37 In its order for reference, the KZD sets out the reasons for which it considers that it is a 'court or tribunal' within the meaning of Article 267 TFEU. The Bulgarian Government and the European Commission also consider that the KZD has such a character, and that the Court of Justice therefore has jurisdiction to give a ruling on the questions referred to it by that body. However, CEB and CRB express doubts on this matter and argue, first of all, that the KZD does not have compulsory jurisdiction, second, that that body does not offer sufficient guarantees as to its independence and, third, that the proceedings pending before that body are not intended to lead to a decision of a judicial nature.

38 In that regard, it should be recalled, as a preliminary point, that, according to settled case-law, in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 267 TFEU, which is a question governed by EU law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent (see, in particular, Case C-196/09 *Miles and Others* [2011] ECR I-0000, paragraph 37 and the case-law cited).

39 In addition, a national court may refer a question to the Court only if there is a case pending before it and if it is called upon to give judgment in proceedings intended to lead to a decision of a judicial nature (see, in particular, Case C-53/03 *Syfait and Others* [2005] ECR I-4609, paragraph 29 and the case-law cited).

40 Therefore, it is appropriate to determine whether a body may refer a case to the Court of Justice on the basis of criteria relating both to the constitution of that body and to its function. In that connection, a national body may be classified as a court or tribunal within the meaning of Article 267 TFEU, when it is performing judicial functions, but when exercising other functions, of an administrative nature, for example, it cannot be recognised as such (see, in particular, order of 26 November 1999 in Case C-192/98 *ANAS* [1999] ECR I-8583, paragraph 22).

41 It follows that, in order to establish whether a national body, entrusted by law with different categories of functions, is to be regarded as a court or tribunal within the meaning of Article 267 TFEU, it is necessary to determine in what specific capacity it is acting within the particular legal context in which it seeks a ruling from the Court (see order in *ANAS*, paragraph 23).

42 Therefore, as regards the present case, it should be observed that although the KZD is called on, in particular, as the body responsible for promoting equal treatment referred to in Article 13 of Directive 2000/43, to exercise various functions which are not in any way of a judicial nature, in the present case, having regard to the functions that it exercises in the proceedings which gave rise to the present request for a preliminary ruling, it is appropriate to ascertain whether or not that body may be regarded as a court or tribunal within the meaning of Article 267 TFEU.

43 In that connection, it is clear from Article 50 of the ZZD that proceedings taking place before the section of the KZD which made the present request for a preliminary ruling may originate either from an application from a person who considers himself a victim of discrimination, pursuant to Point 1 of that provision, or as a complaint made by natural and legal persons or State or local authority bodies, as provided for in Point 3 of Article 50 of the ZZD or, lastly, in an initiative of the KZD itself in accordance with Point 2 of that article.

44 In the present case, it is clear from the assessments made by the KZD as set out in paragraph 24 of this judgment, that Mr Belov brought a complaint before it both on the basis of Article 50(1) of the ZZD, as a person directly concerned by the measure at issue in the main proceedings, and Article 50(3) of the ZZD in so far as he claims also to act on behalf of other inhabitants of the two districts concerned by that measure.

45 It is, in particular, in taking account of the functions that the KZD is called on to exercise when a case is referred to it that it is appropriate in the present case to determine whether that body must be classified as a court or tribunal within the meaning of Article 267 TFEU.

46 In that connection, it must be held that the various factors, among those relied on by CEB and CRB,

which are capable of giving rise to doubts that the proceedings before the KZD based on Article 50(1) and (3) of the ZZD are intended to lead to a decision of a judicial nature for the purposes of the case-law set out in paragraph 39 of this judgment.

47 In the first place, it is clear from Article 50(2) of the ZZD that similar proceedings to those which gave rise to the present request for a preliminary ruling could, in relation to the same facts, equally have been brought by the KZD acting on its own initiative. It is apparent, in light of the information before the Court, that, regardless of the circumstances in which the case was referred to that body on the basis of Article 50 of the ZZD, that is, by way of application, complaint or of its own motion, that body is required to bring proceedings which are essentially similar in which it has, inter alia, extensive powers of investigation in order to gather the evidence necessary to elucidate the facts concerned. Furthermore, the results to which those proceedings are intended to lead thus initiated by application, complaint or of the KZD's own motion, are themselves similar, namely an injunction to cease the discrimination found and an order for the persons responsible for it to pay fines.

48 In the second place, it is common ground that the KZD may, as it has done in the present case, join to the proceedings, of its own motion, other persons than those expressly appointed by the party which has brought the action before it by way of an application or a complaint, in particular where the KZD considers that those parties may have to answer for the discrimination alleged by the applicant/complainant and/or be liable to pay a fine on that basis.

49 Third, it is also common ground, on the basis of the information submitted to the Court, that, where an action is brought against a decision of the KZD adopted after proceedings have been brought on the basis of Article 50 of the ZZD, that body has the status of defendant before the administrative court called on to give a ruling on that application. Furthermore, if the decision of the KZD is annulled by the administrative court before which an action has been brought, that body may appeal against the decision to annul before the Varhoven administrativen sad.

50 Fourth, it also seems to follow from the Administrative Procedural Code, as alleged at the hearing by CEB and CRB and confirmed by Mr Belov, that, if an action is brought against a decision of the KZD given in proceedings such as those at issue in the main proceedings, it is possible for that body to revoke that decision, if the party to whom the decision is addressed is favourable.

51 All the circumstances lead to the view that the decision that the KZD is called on to give at the end of proceedings brought before that body on the basis of Article 50 of the ZZD and in particular subparagraphs 1 and 3 thereof, is similar in substance to an administrative decision and do not have a judicial nature within the meaning of the case-law of the Court relating to the concept of 'court or tribunal' in Article 267 TFEU.

52 Furthermore, it must be stated in that connection that, if such a decision of the KZD is, as stated, subject to appeal before an administrative court whose decision is itself subject to appeal before the Varhoven administrativen sad, the existence of those judicial appeals ensures the effectiveness of the mechanism of the request for a preliminary ruling provided for in Article 267 TFEU and the uniform interpretation of European Union law and, in the present case, in particular of Directive 2000/43, that that provision of the Treaty seeks to ensure. Under Article 267 TFEU, such national courts have the option or, where appropriate, are required to make a request for a preliminary ruling to the Court where a decision on the interpretation or the validity of European Union law is necessary to give their judgment.

53 Similarly, it must be observed that before the Court decisions of the Varhoven kasatsionen sad

(Supreme Court of Cassation) (Bulgaria) were cited of 22 January 2009 and of the Varhoven administrativen sad of 27 October 2010, from which it is clear that the ZZD put in place two alternative independent procedures enabling a person who, like Mr Belov, considers himself to be the victim of discrimination to request that that discrimination should cease. Apart from the possibility to initiate administrative type proceedings, such as those pending before the KZD in the case in the main proceedings based on Article 50 of the ZZD, the person concerned also has the possibility to bring an action before the Rayonen sad (District Court) (Bulgaria) which hears civil matters in order to put an end to such discrimination and the payment of damages.

54 Since the finding in paragraph 51 of this judgment suffices to conclude that when the KZD is called on to exercise a function such as that required of it in the main proceedings, that body is not a 'court or tribunal' within the meaning of Article 267 TFEU, there is no need to examine whether the other criteria for assessing whether a referring body is a 'court or tribunal' for the purposes of Article 267 TFEU are satisfied by the KZD nor therefore to give a ruling on the other objections made by CEB and CRB in that regard (see, to that effect, Case C-517/09 *RTL Belgium* [2010] ECR I-14093, paragraph 48).

55 It follows from all of the foregoing that the Court does not have jurisdiction to rule on the questions referred by the KZD.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

The Court of Justice of the European Union does not have jurisdiction to answer the questions referred by the Komisia za zashtita ot diskriminatsia in its order for reference of 19 July 2011.

[Signatures]

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* Language of the case: Bulgarian.

JUDGMENT OF THE COURT
16 DECEMBER 1976 [1]

Comet BV
v Produktschap voor Siergewassen
(preliminary ruling requested by the College van Beroep voor het Bedrijfsleven)

Case 45/76

Summary

1. *Customs duties on exports — Charges having equivalent effect — Abolition — Direct effect — Individual rights — Protection by the national courts*
(EEC Treaty, Article 16; Regulation No 234/68, Article 10)

2. *Community law — Direct effect — Individual rights — Protection by the national courts — Legal proceedings — National procedural rules — Application*

1. The prohibition laid down in Article 16 of the Treaty and that contained in Article 10 of Regulation No 234/68 have direct effect and confer on individuals rights which the national courts must protect.
2. In the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter. The position would be different only if those rules made it impossible in practice to exercise rights which the national courts have a duty to protect.

In Case 45/76,

Reference to the Court under Article 177 of the EEC Treaty by the College van Beroep voor het Bedrijfsleven, for a preliminary ruling in the action pending before that court between

1 — Language of the Case: Dutch.

COMET BV, Sassenheim,

and

PRODUKTSCHAP VOOR SIERGEWASSEN,

on the interpretation of the Community provisions for the free movement of goods,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

A Netherlands regulation of 1956 by the 'Produktschap voor Siergewassen' (Ornamental Plants Production Board) provides for a levy on exports of bulbs and corms of flowering plants to West Germany.

The levy, which amounts to 0.5 % of the invoiced amount of each consignment is used to finance sales publicity for the said products (Blumenwerbung) in the Federal Republic of Germany. The levy is payable by the German importer to the Netherlands exporter who has to pass it on to the Produktschap. The regulation was repealed on 8 July 1969 with effect from 1 June 1969. By levy notices of 7 July 1969 and 19 September 1969, the Comet BV company was notified that it owed several amounts in respect of flower bulb exports effected before 1 June 1969.

Comet did not initiate proceedings against these levy notices or against a reminder of 8 July 1971 and it paid the amounts claimed. It subsequently maintained that it had paid these amounts in error and claimed to set

them off against sums which it had been called upon to pay under a different head in 1975.

When the Produktschap refused to agree to this set-off, Comet brought proceedings against this refusal before the College van Beroep voor het Bedrijfsleven.

Before that court, the Produktschap did not dispute that the contested charges were incompatible with Community law but it maintains that the application for set-off should be rejected because proceedings were not taken against the 1969 levy notices and the 1971 reminder within the period of 30 days prescribed by Article 33 of the Law concerning administrative jurisdiction over trade organizations (wet administratieve rechtspraak bedrijfsorganisatie).

By order of 25 May 1976, the College van Beroep voor het Bedrijfsleven has referred the following question to the Court:

'Does any provision or any principle of Community law prohibit the raising of an objection against a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law on the ground that he has allowed the period for lodging an appeal under national law to elapse, either in the sense that the action of the litigant may be declared inadmissible by the court for failure to observe the time-limit or in the further sense that the administration may derive from the failure to comply with the time-limit a right to refuse to reconsider its decision?'

The order making the reference was entered at the Court Registry on 26 May 1976.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Comet company, the Commission of the European Communities and the Government of the Federal Republic of Germany.

The Court, on hearing the report of the Judge-Rapporteur and the views of the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted before the Court

A — Observations of the Comet company

The plaintiff in the main action agrees that as a rule, the expiry of the limitation period for an appeal can, under national law, be pleaded against a litigant and that it prevents the administrative act from being contested.

The question which arises under Netherlands law involves the application of this principle to a situation in which an administrative act is claimed or is found to be incompatible with Community law and, in consequence, this question concerns the relationship between Community law and national law.

Has a party an independent right of action to end a situation in which Community law is being infringed? Is such an action beyond the reach of national provisions with the result that it can validly be brought even after expiry of the limitation periods for proceedings under national law? Or, on the other hand, must the time-limits for bringing proceedings be held to apply since, as is suggested in the order making the reference, 'acceptance of the plaintiff's point of view would mean that decisions of the national administration could be contested in the national courts without any limitation as to time on grounds of alleged incompatibility with Community law — in this case on grounds of alleged invalidity of EEC provisions — on which

the relevant decision is based, thereby depriving the administration of the protection necessary to enable it to carry out properly its own duties as well as those assigned to it in a Community context'.

The plaintiff in the main action contends that the abolition of a situation of incompatibility with Community law is a consideration which takes precedence over the submission based on expiry of the limitation period for bringing proceedings.

The general legal principle that Community law prevails over national law is one which implies that the Community legal order would be undermined if the Member States were still in practice able to promulgate measures the practical effect of which would be to frustrate the application of the Treaty on the basis of the direct effect of certain provisions. A Member State ought not to be able to rely on procedural requirements if this means that the legal position of a party is not wholly and unreservedly consistent with the objectives of Community law. On this point the plaintiff in the main action refers to Article 5 of the Treaty and to decisions of the Court concerning 'the effectiveness' of Community law.

As regards the question whether a party has a right of action the plaintiff in the main action considers that the answer depends not only on procedural rules but also on the duty of the Member States, of individuals and of the Community institutions to contribute to the practical application of Community law. All subject to Community law possess a right corresponding to this duty; this is the right to obtain a 'Folgenbeseitigung', that is to say, the annulment, whatever form it may take, of the consequences of a situation which is contrary to Community law. In this connexion the plaintiff in the main action refers to the arguments developed by the Rewe concern in Case 33/76 and to the judgment of the Court in Case 39/72 *Commission* v *Italy* [1973] ECR 101 in which it was held that the default of a Member State can constitute the basis of liability on its part towards individuals. Individual action is, therefore, necessary and must necessarily prevail over the rules of national law so as to ensure full and uniform application of Community law. The plaintiff in the main action ought therefore to be considered as having the right to be heard and the defendant in the main action cannot avail itself of the lapse of the limitation period for bringing proceedings under national law as justification for refusing to rescind the contested decision. The incompatibility of the national provision is something separate from a finding by the Court that Community provisions have been infringed. The judgment of the Court is declaratory and does not confer rights.

As regards the consequences for the State authorities of the independent existence of a right of action and the misgivings expressed by the national court, the plaintiff in the main action points out that if practical considerations concerning the financial consequences of entertaining an individual action were taken into account it would once again be the Member State which, in practice, determined the extent of the legal consequences of its actions. The protection which should be available to the administration to enable it to fulfil its tasks ought primarily to be determined by the administration itself which should take care to ensure that administrative acts accord with Community law.

B — Observations of the Commission of the European Communities

While noting that it is common ground between the parties in the main action that the contested levies are charges having an effect equivalent to duties on exports, which are prohibited by Article 16 of the EEC Treaty as from the end of the first stage (1 January 1962), the

Commission points out that this does not mean that when such a charge has been levied, the undertaking concerned must be recognized as having an independent right of action whereby the latter may claim reimbursement of the charge imposed regardless of any principle of national law.

There can be no doubt about the direct applicability of Article 16 but the mere fact that the accountable party is recognized as being able, on its own account, to claim the illegality of the charge in the light of the Treaty is insufficient indication in what circumstances, in what manner and on what legal basis that party can claim repayment of a charge collected contrary to the Treaty.

Article 16 of the Treaty first confers on a person called upon to pay a charge the right not to pay it, or if he has paid it, the right to have it repaid to him. The Court of Justice has in any case laid down that a claim for repayment of charges, whether national or Community, which have been paid without lawful cause must be submitted on the basis of the provisions made for such actions under national law. In this connexion the Commission quotes the judgment of 19 December 1968 in Case 13/68 *Salgoil* v *Italy* [1968] ECR 453 at p. 463 in which it was held that 'in so far as the provisions in question [Articles 31 and 32 of the EEC Treaty] confer on persons subject to the jurisdiction rights which national courts must protect, those courts must ensure that the said rights are indeed protected, but that it is for the legal system of each Member State to decide which court has jurisdiction and for this purpose to classify those rights with reference to the criteria of national law'.

Similarly, in its judgment of 16 December 1960 in Case 6/60 *(Humblet,* Rec., p. 1131) the Court held that it was for the national legislature to determine whether an unlawful imposition of tax gave rise to a claim for compensatory interest, while it is clear from the judgment of 21 May 1976 in Case 26/74 *(Roquette* [1976] ECR 677) that actions brought in connexion with the common agricultural policy for reimbursement of levies improperly collected on imports must first be brought, in accordance with the rules of national law, against the Member State which collected them, before proceedings may be brought against the Community under Article 215 of the EEC Treaty.

Undoubtedly, the need to base applications for a refund on the provisions of national law has the effect of making repayment dependent on rules which vary from one Member State to another, but this is the position at the present stage of harmonization on the subject of the protection of individual rights.

It fully accords with the system of legal protection provided for by the Treaty under which Community and national guarantees of legal protection shall be complementary and interdependent instead of being in conflict with each other by being mutually exclusive, to appraise the legality or otherwise of the collection of a charge having equivalent effect on the basis of criteria supplied by the Treaty while at the same referring the party concerned to the provisions of national law for the protection of its right to repayment.

The right to be repaid provided for under national law may be asserted by the party concerned only to the extent and under the conditions laid down by that national law. This applies to the actual conditions for the right to repayment as it does to questions of jurisdiction and procedure and the question remains whether a single legal basis is adequate in the case of an application for refund of a payment made or whether, in addition to an action for repayment properly so-called, a separate action should be brought for

annulment of the payment notices issued to the party concerned.

In this connexion it would be reasonable to accept the principle that while substantive national law continues to apply this does not rule out the possibility of considering in a particular case, whether certain provisions of national law, which, *a priori,* make full and unconditional repayment of the amounts collected out of the question, may be incompatible with the guarantee of legal protection given by Article 16 of the EEC Treaty and, if the answer is in the affirmative, to what extent.

Taken by itself, the statement that Article 16 of the EEC Treaty creates rights for the benefit of individuals which national courts must protect could imply that this article provides not only a means for reviewing the legality of a particular charge but also the substantive foundation for an independent and individual right to repayment. The conditions for repayment would thus be based on a single legal foundation and would be freed from the conditions, variations and fortunes of national legal systems. In this way the legal protection of individuals against action taken contrary to the Treaty would be standardized in one important respect. In these circumstances, the Member States could not make repayment of improperly collected charges subject to different conditions laid down under national law but the consequence would be that the individuals concerned could not avail themselves of the legal remedies provided by their national law. In the Commission's view, this notion would obviously be alien to the precedence established by the Court of Justice concerning the direct effect of Articles 13 (2) and 16, failing acceptance of the concept of parallel actions which gives a litigant the choice between national and Community means of legal redress. Apart from the fact that this would involve something totally new in Community law it is likely that, because it would be stricter, the less advantageous means of redress would be replaced by the other.

As regards the applicability of national rules of procedure the Commission considers that, whether the action is based on national or Community law, proceedings for recovery of the overpayment must be brought before the Netherlands court in accordance with rules of procedure applicable in the Netherlands.

In respect of procedural matters, there are no Community provisions which explicitly or by their nature take precedence over the provisions of national law. The question remains, however, whether and to what extent Article 16 of the EEC Treaty prevents the application of the provisions of the Netherlands ARBO Law (Law concerning administrative jurisdiction over trade organizations).

If Article 16 of the Treaty is interpreted as a straightforward statement that charges on exports are illegal, the national rules of procedure continue to apply unconditionally, there being no conflict with the paramountcy of Community law.

If, on the other hand, Article 16 is interpreted as conferring on the applicant a right to recovery of the overpayment, there may, in the Commission's view, be a conflict between the purpose of the rule laid down in Article 16 and the conditions for exercise of the right of action laid down by the Netherlands Law.

If, on the one hand, an action brought under Article 16 is fully discharged only after all the overpayments have been reimbursed and, on the other, the effect of the provisions of the ARBO Law is in fact to make recovery impossible after a certain period, the conditions laid down by the ARBO Law cannot be pleaded against the applicant. A consideration which argues in favour of this solution is

that, for individuals, as a result of direct applicability, the object and the effect of legal protection would, as far as individuals are concerned, be to make repayment subject to uniform conditions in all the Member States.

It must, however, be emphasized that adoption of this solution implies, in the present state of the law, a straightforward abandonment of any rules governing time-limits and the conditions under which proceedings can be brought in view of, first, the lack of any relevant Community rules and, secondly, the possible non-application of national rules.

Such a fundamental and comprehensive abandonment of national rules of procedure cannot easily be reconciled with the principle hitherto recognized by the Court of Justice that national courts must take their decisions in accordance with national rules of procedure.

In the Commission's view, the declared precedence of Article 16 of the EEC Treaty over national law does not absolutely preclude the application of national rules of procedure.

The principle on which the provisions of the ARBO Law are based and which makes the protection of the right of individuals subject to the requirements of legal certainty is recognized in the legal systems of all the Member States. In this connexion the Commission refers to the judgment of the Court of 8 April 1976 in Case 43/75 *Defrenne*, [1976] ECR 455 in which it was held that the individual rights of private parties arising directly out of a provision of the EEC Treaty may, for considerations of legal certainty, be exercised only within prescribed time-limits, even if none have been expressly laid down by Community law.

Nevertheless, rules of procedure which, *a priori*, make it impossible for an applicant to assert his right to repayment in the courts or which make this subject to conditions which cannot be fulfilled are illegal. But the application of Article 33 of the ARBO Law gives rise to no criticism on that account.

The Commission concludes with the statement that, until uniform Community regulations have been adopted, a right to repayment based either on national or Community law is subject to the national rules of procedure relating to the conditions of admissibility and time-limits.

C — Observations of the Government of the Federal Republic of Germany

The Government of the Federal Republic of Germany refers to its observations in Case 33/76, *Rewe*.

These observations are to the effect that no rule of Community law confers on an individual the right to have an administrative act of a Member State annulled or withdrawn if under the national law of that Member State, the act can no longer be contested and has become final.

Individuals are able to rely on the direct effect of a Community provision only in so far as they may do so under the provisions of the administrative law and the procedural law of the Member State concerned.

The absence of Community rules governing procedure in administrative cases is due not to the fact that the component bodies of the Community have not yet completed the task of harmonization but to the fact that the Community was constructed by the Treaty of Rome in such a way that, with the exception of the fields which come under the direct control of the Community and the general task of harmonization assigned to it, the application of Community law was entrusted to the authorities and courts of the Member States.

The distribution of responsibility between the Community and the Member States inherent in the constitution of the Community makes it clear that the rights of individuals to have administrative acts annulled or withdrawn or to recover over-payments are laid down and defined by the relevant national provisions.

There is no question of conflict between Community law and national law since the conditions laid down by national law in respect of procedure in fact constitute a rule of Community law.

Rules governing the existence, in terms of form and finality, of administrative acts, help to ensure legal certainty and stability, principles which form part of the legal order of the Member States and thereby constitute unwritten principles of Community law.

The Government of the Federal Republic of Germany accepts that the legal rights of an individual may differ from one Member State to another. However, the existence of a uniform right to have administrative acts which conflict with a Community provision annulled would produce the scarcely acceptable result that the administrative law of the Member States would have to contain, in respect of certain aspects of administrative action, rules providing for derogations therefrom.

Such a uniform Community law is inconceivable in the absence of complete standardization of the law governing administrative procedure.

Neither Article 3 of the Treaty nor the 'general principles' recognized by the Member States in the field of administrative procedure justify the conclusion that there exists a right under Community law to have administrative acts which have become final withdrawn.

The precedents established by the Court of Justice have, on many occasions, recognized the power of the national legislature to lay down rules on the procedural aspects of rights arising under Community instruments in so far as such rights come within the ambit of the application of Community law by the Member States.

The German Government concludes that neither the provisions prohibiting charges having effect equivalent to customs duties nor other rules of Community law confer on individuals the right to have annulled an administrative act which, under the provisions of the Member State which promulgated it, can no longer be impugned because of non-compliance with the prescribed time-limit.

The plaintiff in the main action, represented by Hattinga Verschure, of The Hague Bar, the Government of the Federal Republic of Germany, represented by its Agent, Mr Seidel, and the Commission of the European Communities, represented by its Agent, Mr Bourgeois, submitted their oral observations at the hearing on 9 November 1976.

The Advocate-General delivered his opinion at the hearing on 13 November 1976.

Law

1 By order of 25 May 1976, received at the Court Registry on 26 May 1976, the College van Beroep voor het Bedrijfsleven referred the following question to the Court under Article 177 of the EEC Treaty: 'Does any provision or any

principle of Community law prohibit the raising of an objection against a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law on the ground that he has allowed the period for lodging an appeal under national law to elapse, either in the sense that the action of the litigant may be declared inadmissible by the court for failure to observe the time-limit or in the further sense that the administration may derive from the failure to comply with the time-limit a right to refuse to reconsider its decision?'

2 The question was submitted in connexion with proceedings brought before that court by the plaintiff in the main action for a declaration that, on exports of bulbs and corms of flowering plants to West Germany effected during the concluding months of 1968 and the early months of 1969, it made an undue payment to the Produktschap voor Siergewassen (hereinafter referred to as 'the Produktschap'), the defendant in the main action, of levies constituting charges having an effect equivalent to customs duties on exports which are contrary to Article 16 of the Treaty and are, moreover, prohibited by Article 10 of Regulation (EEC) No 234/68 of the Council of 27 February 1968 on the establishment of a common organization of the market in live trees and other plants, bulbs, roots and the like, cut flowers and ornamental foliage, which was applicable with effect from 1 July 1968.

3 The plaintiff in the main action asks the national court to recognize that it is entitled to set off the undue payments made against amounts being claimed from it by the Produktschap under a different head.

4 The Produktschap does not dispute that the contested levy constitutes a charge having an effect equivalent to a customs duty on exports and concedes that the national provisions for its imposition had, with effect from 1 July 1968, the date of entry into force of Regulation No 234/68, become incompatible with Article 10 of the Regulation which, in the internal trade of the Community in the horticultural products covered by the regulation, prohibited the levying of any customs duty or charge having equivalent effect.

5 It must, however, be observed that this incompatibility came into being on 1 January 1962 by virtue of Article 16 of the Treaty, under which the Member States are enjoined to abolish between themselves customs duties on exports and charges having equivalent effect by the end of the first stage at the latest.

6 There can, therefore, be no doubt that the levies imposed on the plaintiff in the main action by the levy notices and by the reminder sent to it on 7 July 1969, 19 September 1969 and on 8 July 1971 were in breach of the prohibition in Article 16 of the Treaty.

7 Nevertheless these levies were paid by the plaintiff in the main action which, on the ground that it paid them in error, is claiming reimbursement by way of set-off before the national court.

8 The Produktschap contends that the plaintiff in the main action can no longer impugn the contested levies or claim their reimbursement because it failed to bring proceedings against the levy notices and the reminder which had been sent to it within the period prescribed by national law for such proceedings.

9 The applicant in the main action contends, on the other hand, that the primacy of Community law means that it overrules any decision which constitutes an infringement of it and that, before the national courts, which are bound to protect the rights conferred on it by Article 16, it possesses, in consequence, an independent right of action which is unaffected by limitations provided for under national law which are liable to weaken the impact of the direct effect of that article in the legal order of the Member States.

10 Thus, the question referred seeks to establish whether the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire as the result of the direct effect of a Community provision, in the present case Article 16 of the Treaty and Article 10 of Regulation No 234/68, especially the rules concerning the period within which an action must be brougt are governed by the national law of the Member State where the action is brought or whether, on the other hand, they are independent and fall to be determined only by Community law itself.

11 The prohibition laid down in Article 16 of the Treaty and that contained in Article 10 of Regulation No 234/68 have direct effect and confer on individuals rights which the national courts must protect.

12 Thus, in application of the principle of cooperation laid down in Article 5 of the Treaty, the national courts are entrusted with ensuring the legal protection conferred on individuals by the direct effect of the provisions of Community law.

13 Consequently, in the absence of any relevant Community rules, it is for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Community law, provided that such rules are not less favourable than those governing the same right of action on an internal matter.

14 Articles 100 to 102 and 235 of the Treaty enable the appropriate steps to be taken as necessary, to eleminate differences between the provisions laid down in such matters by law, regulation or administrative action in Member States if these differences are found to be such as to cause distortion or to affect the functioning of the common market.

15 In default of such harmonization measures, the rights conferred by Community law must be exerciced before the national courts in accordance with the rules of procedure laid down by national law.

16 The position would be different only if those rules and time-limits made it impossible in practice to exercise rights which the national courts have a duty to protect.

17 This does not apply to the fixing of a reasonable period of limitation within which an action must be brought.

18 The fixing, as regards fiscal proceedings, of such a period is in fact an application of a fundamental principle of legal certainty which protects both the authority concerned and the party from whom payment is claimed.

19 The answer must therefore be that, in the case of a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law, that law, in its present state, does not prevent the expiry of the period within which proceedings must be brought under

national law from being raised against him, provided that the procedural rules applicable to his case are not less favourable than those governing the same right of action on an internal matter.

Costs

20 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted their observations to the Court, are not recoverable.

21 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the College van Beroep voor het Bedrijfsleven by order of 25 May 1976, hereby rules:

In the case of a litigant who is challenging before the national courts a decision of a national body for incompatibility with Community law, that law, in its present state, does not prevent the expiry of the period within which proceedings must be brought under national law from being raised against him, provided that the procedural rules applicable in his case are not less favourable than those governing the same right of action on an internal matter.

Kutscher Donner Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 16 December 1976.

A. Van Houtte — Registrar

H. Kutscher — President

JUDGMENT OF THE COURT
16 DECEMBER 1976 [1]

Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland (preliminary ruling requested by the Bundesverwaltungsgericht)

Case 33/76

Summary

1. Customs duties — Charges having effect equivalent — Abolition — Direct effect — Rights of individuals — Protection by national courts
(EEC Treaty, Article 13, Regulation No 159/66/EEC, Article 13)

2. Community law — Direct effect — Rights of individuals — Protection by national courts — Recourse to the courts — National procedural rules — Application

1. The prohibition laid down in Article 13 of the Treaty and that laid down in Article 13 of Regulation No 159/66/EEC have a direct effect and confer on citizens rights which the national courts are required to protect.
2. In the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. The position would be different only if the conditions made it impossible in practice to exercise the rights which the national courts are obliged to protect.

In Case 33/76

Reference to the Court under Article 177 of the EEC Treaty by the VIIth Senate of the Bundesverwaltungsgericht for a preliminary ruling in the action pending before that court between

1. REWE-ZENTRALFINANZ eG, Cologne,

2. REWE-ZENTRAL AG, Cologne,

1 — Language of the Case: German.

and

LANDWIRTSCHAFTSKAMMER FÜR DAS SAARLAND, Saarbrücken (Agricultural Chamber for the Saar),

on the interpretation of Articles 5, 9 and 13 (2) of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore (Presidents of Chambers), J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference, the procedure and the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

In 1968 the German companies Rewe-Zentralfinanz eG and Rewe-Zentral AG paid in respect of the import of French apples charges for phyto-sanitary inspection which were found by the judgment of the Court of 11 October 1973 in Case 39/73 [1973] ECR 1039 to be equivalent to customs duties.

In 1973 the said companies applied to the Landwirtschaftskammer für das Saarland to annul the decisions imposing the charges and to refund the amounts paid including interest. This claim was dismissed as inadmissible on the ground that it was out of time under Article 58 of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Court). The actions brought by the two companies before the Verwaltungsgericht für das Saarland (Saarland Administrative Court) were dismissed as was the appeal made by them to the Oberverwaltungsgericht (Higher Administrative Court).

Rewe-Zentralfinanz and Rewe-Zentral then appealed to the Bundesverwaltungsgericht (Federal Administrative Court). The latter took the view that the question whether it is possible to rely on an infringement of Community law irrespective of the expiry of time-limits

in general national procedural provisions required the interpretation of the EEC Treaty and by order dated 23 January 1976 stayed the appeal and referred the following questions to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

1. Where an administrative body in one State has infringed the prohibition on charges having an effect equivalent to customs duties (Articles 5, 9 and 13 (2) of the EEC Treaty) has the Community citizen concerned a right under Community law
   (a) to the annulment or revocation of the administrative measure;
   (b) and/or to a refund of the amount paid even if under the rules of procedure of the national law the time-limit for contesting the validity of the administrative measure is past?
2. Is this the case at least if the European Court of Justice has already ruled that there does exist an infringement of the prohibition contained in Community law?
3. If a right to a refund is held to exist under Community law, is interest to be paid on the amount and if so from what date and at what rate?

The order of the VIIth Senate of the Bundesverwaltungsgericht was registered at the Court on 6 April 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the companies Rewe-Zentralfinanz and Rewe-Zentral, by the Commission of the European Communities, by the Government of the Federal Republic of Germany, by the Government of the Italian Republic and by the Government of the United Kingdom.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without a preparatory inquiry.

II — Summary of written observations

The *appellants* first of all say that the courts of the Member States have so far refrained from submitting to the Court of Justice the question whether charges collected contrary to Community law may exceptionally be retained because no claim has been brought within the prescribed period against the decision to impose the charges.

In its judgment of 7 February 1973 in Case 39/72 [1973] ECR 101 the Court stated that an infringement by a Member State of a rule of Community law which is directly applicable could be the basis of possible liability on the part of the State as against the person concerned. Further in the judgment of 12 July 1973 in Case 70/72 [1973] ECR 813 the Court stated that the aim of the Treaty is to achieve the practical elimination of infringements by Member States and the consequences thereof, past and future.

It is true that in the judgment of 22 January 1976 in Case 60/75 [1976] ECR 45 the Court stated that where there has been an infringement of Community law it will be for the State, as regards the injured party, to take the consequences upon itself in the context of the provisions of national law relating to the liability of the State. Nevertheless there can be no question in this case of simply referring a trader affected by an infringement of Article 13 to national remedies relating to administrative liability for the following reasons:

(a) if the effect of the Community rules *per se* is all-embracing and uniform no other provision can apply to the legal consequences arising from their infringement by a Member State. Otherwise traders would be subject to unequal treatment according to the idiosyncrasies of each national legal system;
(b) the requirements of effective legal protection and the logic of the system of the Treaty imply likewise

that directly applicable Community rules should be characterized as rules the infringement of which by Member States gives the individual under Community law rights to have the effects of the administrative act annulled,

(c) if the legal consequences of such an infringement were to become established in accordance with national law they would be annulled only in part: thus under German law on administrative liability (Article 34 of the Grundgesetz (Basic Law)) in conjunction with Article 839 of the Bürgerliches Gesetzbuch (Civil Code) only infringements committed by the administration in the exercise of public authority are covered. Further German law requires a wilful or negligent breach of official duty.

In its judgment of 17 December 1970 in Case 11/70 [1970] ECR 1125 the Court declared that the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. The absolute precedence of Community law likewise extends in particular to national procedure (Case 66/73 [1974] ECR 33 and Case 146/73 [1974] ECR 139). It would be contrary to the nature of the Community system for Member States to be able to take or maintain in force measures likely to compromise the effectiveness of the Treaty. The mandatory nature of the Treaty and measures adopted to implement it cannot vary from one State to another by the effect of internal measures without the functioning of the Community system being impeded and without the attainment of the aims of the Treaty being jeopardized.

It follows that a party has not only a right to the refund of charges exacted contrary to Community law but also to the annulment or setting aside of the decision imposing the charge. According to German national law this annulment or setting aside ot the decision imposing the charge constitutes a condition precedent to the refund of the charges.

With regard to the second question raised by the Bundesverwaltungsgericht it is not permissible to limit the Member States' duty to make a refund to the date on which the Court of Justice declared that the levying of the charge in question was incompatible with Community law. This follows from the fact that in general the Court of Justice does not give a ruling on this matter but, in the procedure under Article 177, on questions of interpretation raised by the national court.

With regard to the third question, since the aim of the Treaty is to achieve the practical elimination of infringements by Member States, the action in Community law for the annulment of the effects of an administrative measure also covers the entitlement of the trader injured to interest, which is only a special application of this action.

The *Commission* stresses that it does not follow from the direct effect of Article 13 (2) of the EEC Treaty that after the contested charge has been levied notwithstanding the prohibition in question the appellants must be recognized as having an independent right of action enabling them to claim the repayment of the said charge independently of any substantive ground in national law. Article 13 (2) was not conceived as authority in Community law for claims for repayment brought by citizens against a Member State. The Court has always recognized that the action for repayment of national or Community charges wrongly levied may be based on the law of the Member State concerned. Thus in Case 13/68 [1968] ECR 453 it was held that in these circumstances 'it is for the national legal system to determine which court or

tribunal has jurisdiction to give this protection and, for this purpose, to decide how the individual position thus protected is to be classified'. The same is true moreover for actions for compensation under the second paragraph of Article 215 of the EEC Treaty. No doubt the necessity of basing claims for refund on the provisions of national law may make the refund dependent on rules which vary according to the Member States but this position is in accord with the present state of integration with regard to the protection of individual rights. Since the Member States are in principle required to facilitate the exercise of such a right, it can be claimed by a party only to the extent and subject to the conditions laid down by this same national law.

To interpret Article 13 (2) of the Treaty as meaning that it gives an independent substantive right to refund would raise the question of the connexion between such a right based on Community law and those provided for by national laws. To prohibit parties from basing their claims to refund of the provisions of their national law would be contrary to the previous case-law of the Court on the direct effect of Article 13 (2). Further, concurrent actions would constitute an innovation in the sphere of Community law and would lead in practice to the more favourable action prevailing over the other because governed by less strict conditions.

There are in the context of the main action no Community rules on procedure and time-limits which preclude, either expressly or by their nature as provisions having precedence in governing time-limits, the application of national rules of procedure. But to what extent could Article 13 (2) of the Treaty, as a substantive provision of Community law having precedence, prohibit the application of the German Code of administrative procedure? If the effect of the latter were indeed to exclude the repayment after the expiry of a given period, the conditions of admissibility and the time-limits for annulment laid down by it could not be a valid objection to the claim in the main action. In fact the direct effect of Article 13 (2) would mean that the person concerned thus enjoys by means of a Community provision, which by its nature has precedence, an absolute entitlement unlimited in point of time to bring an action for a refund; the full and unconditional assertion of this right, by reason of its proprietary nature, must not be impeded or prevented in fact or in law by any measure or any obstacle relating to the sphere of the States' internal powers. However it is right to object to such a conclusion that in the present situation of the law the uniformity thus achieved in the protection of the rights of individuals with regard to refunds would be nothing other than a refusal to accept any conditions of admissibility and time-limits for bringing actions. Such a general exclusion of any national rule of procedure would be incompatible with the legal principle that the national court gives a decision based on the rules of national procedure even where the plaintiff bases his claims and arguments on Community law.

There is no conflict between Community law and national law since Community law does not claim pre-emincence but recognizes the complementary application of rules of national law or integrates them into its legal system. Such a reference to national law may be indirectly inferred here from the dicta in case-law with regard to direct effect according to which directly applicable provisions give individuals rights 'which national courts must protect'. National courts can do so only by referring to their own rules of procedure, so long as Community law does not itself govern these matters, and thus subject to the conditions on admissibility and the time-limits for bringing actions which they contain. The principle making the protection of parties' rights subject to the

requirements of certainty in legal relations given expression by the German Code of administrative procedure is recognized in the legal systems of all the Member States and likewise recognized to a large extent in the Community legal system. The judgment given in Case 43/75 [1976] ECR 455 has even set specific time-limits in cases where Community law has not expressly prescribed them.

This position is certainly hardly satisfactory since the time-limits laid down by national law vary between 1 month and 30 years (in this respect it may be asked whether each Member State can, in so far as it is concerned, decide which is the right laid down by national law to which such a Community right must be assimilated). But to lay down at a Community level uniform time-limits for the assertion of the rights in question in the main action would lead to taking into consideration all the other claims on Member States based on Community law and involving other spheres of national law.

There is no purpose in the second question since rights to refund are based on Article 13 (2) of the Treaty. At most the Court could give an answer similar to that contained in the judgment in Case 43/75 to which reference has already been made.

The third question has not been settled in Community law and in similar cases the Court has referred to national law. If the main action fails because of German procedural rules there will be no purpose in this question.

The *Government of the Federal Republic of Germany* considers that the absence of Community rules on the organization of administrative procedure or the system of legal protection to which Member States must conform when applying substantive Community law is due to the fact that, apart from the sectors governed directly by the Community and the general task of harmonization given to it, the execution of Community law has been entrusted to the authorities and courts of the Member States. The division of tasks between the Community and the Member States is explained by the fact that the rights of individuals to the annulment or withdrawal of administrative measures or to the refund of sums paid are given concrete form and limited by the national provisions on the subject. The limitation afforded by the national law on procedure to the assertion of Community rights is therefore in the true sense a rule of Community law.

Under German law when an administrative measure can no longer be the subject of a legal action for annulment because it has become definitive it is also as a rule no longer possible to require the authority to withdraw the administrative measure which has become unassailable or to refund the sum paid. This explains why administrative measures which have become unassailable are not affected when the Bundesverfassungsgericht (Federal Constitutional Court) declares that the legal provision on which they are based is unconstitutional.

The fact that therefore the legal position of parties may differ from one Member State to another is only the result of the implementation of Community law by Member States.

The provision in Article 5 of the EEC Treaty referred to in the question certainly requires Member States to adopt appropriate measures in Community matters but it cannot give rights to parties. The same is true of the 'general principles' of Member States with regard to administrative procedure: they do not allow the conclusion either, by analogy with the second paragraph of Article 215 of the Treaty, that there is a Community right to the withdrawal of administrative measures which have become final. In particular it is not proved that the other

Member States, in contrast to the Federal Republic of Germany, generally recognize a right to the withdrawal of administrative measures which have become definitive.

The *Government of the Italian Republic* states that in the absence of Community rules it must necessarily be recognized that the means and conditions for protecting subjective rights which the Community creates in favour of individuals are always governed by the laws of the various Member States.

In fact the order of reference clearly shows that the national court assumes that the sums exacted in contravention of the prohibition on levying charges having equivalent effect must be refunded. It is this assumption which must be examined. Thus it may be asked whether and if so to what extent national administrations are bound to refund sums exacted in contravention of the prohibition on levying charges having an equivalent effect. It is to be observed that the Commission imposes no obligation on Member States to recover from individuals sums paid for aid which has not been authorized or refunds on exports which have exceeded the amount of refunds authorized. Similarly an obligation to reimburse sums paid to individuals as a result of a wrong interpretation of Community rules has been expressly excluded. Accordingly it would seem that the same criterion should apply in the case of the obligation to refund sums wrongly levied in contravention of the prohibition against charges having an effect equivalent to customs duties. This view accords with that adopted by the Court in the aforementioned Case 43/75.

It is not necessary to stress the serious financial consequences which would ensue for the budgets of the various Member States to note that an obligation to refund would give rise to an unjustified discrimination between Member States and Community citizens according to the rules issued by each legal system regarding recovery of customs duties improperly charged.

Moreover refund would lead in practice to an unforeseen increase in the profit margin or in any event in the assets of the dealers concerned since the amounts in question have obviously already been taken into account in determining costs and therefore in the repercussions on purchasers arising from the increase in resultant charges. A refund would lead in practice to an 'aid' benefiting national dealers and to the very sort of change in the market and in the conditions of competition which Community rules are intendent to prevent; above all the result would be a new disadvantage to the exporters of other Member States who have already had to suffer the practical disadvantage arising from the obstacle constituted by the increase in customs duties provided for by the national law of the importing State.

As a result the Italian Government thinks that the direct applicability of Community rules to the prohibition against levying charges having an effect equivalent to customs duties cannot be relied on in respect of sums which have been paid as particular customs duties before these duties have been the subject of a relevant decision intended to establish their nature as charges having an equivalent effect. As regards the specific questions raised by the order of reference a ruling may be given that the exercise of the right to the refund of sums paid as charges having an equivalent effect is governed, just as in the case of submissions of inadmissibility as regards time-limits, estoppel or prescription, by national laws in the same way as national laws determine whether, from which date and at what rate interest may be payable on sums to be refunded to those entitled to them.

The *Government of the United Kingdom* points out that the importance of

time-limits is frequently acknowledged in Community law and that the Court (Second Chamber) stated in Case 79/70 [1971] ECR 689 that they were matters of public policy. It cannot be denied that they may have the effect of limiting substantive rights. The only satisfactory remedy lies in the adoption of Community legislation to harmonize the relevant rules of prescription and limitation. But the invalidation of national time-limits in advance of appropriate Community legislation would create uncertainty and add disproportionately to the complexities of accounting and to the cost of collection borne by national and Community funds.

The answers given by the Court in this case will lay down principles of general application likely to apply equally to any case in which a Community customs duty, an agricultural levy, value-added tax or an excise duty collected by the Member States in accordance with the national provisions imposed by law, regulation or administrative action has been collected contrary to the relevant Community provisions.

During the oral procedure which took place on 9 November 1976 the appellants, represented by Dietrich Ehle, Advocate of the Cologne Bar, the Government of the Federal Republic of Germany, represented by its Legal Adviser, Mr Seidel, the Government of the Italian Republic represented by Mr Marzano, Avvocato dello Stato, and the Commission of the European Communities represented by its Legal Adviser, Mr Kalbe, acting as Agent, expanded the arguments which they set out in the written procedure.

The Advocate-General delivered his opinion at the hearing on 30 November 1976.

Law

1 By order dated 23 January 1976, received at the Court Registry on 6 April 1976, the Bundesverwaltungsgericht referred to the Court three questions on Articles 5, 9 and 13 (2) of the EEC Treaty for a preliminary ruling under Article 177 of the EEC Treaty.

2 These questions have arisen in a case relating to the payment in 1968 on the importation by the appellants of French apples of charges for phytosanitary inspection, regarded as equivalent to customs duties by the judgment of the Court of 11 October 1973 in Case 39/73 *(Rewe Zentralfinanz eGmbH* [1973] ECR 1039).

The respondent to the appeal rejected the appellants' claims to have the decisions imposing the charges annulled and the amounts paid refunded (with interest) on the ground that they were inadmissible because the time-limits laid down by Article 58 of the Verwaltungsgerichtsordnung (Code of Procedure before the Administrative Courts) had not been observed.

3 The first question asks whether where an administrative body in a State has infringed the prohibition on charges having an effect equivalent to customs duties (Articles 5, 9 and 13 (2) or the EEC Treaty) the Community citizen concerned has a right under Community law to the annulment or revocation of the administrative measure and/or to a refund of the amount paid even if under the rules of procedure of the national law the time-limit for contesting the validity of the administrative measure is past.

The second question asks whether this is so if the Court of Justice has already ruled that there does exist an infringement of the prohibition contained in Community law.

The third question asks whether, if a right to refund is held to exist under Community law, interest is to be paid on the amount and if so from what date and at what rate.

The first question

4 Both the respondent and the national court accept that the charges in question had been unlawfully exacted.

Although it has been possible to rely on the direct effect of Article 13 (2) of the EEC Treaty only as from 1 January 1970, the end of the transitional period, it should be stated however that the levying of the said charges was already previously unlawful by virtue of Article 13 (1) of Regulation No 159/66/EEC of the Council of 25 October 1966 (JO 192 of 27 October 1966) which abolished them in respect of fruit and vegetables as from 1 January 1967.

5 The prohibition laid down in Article 13 of the Treaty and that laid down in Article 13 of Regulation No 159/66/EEC have a direct effect and confer on citizens rights which the national courts are required to protect.

Applying the principle of cooperation laid down in Article 5 of the Treaty, it is the national courts which are entrusted with ensuring the legal protection which citizens derive from the direct effect of the provisions of Community law.

Accordingly, in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law, it being understood that such conditions

cannot be less favourable than those relating to similar actions of a domestic nature.

Where necessary, Articles 100 to 102 and 235 of the Treaty enable appropriate measures to be taken to remedy differences between the provisions laid down by law, regulation or administrative action in Member States if they are likely to distort or harm the functioning of the Common Market.

In the absence of such measures of harmonization the right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules.

The position would be different only if the conditions and time-limits made it impossible in practice to exercise the rights which the national courts are obliged to protect.

This is not the case where reasonable periods of limitation of actions are fixed.

The laying down of such time-limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the tax-payer and the administration concerned.

6 The answer to be given to the first question is therefore that in the present state of Community law there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.

The second question

7 The fact that the Court has given a ruling on the question of infringement of the Treaty does not affect the reply given to the first question.

The third question

8 In view of the reply given to the first question the third question does not arise.

Costs

9 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Italian Republic, the Government of the United Kingdom and the Commission of the European Communities, which have made observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 23 January 1976, hereby rules:

1. **In the present state of Community law there is nothing to prevent a citizen who contests before a national court a decision of a national authority on the ground that it is incompatible with Community law from being confronted with the defence that limitation periods laid down by national law have expired, it being understood that the procedural conditions governing the action may not be less favourable than those relating to similar actions of a domestic nature.**

2. **The fact that the Court has given a ruling on the question of infringement of the Treaty does not affect the reply given to the first question.**

Kutscher Donner Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 16 December 1976.

A. Van Houtte
Registrar

H. Kutscher
President

JUDGMENT OF THE COURT (Sixth Chamber)
13 November 1990 *

In Case C-106/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Juzgado de Primera Instancia e Instrucción (Court of First Instance and Examining Magistrates' Court) No 1, Oviedo, Spain, for a preliminary ruling in the proceedings pending before that court between

Marleasing SA

and

La Comercial Internacional de Alimentación SA

on the interpretation of Article 11 of the First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community (Official Journal, English Special Edition 1968 (I), p. 41),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of Chamber, T. F. O'Higgins, M. Díez de Velasco, C. N. Kakouris and P. J. G. Kapteyn, Judges,

Advocate General: W. van Gerven
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of

Marleasing SA, by José Ramón Buzón Ferrero, of the Oviedo Bar,

* Language of the case: Spanish.

the Commission of the European Communities, by its Legal Adviser Antonio Caeiro and by Daniel Calleja, a member of its Legal Department, acting as Agents,

having regard to the Report for the Hearing and further to the hearing on 6 June 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 12 July 1990,

gives the following

Judgment

1 By order of 13 March 1989, which was received at the Court on 3 April 1989, the Juzgado de Primera Instancia e Instrucción No 1, Oviedo, referred a question to the Court pursuant to Article 177 of the EEC Treaty for a preliminary ruling on the interpretation of Article 11 of Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community.

2 Those questions arose in a dispute between Marleasing SA, the plaintiff in the main proceedings, and a number of defendants including La Comercial Internacional de Alimentación SA (hereinafter referred to as 'La Comercial'). The latter was established in the form of a public limited company by three persons, including Barviesa SA, which contributed its own assets.

3 It is apparent from the grounds set out in the order for reference that Marleasing's primary claim, based on Articles 1261 and 1275 of the Spanish Civil Code, according to which contracts without cause or whose cause is unlawful have no legal effect, is for a declaration that the founders' contract establishing La Comercial is void on the ground that the establishment of the company lacked cause, was a sham transaction and was carried out in order to defraud the

creditors of Barviesa SA, a co-founder of the defendant company. La Comercial contended that the action should be dismissed in its entirety on the ground, in particular, that Article 11 of Directive 68/151, which lists exhaustively the cases in which the nullity of a company may be ordered, does not include lack of cause amongst them.

4 The national court observed that in accordance with Article 395 of the Act concerning the Conditions of Accession of Spain and the Portuguese Republic to the European Communities (Official Journal 1985 L 302, p. 23) the Kingdom of Spain was under an obligation to bring the directive into effect as from the date of accession, but that that had still not been done at the date of the order for reference. Taking the view, therefore, that the dispute raised a problem concerning the interpretation of Community law, the national court referred the following question to the Court:

'Is Article 11 of Council Directive 68/151/EEC of 9 March 1968, which has not been implemented in national law, directly applicable so as to preclude a declaration of nullity of a public limited company on a ground other than those set out in the said article?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 With regard to the question whether an individual may rely on the directive against a national law, it should be observed that, as the Court has consistently held, a directive may not of itself impose obligations on an individual and, consequently, a provision of a directive may not be relied upon as such against such a person (judgment in Case 152/84 *Marshall* v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723).

7 However, it is apparent from the documents before the Court that the national court seeks in substance to ascertain whether a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a

declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

8 In order to reply to that question, it should be observed that, as the Court pointed out in its judgment in Case 14/83 *Von Colson and Kamann* v *Land Nordrhein-Westfalen* [1984] ECR 1891, paragraph 26, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.

9 It follows that the requirement that national law must be interpreted in conformity with Article 11 of Directive 68/151 precludes the interpretation of provisions of national law relating to public limited companies in such a manner that the nullity of a public limited company may be ordered on grounds other than those exhaustively listed in Article 11 of the directive in question.

10 With regard to the interpretation to be given to Article 11 of the directive, in particular Article 11(2)(b), it should be observed that that provision prohibits the laws of the Member States from providing for a judicial declaration of nullity on grounds other than those exhaustively listed in the directive, amongst which is the ground that the objects of the company are unlawful or contrary to public policy.

11 According to the Commission, the expression 'objects of the company' must be interpreted as referring exclusively to the objects of the company as described in the instrument of incorporation or the articles of association. It follows, in the Commission's view, that a declaration of nullity of a company cannot be made on the basis of the activity actually pursued by it, for instance defrauding the founders' creditors.

12 That argument must be upheld. As is clear from the preamble to Directive 68/151, its purpose was to limit the cases in which nullity can arise and the retroactive effect of a declaration of nullity in order to ensure 'certainty in the law as regards relations between the company and third parties, and also between members' (sixth recital). Furthermore, the protection of third parties 'must be ensured by provisions which restrict to the greatest possible extent the grounds on which obligations entered into in the name of the company are not valid'. It follows, therefore, that each ground of nullity provided for in Article 11 of the directive must be interpreted strictly. In those circumstances the words 'objects of the company' must be understood as referring to the objects of the company as described in the instrument of incorporation or the articles of association.

13 The answer to the question submitted must therefore be that a national court hearing a case which falls within the scope of Directive 68/151 is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

Costs

14 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Juzgado de Primera Instancia e Instrucción No 1, Oviedo, by order of 13 March 1989, hereby rules:

A national court hearing a case which falls within the scope of Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States

of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, is required to interpret its national law in the light of the wording and the purpose of that directive in order to preclude a declaration of nullity of a public limited company on a ground other than those listed in Article 11 of the directive.

Mancini O'Higgins

Díez de Velasco Kakouris Kapteyn

Delivered in open court in Luxembourg on 13 November 1990.

J.-G. Giraud
Registrar

G. F. Mancini
President of the Sixth Chamber

JUDGMENT OF THE COURT
19 November 1991 *

In Joined Cases C-6/90 and C-9/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Pretura di Vicenza (Italy) (in Case C-6/90) and by the Pretura di Bassano del Grappa (Italy) (in Case C-9/90) for a preliminary ruling in the proceedings pending before those courts between

Andrea Francovich

and

Italian Republic

and between

Danila Bonifaci and Others

and

Italian Republic

on the interpretation of the third paragraph of Article 189 of the EEC Treaty and Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of the employer (Official Journal 1980 L 283, p. 23),

* Language of the case: Italian.

THE COURT,

composed of: O. Due, President, Sir Gordon Slynn, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman, Principal Administrator,

after considering the written observations submitted on behalf of

— Andrea Francovich and Danila Bonifaci and Others by Claudio Mondin, Aldo Campesan and Alberto dal Ferro, of the Vicenza Bar,

— the Italian Government by Oscar Fiumara, Avvocato dello Stato, acting as Agent,

— the Government of the Netherlands by B. R. Bot, Secretary-General at the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom by J. E. Collins, of the Treasury Solicitor's Department, acting as Agent, assisted by Richard Plender QC,

— the Commission of the European Communities by Giuliano Marenco and Karen Banks, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing oral argument on behalf of Andrea Francovich and Danila Bonifaci, the Italian Government, the United Kingdom, the German Government, represented by Jochim Sedemund, Rechtsanwalt, Cologne, acting as Agent, and the Commission at the hearing on 27 February 1991,

after hearing the Opinion of the Advocate General at the sitting on 28 May 1991,

gives the following

Judgment

1 By orders of 9 July and 30 December 1989, which were received at the Court on 8 January and 15 January 1990 respectively, the Pretura di Vicenza (in Case C-6/90) and the Pretura di Bassano del Grappa (in Case C-9/90) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of the third paragraph of Article 189 of the EEC Treaty and Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (Official Journal 1980 L 283, p. 23).

2 Those questions were raised in the course of proceedings brought by Andrea Francovich and by Danila Bonifaci and Others (hereinafter referred to as 'the plaintiffs') against the Italian Republic.

3 Directive 80/987 is intended to guarantee employees a minimum level of protection under Community law in the event of the insolvency of their employer, without prejudice to more favourable provisions existing in the Member States. In particular it provides for specific guarantees of payment of unpaid wage claims.

4 Under Article 11 the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within a period which expired on 23 October 1983. The Italian Republic failed to fulfil that obligation, and its default was recorded by the Court in its judgment in Case 22/87 *Commission* v *Italy* [(1989] ECR 143).

5 Mr Francovich, a party to the main proceedings in Case C-6/90, had worked for CDN Elettronica SnC in Vicenza but had received only sporadic payments on account of his wages. He therefore brought proceedings before the Pretura di Vicenza, which ordered the defendant to pay approximately LIT 6 million. In attempting to enforce that judgment the bailiff attached to the Tribunale di Vicenza was obliged to submit a negative return. Mr Francovich then claimed to be entitled to obtain from the Italian State the guarantees provided for in Directive 80/987 or, in the alternative, compensation.

6 In Case C-9/90 Danila Bonifaci and 33 other employees brought proceedings before the Pretura di Bassano del Grappa, stating that they had been employed by Gaia Confezioni Srl, which was declared insolvent on 5 April 1985. When the employment relationships were discontinued, the plaintiffs were owed more than LIT 253 million, which was proved as a debt in the company's insolvency. More than five years after the insolvency they had been paid nothing, and the receiver had told them that even a partial distribution in their favour was entirely improbable. Consequently, the plaintiffs brought proceedings against the Italian Republic in which they claimed that, in view of its obligation to implement Directive 80/987 with effect from 23 October 1983, it should be ordered to pay them their arrears of wages, at least for the last three months, or in the alternative to pay compensation.

7 It was in those circumstances that the national courts referred the following questions, which are identical in both cases, to the Court for a preliminary ruling:

'(1) Under the system of Community law in force, is a private individual who has been adversely affected by the failure of a Member State to implement Directive 80/897 — a failure confirmed by a judgment of the Court of Justice — entitled to require the State itself to give effect to those provisions of that directive which are sufficiently precise and unconditional, by directly invoking the Community legislation against the Member State in default so as to obtain the guarantees which that State itself should have provided and in any event to claim reparation of the loss and damage sustained in relation to provisions to which that right does not apply?

(2) Are the combined provisions of Articles 3 and 4 of Council Directive 80/987 to be interpreted as meaning that where the State has not availed itself of the option of laying down limits under Article 4, the State itself is obliged to pay the claims of employees in accordance with Article 3?

(3) If the answer to Question 2 is in the negative, the Court is asked to state what the minimum guarantee is that the State must provide pursuant to Directive 80/987 to an entitled employee so as to ensure that the share of pay payable to that employee may be regarded as giving effect to the directive.'

8 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 The first question submitted by the national courts raises two issues, which should be considered separately. It concerns, first, the direct effect of the provisions of the directive which determine the rights of employees and, secondly, the existence and scope of State liability for damage resulting from breach of its obligations under Community law.

The direct effect of the provisions of the directive which determine the rights of employees

10 The first part of the first question submitted by the national courts seeks to determine whether the provisions of the directive which determine the rights of employees must be interpreted as meaning that the persons concerned can enforce those rights against the State in the national courts in the absence of implementing measures adopted within the prescribed period.

11 As the Court has consistently held, a Member State which has not adopted the implementing measures required by a directive within the prescribed period may not, against individuals, plead its own failure to perform the obligations which the directive entails. Thus wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions of the directive define rights which individuals are able to assert against the State (judgment in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53).

12 It is therefore necessary to see whether the provisions of Directive 80/987 which determine the rights of employees are unconditional and sufficiently precise. There are three points to be considered: the identity of the persons entitled to the guarantee provided, the content of that guarantee and the identity of the person liable to provide the guarantee. In that regard, the question arises in particular whether a State can be held liable to provide the guarantee on the ground that it did not take the necessary implementing measures within the prescribed period.

13 With regard first of all to the identity of the persons entitled to the guarantee, it is to be noted that, according to Article 1(1), the directive applies to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1), the latter provision defining the circumstances in which an employer must be deemed to be in a state of insolvency. Article 2(2) refers to national law for the definition of the concepts of 'employee' and 'employer'. Finally, Article 1(2) provides that the Member States may, by way of exception and under certain conditions, exclude claims by certain categories of employees listed in the annex to the directive.

14 Those provisions are sufficiently precise and unconditional to enable the national court to determine whether or not a person should be regarded as a person intended to benefit under the directive. A national court need only verify whether

the person concerned is an employed person under national law and whether he is excluded from the scope of the directive in accordance with Article 1(2) and Annex 1 (as to the necessary conditions for such exclusion, see the judgments in Case 22/87 *Commission* v *Italy*, cited above, paragraphs 18 to 23, and Case C-53/88 *Commission* v *Greece* [1990] ECR I-3917, paragraphs 11 to 26), and then ascertain whether one of the situations of insolvency provided for in Article 2 of the directive exists.

15 With regard to the content of the guarantee, Article 3 of the directive provides that measures must be taken to ensure the payment of outstanding claims resulting from contracts of employment or employment relationships and relating to pay for the period prior to a date determined by the Member State, which may choose one of three possibilities: (a) the date of the onset of the employer's insolvency; (b) that of the notice of dismissal issued to the employee concerned on account of the employer's insolvency; (c) that of the onset of the employer's insolvency or that on which the contract of employment or the employment relationship with the employee concerned was discontinued on account of the employer's insolvency.

16 Depending on the choice it makes, the Member State has the option, under Article 4(1) and (2), to restrict liability to periods of three months or eight weeks respectively, calculated in accordance with detailed rules laid down in that article. Finally, Article 4(3) provides that the Member States may set a ceiling on liability, in order to avoid the payment of sums going beyond the social objective of the directive. Where they exercise that option, the Member States must inform the Commission of the methods used to set the ceiling. In addition, Article 10 provides that the directive does not affect the option of Member States to take the measures necessary to avoid abuses and in particular to refuse or reduce liability in certain circumstances.

17 Article 3 of the directive thus leaves the Member State a discretion in determining the date from which payment of claims must be ensured. However, as is already implicit in the Court's case-law (see the judgments in Case 71/85 *Netherlands* v *FNV* [1986] ECR 3855 and Case 286/85 *McDermott and Cotter* v *Minister for*

Social Welfare and Attorney General [1987] ECR 1453, paragraph 15), the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone.

18 In this case, the result required by the directive in question is a guarantee that the outstanding claims of employees will be paid in the event of the insolvency of their employer. The fact that Articles 3 and 4(1) and (2) give the Member States some discretion as regards the means of establishing that guarantee and the restriction of its amount do not affect the precise and unconditional nature of the result required.

19 As the Commission and the plaintiffs have pointed out, it is possible to determine the minimum guarantee provided for by the directive by taking the date whose choice entails the least liability for the guarantee institution. That date is that of the onset of the employer's insolvency, since the two other dates, that of the notice of dismissal issued to the employee and that on which the contract of employment or the employment relationship was discontinued, are, according to the conditions laid down in Article 3, necessarily subsequent to the onset of the insolvency and thus define a longer period in respect of which the payment of claims must be ensured.

20 The possibility under Article 4(2) of limiting the guarantee does not make it impossible to determine the minimum guarantee. It follows from the wording of that article that the Member States have the option of limiting the guarantees granted to employees to certain periods prior to the date referred to in Article 3. Those periods are fixed in relation to each of the three dates provided for in Article 3, so that it is always possible to determine to what extent the Member State could have reduced the guarantee provided for by the directive depending on the date which it would have chosen if it had transposed the directive.

21 As regards Article 4(3), according to which the Member States may set a ceiling on liability in order to avoid the payment of sums going beyond the social objective of the directive, and Article 10, which states that the directive does not affect the option of Member States to take the measures necessary to avoid abuses, it should be observed that a Member State which has failed to fulfil its obligations to transpose a directive cannot defeat the rights which the directive creates for the benefit of individuals by relying on the option of limiting the amount of the guarantee which it could have exercised if it had taken the measures necessary to implement the directive (see, in relation to an analogous option concerning the prevention of abuse in fiscal matters, the judgment in Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraph 34).

22 It must therefore be held that the provisions in question are unconditional and sufficiently precise as regards the content of the guarantee.

23 Finally, as regards the identity of the person liable to provide the guarantee, Article 5 of the directive provides that:

'Member States shall lay down detailed rules for the organization, financing and operation of the guarantee institutions, complying with the following principles in particular:

(a) the assets of the institutions shall be independent of the employers' operating capital and be inaccessible to proceedings for insolvency;

(b) employers shall contribute to financing, unless it is fully covered by the public authorities;

(c) the institutions' liabilities shall not depend on whether or not obligations to contribute to financing have been fulfilled.'

24 It has been submitted that since the directive provides for the possibility that the guarantee institutions may be financed entirely by the public authorities, it is unacceptable that a Member State may thwart the effects of the directive by asserting that it could have required other persons to bear part or all of the financial burden resting upon it.

25 That argument cannot be upheld. It follows from the terms of the directive that the Member State is required to organize an appropriate institutional guarantee system. Under Article 5, the Member State has a broad discretion with regard to the organization, operation and financing of the guarantee institutions. The fact, referred to by the Commission, that the directive envisages as one possibility among others that such a system may be financed entirely by the public authorities cannot mean that the State can be identified as the person liable for unpaid claims. The payment obligation lies with the guarantee institutions, and it is only in exercising its power to organize the guarantee system that the State may provide that the guarantee institutions are to be financed entirely by the public authorities. In those circumstances the State takes on an obligation which in principle is not its own.

26 Accordingly, even though the provisions of the directive in question are sufficiently precise and unconditional as regards the determination of the persons entitled to the guarantee and as regards the content of that guarantee, those elements are not sufficient to enable individuals to rely on those provisions before the national courts. Those provisions do not identify the person liable to provide the guarantee, and the State cannot be considered liable on the sole ground that it has failed to take transposition measures within the prescribed period.

27 The answer to the first part of the first question must therefore be that the provisions of Directive 80/987 which determine the rights of employees must be

interpreted as meaning that the persons concerned cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period.

Liability of the State for loss and damage resulting from breach of its obligations under Community law

28 In the second part of the first question the national court seeks to determine whether a Member State is obliged to make good loss and damage suffered by individuals as a result of the failure to transpose Directive 80/987.

29 The national court thus raises the issue of the existence and scope of a State's liability for loss and damage resulting from breach of its obligations under Community law.

30 That issue must be considered in the light of the general system of the Treaty and its fundamental principles.

(a) *The existence of State liability as a matter of principle*

31 It should be borne in mind at the outset that the EEC Treaty has created its own legal system, which is integrated into the legal systems of the Member States and which their courts are bound to apply. The subjects of that legal system are not only the Member States but also their nationals. Just as it imposes burdens on individuals, Community law is also intended to give rise to rights which become part of their legal patrimony. Those rights arise not only where they are expressly granted by the Treaty but also by virtue of obligations which the Treaty imposes in a clearly defined manner both on individuals and on the Member States and the Community institutions (see the judgments in Case 26/62 *Van Gend en Loos* [1963] ECR 1 and Case 6/64 *Costa* v *ENEL* [1964] ECR 585).

32 Furthermore, it has been consistently held that the national courts whose task it is to apply the provisions of Community law in areas within their jurisdiction must ensure that those rules take full effect and must protect the rights which they confer on individuals (see in particular the judgments in Case 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR 629, paragraph 16, and Case C-213/89 *Factortame* [1990] ECR I-2433, paragraph 19).

33 The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible.

34 The possibility of obtaining redress from the Member State is particularly indispensable where, as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law.

35 It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.

36 A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which the Member States are required to take all appropriate measures, whether general or particular, to ensure fulfilment of their obligations under Community law. Among these is the obligation to nullify the unlawful consequences of a breach of Community law (see, in relation to the analogous provision of Article 86 of the ECSC Treaty, the judgment in Case 6/60 *Humblet* v *Belgium* [1960] ECR 559).

37 It follows from all the foregoing that it is a principle of Community law that the Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

(b) *The conditions for State liability*

38 Although State liability is thus required by Community law, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage.

39 Where, as in this case, a Member State fails to fulfil its obligation under the third paragraph of Article 189 of the Treaty to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to reparation provided that three conditions are fulfilled.

40 The first of those conditions is that the result prescribed by the directive should entail the grant of rights to individuals. The second condition is that it should be possible to identify the content of those rights on the basis of the provisions of the directive. Finally, the third condition is the existence of a causal link between the breach of the State's obligation and the loss and damage suffered by the injured parties.

41 Those conditions are sufficient to give rise to a right on the part of individuals to obtain reparation, a right founded directly on Community law.

42 Subject to that reservation, it is on the basis of the rules of national law on liability that the State must make reparation for the consequences of the loss and damage

caused. In the absence of Community legislation, it is for the internal legal order of each Member State to designate the competent courts and lay down the detailed procedural rules for legal proceedings intended fully to safeguard the rights which individuals derive from Community law (see the judgments in Case 60/75 *Russo* v *AIMA* [1976] ECR 45, Case 33/76 *Rewe* v *Landwirstschaftskammer Saarland* [1976] ECR 1989 and Case 158/80 *Rewe* v *Hauptzollamt Kiel* [1981] ECR 1805).

43 Further, the substantive and procedural conditions for reparation of loss and damage laid down by the national law of the Member States must not be less favourable than those relating to similar domestic claims and must not be so framed as to make it virtually impossible or excessively difficult to obtain reparation (see, in relation to the analogous issue of the repayment of taxes levied in breach of Community law, *inter alia* the judgment in Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595).

44 In this case, the breach of Community law by a Member State by virtue of its failure to transpose Directive 80/987 within the prescribed period has been confirmed by a judgment of the Court. The result required by that directive entails the grant to employees of a right to a guarantee of payment of their unpaid wage claims. As is clear from the examination of the first part of the first question, the content of that right can be identified on the basis of the provisions of the directive.

45 Consequently, the national court must, in accordance with the national rules on liability, uphold the right of employees to obtain reparation of loss and damage caused to them as a result of failure to transpose the directive.

46 The answer to be given to the national court must therefore be that a Member State is required to make good loss and damage caused to individuals by failure to transpose Directive 80/987.

The second and third questions

47 In view of the reply to the first question referred by the national court, there is no need to rule on the second and third questions.

Costs

48 The costs incurred by the Italian Government, the United Kingdom and the Netherlands and German Governments and by the Commission of the European Communities, which submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Pretura di Vicenza (in Case C-6/90) and the Pretura di Bassano del Grappa (in Case C-9/90), by orders of 9 July 1989 and 30 December 1989 respectively, hereby rules:

1. **The provisions of Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer which determine the rights of employees must be interpreted as meaning that the persons concerned cannot enforce those rights against the State before the national courts where no implementing measures are adopted within the prescribed period;**

2. A Member State is required to make good loss and damage caused to individuals by failure to transpose Directive 80/987/EEC.

Due Slynn Joliet Schockweiler

Grévisse Kapteyn Mancini

Moitinho de Almeida Rodríguez Iglesias Díez de Velasco Zuleeg

Delivered in open court in Luxembourg on 19 November 1991.

J.-G. Giraud
Registrar

O. Due
President

JUDGMENT OF THE COURT
5 March 1996 *

In Joined Cases C-46/93 and C-48/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesgerichtshof (Case C-46/93) and by the High Court of Justice, Queen's Bench Division, Divisional Court (Case C-48/93) for a preliminary ruling in the proceedings pending before those courts between

Brasserie du Pêcheur SA

and

Federal Republic of Germany

and between

The Queen

and

Secretary of State for Transport

* Languages of the cases: English and German.

ex parte: Factortame Ltd and Others

on the interpretation of the principle of the liability of the State for damage caused to individuals by breaches of Community law attributable to the State,

THE COURT,

composed of: G. C. Rodríguez Iglesias (Rapporteur), President, C. N. Kakouris, D. A. O. Edward and G. Hirsch (Presidents of Chambers), G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, C. Gulmann and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrars: H. von Holstein, Deputy Registrar, and H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Brasserie du Pêcheur SA, by Hermann Büttner, Rechtsanwalt, Karlsruhe,

— claimants 1 to 36 and 38 to 84 in Case C-48/93, by David Vaughan QC, Gerald Barling QC and David Anderson, Barrister, instructed by Stephen Swabey, Solicitor,

— claimants 85 to 97 in Case C-48/93, by Nicholas Green, Barrister, instructed by Nicholas Horton, Solicitor,

— the 37th claimant in Case C-48/93, by Nicholas Forwood QC and Peter Duffy, Barrister, instructed by Holman Fenwick & Willan, Solicitors,

— the Government of the Federal Republic of Germany, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, and Joachim Sedemund, Rechtsanwalt, Cologne,

— the United Kingdom, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, and Stephen Richards, Christopher Vajda and Rhodri Thompson, Barristers,

— the Danish Government, by J. Mølde, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Spanish Government, by Alberto José Navarro González, Director-General for Community Legal and Institutional Affairs, and Rosario Silva de Lapuerta and Gloria Calvo Díaz, Abogados del Estado, of the State Legal Service, acting as Agents,

— the French Government, by Jean-Pierre Puissochet, Director of Legal Affairs in the Ministry of Foreign Affairs, and Catherine de Salins, Deputy Director of the Foreign Affairs Directorate in that Ministry, acting as Agents,

— Ireland, represented by M. A. Buckley, Chief State Solicitor, acting as Agent,

— the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by Christian Timmermans, Assistant Director-General of its Legal Service, Jörn Pipkorn, Legal Adviser, and Christopher Docksey, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Brasserie du Pêcheur SA, represented by H. Büttner and P. Soler-Couteaux, of the Strasbourg Bar; claimants 1 to 36 and 38 to 84 in Case C-48/93, represented by D. Vaughan, G. Barling, D. Anderson and S. Swabey; claimants 85 to 97 in Case C-48/93, represented by N. Green; the 37th claimant in Case C-48/93, represented by N. Forwood and P. Duffy; the German Government, represented by J. Sedemund; the United Kingdom, represented by Sir Nicholas Lyell QC, Attorney General, S. Richards, C. Vajda and J. E. Collins; the Danish Government, represented by P. Biering, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the Greek Government, represented by F. Georgakopoulos, Assistant Legal Adviser to the State Legal Council, acting as Agent; the Spanish Government, represented by R. Silva de Lapuerta and G. Calvo Díaz; the French Government, represented by C. de Salins; the Netherlands Government, represented by J. W. de Zwaan, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent, and the Commission, represented by C. Timmermans, J. Pipkorn and C. Docksey, at the hearing on 25 October 1994,

after hearing the Opinion of the Advocate General at the sitting on 28 November 1995,

gives the following

Judgment

1 By orders of 28 January 1993 and 18 November 1992, received at the Court on 17 February 1993 and 18 February 1993, respectively, the Bundesgerichtshof (Federal Court of Justice) (Case C-46/93) and the High Court of Justice, Queen's

Bench Division, Divisional Court (Case C-48/93) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty questions concerning the conditions under which a Member State may incur liability for damage caused to individuals by breaches of Community law attributable to that State.

2 The questions were raised in two sets of proceedings between, on the one hand, Brasserie du Pêcheur SA and the Federal Republic of Germany and, on the other, Factortame Ltd and others (hereinafter 'Factortame') and the United Kingdom of Great Britain and Northern Ireland.

Case C-46/93

3 Before the national court, Brasserie du Pêcheur, a French company based at Schiltigheim (Alsace), claims that it was forced to discontinue exports of beer to Germany in late 1981 because the competent German authorities considered that the beer it produced did not comply with the Reinheitsgebot (purity requirement) laid down in Paragraphs 9 and 10 of the Biersteuergesetz of 14 March 1952 (Law on Beer Duty, BGBl. I, p. 149), in the version dated 14 December 1976 (BGBl. I, p. 3341, hereinafter 'the BStG').

4 The Commission took the view that those provisions were contrary to Article 30 of the EEC Treaty and brought infringement proceedings against the Federal Republic of Germany on two grounds, namely the prohibition on marketing under the designation 'Bier' (beer) beers lawfully manufactured by different methods in other Member States and the prohibition on importing beers containing additives. By judgment of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227, the Court held that the prohibition on marketing beers imported from other Member States which did not comply with the provisions in question was incompatible with Article 30 of the Treaty.

5 Brasserie du Pêcheur consequently brought an action against the Federal Republic of Germany for reparation of the loss suffered by it as a result of that import restriction between 1981 and 1987, seeking damages in the sum of DM 1 800 000, representing a fraction of the loss actually incurred.

6 The Bundesgerichtshof refers to Paragraph 839 of the Bürgerliches Gesetzbuch (German Civil Code, 'the BGB') and Article 34 of the Grundgesetz (Basic Law, 'the GG'). According to the first sentence of Paragraph 839 of the BGB, 'If an official wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom.' Article 34 of the GG provides that 'If a person infringes, in the exercise of a public office entrusted to him, the obligations incumbent upon him as against a third party, liability therefor shall attach in principle to the State or to the body in whose service he is engaged.'

7 If those provisions are read together, it appears that, in order for the State to be liable, the third party must be capable of being regarded as beneficiary of the obligation breached, which means that the State is liable for breach only of obligations conceived in favour of a third party. However, as the Bundesgerichtshof points out, in the case of the BStG the task assumed by the national legislature concerns only the public at large and is not directed towards any particular person or class of persons who could be regarded as 'third parties' within the meaning of the provisions mentioned above.

8 In this context, the Bundesgerichtshof has referred the following questions to the Court for a preliminary ruling:

'1. Does the principle of Community law according to which Member States are obliged to pay compensation for damage suffered by an individual as a result of breaches of Community law attributable to those States also apply where such a breach consists of a failure to adapt a national parliamentary statute to the higher-ranking rules of Community law (this case concerning a failure to adapt

Paragraphs 9 and 10 of the German Biersteuergesetz to Article 30 of the EEC Treaty)?

2. May the national legal system provide that any entitlement to compensation is to be subject to the same limitations as those applying where a national statute breaches higher-ranking national law, for example where an ordinary Federal law breaches the Grundgesetz of the Federal Republic of Germany?

3. May the national legal system provide that entitlement to compensation is to be conditional on fault (intent or negligence) on the part of the organs of the State responsible for the failure to adapt the legislation?

4. If Question 1 is to be answered in the affirmative and Question 2 in the negative:

   (a) May liability to pay compensation under the national legal system be limited to the reparation of damage done to specific individual legal interests, for example property, or does it require full compensation for all financial losses, including lost profits?

   (b) Does the obligation to pay compensation also require reparation of the damage already incurred before it was held in the judgment of the European Court of Justice of 12 March 1987 in Case 178/84 *Commission* v *Germany* [1987] ECR 1227 that Paragraph 10 of the German Biersteuergesetz infringed higher-ranking Community law?'

Case C-48/93

9 On 16 December 1988 Factortame and others, being individuals and companies incorporated under the laws of the United Kingdom, together with the directors and shareholders of those companies, brought an action before the High Court of Justice, Queen's Bench Division, Divisional Court (hereinafter 'the Divisional Court'), in which they challenged the compatibility of Part II of the Merchant Shipping Act 1988 with Community law, in particular Article 52 of the EEC Treaty. That act entered into force on 1 December 1988, subject to a transitional period expiring on 31 March 1989. It provided for the introduction of a new register for British fishing boats and made registration of such vessels, including those already registered in the former register, subject to certain conditions relating to the nationality, residence and domicile of the owners. Fishing boats ineligible for registration in the new register were deprived of the right to fish.

10 In answer to questions referred by the Divisional Court, the Court held by judgment of 25 July 1991 in Case C-221/89 *Factortame II* [1991] ECR I-3905 that conditions relating to the nationality, residence and domicile of vessel owners and operators as laid down by the registration system introduced by the United Kingdom were contrary to Community law, but that it was not contrary to Community law to stipulate as a condition for registration that the vessels in question must be managed and their operations directed and controlled from within the United Kingdom.

11 On 4 August 1989 the Commission brought infringement proceedings against the United Kingdom. In parallel, it applied for interim measures ordering the suspension of the abovementioned nationality conditions on the ground that they were contrary to Articles 7, 52 and 221 of the EEC Treaty. By order of 10 October 1989 in Case 246/89 R *Commission* v *United Kingdom* [1989] ECR 3125, the President of the Court granted that application. Pursuant to that order, the United Kingdom adopted provisions amending the new registration system with effect from 2 November 1989. By judgment of 4 October 1991 in Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, the Court confirmed that the reg-

istration conditions challenged in the infringement proceedings were contrary to Community law.

12 Meanwhile, on 2 October 1991, the Divisional Court made an order designed to give effect to this Court's judgment of 25 July 1991 in *Factortame II* and, at the same time, directed the claimants to give detailed particulars of their claims for damages. Subsequently, the claimants provided the national court with a detailed statement of their various heads of claim, covering expenses and losses incurred between 1 April 1989, when the legislation at issue entered into force, and 2 November 1989, when it was repealed.

13 Lastly, by order of 18 November 1992, the Divisional Court gave Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, leave to amend its claim to include a claim for exemplary damages for unconstitutional behaviour on the part of the public authorities.

14 In that context, the Divisional Court referred the following questions to the Court for a preliminary ruling:

'1. In all the circumstances of this case, where:

(a) a Member State's legislation laid down conditions relating to the nationality, domicile and residence of the owners and managers of fishing vessels, and of the shareholders and directors in vessel-owning and managing companies, and

(b) such conditions were held by the Court of Justice in Cases C-221/89 and C-246/89 to infringe Articles 5, 7, 52 and 221 of the EEC Treaty,

are those persons who were owners or managers of such vessels, or directors and/or shareholders in vessel-owning and managing companies, entitled as a matter of Community law to compensation by that Member State for losses which they have suffered as a result of all or any of the above infringements of the EEC Treaty?

2. If Question 1 is answered in the affirmative, what considerations, if any, does Community law require the national court to apply in determining claims for damages and interest relating to:

(a) expenses and/or loss of profit and/or loss of income during the period subsequent to the entry into force of the said conditions, during which the vessels were forced to lay up, to make alternative arrangements for fishing and/or to seek registration elsewhere;

(b) losses consequent on sales at an undervalue of the vessels, or of shares therein, or of shares in vessel-owning companies;

(c) losses consequent on the need to provide bonds, fines and legal expenses for alleged offences connected with the exclusion of vessels from the national register;

(d) losses consequent on the inability of such persons to own and operate further vessels;

(e) loss of management fees;

(f) expenses incurred in an attempt to mitigate the above losses;

(g) exemplary damages as claimed?'

15 Reference is made to the Report for the Hearing for a fuller account of the facts of the main proceedings, the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

State liability for acts and omissions of the national legislature contrary to Community law (first question in both Case C-46/93 and Case C-48/93)

16 By their first questions, each of the two national courts essentially seeks to establish whether the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the infringement in question.

17 In Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 37, the Court held that it is a principle of Community law that Member States are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible.

18 The German, Irish and Netherlands Governments contend that Member States are required to make good loss or damage caused to individuals only where the provisions breached are not directly effective: in *Francovich and Others* the Court simply sought to fill a lacuna in the system for safeguarding rights of individuals. In so far as national law affords individuals a right of action enabling them to assert their rights under directly effective provisions of Community law, it is unnecessary, where such provisions are breached, also to grant them a right to reparation founded directly on Community law.

19 That argument cannot be accepted.

20 The Court has consistently held that the right of individuals to rely on the directly effective provisions of the Treaty before national courts is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty (see, in particular, Case 168/85 *Commission* v *Italy* [1986] ECR 2945, paragraph 11, Case C-120/88 *Commission* v *Italy* [1991] ECR I-621, paragraph 10, and C-119/89 *Commission* v *Spain* [1991] ECR I-641, paragraph 9). The purpose of that right is to ensure that provisions of Community law prevail over national provisions. It cannot, in every case, secure for individuals the benefit of the rights conferred on them by Community law and, in particular, avoid their sustaining damage as a result of a breach of Community law attributable to a Member State. As appears from paragraph 33 of the judgment in *Francovich and Others*, the full effectiveness of Community law would be impaired if individuals were unable to obtain redress when their rights were infringed by a breach of Community law.

21 This will be so where an individual who is a victim of the non-transposition of a directive and is precluded from relying on certain of its provisions directly before the national court because they are insufficiently precise and unconditional, brings an action for damages against the defaulting Member State for breach of the third paragraph of Article 189 of the Treaty. In such circumstances, which obtained in the case of *Francovich and Others*, the purpose of reparation is to redress the inju-

rious consequences of a Member State's failure to transpose a directive as far as beneficiaries of that directive are concerned.

22 It is all the more so in the event of infringement of a right directly conferred by a Community provision upon which individuals are entitled to rely before the national courts. In that event, the right to reparation is the necessary corollary of the direct effect of the Community provision whose breach caused the damage sustained.

23 In this case, it is undisputed that the Community provisions at issue, namely Article 30 of the Treaty in Case C-46/93 and Article 52 in Case C-48/93, have direct effect in the sense that they confer on individuals rights upon which they are entitled to rely directly before the national courts. Breach of such provisions may give rise to reparation.

24 The German Government further submits that a general right to reparation for individuals could be created only by legislation and that for such a right to be recognized by judicial decision would be incompatible with the allocation of powers as between the Community institutions and the Member States and with the institutional balance established by the Treaty.

25 It must, however, be stressed that the existence and extent of State liability for damage ensuing as a result of a breach of obligations incumbent on the State by virtue of Community law are questions of Treaty interpretation which fall within the jurisdiction of the Court.

26 In this case, as in *Francovich and Others*, those questions of interpretation have been referred to the Court by national courts pursuant to Article 177 of the Treaty.

27 Since the Treaty contains no provision expressly and specifically governing the consequences of breaches of Community law by Member States, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the Member States.

28 Indeed, it is to the general principles common to the laws of the Member States that the second paragraph of Article 215 of the Treaty refers as the basis of the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties.

29 The principle of the non-contractual liability of the Community expressly laid down in Article 215 of the Treaty is simply an expression of the general principle familiar to the legal systems of the Member States that an unlawful act or omission gives rise to an obligation to make good the damage caused. That provision also reflects the obligation on public authorities to make good damage caused in the performance of their duties.

30 In any event, in many national legal systems the essentials of the legal rules governing State liability have been developed by the courts.

31 In view of the foregoing considerations, the Court held in *Francovich and Others*, at paragraph 35, that the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which it can be held responsible is inherent in the system of the Treaty.

32 It follows that that principle holds good for any case in which a Member State breaches Community law, whatever be the organ of the State whose act or omission was responsible for the breach.

33 In addition, in view of the fundamental requirement of the Community legal order that Community law be uniformly applied (see, in particular, Joined Cases C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-415, paragraph 26), the obligation to make good damage caused to individuals by breaches of Community law cannot depend on domestic rules as to the division of powers between constitutional authorities.

34 As the Advocate General points out in paragraph 38 of his Opinion, in international law a State whose liability for breach of an international commitment is in issue will be viewed as a single entity, irrespective of whether the breach which gave rise to the damage is attributable to the legislature, the judiciary or the executive. This must apply *a fortiori* in the Community legal order since all State authorities, including the legislature, are bound in performing their tasks to comply with the rules laid down by Community law directly governing the situation of individuals.

35 The fact that, according to national rules, the breach complained of is attributable to the legislature cannot affect the requirements inherent in the protection of the rights of individuals who rely on Community law and, in this instance, the right to obtain redress in the national courts for damage caused by that breach.

36 Consequently, the reply to the national courts must be that the principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is applicable where the national legislature was responsible for the breach in question.

Conditions under which the State may incur liability for acts and omissions of the national legislature contrary to Community law (second question in Case C-46/93 and first question in Case C-48/93)

37 By these questions, the national courts ask the Court to specify the conditions under which a right to reparation of loss or damage caused to individuals by breaches of Community law attributable to a Member State is, in the particular circumstances, guaranteed by Community law.

38 Although Community law imposes State liability, the conditions under which that liability gives rise to a right to reparation depend on the nature of the breach of Community law giving rise to the loss and damage (*Francovich and Others*, paragraph 38).

39 In order to determine those conditions, account should first be taken of the principles inherent in the Community legal order which form the basis for State liability, namely, first, the full effectiveness of Community rules and the effective protection of the rights which they confer and, second, the obligation to cooperate imposed on Member States by Article 5 of the Treaty (*Francovich and Others*, paragraphs 31 to 36).

40 In addition, as the Commission and the several governments which submitted observations have emphasized, it is pertinent to refer to the Court's case-law on non-contractual liability on the part of the Community.

41 First, the second paragraph of Article 215 of the Treaty refers, as regards the non-contractual liability of the Community, to the general principles common to the

laws of the Member States, from which, in the absence of written rules, the Court also draws inspiration in other areas of Community law.

42 Second, the conditions under which the State may incur liability for damage caused to individuals by a breach of Community law cannot, in the absence of particular justification, differ from those governing the liability of the Community in like circumstances. The protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage.

43 The system of rules which the Court has worked out with regard to Article 215 of the Treaty, particularly in relation to liability for legislative measures, takes into account, *inter alia*, the complexity of the situations to be regulated, difficulties in the application or interpretation of the texts and, more particularly, the margin of discretion available to the author of the act in question.

44 Thus, in developing its case-law on the non-contractual liability of the Community, in particular as regards legislative measures involving choices of economic policy, the Court has had regard to the wide discretion available to the institutions in implementing Community policies.

45 The strict approach taken towards the liability of the Community in the exercise of its legislative activities is due to two considerations. First, even where the legality of measures is subject to judicial review, exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests. Second, in a legislative context characterized

by the exercise of a wide discretion, which is essential for implementing a Community policy, the Community cannot incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers (Joined Cases 83/76, 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraphs 5 and 6).

46 That said, the national legislature — like the Community institutions — does not systematically have a wide discretion when it acts in a field governed by Community law. Community law may impose upon it obligations to achieve a particular result or obligations to act or refrain from acting which reduce its margin of discretion, sometimes to a considerable degree. This is so, for instance, where, as in the circumstances to which the judgment in *Francovich and Others* relates, Article 189 of the Treaty places the Member State under an obligation to take, within a given period, all the measures needed in order to achieve the result required by a directive. In such a case, the fact that it is for the national legislature to take the necessary measures has no bearing on the Member State's liability for failing to transpose the directive.

47 In contrast, where a Member State acts in a field where it has a wide discretion, comparable to that of the Community institutions in implementing Community policies, the conditions under which it may incur liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation.

48 In the case which gave rise to the reference in Case C-46/93, the German legislature had legislated in the field of foodstuffs, specifically beer. In the absence of Community harmonization, the national legislature had a wide discretion in that sphere in laying down rules on the quality of beer put on the market.

49 As regards the facts of Case C-48/93, the United Kingdom legislature also had a wide discretion. The legislation at issue was concerned, first, with the registration of vessels, a field which, in view of the state of development of Community law, falls within the jurisdiction of the Member States and, secondly, with regulating fishing, a sector in which implementation of the common fisheries policy leaves a margin of discretion to the Member States.

50 Consequently, in each case the German and United Kingdom legislatures were faced with situations involving choices comparable to those made by the Community institutions when they adopt legislative measures pursuant to a Community policy.

51 In such circumstances, Community law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

52 Firstly, those conditions satisfy the requirements of the full effectiveness of the rules of Community law and of the effective protection of the rights which those rules confer.

53 Secondly, those conditions correspond in substance to those defined by the Court in relation to Article 215 in its case-law on liability of the Community for damage caused to individuals by unlawful legislative measures adopted by its institutions.

54 The first condition is manifestly satisfied in the case of Article 30 of the Treaty, the relevant provision in Case C-46/93, and in the case of Article 52, the relevant provision in Case C-48/93. Whilst Article 30 imposes a prohibition on Member States, it nevertheless gives rise to rights for individuals which the national courts must protect (Case 74/76 *Iannelli & Volpi* v *Meroni* [1977] ECR 557, paragraph 13). Likewise, the essence of Article 52 is to confer rights on individuals (Case 2/74 *Reyners* [1974] ECR 631, paragraph 25).

55 As to the second condition, as regards both Community liability under Article 215 and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member State or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.

56 The factors which the competent court may take into consideration include the clarity and precision of the rule breached, the measure of discretion left by that rule to the national or Community authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law.

57 On any view, a breach of Community law will clearly be sufficiently serious if it has persisted despite a judgment finding the infringement in question to be established, or a preliminary ruling or settled case-law of the Court on the matter from which it is clear that the conduct in question constituted an infringement.

58 While, in the present cases, the Court cannot substitute its assessment for that of the national courts, which have sole jurisdiction to find the facts in the main proceedings and decide how to characterize the breaches of Community law at issue, it will be helpful to indicate a number of circumstances which the national courts might take into account.

59 In Case C-46/93 a distinction should be drawn between the question of the German legislature's having maintained in force provisions of the Biersteuergesetz concerning the purity of beer prohibiting the marketing under the designation 'Bier' of beers imported from other Member States which were lawfully produced in conformity with different rules, and the question of the retention of the provisions of that same law prohibiting the import of beers containing additives. As regards the provisions of the German legislation relating to the designation of the product marketed, it would be difficult to regard the breach of Article 30 by that legislation as an excusable error, since the incompatibility of such rules with Article 30 was manifest in the light of earlier decisions of the Court, in particular Case 120/78 *Rewe-Zentral* [1979] ECR 649 ('Cassis de Dijon') and Case 193/80 *Commission* v *Italy* [1981] ECR 3019 ('vinegar'). In contrast, having regard to the relevant case-law, the criteria available to the national legislature to determine whether the prohibition of the use of additives was contrary to Community law were significantly less conclusive until the Court's judgment of 12 March 1987 in *Commission* v *Germany*, cited above, in which the Court held that prohibition to be incompatible with Article 30.

60 A number of observations may likewise be made about the national legislation at issue in Case C-48/93.

61 The decision of the United Kingdom legislature to introduce in the Merchant Shipping Act 1988 provisions relating to the conditions for the registration of fishing vessels has to be assessed differently in the case of the provisions making registration subject to a nationality condition, which constitute direct discrimination

manifestly contrary to Community law, and in the case of the provisions laying down residence and domicile conditions for vessel owners and operators.

62 The latter conditions are prima facie incompatible with Article 52 of the Treaty in particular, but the United Kingdom sought to justify them in terms of the objectives of the common fisheries policy. In the judgment in *Factortame II*, cited above, the Court rejected that justification.

63 In order to determine whether the breach of Article 52 thus committed by the United Kingdom was sufficiently serious, the national court might take into account, *inter alia*, the legal disputes relating to particular features of the common fisheries policy, the attitude of the Commission, which made its position known to the United Kingdom in good time, and the assessments as to the state of certainty of Community law made by the national courts in the interim proceedings brought by individuals affected by the Merchant Shipping Act.

64 Lastly, consideration should be given to the assertion made by Rawlings (Trawling) Ltd, the 37th claimant in Case C-48/93, that the United Kingdom failed to adopt immediately the measures needed to comply with the Order of the President of the Court of 10 October 1989 in *Commission* v *United Kingdom*, cited above, and that this needlessly increased the loss it sustained. If this allegation — which was certainly contested by the United Kingdom at the hearing — should prove correct, it should be regarded by the national court as constituting in itself a manifest and, therefore, sufficiently serious breach of Community law.

65 As for the third condition, it is for the national courts to determine whether there is a direct causal link between the breach of the obligation borne by the State and the damage sustained by the injured parties.

66 The aforementioned three conditions are necessary and sufficient to found a right in individuals to obtain redress, although this does not mean that the State cannot incur liability under less strict conditions on the basis of national law.

67 As appears from paragraphs 41, 42 and 43 of *Francovich and Others*, cited above, subject to the right to reparation which flows directly from Community law where the conditions referred to in the preceding paragraph are satisfied, the State must make reparation for the consequences of the loss and damage caused in accordance with the domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (see also Case 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR 3595).

68 In that regard, restrictions that exist in domestic legal systems as to the non-contractual liability of the State in the exercise of its legislative function may be such as to make it impossible in practice or excessively difficult for individuals to exercise their right to reparation, as guaranteed by Community law, of loss or damage resulting from the breach of Community law.

69 In Case C-46/93 the national court asks in particular whether national law may subject any right to compensation to the same restrictions as apply where a law is in breach of higher-ranking national provisions, for instance, where an ordinary Federal law infringes the Grundgesetz of the Federal Republic of Germany.

70 While the imposition of such restrictions may be consistent with the requirement that the conditions laid down should not be less favourable than those relating to

similar domestic claims, it is still to be considered whether such restrictions are not such as in practice to make it impossible or excessively difficult to obtain reparation.

71 The condition imposed by German law where a law is in breach of higher-ranking national provisions, which makes reparation dependent upon the legislature's act or omission being referable to an individual situation, would in practice make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law, since the tasks falling to the national legislature relate, in principle, to the public at large and not to identifiable persons or classes of person.

72 Since such a condition stands in the way of the obligation on national courts to ensure the full effectiveness of Community law by guaranteeing effective protection for the rights of individuals, it must be set aside where an infringement of Community law is attributable to the national legislature.

73 Likewise, any condition that may be imposed by English law on State liability requiring proof of misfeasance in public office, such an abuse of power being inconceivable in the case of the legislature, is also such as in practice to make it impossible or extremely difficult to obtain effective reparation for loss or damage resulting from a breach of Community law where the breach is attributable to the national legislature.

74 Accordingly, the reply to the questions from the national courts must be that, where a breach of Community law by a Member State is attributable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the

breach and the damage sustained by the individuals. Subject to that reservation, the State must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

The possibility of making reparation conditional upon the existence of fault (third question in Case C-46/93)

75 By its third question, the Bundesgerichtshof essentially seeks to establish whether, pursuant to the national legislation which it applies, the national court is entitled to make reparation conditional upon the existence of fault (whether intentional or negligent) on the part of the organ of the State to which the infringement is attributable.

76 As is clear from the case-file, the concept of fault does not have the same content in the various legal systems.

77 Next, it follows from the reply to the preceding question that, where a breach of Community law is attributable to a Member State acting in a field in which it has a wide discretion to make legislative choices, a finding of a right to reparation on the basis of Community law will be conditional, *inter alia*, upon the breach having been sufficiently serious.

78 So, certain objective and subjective factors connected with the concept of fault under a national legal system may well be relevant for the purpose of determining

whether or not a given breach of Community law is serious (see the factors mentioned in paragraphs 56 and 57 above).

79 The obligation to make reparation for loss or damage caused to individuals cannot, however, depend upon a condition based on any concept of fault going beyond that of a sufficiently serious breach of Community law. Imposition of such a supplementary condition would be tantamount to calling in question the right to reparation founded on the Community legal order.

80 Accordingly, the reply to the question from the national court must be that, pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.

The actual extent of the reparation (question 4(a) in Case C-46/93 and the second question in Case C-48/93)

81 By these questions, the national courts essentially ask the Court to identify the criteria for determination of the extent of the reparation due by the Member State responsible for the breach.

82 Reparation for loss or damage caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained so as to ensure the effective protection for their rights.

83 In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation.

84 In particular, in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.

85 Indeed, it is a general principle common to the legal systems of the Member States that the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself (Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 33).

86 The Bundesgerichtshof asks whether national legislation may generally limit the obligation to make reparation to damage done to certain, specifically protected individual interests, for example property, or whether it should also cover loss of profit by the claimants. It states that the opportunity to market products from other Member States is not regarded in German law as forming part of the protected assets of the undertaking.

87 Total exclusion of loss of profit as a head of damage for which reparation may be awarded in the case of a breach of Community law cannot be accepted. Especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.

88 As for the various heads of damage referred to in the Divisional Court's second question, Community law imposes no specific criteria. It is for the national court to rule on those heads of damage in accordance with the domestic law which it applies, subject to the requirements set out in paragraph 83 above.

89 As regards in particular the award of exemplary damages, such damages are based under domestic law, as the Divisional Court explains, on the finding that the public authorities concerned acted oppressively, arbitrarily or unconstitutionally. In so far as such conduct may constitute or aggravate a breach of Community law, an award of exemplary damages pursuant to a claim or an action founded on Community law cannot be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law.

90 Accordingly, the reply to the national courts must be that reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.

Extent of the period covered by reparation (question 4(b) in Case C-46/93)

91 By this question, the Bundesgerichtshof asks whether the damage for which reparation may be awarded extends to harm sustained before a judgment is delivered by the Court finding that an infringement has been committed.

92 Following from the reply to the second question, the right to reparation under Community law exists where the conditions set out in paragraph 51 above are satisfied.

93 One of those conditions is that the breach of Community law must have been sufficiently serious. The fact that there is a prior judgment of the Court finding an infringement will certainly be determinative, but it is not essential in order for that condition to be satisfied (see paragraphs 55, 56 and 57 of this judgment).

94 Were the obligation of the Member State concerned to make reparation to be confined to loss or damage sustained after delivery of a judgment of the Court finding the infringement in question, that would amount to calling in question the right to reparation conferred by the Community legal order.

95 In addition, to make the reparation of loss or damage conditional upon the requirement that there must have been a prior finding by the Court of an infringement of Community law attributable to a Member State would be contrary to the principle of the effectiveness of Community law, since it would preclude any right to reparation so long as the presumed infringement had not been the subject of an action brought by the Commission under Article 169 of the Treaty and of a finding of an infringement by the Court. Rights arising for individuals out of Community provisions having direct effect in the domestic legal systems of the Member States cannot depend on the Commission's assessment of the expediency of taking

action against a Member State pursuant to Article 169 of the Treaty or on the delivery by the Court of any judgment finding an infringement (see, to this effect, Joined Cases 314/81, 315/81, 316/81 and 83/82 *Waterkeyn and Others* [1982] ECR 4337, paragraph 16).

96 Accordingly, the reply to the national court's question must be that the obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

The request that the temporal effects of the judgment should be limited

97 The German Government requests the Court to limit any damage to be made good by the Federal Republic of Germany to loss or damage sustained after delivery of judgment in this case, in so far as the victims did not bring legal proceedings or make an equivalent claim before. It considers that such a temporal limitation of the effects of this judgment is necessary owing to the scale of its financial consequences for the Federal Republic of Germany.

98 It must be borne in mind that, were the national court to find that the conditions for liability of the Federal Republic of Germany are satisfied in this case, the State would have to make good the consequences of the damage caused within the framework of its domestic law on liability. Substantive and procedural conditions laid down by national law on reparation of damage are able to take account of the requirements of the principle of legal certainty.

99 However, those conditions may not be less favourable than those relating to similar domestic claims and must not be such as in practice to make it impossible or excessively difficult to obtain reparation (*Francovich and Others*, paragraph 43).

100 In view of the foregoing, there is no need for the Court to limit the temporal effects of this judgment.

Costs

101 The costs incurred by the Danish, German, Greek, Spanish, French, Irish and Netherlands Governments, the United Kingdom and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesgerichtshof, by order of 28 January 1993, and by the High Court of Justice, Queen's Bench Division, Divisional Court, by order of 18 November 1992, hereby rules:

1. The principle that Member States are obliged to make good damage caused to individuals by breaches of Community law attributable to the State is

applicable where the national legislature was responsible for the breach in question.

2. Where a breach of Community law by a Member State is attibutable to the national legislature acting in a field in which it has a wide discretion to make legislative choices, individuals suffering loss or injury thereby are entitled to reparation where the rule of Community law breached is intended to confer rights upon them, the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained by the individuals. Subject to that reservation, the state must make good the consequences of the loss or damage caused by the breach of Community law attributable to it, in accordance with its national law on liability. However, the conditions laid down by the applicable national laws must not be less favourable than those relating to similar domestic claims or framed in such a way as in practice to make it impossible or excessively difficult to obtain reparation.

3. Pursuant to the national legislation which it applies, reparation of loss or damage cannot be made conditional upon fault (intentional or negligent) on the part of the organ of the State responsible for the breach, going beyond that of a sufficiently serious breach of Community law.

4. Reparation by Member States of loss or damage which they have caused to individuals as a result of breaches of Community law must be commensurate with the loss or damage sustained. In the absence of relevant Community provisions, it is for the domestic legal system of each Member State to set the criteria for determining the extent of reparation. However, those criteria must not be less favourable than those applying to similar claims or actions based on domestic law and must not be such as in practice to make it impossible or excessively difficult to obtain reparation. National legislation which generally limits the damage for which reparation may be granted to damage done to certain, specifically protected individual interests not

including loss of profit by individuals is not compatible with Community law. Moreover, it must be possible to award specific damages, such as the exemplary damages provided for by English law, pursuant to claims or actions founded on Community law, if such damages may be awarded pursuant to similar claims or actions founded on domestic law.

5. The obligation for Member States to make good loss or damage caused to individuals by breaches of Community law attributable to the State cannot be limited to damage sustained after the delivery of a judgment of the Court finding the infringement in question.

Rodríguez Iglesias Kakouris Edward

Hirsch Mancini Schockweiler

Moitinho de Almeida Gulmann Murray

Delivered in open court in Luxembourg on 5 March 1996.

R. Grass — Registrar

G. C. Rodríguez Iglesias — President

JUDGMENT OF THE COURT (Fourth Chamber)
26 September 1996 *

In Case C-168/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Pretura Circondariale di Vicenza (Italy) for a preliminary ruling in the criminal proceedings before that court against

Luciano Arcaro

on the interpretation of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 129, p. 23) and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291 p. 1),

THE COURT (Fourth Chamber),

composed of: C. N. Kakouris (Rapporteur), President of the Chamber, P. J. G. Kapteyn and H. Ragnemalm, Judges,

Advocate General: M. B. Elmer,
Registrar: H. von Holstein, Deputy Registrar

* Language of the case: Italian.

after considering the written observations submitted on behalf of the Commission of the European Communities by Laura Pignataro and Dominique Maidani, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 14 March 1996,

gives the following

Judgment

1 By order of 22 April 1995, received at the Court on 30 May 1995, the Pretura Circondariale (District Magistrate's Court), Vicenza, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community (OJ 1976 L 179, p. 23) and Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges (OJ 1983 L 291, p. 1).

2 Those questions have been raised in criminal proceedings brought against Luciano Arcaro pursuant to Articles 5, 7 and 18 of Legislative Decree No 133 of 27 January 1992 on industrial discharge of dangerous substances into the aquatic environment (Ordinary Supplement No 34 of GURI No 41 of 19 February 1992, and corrigendum published in GURI No 124 of 28 May 1992, hereinafter 'the Decree').

3 Article 3 of Directive 76/464 provides that all discharges of substances in List I of its Annex 'shall require prior authorization by the competent authority of the Member State concerned'. That list includes substances particularly dangerous for the aquatic environment, including cadmium.

4 For that category of substances, discharge authorizations must be issued in accordance with Articles 3 and 5 of the same directive. According to those provisions, discharge authorizations must lay down in particular emission standards, namely the maximum concentration and maximum permissible quantity of a substance in a discharge, the conditions on which the discharge is authorized and the period in which it may be made.

5 According to Article 6(1) of Directive 76/464, emission standards must not exceed the value limits laid down by the Council.

6 In the case of cadmium, the national authorities are to observe the limit values, time-limits and monitoring procedures laid down in the Annexes to Directive 83/513.

7 However, Annex I (footnotes 1 and 7) to that directive provides that, as regards sectors not mentioned in that annex, limit values for cadmium discharges are to be fixed by the Council at a later stage. In the meantime, the Member States are to fix emission standards autonomously, in accordance with Directive 76/464, and those standards must not be less stringent than the most nearly comparable limit value in that annex.

8 In Italy, the Decree was adopted in order to implement a number of Community directives on discharges containing dangerous substances, including Directives 76/464 and 83/513.

9 It applies to discharges of dangerous substances included in the groups of substances as mentioned in List I and II in its annex A (Article 1). Annex B lays down the 'limit values for emission standards' for certain of the dangerous substances referred to in List I of Annex A.

10 The Decree lays down the rules for authorization by local authorities of discharges of the substances in List I of Annex A. Those rules are based on a distinction between discharges from new industrial plant and discharges from industrial plant existing on 6 March 1992 or brought into operation before 6 March 1993.

11 All industrial plants, whether new or already existing, must, in order to be able to carry out discharge operations, obtain authorization (Article 5 of the Decree). In the case of both categories, local authorities, when issuing discharge authorizations, prescribe emission standards in conformity with the limit values laid down in Annex B. However, if the discharge concerns substances for which no limit value has yet been laid down in Annex B, the following rules apply.

12 In the case of new plant, prior authorization for discharge is compulsory and is issued in accordance with the tolerance limits laid down by Law No 319 of 10 May 1976 (GURI No 141 of 29 May 1976), as amended (Article 6(3) of the Decree). On the other hand, in the case of existing plant, Article 7(7) of the Decree provides that the Decree, and therefore the obligation to obtain authorization, is to be applicable only after adoption of the ministerial decrees provided for in Article 2(3)(b).

13 According to the case file, Annex B does not indicate the limit values for the cadmium discharges with which the main proceedings are concerned. Consequently, according to the Decree, the obligation to obtain authorization applies to such discharges only if they come from new plant.

14 Article 18 of the Decree lays down the penalties applicable in the event of infringements of its provisions.

15 It appears from the case file forwarded to the Court that Mr Arcaro, the legal representative of an undertaking whose main activity is the working of precious metals, is being prosecuted under Articles 5, 7 and 18 of the Decree for discharging cadmium into surface waters (the River Bacchiglione) without having submitted an application for the relevant authorization.

16 In proceedings before Pretura Circondariale di Vicenza, brought by the Public Prosecutor, Mr Arcaro submits, first, that his undertaking is an existing plant within the meaning of the Decree and that, having regard to the production of his undertaking, the system of authorization laid down in Article 7 of the Decree would be applicable to it only if emission limit values, corresponding to that production, had been adopted by ministerial decree.

17 The Pretore finds that the provisions of Article 7(1) and (7) of the Decree exclude the majority of existing plant from the system of authorization which it introduces.

18 However, in point 8 of its order for reference, the Pretore expresses doubts concerning the conformity of those provisions with the Community directives which they implement and which, according to the Pretore, require authorization for all discharges which are subject to them, without any distinction between new plant and existing plant. In this regard, the Pretore refers, by way of example, to Article 1(2)(d) and Article 3 of Directive 76/464, and to Article 3 of Directive 83/513.

19 In view of those considerations, the Pretore has decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Does point 8 of this order for reference put forward a correct interpretation of the Community directives which Legislative Decree No 133/1992 is intended to implement?

(2) If Question 1 is answered in the affirmative, is it possible for direct effect to be given to the Community provisions, in the light of a correct interpretation of Community law, and at the same time for the national provisions which are incompatible therewith to be left unapplied even though the citizen's legal position may as a result be impaired?

(3) If Question 2 is answered in the negative, what other method of procedure may be adopted under a correct interpretation of Community law to achieve the elimination from national legislation of provisions which are incompatible with those of Community law, where the direct application of the latter would result in impairment of the citizen's legal position?'

The first question

20 This question is vaguely formulated since it concerns an interpretation of all the Community directives which the Decree is intended to implement and the provisions of Directives 76/464 and 83/513, mentioned more particularly in point 8 of the order for reference, are mentioned only by way of example.

21 However, according to settled case-law, where questions are formulated imprecisely, the Court may extract from all the information provided by the national

court and from the documents concerning the main proceedings the points of Community law needing to be interpreted, having regard to the subject matter of the dispute (judgment in Case 251/83 *Haug-Adrion* [1984] ECR 4277, paragraph 9).

22 In the present case, as explained in paragraphs 15 and 16 of this judgment, the documents concerning the main proceedings show that those proceedings concern cadmium discharges made without authorization by an existing plant within the meaning of the Decree.

23 Since, as far as cadmium discharges are concerned, the relative provisions of Community law are contained in Directives 76/464 and 83/513, the first preliminary question must be understood as seeking to ascertain whether the relevant provisions of those directives are to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of prior authorization.

24 In this regard, it should be observed that Article 3 of Directive 76/464 provides that:

'With regard to the substances belonging to the families and groups of substances in List I ...:

1. all discharges into the waters ... which are liable to contain any such substance shall require prior authorization by the competent authority of the Member State concerned;

...'

List I, contained in the Annex to the directive, mentions, in point 6, cadmium.

25 It follows that any discharge of cadmium is subject to the issue of prior authorization, without there being any exception for discharges coming from plant existing before a certain date.

26 That interpretation is not contradicted by Article 3, point 3, nor by Article 6(4) of Directive 76/464.

27 The first of those provisions provides:

'With regard to the substances belonging to the families and groups of substances in List I ...:

3. in the case of existing discharges of any such substance into the waters referred to in Article 1, the dischargers must comply with the conditions laid down in the authorization within the periods stipulated therein. This period may not exceed the limits laid down in accordance with Article 6(4).'

28 Article 6(4) provides:

'For those substances included in the families and groups of substances referred to in paragraph 1, the deadlines referred to in point 3 of Article 3 shall be laid down by the Council in accordance with Article 12, taking into account the features of the industrial sectors concerned and, where appropriate, the types of products.'

29 Consequently, although those provisions concern 'existing discharges' of the substances in List I, they make no exception, in favour of a plant existing before a certain date, to the obligation to obtain prior authorization; they simply refer to the time-limits which are to be laid down in the authorization for this type of discharge.

30 Moreover, that interpretation is not undermined by Directive 83/513, which, in Article 2(f) and (g), defines 'existing plant' and 'new plant'. Thus, Article 2 provides:

'For the purposes of this Directive:

...

(f) "existing plant" means an industrial plant which is operational on the date of notification of this Directive;

(g) "new plant" means:

— an industrial plant which has become operational after the date of notification of this Directive,

— an existing industrial plant whose cadmium-processing capacity has been substantially increased after the date of notification of this Directive.'

Nevertheless, that distinction is relevant only in relation to the first subparagraph of Article 3(4) of that directive, according to which 'Member States may grant authorization for new plants only if those plants apply the standards corresponding to the best technical means available when'.

31 It accordingly follows that that provision does not exempt the plants concerned from the obligation to obtain an authorization. On the contrary, it reinforces it.

32 The answer to the first question must therefore be that Article 3 of Directive 76/464 is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorization.

The second question

33 By this question the national court wishes to ascertain in substance whether, in the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Directive 83/513, a public authority of that State may rely on that Article 3 against an individual, although this may impair that individual's position.

34 The Commission observes that the system for authorizing discharges provided for by Directives 76/464 and 85/513 entails the designation of competent national authorities for this purpose, having a real power of assessment. It concludes that the provisions of these directives cannot be regarded as unconditional, within the meaning of the case-law of the Court, and that they therefore have no direct effect.

It also submits that, in any event, a directive cannot by itself create obligations for an individual nor be relied upon as such against an individual before a national court.

35 Having regard to a situation such as that with which the main proceedings are concerned, it is not necessary to examine whether Article 3 of the Directive is unconditional and sufficiently precise.

36 The Court has made it clear that the possibility of relying, before a national court, on an unconditional and sufficiently precise provision of a directive which has not been transposed exists only for individuals and only in relation to 'each Member State to which it is addressed'. It follows that a directive may not by itself create obligations for an individual and that a provision of a directive may not therefore be relied upon as such against such a person (judgments in Case 152/84 *Marshall* [1986] ECR 723, paragraph 48, and in Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, paragraph 9). The Court has stated that this case-law seeks to prevent a Member State from taking advantage of its own failure to comply with Community law (judgments in Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 22, and Case C-192/94 *El Corte Inglés* [1996] ECR I-1281, paragraph 16).

37 In that same line of authority the Court has also ruled that a directive cannot, of itself and independently of a national law adopted by a Member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive (judgment in Case 14/86 *Pretore di Salò* [1987] ECR 2545).

38 The answer to the second question must therefore be that, in the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Directive 83/513, a public authority of that State may not rely on that Article 3 against an individual.

The third question

39 By this question the national court essentially seeks to ascertain whether, upon a correct interpretation of Community law, there is a method of procedure allowing the national court to eliminate from national legislation provisions which are contrary to a provision of a directive which has not been transposed, where the latter provision may not be relied on before the national court.

40 It should be observed first of all that there is no such method of procedure in Community law.

41 It should be added that the Member States' obligation, arising under a directive, to achieve the result envisaged by the directive and their duty, under Article 5 of the Treaty, to take all appropriate measures, whether general or particular, to ensure fulfilment of that obligation, are binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, the national court called upon to interpret that law is required to do so, as far as possible, in the light of the wording and purpose of the directive in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Article 189 of the Treaty (see the judgments in Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraph 8, and Case C-334/92 *Wagner Miret* [1993] ECR I-6911, paragraph 20).

42 However, that obligation of the national court to refer to the content of the directive when interpreting the relevant rules of its own national law reaches a limit where such an interpretation leads to the imposition on an individual of an obligation laid down by a directive which has not been transposed or, more especially, where it has the effect of determining or aggravating, on the basis of the directive and in the absence of a law enacted for its implementation, the liability in criminal law of persons who act in contravention of that directive's provisions (see the judgment in *Kolpinghuis Nijmegen*, cited above, paragraphs 13 and 14).

43 The reply to the third question must therefore be that there is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court.

Costs

44 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, so far as the parties to the main proceedings are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to questions referred to it by the Pretura Circondariale di Vicenza, by order of 22 April 1995, hereby rules:

1. Article 3 of Council Directive 76/464/EEC of 4 May 1976 on pollution caused by certain dangerous substances discharged into the aquatic environment of the Community is to be interpreted as making any discharge of cadmium, irrespective of the date on which the plant from which it comes commenced operation, subject to the issue of a prior authorization.

2. **In the absence of full transposition by a Member State within the time allowed of Directive 76/464, and therefore of Article 3 thereof, and of Council Directive 83/513/EEC of 26 September 1983 on limit values and quality objectives for cadmium discharges, a public authority of that State may not rely on that Article 3 against an individual.**

3. **There is no method of procedure in Community law allowing the national court to eliminate national provisions contrary to a provision of a directive which has not been transposed where that provision may not be relied upon before the national court.**

Kakouris Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 26 September 1996.

R. Grass C. N. Kakouris

Registrar President of the Fourth Chamber

JUDGMENT OF THE COURT
18 December 1997 *

In Case C-129/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Belgian Conseil d'État for a preliminary ruling in the proceedings pending before that court between

Inter-Environnement Wallonie ASBL

and

Région Wallonne

on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón (Rapporteur), Judges,

* Language of the case: French.

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Inter-Environnement Wallonie ASBL, by Jacques Sambon, of the Brussels Bar,

— the Belgian Government, by Jan Devadder, Senior Adviser in the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in the same ministry, acting as Agents,

— the French Government, by Jean-François Dobelle, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, and Romain Nadal, Assistant Foreign Affairs Secretary in that directorate, acting as Agents,

— the Netherlands Government, by Adriaan Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent;

— the United Kingdom Government, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Derrick Wyatt QC, and

— the Commission of the European Communities, by Maria Condou-Durande, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Inter-Environnement Wallonie ASBL, represented by Jacques Sambon; the French Government, represented by Jean-François Dobelle and Romain Nadal; the Netherlands Government, represented by Johannes Steven van den Oosterkamp, Deputy Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; the United Kingdom Government, represented by Derrick Wyatt QC; and the Commission, represented by Maria Condou Durande, at the hearing on 5 February 1997,

after hearing the Opinion of the Advocate General at the sitting on 24 April 1997,

gives the following

Judgment

1 By judgment of 29 March 1996, received at the Court on 23 April 1996, the Belgian Conseil d'État referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 5 and 189 of the EEC Treaty and Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste (OJ 1975 L 194, p. 39), as amended by Council Directive 91/156/EEC of 18 March 1991 (OJ 1991 L 78, p. 32).

2 Those questions were raised in proceedings brought by Inter-Environnement Wallonie, a non-profit-making association, for annulment of the Order of the Walloon Regional Executive of 9 April 1992 on toxic or hazardous waste ('the Order').

The relevant Community provisions

3 The object of Directive 75/442 is to approximate the laws of the Member States on the disposal of waste. It has been amended by Directive 91/156.

4 Directive 75/442, as amended by Directive 91/156, defines waste in Article 1(a) as follows:

'For the purposes of this Directive:

(a) "waste" shall mean any substance or object in the categories set out in Annex I which the holder discards or intends or is required to discard.

The Commission, acting in accordance with the procedure laid down in Article 18, will draw up, not later than 1 April 1993, a list of wastes belonging to the categories listed in Annex I. This list will be periodically reviewed and, if necessary, revised by the same procedure.'

5 The list mentioned in that last provision was laid down in Commission Decision 94/3/EC of 20 December 1993 establishing a list of wastes pursuant to Article 1(a) of Directive 75/442 (OJ 1994 L 5, p. 15). Paragraph 3 of the introductory note to that list states, first, that the list is not exhaustive and, second, that the fact that a material appears in it is only relevant when the definition of waste has been satisfied.

6 Articles 9(1) and 10 of Directive 75/442, as amended, provide that any establishment or undertaking which carries out the operations specified in Annex IIA or Annex IIB must obtain a permit from the competent authority. Annex IIA concerns disposal operations whilst Annex IIB lists the operations which may lead to recovery.

7 Article 11 of Directive 75/442, as amended, provides an exception to the requirement of a permit:

'1. Without prejudice to Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste [OJ 1978 L 84, p. 43], as last amended by the Act of Accession of Spain and Portugal, the following may be exempted from the permit requirement imposed in Article 9 or Article 10:

(a) establishments or undertakings carrying out their own waste disposal at the place of production;

and

(b) establishments or undertakings that carry out waste recovery.

This exemption may apply only:

— if the competent authorities have adopted general rules for each type of activity laying down the types and quantities of waste and the conditions under which the activity in question may be exempted from the permit requirements,

and

— if the types or quantities of waste and methods of disposal or recovery are such that the conditions imposed in Article 4 are complied with.

2. The establishments or undertakings referred to in paragraph 1 shall be registered with the competent authorities.

(...)'

8 Article 4 of Directive 75/442, as amended, provides:

'Member States shall take the necessary measures to ensure that waste is recovered or disposed of without endangering human health and without using processes or methods which could harm the environment, and in particular:

— without risk to water, air, soil and plants and animals,

— without causing a nuisance through noise or odours,

— without adversely affecting the countryside or places of special interest.

...'

9 According to the first indent of Article 2(1) of Directive 91/156, the Member States were to bring into force the laws, regulations and administrative provisions

necessary to comply with that directive not later than 1 April 1993 and forthwith to inform the Commission thereof. The second indent provides: 'When Member States adopt these measures, the measures shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.'

10 Article 1(3) of Council Directive 91/689/EEC of 12 December 1991 on hazardous waste (OJ 1991 L 377, p. 20) refers, for the definition of waste, to Directive 75/442. Article 1(4) defines 'hazardous waste'.

11 Article 3 of Directive 91/689 provides:

'1. The derogation referred to in Article 11(1)(a) of Directive 75/442/EEC from the permit requirement for establishments or undertakings which carry out their own waste disposal shall not apply to hazardous waste covered by this Directive.

2. In accordance with Article 11(1)(b) of Directive 75/442/EEC, a Member State may waive Article 10 of that Directive for establishments or undertakings which recover waste covered by this Directive:

— if the Member State adopts general rules listing the type and quantity of waste and laying down specific conditions (limit values for the content of hazardous substances in the waste, emission limit values, type of activity) and other necessary requirements for carrying out different forms of recovery, and

— if the types or quantities of waste and methods of recovery are such that the conditions laid down in Article 4 of Directive 75/442/EEC are complied with.'

12 Article 11 of Directive 91/689 repealed Council Directive 78/319/EEC of 20 March 1978 on toxic and dangerous waste (OJ 1978 L 84, p. 43) with effect from 12 December 1993. However, Article 1 of Council Directive 94/31/EC of 27 June 1994 amending Directive 91/689 (OJ 1994 L 168, p. 28) deferred the repeal of Directive 78/319 until 27 June 1995.

The relevant national provisions

13 The Decree of the Walloon Regional Council of 5 July 1985 on waste, as amended by the Decree of 25 July 1991 ('the Decree'), defines waste at Article 3(1) as follows:

'waste: all substances or objects in the categories set out in Annex I which the holder discards or intends or is required to discard'.

14 Article 5(1) of the Order provides:

'Authorization is required for the setting-up and running of an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste which is not an integral part of an industrial production process ...'.

15 The preamble to the Order makes particular reference to the Decree, Directive 75/442, as amended, and to Directives 78/319 and 91/689. Article 86 of the Order states that it is to come into force on the day of its publication in the *Moniteur Belge*. Publication took place on 23 June 1992.

Facts of the case in the main proceedings

16 By application lodged on 21 August 1992, Inter-Environnement Wallonie requested the Belgian Conseil d'État to annul the Order in its entirety or, in the alternative, certain of its provisions.

17 In its order for reference, the Conseil d'État has already ruled on five of the six pleas raised by Inter-Environnement Wallonie and has annulled various provisions in the Order.

18 In its remaining plea, Inter-Environnement Wallonie maintains that Article 5(1) of the Order infringes, in particular, Article 11 of Directive 75/442, as amended, and Article 3 of Directive 91/689, inasmuch as it excludes from the permit system the operations of setting up and running an installation intended specifically for the collection, pre-treatment, disposal or recovery of toxic or dangerous waste, where that installation forms 'an integral part of an industrial production process'.

19 In the first part of that plea, Inter-Environnement Wallonie claims that Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689, allows exemptions from the permit requirement for undertakings carrying out

waste recovery only on the conditions laid down by those provisions and only where those undertakings are registered with the competent authorities.

20 On that point, the Conseil d'État considers that Article 5(1) of the Order is indeed contrary to Article 11 of Directive 75/442, as amended, in conjunction with Article 3 of Directive 91/689.

21 Finding that the Order was adopted at a time when the period allowed by the directive for its transposition had not yet expired, the Conseil d'État questions to what extent a Member State may, during that period, adopt a measure contrary to the directive. It adds that a negative reply to that question, as proposed by Inter-Environnement Wallonie, would be incompatible with the rule that the validity of a measure is to be assessed at the time of its adoption.

22 In the second part of its plea, Inter-Environnement Wallonie claims that the exception in Article 5(1) of the Order is contrary to the Decree which, it states, does not provide for any derogation for operations forming part of an industrial process.

23 On that point, the Conseil d'État finds that Article 3(1) of the Decree and the annex to which it refers are intended to be a faithful transposition of Directive 75/442, as amended. While the case-law of the Court makes it clear that waste means any substances and objects which the holder discards or is required to discard without intending thereby to exclude their economic reutilization by other persons, it does not make it possible to establish whether a substance or object referred to in Article 1 of Directive 75/442, as amended, which directly or indirectly forms an integral part of an industrial production process is waste within the meaning of Article 1(a) of that directive.

24 In those circumstances, the Conseil d'État has referred the following questions to the Court for a preliminary ruling:

'(1) Do Articles 5 and 189 of the EEC Treaty preclude Member States from adopting a provision contrary to Directive 75/442/EEC of 15 July 1975 on waste, as amended by Directive 91/156/EEC of 18 March 1991, before the period for transposing the latter has expired?

Do those same Treaty articles preclude Member States from adopting and bringing into force legislation which purports to transpose the abovementioned directive but whose provisions appear to be contrary to the requirements of that directive?

(2) Is a substance referred to in Annex I to Council Directive 91/156/EEC of 18 March 1991 amending Directive 75/442/EEC on waste and which directly or indirectly forms an integral part of an industrial production process to be considered "waste" within the meaning of Article 1(a) of that directive?'

Question 2

25 By its second question, which it is appropriate to consider first, the national court is in essence asking whether a substance is excluded from the definition of waste in Article 1(a) of Directive 75/442, as amended, merely because it directly or indirectly forms an integral part of an industrial production process.

26 First of all, it follows from the wording of Article 1(a) of Directive 75/442, as amended, that the scope of the term 'waste' turns on the meaning of the term 'discard'.

27 It is also clear from the provisions of Directive 75/442, as amended, in particular from Article 4, Articles 8 to 12 and Annexes IIA and IIB, that the term 'discard' covers both disposal and recovery of a substance or object.

28 As the Advocate General has pointed out in paragraphs 58 to 61 of his Opinion, the list of categories of waste in Annex I to Directive 75/442, as amended, and the disposal and recovery operations listed in Annexes IIA and IIB to that directive demonstrate that the concept of waste does not in principle exclude any kind of residue, industrial by-product or other substance arising from production processes. This finding is further supported by the list of waste drawn up by the Commission in Decision 94/3.

29 First, Directive 75/442, as amended, applies, as is apparent in particular from Articles 9 to 11, not only to disposal and recovery of waste by specialist undertakings, but also to disposal and recovery of waste by the undertaking which produced them, at the place of production.

30 Second, while Article 4 of Directive 75/442, as amended, provides that waste is to be recovered or disposed of without endangering human health or using processes or methods which could harm the environment, there is nothing in that directive to indicate that it does not apply to disposal or recovery operations forming part of an industrial process where they do not appear to constitute a danger to human health or the environment.

31 Finally, it should be borne in mind that the Court has already held that the definition of waste in Article 1 of Directive 75/442, as amended, is not to be understood as excluding substances and objects which were capable of economic reutilization (Case C-359/88 *Zanetti and Others* [1990] ECR I-1509, paragraphs 12 and 13; C-422/92 *Commission* v *Germany* [1995] ECR I-1097, paragraphs 22 and 23, and Joined Cases C-304/94, C-330/94, C-342/94 and C-224/95 *Tombesi and Others* [1997] ECR I-3561, paragraphs 47 and 48).

32 It follows from all those considerations that substances forming part of an industrial process may constitute waste within the meaning of Article 1(a) of Directive 75/442, as amended.

33 That conclusion does not undermine the distinction which must be drawn, as the Belgian, German, Netherlands and United Kingdom Governments have correctly submitted, between waste recovery within the meaning of Directive 75/442, as amended, and normal industrial treatment of products which are not waste, no matter how difficult that distinction may be.

34 The answer to the second question must therefore be that a substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442, as amended, by the mere fact that it directly or indirectly forms an integral part of an industrial production process.

Question 1

35 By its first question, the national court is in substance asking whether Articles 5 and 189 of the EEC Treaty preclude the Member States from adopting measures contrary to Directive 91/156 during the period prescribed for its transposition.

36 According to Inter-Environnement Wallonie, it follows from the primacy of Community law and from Article 5 of the Treaty that, even where a Member State decides to transpose a Community directive before the end of the period prescribed therein, such transposition must be consistent with the directive. Consequently, since it chose to transpose Directive 91/156 on 9 April 1992, the Région Wallonne should have complied with that directive.

37 The Commission endorses that position and maintains that Articles 5 and 189 of the Treaty preclude Member States from adopting a provision contrary to Directive 91/156 during the period prescribed for its transposition. It states that in this respect it is irrelevant whether or not a particular measure is specifically intended to transpose the directive.

38 On the other hand, the Belgian, French and United Kingdom Governments consider that until the period prescribed for transposition of a directive has expired, the Member States remain free to adopt national rules which are at variance with it. The United Kingdom Government adds, however, that it would be contrary to Articles 5 and 189 of the Treaty for a Member State to adopt measures which would have the effect of making it impossible or excessively difficult for that State to transpose the directive correctly into national law.

39 The Netherlands Government is of the opinion that the adoption of a directive means that the Member States are no longer free to undertake anything which might make it more difficult to achieve the result prescribed. None the less, it considers that a Member State cannot be regarded as being in breach of Articles 5 and 189 of the Treaty where, as in the present case, it is not certain that the national provisions are inconsistent with the directive concerned.

40 It should be recalled at the outset that the obligation of a Member State to take all the measures necessary to achieve the result prescribed by a directive is a binding obligation imposed by the third paragraph of Article 189 of the Treaty and by the directive itself (Case 51/76 *Verbond van Nederlandse Ondernemingen* v *Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113, paragraph 22; Case 152/84

Marshall v *Southampton and South-West Hampshire Area Health Authority* [1986] ECR 723, paragraph 48, and Case 72/95 *Kraaijeveld and Others* v *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403, paragraph 55). That duty to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts (see Case C-106/89 *Marleasing* v *Comercial Internacional de Alimentación* [1990] ECR I-4135, paragraph 8, and *Kraaijeveld*, cited above, paragraph 55).

41 The next point to note is that, in accordance with the second paragraph of Article 191 of the EEC Treaty, applicable at the material time, '[d]irectives and decisions shall be notified to those to whom they are addressed and shall take effect upon such notification'. It follows from that provision that a directive has legal effect with respect to the Member State to which it is addressed from the moment of its notification.

42 Here, and in accordance with current practice, Directive 91/156 itself laid down a period by the end of which the laws, regulations and administrative provisions necessary for compliance are to have been brought into force.

43 Since the purpose of such a period is, in particular, to give Member States the necessary time to adopt transposition measures, they cannot be faulted for not having transposed the directive into their internal legal order before expiry of that period.

44 Nevertheless, it is during the transposition period that the Member States must take the measures necessary to ensure that the result prescribed by the directive is achieved at the end of that period.

45 Although the Member States are not obliged to adopt those measures before the end of the period prescribed for transposition, it follows from the second paragraph of Article 5 in conjunction with the third paragraph of Article 189 of the Treaty and from the directive itself that during that period they must refrain from taking any measures liable seriously to compromise the result prescribed.

46 It is for the national court to assess whether that is the case as regards the national provisions whose legality it is called upon to consider.

47 In making that assessment, the national court must consider, in particular, whether the provisions in issue purport to constitute full transposition of the directive, as well as the effects in practice of applying those incompatible provisions and of their duration in time.

48 For example, if the provisions in issue are intended to constitute full and definitive transposition of the directive, their incompatibility with the directive might give rise to the presumption that the result prescribed by the directive will not be achieved within the period prescribed if it is impossible to amend them in time.

49 Conversely, the national court could take into account the right of a Member State to adopt transitional measures or to implement the directive in stages. In such cases, the incompatibility of the transitional national measures with the directive, or the non-transposition of certain of its provisions, would not necessarily compromise the result prescribed.

50 The answer to the first question must therefore be that the second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive

91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.

Costs

51 The costs incurred by the Belgian, German, French, Netherlands and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Belgian Conseil d'État by judgment of 29 March 1996, hereby rules:

1. A substance is not excluded from the definition of waste in Article 1(a) of Council Directive 75/442/EEC of 15 July 1975 on waste, as amended by Council Directive 91/156/EEC of 18 March 1991, merely because it directly or indirectly forms an integral part of an industrial production process.

2. The second paragraph of Article 5 and the third paragraph of Article 189 of the EEC Treaty, and Directive 91/156, require the Member States to which that directive is addressed to refrain, during the period laid down therein for its implementation, from adopting measures liable seriously to compromise the result prescribed.

Rodríguez Iglesias Gulmann Ragnemalm

Schintgen Mancini Moitinho de Almeida

Kapteyn Murray Edward

Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 18 December 1997.

R. Grass

Registrar

G. C. Rodríguez Iglesias

President

JUDGMENT OF THE COURT (Grand Chamber)

8 March 2011 (*)

(Environment – Aarhus Convention – Public participation in the decision-making process and access to justice in environmental matters – Direct effect)

In Case C-240/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia), made by decision of 22 June 2009, received at the Court on 3 July 2009, in the proceedings

Lesoochranárske zoskupenie VLK

v

Ministerstvo životného prostredia Slovenskej republiky,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot (Rapporteur), K. Schiemann and D. Šváby, Presidents of Chambers, A. Rosas, R. Silva de Lapuerta, U. Lõhmus, A. Ó Caoimh, M. Safjan and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: R. Şereş, Administrator,

having regard to the written procedure and further to the hearing on 4 May 2010,

after considering the observations submitted on behalf of:

– Lesoochranárske zoskupenie VLK, by I. Rajtáková, advokátka,

– the Slovak Government, by B. Ricziová, acting as Agent,

– the German Government, by M. Lumma and B. Klein, acting as Agents,

– the Greek Government, by G. Karipsiadis and T. Papadopoulou, acting as Agents,

– the French Government, by G. de Bergues and S. Menez, acting as Agents,

– the Polish Government, by M. Dowgielewicz, D. Krawczyk and M. Nowacki, acting as Agents,

– the Finnish Government, by J. Heliskoski and M. Pere, acting as Agents,

– the Swedish Government, by A. Falk, acting as Agent,

– the United Kingdom Government, by L. Seeboruth and J. Stratford, acting as Agents,

– the European Commission, by P. Oliver and A. Tokár, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2010,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 (OJ 2005 L 124, p. 1) ('the Aarhus Convention').

2 The reference has been made in proceedings between Lesoochranáske zoskupenie VLK ('zoskupenie'), an association established in accordance with Slovak law whose objective is the protection of the environment, and the Ministerstvo životného prostredia Slovenskej republiky (Ministry of the Environment of the Slovak Republic) ('the Ministerstvo životného prostredia'), concerning the association's request to be a 'party' to the administrative proceedings relating to the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas, or the use of chemical substances in such areas.

Legal context

International law

3 Article 9 of the Aarhus Convention states:

‘1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under Article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph.

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

(a) having a sufficient interest or, alternatively,

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

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

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures

prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

…'

4 Article 19(4) and (5) of the Aarhus Convention states:

'4. Any organisation referred to in Article 17 which becomes a Party to this Convention without any of its Member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organisation's Member States is a Party to this Convention, the organisation and its Member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organisation and the Member States shall not be entitled to exercise rights under this Convention concurrently.

5. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organisations referred to in Article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organisations shall also inform the Depositary of any substantial modification to the extent of their competence.'

European Union ('EU') law

5 Article 12(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive') provides:

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

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

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

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

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

6 Article 16(1) of the Habitats Directive further states:

'Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15(a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

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

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

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

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.'

7 Annex IV to the Habitats Directive relating to animal and plant species of Community interest in need of strict protection, mentions, in particular, the species 'Ursus arctos'.

8 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41, p. 26) states in recital 5 in the preamble thereto:

'On 25 June 1998 the European Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters ("the Aarhus Convention"). Provisions of Community law must be consistent with that Convention with a view to its conclusion by the European Community.'

9 Article 6 of Directive 2003/4 implements Article 9(1) of the Aarhus Convention, and reproduces almost word for word its provisions.

10 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC states in recitals 5, 9 and 11 in the preamble thereto:

‘(5) On 25 June 1998 the Community signed the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (“the Århus Convention”). Community law should be properly aligned with that Convention with a view to its ratification by the Community;

…

(9) Article 9(2) and (4) of the Århus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.

…

(11) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [OJ 1985 L 175, p. 40], and Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control [OJ 1996 L 257, p. 26] should be amended to ensure that they are fully compatible with the provisions of the Århus Convention, in particular Article 6 and Article 9(2) and (4) thereof.’

11 Articles 3(7) and 4(4) of Directive 2003/35 introduce respectively Article 10a into Directive 85/337 and Article 15a into Directive 96/61 in order to implement Article 9(2) of the Aarhus Convention, which they reproduce in almost identical terms.

12 Decision 2005/370 states, in recitals 4 to 7 in the preamble thereto:

‘(4) Under the terms of the Aarhus Convention, a regional economic integration organisation must declare in its instrument of ratification, acceptance, approval or accession, the extent of its competence in respect of the matters governed by the Convention.

(5) The Community, in accordance with the Treaty, and in particular Article 175(1) thereof, is competent, together with its Member States, for entering into international agreements, and for implementing the obligations resulting therefrom, which contribute to the pursuit of the objectives listed in Article 174 of the Treaty.

(6) The Community and most of its Member States signed the Aarhus Convention in 1998 and since then have pursued their efforts in view of their approval of the Convention. In the meantime, relevant Community legislation is being made consistent with the Convention.

(7) The objective of the Aarhus Convention, as set forth in its Article 1 thereof, is consistent with the objectives of the Community's environmental policy, listed in Article 174 of the Treaty, pursuant to which the Community, which shares competence with its Member States, has already adopted a comprehensive set of legislation which is evolving and contributes to the achievement of the objective of the Convention, not only by its own institutions, but also by public authorities in its Member States.'

13 Article 1 of Decision 2005/370 provides:

'The UN/ECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, (Aarhus Convention) is hereby approved on behalf of the Community.'

14 In its declaration of competence made pursuant to Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Commission stated, in particular, 'that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.

15 Articles 10 to 12 of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13) aim to ensure access to justice by non-governmental organisations with respect to

administrative acts adopted by the institutions and bodies of the European Union or omissions by the latter, in accordance with Article 9(3) of the Aarhus Convention.

Slovak law

16 Pursuant to Article 82(3) of Law No 543/2002 on the protection of nature and the countryside, as amended, (zákon č. 543/2002 Z.z. o ochrane prírody a krajiny), which applies to the dispute in the main proceedings, an association having legal personality is to be regarded as a 'participant' in administrative proceedings, within the meaning of that provision, if, for at least one year, it has had the object of protecting nature and the countryside, and it has given written notice of its participation in those proceedings within the period prescribed in that article. The status of 'participant' confers on it the right to be informed of all pending administrative proceedings relating to the protection of nature and the countryside.

17 In accordance with Article 15a(2) of the Code of Administrative Procedure (Správny poriadok), 'a participant' is entitled to be informed that administrative proceedings have been initiated, to have access to files submitted by the parties to the administrative proceedings, to attend hearings and on-the-spot inspections, and to produce evidence and other information on the basis of which the decision will be taken.

18 Under Article 250(2) of the Code of Civil Procedure (Občiansky súdny poriadok) any natural or legal person who/which claims that his/its rights, as a party to the administrative proceedings, have been prejudiced by the decision taken or by the procedure followed by the administrative authority is to have the status of an applicant. Any natural or legal person not appearing at the administrative proceedings and whose presence, as a party to the proceedings has been requested, may also be an applicant.

19 According to Article 250(m) of the Code of Civil Procedure, persons having the status of parties to the proceedings are those who were parties to the administrative proceedings and the administrative body whose decision is to be reviewed.

The dispute in the main proceedings and the questions referred for a preliminary ruling

20 The zoskupenie was informed of the initiation of a number of administrative proceedings brought by various hunting associations or other persons concerning the grant of derogations to the system of protection for species such as the brown bear, access to protected countryside areas or the use of chemical substances in such areas.

21 The zoskupenie therefore applied to the Ministerstvo životného prostredia to be a 'party' to the administrative proceedings concerning the grant of those derogations or authorisations and relied on the Aarhus Convention for that purpose. The Ministerstvo životného prostredia rejected that request and the administrative appeal subsequently brought by the zoskupenie against that rejection.

22 The zoskupenie then brought a contentious appeal against the two decisions, arguing in particular that the provisions in Article 9(3) of the Aarhus Convention had direct effect.

23 In those circumstances, the Najvyšší súd Slovenskej republiky decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention of 25 June 1998, given that the principal objective pursued by that international treaty is to change the classic definition of *locus standi* by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an international treaty ("self-executing effect") in a situation where the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law?

2. Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or direct effect of Community law within the meaning of the settled case-law of the Court of Justice?

3. If the answer to the first or the second question is in the affirmative, is it then possible to interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept "act of a public authority" an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an administrative body, the unlawfulness of which lies in its effect on the environment?'

24 By order of the President of the Court of 23 October 2009, the referring court's request that the accelerated procedure provided for in the first paragraph of Article 104a of the Rules of Procedure be applied to the present case was rejected.

Consideration of the questions referred

Admissibility

25 The Polish and United Kingdom Governments submit that the questions are admissible only in so far as they concern the provisions of Article 9(3) of the Aarhus Convention, and are inadmissible for the remainder on the ground that the interpretation of EU law requested bears no relation to the actual facts of the main action or its purpose.

26 In answer to those arguments, it is sufficient to note that the questions referred relate essentially only to Article 9(3) of the Aarhus Convention, and do not concern the other subparagraphs of that article.

27 In those circumstances, there are no grounds for the Court to rule that the questions referred are partially inadmissible because they concern provisions other than those in Article 9(3) of the Aarhus Convention.

The first and second questions

28 By its first two questions, which it is appropriate to examine together, the referring court asks essentially whether individuals, and in particular environmental protection associations, where they wish to challenge a decision to derogate from a system of environmental protection, such as that put in place by the Habitats Directive for a species mentioned in Annex IV thereto, may derive a right to bring proceedings under EU law, having regard, in particular, to the provisions of Article 9(3) of the Aarhus Convention on direct effect, to which its questions relate.

29 A preliminary point to be made is that Article 300(7) EC provides that '[a]greements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'.

30 The Aarhus Convention was signed by the Community and subsequently approved by Decision 2005/370. Therefore, according to settled case-law, the provisions of that convention now form an integral part of the legal order of the European Union (see, by analogy, Case C-344/04 *IATA and ELFAA* [2006] ECR I-403, paragraph 36, and Case C-459/03 *Commission* v *Ireland* [2006] ECR I-4635, paragraph 82). Within the framework of that legal order the Court therefore has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement (see, inter alia, Case 181/73 *Haegeman*[1974] ECR 449, paragraphs 4 to 6, and Case 12/86 *Demirel* [1987] ECR 3719, paragraph 7).

31 Since the Aarhus Convention was concluded by the Community and all the Member States on the basis of joint competence, it follows that where a case is brought before the Court in accordance with the provisions of the EC

Treaty, in particular Article 234 EC thereof, the Court has jurisdiction to define the obligations which the Community has assumed and those which remain the sole responsibility of the Member States in order to interpret the Aarhus Convention (see, by analogy, Joined Cases C-300/98 and C-392/98 *Dior and Others*[2000] ECR I-11307, paragraph 33, and Case C-431/05 *Merck Genéricos – Produtos Farmacêuticos* [2007] ECR I-7001, paragraph 33).

32 Next, it must be determined whether, in the field covered by Article 9(3) of the Aarhus Convention, the European Union has exercised its powers and adopted provisions to implement the obligations which derive from it. If that were not the case, the obligations deriving from Article 9(3) of the Aarhus Convention would continue to be covered by the national law of the Member States. In those circumstances, it would be for the courts of those Member States to determine, on the basis of national law, whether individuals could rely directly on the rules of that international agreement relevant to that field or whether the courts must apply those rules of their own motion. In that case, EU law does not require or forbid the legal order of a Member State to accord to individuals the right to rely directly on a rule laid down in the Aarhus Convention or to oblige the courts to apply that rule of their own motion (see, by analogy, *Dior and Others*, paragraph 48 and *MerckGenéricos – Produtos Farmacêuticos*, paragraph 34).

33 However, if it were to be held that the European Union has exercised its powers and adopted provisions in the field covered by Article 9(3) of the Aarhus Convention, EU law would apply and it would be for the Court of Justice to determine whether the provision of the international agreement in question has direct effect.

34 Therefore, it is appropriate to examine whether, in the particular field into which Article 9(3) of the Aarhus Convention falls, the European Union has exercised its powers and adopted provisions to implement obligations deriving from it (see, by analogy, *MerckGenéricos – Produtos Farmacêuticos*, paragraph 39).

35 In that connection, it must be observed first of all, that, in the field of environmental protection, the European Union has explicit external competence pursuant to Article 175 EC, read in conjunction with Article 174(2) EC (see, *Commission* v *Ireland*, paragraphs 94 and 95).

36 Furthermore, the Court has held that a specific issue which has not yet been the subject of EU legislation is part of EU law, where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it (see, by analogy, Case C-239/03 *Commission* v *France* [2004] ECR I-9325, paragraphs 29 to 31).

37 In the present case, the dispute in the main proceedings concerns whether an environmental protection association may be a 'party' to administrative proceedings concerning, in particular, the grant of derogations to the system of protection for species such as the brown bear. That species is mentioned in Annex IV(a) to the Habitats Directive, so that, under Article 12 thereof, it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Article 16 of that directive.

38 It follows that the dispute in the main proceedings falls within the scope of EU law.

39 It is true that, in its declaration of competence made in accordance with Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, the Community stated, in particular, that 'the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.

40 However, it cannot be inferred that the dispute in the main proceedings does not fall within the scope of EU law because, as stated in paragraph 36 of this judgment, a specific issue which has not yet been subject to EU legislation may fall within the scope of EU law if it relates to a field covered in large measure by it.

41 In that connection, it is irrelevant that Regulation No 1367/2006, which is intended to implement the provisions of Article 9(3) of the Aarhus Convention, only concerns the institutions of the European Union and cannot be regarded as the adoption by the European Union of provisions implementing the obligations which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial proceedings.

42 Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of the latter that, in order to forestall future differences of interpretation, that provision should be interpreted uniformly, whatever the circumstances in which it is to apply (see, in particular, Case C-130/95 *Giloy* [1997] ECR I-4291, paragraph 28, and Case C-53/96 *Hermès* [1998] ECR I-3603, paragraph 32).

43 It follows that the Court has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention and, in particular, to give a ruling on whether or not they have direct effect.

44 In that connection, a provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (see, in particular, Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraph 21, and Case C-372/06 *Asda Stores* [2007] ECR I-11223, paragraph 82).

45 It must be held that the provisions of Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who meet the criteria, if any, laid down by national law are entitled to exercise the rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.

46 However, it must be observed that those provisions, although drafted in broad terms, are intended to ensure effective environmental protection.

47 In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, in this case the Habitats Directive, since the Member States are responsible for ensuring that those rights are effectively protected in each case (see, in particular, Case C-268/06 *Impact* [2008] ECR I-2483, paragraphs 44 and 45).

48 On that basis, as is apparent from well-established case-law, the detailed procedural rules governing actions for safeguarding an individual's rights under EU law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness) (*Impact*, paragraph 46 and the case-law cited).

49 Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50 It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure

effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

51 Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 44, and *Impact*, paragraph 54).

52 In those circumstances, the answer to the first and second questions referred is that Article 9(3) of the Aarhus Convention does not have direct effect in EU law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

The third question

53 In the light of the reply given to the first and second questions, it is not necessary to reply to the third question.

Costs

54 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council

Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.

[Signatures]

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* Language of the case: Slovak.

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Environmental judgements by the Court of Justice and their duration

Ludwig Krämer

College of Europe
Collège d'Europe
Brugge
Natolin

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Ludwig Krämer

Environmental judgments by the Court of Justice and their duration

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European Legal Studies/Etudes Européennes Juridiques
Dijver 11 | B-8000 Brugge, Belgium | Tel. +32 (0)50 47 72 61 | Fax +32 (0)50 47 72 60
E-mail law.info@coleurop.be | www.coleurop.be

Environmental judgments by the Court of Justice and their duration

Prof. Dr. Ludwig Krämer

Infringement procedures under the EC Treaty

Little attention is paid, until now, to the duration of environmental procedures under Articles 226 and 228 EC Treaty, though these procedures are the only instrument at the disposal of the European Commission to enforce the application of EC environmental law[1]. Indeed, the Commission itself has no possibility to impose a fine or a penalty payment against a Member State, or to withhold sums under the Structural Funds, where a Member State persistently infringes Community environmental law. Rather, the Commission is obliged to first issue a Letter of Formal Notice against a Member State which infringes Community law. Where the infringement is not repaired, the Commission may issue a Reasoned Opinion against the Member State, and if also this does not lead to the compliance with EC law, it may appeal to the Court of Justice[2]. At this moment, it may also ask for interim measures on which only the Court of Justice may decide.

The judgment by the Court is declaratory: the Court states, if it finds a case of non-compliance, that the Member State in question has infringed its obligations under Community law, by not doing this or that. It is then up to the Member State to take the necessary measures in order to bring its national law in line with the requirements of Community law. Where the Member State does not do so, the Commission may send, under Article 228 EC Treaty, a second letter of formal notice, then a second reasoned opinion and, should this not be successful, seize the Court of Justice a second time. The Court may then, in its judgment under Article 228 EC Treaty and on request of the Commission, impose a lump sum or a penalty payment on the Member State in question.

These provisions apply to all three forms of national infringements, i.e. cases, where a Member State did not transpose EC secondary legislation into its national legal order (non-transposition), where the Member State transposed secondary EC legislation in an incomplete or incorrect way (incorrect transposition), or where a Member State did not correctly apply primary or secondary Community law in concrete cases (incorrect application). Of course, nothing prevents the Commission from bringing a case against a Member State which groups aspects of incorrect transposition with aspects of incorrect application. Nevertheless, the differentiation is of use, because the object of litigation in the case of incorrect transposition is of purely legal nature, while in the case of incorrect application the practice of a Member State, at national, regional or local level, is examined by the Commission and, subsequently, by the Court.

The duration of litigation is also of interest in other cases. Article 230 EC Treaty concerns those cases, where an action is brought against a Community institution or body. In these cases, no pre-judicial procedure is foreseen, and thus, the overall duration of the procedure is much shorter. Also in the cases of Article 234 EC Treaty, where a national court asks the EC Court of Justice for a preliminary ruling, no pre-judicial procedure is required.

One would have wished that in cases of Articles 242 and 243 EC Treaty which concern interim measures, the Commission would be allowed to ask the Court for such interim measures, without having first to send letters of formal notice and reasoned opinions. However, these provisions do not provide for an exception to

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[1] For previous years see L. Krämer, Statistics on environmental judgments by the EC Court of Justice, Journal of Environmental Law 2006, p.407, with further references.

[2] For details see Article 226 EC Treaty.

Articles 226 and 228. It will be shown below that the pre-judicial phase of litigation – the issuing of letters of formal notice and of reasoned opinions – normally takes a long time; this then leads to the situation that the Commission, when finally the application to the Court is made, has great difficulties to explain that interim measures are necessary in view of the urgency of the case or the threat to the environment. This is the underlying reason, why in the more than thirty years between 1976 and 2007, only 10 environmental procedures had been brought to the Court which asked for interim measures[3].

The Commission does not normally publish the letter of formal notice or the reasoned opinions which it issues[4]. It also refuses to give, under the EC provisions on access to documents[5] or access to environmental information[6], access to them on request. In this attitude, it appears to be supported by the Court of First Instance which agreed with the Commission that the refusal to give access allowed the Member State in question and the Commission to find an amicable solution to the problem in question[7]. The Court of First Instance did not discuss that just the publication of letters of formal notice and reasoned opinions might facilitate such an amicable solution. The Court of Justice did not yet decide on this question.

The following contribution gives some statistical data on the duration of environmental procedures – pre-judicial and judicial – under the different Treaty provisions. The contribution concentrates on the years 2006 and 2007. Data on previous years which have been published earlier will be used to show trends in the duration.

"Environmental" cases are understood in a material sense. Thus, where, for example, a case deals with the question, whether a Member State is entitled to adopt national legislation on air emissions by cars that deviates from existing EC legislation, the case is considered to be an environmental case, though the interpretation of Article 95(4) and (5) EC Treaty is at stake – and the Court of Justice's own classification system would range such a case under "institutional matters" or "free circulation of goods". Generally, this classification gives good results; sometimes, though, doubts might exist, whether a product-related directive should be classified as an "environmental" or a "free circulation of goods" act of legislation.

Number and legal basis of judgments

In 2006 and 2007, there were 115 judgments on environmental matters delivered, more than in any earlier two-year period. On average, the Court delivered about one environmental judgment per week (Table 1).

Table 1: Number of Decisions in environmental matters 1976-2007

1976	1	1987	12	1998	34
1977	-	1988	9	1999	23
1978	-	1989	3	2000	21
1979	-	1990	11	2001	23
1980	3	1991	17	2002	47
1981	3	1992	7	2003	56
1982	7	1993	12	2004	63

[3] See Table 3 below.

[4] See L. Krämer, Access to letters of formal notice and reasoned opinions in environmental law matters, European Environmental Law Review 2003, p.197.

[5] See on that Article 255 EC Treaty and Regulation 1049/2001, OJ 2001, L 145 p.43.

[6] See Regulation 1367/2006, OJ 2006, L 264 p.13.

[7] Court of First Instance, Cases T-105/95, WWF v. Commission, ECR 1997, p.II-313; T-191/99, Petrie a.o. v. Commission ECR 2001, p.II-3677.

1983	1	1994	14	2005	43
1984	4	1995	7	2006	52
1985	5	1996	29	2007	63
1986	1	1997	20	Total	587

The increase of decisions over the last years is mainly due to the fact that the Commission examines more systematically the cases of non-transposition and of incorrect transposition and, furthermore, that individual persons apply more frequently to the Court.
The 115 judgments were divided on the different sectors of environmental law as follows (Table 2).

Table 2: Decisions concerning the different sectors of environmental law 1976-2007(all legal bases)

Period	Waste	Water	Nature	Products	Horizontal Acts	Air Climate	Impact Assessment	Noise	Total
1976-1991	23	18	13	8	4	6	-	-	72
1992-1994	11	6	9	4	-	1	2	-	33
1995-1997	13	7	10	13	8	3	3	-	57
1998-1999	9	19	5	7	5	2	7	3	57
2000-2001	8	15	11	4	3	2	1	-	44
2002-2003	27	14	14	19	18	3	4	4	103
2004-2005	41	17	16	12	4	9	7	-	106
2006-2007	20	12	30	9	12	17	12	3	115
Total	152	108	108	76	54	43	36	10	587

As can be seen, the greatest number of cases during 2006-2007 concerned nature protection issues. In eight of the total of 30 cases, individual persons had applied to the Court, because they opposed the inclusion of their land property in the EC-lists of Natura 2000 which groups habitats of fauna and flora of Community interest. They were all unsuccessful, as the Court declared that they were not directly and individually affected by such a decision[8]. In view of legal consequences which flow from the Commission's decision on lists of Community interest, I am rather of the opinion that individual persons do have standing under Article 230 EC Treaty.
Waste matters rank second in 2006-2007, though in the overall period 1976-2007, they continue to occupy a lead position. Waste treatment and disposal remains a problem in most Member States – not only in Italy – and the shared competence between administrations at local, regional, national and Community level does not facilitate environmentally sound waste management practices. The reviewed EC legislation on waste[9] is not likely to change much of this situation.

[8] See for example Court of First Instance, Cases T-136/04 Fhr.v.Cramer v. Commission, ECR 2006, p.II-1805; T-150/05 Sahlstedt v. Commission, ECR 2006, p.II-1851; T-117/05 Rodenbröker v. Commission, ECR 2006, p.II-2593; T-122/05, Benkö v. Commission, ECR 2006, p.II-2939.

[9] See Regulation 1013/2006 on the shipment of waste, OJ 2006, L 190 p.1; Directive 2006/66 on batteries, OJ 2006, L 266 p.1, and in particular the imminent adoption of the revision of Directive 2006/12 on waste, OJ 2006, L 114 p.9

Table 2 clearly demonstrates the low priority of noise legislation in the Community. Noise is of considerable concern to numerous people in the EC, and the main source of noise is transport – which is a common EC policy. Yet, EC measures on noise are scarce and do not follow a consistent strategy, and this is even reflected in the number of court decisions on noise which concern lack of transposition or incorrect transposition, but not the application of noise protection levels.
Table 3 shows the legal basis of the Court's Decisions. It demonstrates the important role of the Commission in enforcing the application of Community environmental law (Articles 226 and 228 EC Treaty) which remains the significant aspect of the Table. As regards environmental law, the Commission almost has a monopoly for taking actions

Table 3: Legal basis of the Court's Decisions 1976-2007 (Number of cases)

Period	Art.226	Art.227	Art.228	Art.230	Art.232	Art.234	Art.242,243	Art.225(appeal)	Total
1976-1991	50	-	1	3	-	17	1	-	-
1992-1994	14	-	4	9	-	6	-	-	-
1995-1997	30	-	-	5	-	15	2	3	1
1998-1999	37	-	-	2	-	17	-	1	-
2000-2001	28	-	1	2	-	11	1	-	1
2002-2003	77	-	1	9	-	15	1	-	-
2004-2005	85	-	-	4	-	16	1	-	-
2006-2007	70	-	-	25	-	12	4	3	1
Total	391	-	7	59	-	109	10	7	3

in Court. All the more it is regrettable, that the procedures under Article 226 and 228 are so non-transparent. Indeed, the Commission does not lay accounts on its actions. Its annual reports on the monitoring the application of Community law[10] are unhelpful. They do not explain, why actions were started, they do not detail the pre-judicial procedures under Articles 226 and 228 – the dispatch of letters of formal notice is only mentioned, where a Member State has not communicated its national transposing legislation; where a Member State has incorrectly transposed the legislation or where it does not apply environmental legislation in practice, the Commission keeps this information confidential – and the basis of tables and statistics changes frequently so that comparisons from one year to the other are hardly possible. Letters of formal notice and reasoned opinions are only exceptionally made public.
The Commission's quasi-monopoly in enforcing EC environmental law also becomes obvious when one considers actions by environmental organisations against the breach of EC environmental law. Indeed, the three cases where environmental organisations were involved in 2006-2007, concerned the request from national courts for a preliminary ruling[11]. In practice, access to the EC Courts is not possible

[10] See last Commission, Monitoring the application of Community law 23rd Report, for 2005, COM (2006) 416; 24th Report, on 2006, COM(2007) 398.
[11] Cases C-60/05 WWF v. Lombardia, ECR 2006, p.I-2147; C-138/05 Milieufederatie, ECR 2006, p.I-8339; C-244/05 Bund Naturschutz, ECR 2006, p.I-8445.

for environmental organisations which have, in the past, seen all their actions declared inadmissible, as they were considered not to be directly and individually concerned by the breach of EC environmental legislation[12]. This practice appears not to be in compliance with the provisions on access to justice of the Aarhus Convention[13] which, after its ratification by the EC, is part of EC law and binds the EC institutions, including the EC Courts.
Table 4 differentiates Court judgments against Member States, based on Article 226 and 228 EC Treaty. For the years 2006-2007, Italy ranks top. The Table illustrates the policy of the Scandinavian States Denmark, Sweden and, to a lesser degree, Finland, to avoid, if any possible, negative judgments by the Court of Justice, by ensuring that compliance measures are taken; the contrast between Denmark on the one hand and Ireland and Great Britain on the other hand which all joined the EU in 1973, is as noticeable as the contrast between Austria and Sweden/Finland which all three joined the EU in 1995. The same active policy to ensure compliance is ensured by the Netherlands. Generally, however, Table 4, as all the other Tables in this paper, should be viewed as showing some trends rather than allowing too precise conclusions.

Table 4: Environmental judgments against Member States 1976-2007 (Articles 226 and 228 EC Treaty)

	1976 -1991	1992 -1994	1995 -1997	1998 -1999	2000 -2001	2002 -2003	2004 -2005	2006 2007	Total
Italy	15	2	5	5	3	9	16	16	71
Belgium	14	4	6	6	3	6	5	4	48
France	6	1	2	3	7	14	7	2	42
Germany	9	4	8	5	1	6	6	1	40
Spain	1	2	1	4	2	11	8	6	35
Greece	1	1	5	3	3	4	8	4	30
UK	-	2	-	1	2	7	7	7	26
Luxembg	1	1	2	2	1	7	-	10	24
Ireland	-	-	-	1	2	7	5	6	21
Portugal	-	-	-	7	2	2	6	4	21
Netherld	4	1	-	1	1	3	5	-	15
Austria			-	-	1	-	7	5	13
Finland			-	-	-	1	3	5	9
Denmark	2	-	-	-	-	1	1	-	3
Sweden			-	-	1	-	1	-	2
Malta							-	1	1

It might be interesting to compare this Table 4 with the Table on environmental cases which were submitted by national courts to the Court of Justice for a preliminary ruling (Article 234 EC Treaty). These cases are listed in Table 5.

Table 5: Preliminary rulings in environmental matters 1976-2007 (grouped according to the Member State of the requesting court)

	1976-1991	1992-1994	1995-1997	1998-1999	2000-2001	2002-2003	2004-2005	2006-2007	Total

[12] The landmark cases are T-585/93 Greenpeace v. Commission ECR 1995, p.II-2205 and C-321/95P Greenpeace v. Commission ECR 1998, p.I-1651.

[13] Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention) of 25 June 1998. The EC ratified this Convention by Decision 2005/370, OJ 2005, L 124 p.1.

Italy	6	2	6	4	2	1	4	2	27
Netherld.	5	-	2	5	1	2	3	2	20
France	4	2	1	-	2	2	1	1	13
Belgium	1	1	4	1	-	-	4	-	11
Germany	-	1	-	3	2	-	3	1	10
UK	-	-	1	1	1	2	1	2	8
Sweden			1	1	1	1	-	3	7
Finland			-	1	-	3	-	-	4
Austria			-	-	-	4	-	-	4
Denmark	-	-	-	1	1	-	-	1	3
Luxembg	-	-	-	-	1	-	-	-	1
Spain	-	-	-	-	-	-	-	-	-
Portugal	-	-	-	-	-	-	-	-	-
Ireland	-	-	-	-	-	-	-	-	-
Greece	-	-	-	-	-	-	-	-	-
Total	16	6	15	17	11	15	16	12	108

It is not surprising that Italian and Dutch courts top this list. Indeed, Italian courts are – at the latest following the role in the "mani pulite"-events in the 1990s – known for their creative ingenuity and intellectual curiosity. This is probably the reason, why they actively explore, be it via requests for a preliminary ruling, what kind of legal arguments EC environmental law offers. As regards the Netherlands, about three quarters of their gross national products stems from foreign trade. In that country, EC environmental law is frequently seen as an opportunity and, in any way, as part of the national provisions which aim at the optimisation of environmental protection.

. Germany, with the largest population, sophisticated environmental legislation and a very great number of courts, submitted remarkably few cases for a preliminary ruling; these figures reflect the generally rather reserved attitude of the German judiciary and legal profession in general with regard to EC environmental law.

The four Member States Spain, Portugal, Ireland and Greece, as well as the twelve Member States which joined the European Union in 2004, have not yet been the cause of any preliminary ruling from the Court of Justice in environmental matters.

Article 228(1) EC Treaty states that a Member State shall take the necessary measures in order to comply with the statements of a judgment by the Court of Justice. The European Commission regularly publishes a list of judgments of the Court of Justice which had not yet been complied with by the Member States at the end of each year. With the increase of the number of judgments in environmental matters (see on that Table 1), also the overall figures of non-compliance increased. At the end of 2005, 81 judgments, and at the end of 2006 66 judgments had not yet complied with[14]. Table 5 lists the evolution of the last five years.

Table 5: Number of judgments that had not been complied with by the end of the year (all legal bases)

Member State	2002	2003	2004	2005	2006
France	13	17	18	14	7
Italy	6	6	14	12	8
Ireland	8	6	8	9	7
Spain	4	6	4	9	7
UK	4	3	6	7	8
Belgium	6	8	6	5	3
Greece	4	4	5	7	6

[14] Annual reports on monitoring application (note 10, above), each time annex V.

Luxembg	5	6	1	-	6
Portugal	1	3	5	4	4
Germany	3	4	5	3	1
Austria	1	1	4	5	5
Netherld	2	4	4	3	-
Finland	-	1	3	2	3
Sweden	1	1	2	1	1
Denmark	-	1	1	-	-
Total	58	71	86	81	66

Of course, the figures for the different years may not be cumulated. Nevertheless, Table 5 shows that the above-mentioned four States Denmark, Sweden, Finland and Netherlands also attach some political importance to quickly comply with the judgments of the Court of Justice. In France, Italy, Ireland and Spain, such a policy seems to be less a priority.

Duration of procedures

The duration of litigation before the Courts is of particular interest for economic operators, but also for environmental organisations, administrations and lawyers. Table 6 shows the duration during the years 2006-2007.

Table 6: Duration of Court litigation 2006-2007 (in months, figures rounded)

Legal Basis	Number of cases	Longest duration	Shortest duration	Average
Article 226	70	39	5	18
- lack of transposition	15	14	5	9
- incorrect transposition	21	34	6	19
- incorrect application	34	39	5	21
Article 230	25	50	2	21
- Court 1st Instance	21	50	2	21
- Court of Justice	7	34	12	23
Article 234	12	36	9	19

On average thus, Court procedures under Article 226 take 18 months, under Article 230 21 months and under Article 234 19 months. Where the action concerns a case of lack of transposition, the procedure takes 9 months only.

The duration of Court litigation under Article 226 has not significantly changed during the last fifteen years, as can be seen from Table 7. This is different from actions under Article 230 – the duration varied between 14 and 33 months – and Article 234, where the variation was between 16 and 24 months. Overall, for all three legal bases, a reduction of the duration as compared to the previous period 2004-2005 can be observed.

Table 7: Duration of Court litigation 1992-2007 (in months, figures rounded)

Period	Article 226	Article 230	Article 234
1992-1994	22	14	18
1995-1997	14	20	16
1998-1999	20	29	23
2000-2001	21	16	24
2002-2003	19	33	26

2004-2005	20	30	22
2006-2007	18	23(1st Inst:21)	19

For procedures under Article 226 EC Treaty which oppose the European Commission and a Member State, the duration of the litigation before the Court itself might be misleading, because in all cases, the litigation before the Court has to be preceded by a pre-judicial procedure. This procedure is, as mentioned above, opened by the dispatch of a Letter of Formal Notice[15] to which the Member State in question may answer. When the Commission considers the infringement of Community law not yet to be ended, it may issue a Reasoned Opinion to which the Member State again may react. Only then may the Commission make an application to the Court.
Table 8 indicates the duration of procedures under Article 226, from the dispatch of the Letter of Formal Notice till the judgment of the Court:

Table 8: Duration of procedures under Article 226 in 2006-2007 from the dispatch of the Letter of Formal Notice till the Court's judgment (figures in months and rounded)

Procedure	Number of cases[16]	Longest duration	Shortest duration	Average
Lack of transposition	12 (of 15)	35	21	26
Incorrect transposition	18 (of 21)	98	22	51
Incorrect application	31 (of 34)	109	26	52
Total	61 (of 70)	109	21	47

This means that the procedure under Article 226 EC Treaty takes, on average, almost four years – really a long time.
With regard to previous periods, this time-span has not significantly been reduced, as appears from Table 9:

Table 9: Duration of procedures under Article 226 in the years 1992-2007 (from dispatch of the letter of formal notice till the Court's judgment; figures in months and rounded)

Period	Number of cases	Longest duration	Shortest duration	Average
1992-1994	14	85	36	57
1995-1997	30	87	27	47
1998-1999	37	120	21	68
2000-2001	28	128	22	59
2002-2003	77	147	15	45
2004-2005	85	168	19	47
2006-2007	61	108	15	47

This long duration of litigation has several effects: First, Member States which do not correctly transpose or apply EC environmental legislation, can be ensured that it

[15] The term "letter of formal notice" is not found in Article 226 which does not require a specific form for the begin of the infringement procedures; however, the term is generally used. The Court appears to require a written form of notice in all cases, for reasons of legal certainty.

[16] Only those cases were included in this Table, where the precise date of the dispatch of the Letter of Formal Notice could be determined. The total number of cases in 2006-2007 is set in brackets.

takes a while before they are called to order by the judgment of the EC Court of Justice, with all its negative publicity. This effect is increased by the fact that the Commission often does not start the procedure under Article 226 EC Treaty as soon as the national incorrect legislation is adopted or as soon as there is a concrete case of non-application. Rather, the delay between the enactment of the national legislation and the begin of the infringement procedure is frequently quite considerable[17].

Second, this problem of delays becomes even more important in cases of Article 228 EC Treaty. In 2006-2007, there were no such cases decided in environmental matters. Since 1992, the Court of Justice had decided, overall, six environmental cases under Article 228 and its predecessor, Article 171 EC Treaty. The average time-span between the dispatch of the letter of formal notice under Article 226 and the judgment under Article 228 was 136 months, thus more than eleven years[18].

It is clear that such delays do not have much of a deterrent effect on Member States, inciting them to comply with Court judgments – and, this should not be forgotten, to adequately protect their environment! - as quickly as possible.

This observation might sound abstract and theoretical. A concrete example, though, is the case of the present waste problems in the Italian region of Campania (Naples). The EC procedure against Italy for non-compliance with EC waste law started in 1987[19], but was later discontinued. More than twenty years later, Italy still does not comply with its legal requirements.

Though the length of procedures under Articles 226 and 228 EC Treaty may not have a deterrent effect on Member States by inducing them to align their legislation and practice to EC environmental law, it certainly has a deterrent effect on the EC Commission, in the sense that the Commission does not even start proceedings against a Member State. This happens in particular, where cases on the lack of application of EC environmental law are in question. The construction of a motorway without an environmental impact assessment, the refusal to grant access to environmental information, the realisation of infrastructure projects within a natural habitat – there are numerous cases of this kind, where the Commission does not begin or pursue infringement procedures, because a judgment from the Court would come at a stage, when the environmental impairment has occurred and cannot be repaired – when “the infringement is consumed”, as it is called in the Brussels jargon.

Table 10 tries to elucidate the reasons for the length of procedure, differentiating between the pre-Court procedure – from the dispatch of the Letter of Formal Notice till the application to the Court – and the procedure before the Court.

Table 10: Average duration of procedures under Article 226 in 2006-2007 (in months; figures rounded)

	Pre-Court procedure	Court procedure	Total duration
Lack of transposition	16	8	24
Incorrect transposition	33	21	54
Incorrect application	27	23	50
Total	28	19	47

[17] See, for example case C-376/06 Commission v. Portugal, ECR 2007, p.I-78, where this period was 26 months.

[18] See cases C-345/92, Commission v. Germany, ECR 1993, p.I-1115 (duration 109 months); C-174/91, Commission v. Belgium, ECR 1993, p.I-2275 (duration 106 months); C-366/89, Commission v. Italy, ECR 1993, p.I-4201 (duration 175 months); C-291/93 Commission v. Italy, ECR 1994, p.I-859 (duration 120 months); C-378/97 Commission v. Greece, ECR 2000, p.I-5047 (duration 134 months); C-278/01, Commission v. Spain, ECR 2003, p.I-14141 (duration 170 months).

[19] See case C-33/90, Commission v. Italy, ECR 1991, p.I-5698 and, for the background L.Krämer, European Environmental Law Casebook, London 1993, p. 387.

These data show that in all cases the pre-Court procedure was longer than the procedure before the Court itself. Part of the explanation is certainly that the Commission is obliged to clarify the facts of a case which is often done during the pre-Court procedure; and this takes time, all the more, when Member States do not answer requests for information or are otherwise reluctant to assist the Commission.
However, in the cases of lack of transposition and incorrect transposition, the factual side of a specific case does not offer specific difficulties. Indeed, where a Member State has not transposed an environmental directive into its national law, the legal situation is quite clear and one might imagine that the Commission clarifies this situation before it starts the procedure under Article 226 EC Treaty.
The situation of incorrect transposition has to be examined merely under legal aspects, too: the national legislation must be compared with the environmental directive, as to whether it is correct and whether it covers the whole of the territory of a Member State. This is best done before infringement procedures start. Then, however, it is not clear, why the Commission needs, on average, more than two and a half years before it applies to the Court (incorrect transposition) and 16 months in those cases, where no national legislation exists.
Table 11 shows that in the past, the pre-Court procedure was always longer than the Court procedure and never shorter than two years. Also, the duration of the procedure before the Court was remarkably stable during the last ten years.

Table 11: Comparison of the average duration of procedures under Article 226 EC Treaty between 1992 and 2007 (in months; figures rounded)

Period	Pre-Court procedure	Court procedure	Total duration
1992-1994	35	22	47
1995-1997	33	14	47
1998-1999	48	20	68
2000-2001	38	21	59
2002-2003	26	19	45
2004-2005	27	20	47
2006-2007	28	19	47

In order to further explore the origin of the delays in these procedures, the cases where the length of procedure between the dispatch of the letter of formal notice and the Court judgment exceeded 80 months, underwent a more detailed scrutiny. The 80-month length is admittedly arbitrary; however, it allows comparisons with previous years.
In 2006-2007, there were five cases which took, overall, more than eighty months, as is shown by Table 12.

Table 12: Court judgments under Article 226 with a total duration of more than 80 months between the dispatch of the letter of formal notice and the judgment (in months; figures rounded)

Date, number of judgment	Date Letter of Formal Notice	Reply by Member State	Date Reasoned Opinion	Reply by Member State	Application to the Court	Total duration of procedure
28-6-07 C-235/04 Comm. v.	26-1-00	18-5-01	31-1-01	17-4-01	4-6-04	53+36 = 89 months; Nature Conservation

Spain						
12-7-07 C-507/04 Comm. v. Austria	13-4-00	26-7-00	17-10-03	23-12-03	28-12-04	56+31= 87 months; Nature Conservation
13-12-07 C-418/04 Comm. v. Ireland	11-11-98		24-10-01		29-9-04	72+37= 109 months; Nature Conservation
18-12-07 C-195/05 Comm.v. Italy	22-10-99	11-6-01	11-7-03	4-11-03	2-5-05	62+32= 94 months; Waste Management
10-5-07 C-508/04 Comm.v. Austria	13-4-00	27-7-00	17-12-03	23-12-03	8-12-04	56+29= 85 months; Nature conservation

The Table shows that the main cause of delay in these procedures is the failure by the European Commission to decide on or execute the next step in the procedure. Indeed,

- in case C-235/04, 38 months passed between the answer of the Member State to the Reasoned Opinion and the application to the Court;
- in case C-507/04, 39 months passed between the answer of the Member State to the Letter of Formal Notice and the dispatch of the Reasoned Opinion;
- in case C-418/04, 37 months passed between the dispatch of the Letter of Formal Notice and that of the Reasoned Opinion; and another 35 months passed between the dispatch of the Reasoned Opinion and the Application to the Court;
- in case C-195/05, 25 months passed between the Member State's answer to the Letter of Formal Notice and the dispatch of the Reasoned Opinion; and another 18 months passed between the Member State's answer to the Reasoned Opinion and the application to the Court;
- in case C-508/04, 41 months passed between the Member State's answer to the Letter of Formal Notice and the dispatch of the Reasoned Opinion.

Such delays cannot be explained by lack of human resources, translation problems or other administrative circumstances, all the more as three of the five cases concerned the incorrect legal transposition of an EC directive into national legislation; thus, there were no matters of fact to be clarified.

The Commission never even tried to explain such delays – which have been existing since years and are, with regard to administrative behaviour, only the tip of the iceberg. It had already been mentioned above that procedures which take, on average, 47 months, simply are too lengthy. The Commission, though, keeps the precise internal provisions on the procedure under Article 226 EC Treaty confidential. Of course, its annual reports on the monitoring the implementation of Community law do not discuss such items as the length of procedure, and the separate reports on the monitoring the implementation of environmental legislation are also silent on this issue.

In this context, the quasi-monopoly of the Commission to bring cases on environmental matters before the Court of Justice gains all its weight: if the Commission delays procedures to protect the environment or does not take steps

under Articles 226/228 EC Treaty at all – who then will protect the environment? Environmental organisations and individual persons have practically no access to the Court of Justice. True, the European Union is not a State and one should not be too surprised that there is nobody else to ensure the enforcement of *European* law or to protect the *European* environment. Yet, the EU Treaty mentions the European general interest as a value to be protected[20]. And all experience shows that Member States which perceive EC (environmental) laws all too often as "foreign laws"[21], have a limited interest to protect the environment in cases of conflict with other, planning or economical, interests

Concluding remarks

The data for 2006-2007 on environmental judgments by the EC Court of Justice confirm the trends of previous years: The number of environmental judgments delivered by the Court increase. Article 226 remains by far the principal legal basis for the Court decisions, which underlines the important role of the Commission in ensuring the application of EC environmental law. Court actions of one Member State against the other do not exist in environmental law; the Member States prefer to leave it to the European Commission to take action against a specific Member State. The number of actions based on Article 230 EC Treaty increased, though all applications of individual persons against the inscription of their land on the list of natural habitats of Community interest were rejected as inadmissible.

Most judgments were given against Italy which also was the most often condemned by the Court since 1976. In this overall list follow with Belgium, France and Germany three other of the original six EC Member States. They are followed by Spain which only joined the EC in 1986. Remarkable is the low number of judgments which were given against Denmark, Sweden and Finland, as well as against the Netherlands which is also one of the original six Member States.

The duration of litigation before the Court – 18 to 20 months - remains stable since about ten years. The same is true for the duration of the procedure under Article 226 – pre-Court procedure *and* Court litigation – which takes, on average, 47 months, thus almost four years. The duration of procedures appears unacceptably long, in particular as regards cases of lack of transposition of EC legislation into national law (average 26 months) and the incorrect transposition (average 51 months). The pre-litigation procedure takes more time than the procedure before the Court itself. A closer look at cases which took more than 80 months reveals that the length of procedure is essentially due to delays for which the European Commission is responsible.

The lessons to learn from these data appear clear: the European Commission has a quasi-monopoly in enforcing EC environmental law and bringing cases before the Court of Justice. The best remedies against monopolistic situations are well known from economic policy:

(1) Transparency. This means that the Commission should publish the rules and provisions which govern the EC infringement procedures.

(2) Openness. This means that the Commission should publish the Letters of Formal Notice and Reasoned Opinions which it decides against Member States. At present, these decisions are kept confidential, with no convincing arguments. The Commission goes even so far to keep confidential the legal studies which it undertakes to examine Member States' correct transposition of EC legislation[22]

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[20] See Article 213 EC Treaty.

[21] Commission, European Governance, A White Paper, COM (2001) 428, p.25.

[22] See European Parliament, Resolution of 21 February 2008, no 7: "The European Parliament.. is not satisfied with the Commission's answer concerning the confidentiality of

(3) Competition. This means that the Commission should present legislative proposals which allow environmental organisations and individual persons to have legal standing before the Court of Justice in environmental matters. And the European Parliament and the Council should speedily adopt such proposals, in order to at last comply with the requirements of the Aarhus Convention in this regard.

What happened instead in 2006-2007 is that the Commission decided not to look at (environmental) complaints any more, but to concentrate on the non-transposition of Community legislation, on non-compliance with judgments of the Court (Article 228 EC Treaty, and on cases which raise fundamental problems[23]. As environmental complaints constitute by far the largest source of information for the Commission as regards the application of EC environmental legislation in practice within the 27 Member States, the Commission deliberately changed its policy to seriously control the effective application of EC environmental law. In my opinion, this reduction is not compatible with Article 211 EC Treaty which requires the Commission to ensure that EC law, including EC environmental law, is not only transposed into national law, but that it is "applied".

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the conformity studies; calls once more on the Commission to publish on its website the studies requested by the various Directorate-Generals on the valuation of the conformity of national implementation measures with Community legislation" (http://www.europarl.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+PG-TA).

[23] See Commission, COM (2007) 502. See on that European Parliament (note 22, above) no.19: "The European Parliament.. observes that the Commission is often the only body left to which citizens can turn to complain about the non-application of Community law; is therefore concerned that, by referring back to the Member States concerned (which is the party responsible for the incorrect application of Community law in the first place), the new working method could present a risk of weakening the Commission's institutional responsibility for ensuring the application of Community law as the "guardian of the Treaty" in accordance with Article 211 of the EC Treaty.

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